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# **FREE SPEECH VS CONTENT MODERATION: ANALYZING INDIA'S LEGAL FRAMEWORK FOR SOCIAL MEDIA REGULATION**

AUTHORED BY – POCHANA SAI NIKHITHA

Designation – Student (BA.LLB 4<sup>th</sup> Year)

University – Bennett University

## **ABSTRACT –**

Article 19(1)(a) of the Indian Constitution guarantees citizens the fundamental right to freedom of speech and expression, allowing them to share opinions through writing, speech, images, or any other means. The Supreme Court has upheld this right as a cornerstone of democracy, enabling the free exchange of ideas. In the digital age, social media has emerged as a crucial platform for public discourse, but it has also become a site of tension between free expression and government regulation. This paper examines the balance between free speech and content moderation on social media in India. While free speech promotes democracy and safeguards minority voices, it also carries risks such as misinformation, hate speech, and incitement to violence. Government measures, including internet shutdowns during protests and the deletion of social media accounts critical of the state, raise concerns over potential violations of constitutional freedoms.

The study analyses legal frameworks like the Information Technology Act, 2000—particularly Section 69A, which authorises blocking online content in the interest of sovereignty, security, or public order—and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which govern intermediary responsibilities and content moderation. It also addresses the misuse of provisions such as Section 124A (sedition) and evaluates their implications under the Bharatiya Nyaya Sanhitha, 2023. Through case studies and legal analysis, this paper argues that while content moderation is essential to curb harmful speech, excessive control risks undermining democratic principles. The research highlights the need for a balanced regulatory approach that protects both public interest and the fundamental right to free expression in the evolving digital sphere.

### **KEY WORDS –**

1. Free Speech
2. Social Media Regulation
3. Content Moderation
4. Internet Shutdowns
5. Bharatiya Nyaya Sanhitha, 2023

### **LITERATURE REVIEW –**

The true democracy depends on the people's power and on ensuring free expression. Free speech allows people to live with dignity, and without it, democracy lacks true significance (Tejaswini Kaushal, 2023). Freedom of expression strengthens governance, law and democracy. The media plays a crucial role in examining government actions, ensuring accountability in transparent resource management and policy development (V. Govindu, 2011). Social media has been increasingly used for illegal purposes. Regulations should be imposed in a balanced manner without hindering person's Right to Free to Speech and Expression (Aleena Rose Jose & Anagha O, 2021).

### **INTRODUCTION –**

Freedom of speech and expression is considered as a keystone of a democratic society. The Constitution of India mentions this as a fundamental right under Article 19(1)(a)<sup>1</sup>, Right to freedom of speech and expression. It is to be enjoyed by all people irrespective of religious, cultural, ethnic, political formation or other back grounds. Freedom of speech and expression is viewed as an integral concept in democracy. Social media or internet is a vital communication tool, through which individuals express their views. There have been various instances of free speech violations where people were arrested because of their views on social media platforms. This paper focuses on the balance between free speech and content moderation on social media platforms and examines various regulations and laws introduced by the government to control social media content<sup>2</sup>. Freedom of speech and expression is considered vital for the well-functioning of the society.

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<sup>1</sup> Constitution of India 1950, art 19(1)(a).

<sup>2</sup> Kaushal T, 'A Bird's Eye View of the Right to Freedom of Speech and Expression in India' (Manupatra, 16 February 2023) <<http://articles.manupatra.com/article-details/A-Bird-s-Eye-View-of-the-Right-to-Freedom-of-Speech-and-Expression-in-India>> accessed 2 November 2024

The right of freedom of speech and expression is considered as the “mother” of all other freedoms. The Constitution of India guarantees this basic right to free speech and expression under Article 19(1)(a). The right to free speech is guaranteed by the International Covenant on Civil and Political Rights (ICCPR) under international human rights law, and Article 19 of the Universal Declaration of Human Rights (UDHR) acknowledges freedom of expression as a human right. Freedom of speech and expression allows individuals the right to share their views and opinions through spoken or written words, publications, illustrations, or any other forms of communication. This right also covers the representation of ideas, feelings, and thoughts using visual or communicative media, such as symbols, signs, gestures, and similar means. The scope of the right to free speech under Article 19(1)(a) has been broadened to encompass the right to access and disseminate information. In *Romesh Thappar v. State of Madras*, the Supreme Court held that right to free speech and of the press form the cornerstone of all democratic systems, as the absence of unrestricted political discussion would make public education, essential to the smooth operation of a government by the people, impossible<sup>3</sup>. In the case of *State of Uttar Pradesh v. Raj Narain*, the SC held that Article 19(1)(a) of the Constitution confers on all citizens the right to freedom of speech and to receive and share information concerning issues of public significance<sup>4</sup>. In *Maneka Gandhi v. Union of India*, Justice Bhagwati, highlighted that free speech is fundamental to a democratic society, which is rooted in open and unrestricted debate, discussion, and dialogue to serve as a check on government action<sup>5</sup>. Democracy is governed "of the people, by the people, and for the people," it is evident that every citizen has the right to participate in democratic processes. Furthermore, unfettered and open debate on public issues is crucial for citizens to exercise their right to vote effectively. In a democracy, freedom of speech and expression enable open dialogue and discussion. It plays a vital role in influencing public perspectives on social, political, and economic matters. The Supreme Court has interpreted the importance of free speech and expression in various cases. In *Mahesh Bhatt v. Union of India & Anr.*, the Supreme Court ruled that free speech is a cornerstone of the Indian Constitution, which upholds and protects it. The Court noted that free speech and expression are vital for maintaining democracy, as an informed and educated citizenry is vital for a functioning democracy. Any restrictions or laws limiting free speech, whether through opposing views or laws imposing restrictions, would ultimately undermine this right. This right is subject to limitations established by the state. As no fundamental right

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<sup>3</sup> *Romesh Thappar v. State of Madras* 1950 SC 124

<sup>4</sup> *State of Uttar Pradesh v. Raj Narain* 1975 AIR 865

<sup>5</sup> *Maneka Gandhi v. Union of India* 1978 AIR 597

is absolute, the right to freedom of speech and expression is also not absolute. It is subjected to some restrictions under Article 19(2) of the Constitution, which authorises the state to impose “reasonable restrictions”. Article 19(2) of the Indian Constitution specifies the grounds on which right to freedom of speech and expression is limited. The grounds were “in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”

Social media plays an important role in letting people to express their views, opinions. Nowadays, emergence of internet and social media became an essential part of people’s life. Social media, one of the prevalent means of computer-mediated communication, plays a key role in how people form decisions regarding various issues. Most of the population in India is using social media<sup>6</sup>. During Covid 19 pandemic, the use of social media and various other platforms became popular among public. Expressing of views, opinions in social media comes under Right to Freedom of Speech and Expression under article 19(1)(a) of Indian Constitution. Through social media, people express not only their views and opinions but also share their thoughts, ideas and includes photos, videos, documents etc. Indians are actively involved in using social media. Number of internet users has been increasing overtime. Using of social media has 2 extremes. In 2012, a girl was arrested for posting a post in Facebook on her profile in which she questioned the people about the shutdown of Mumbai due to death of Bal Thackeray. She expressed that forced respect is not true respect and the shutdown was result of fear. Her friend who liked the post of her, was also arrested, following which there was uproar and the charges against them were later dropped by the court. Another incident in the state of West Bengal, is a reminder of social media as a catalyst for social discord.<sup>7</sup>The riots in 2017 were triggered by a ‘blasphemous’ Facebook post of a 17-year-old boy which incited riots and resulted in death and injuries to many people<sup>8</sup>. In the first case, the freedom of speech and expression of a person is hindered, while in the second it is being misused. Balance between these two issues is the need of the hour. Framing policies without hampering freedom of speech and expression is essential.

Social media and Internet have become vital tools in enabling individuals to practice their right

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<sup>6</sup> Kaushal (n 2)

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

to freedom of speech and expression and to exchange ideas and information. The internet plays a primary role in enabling individuals to practice their right to freedom of speech and expression and access to the internet is recognised as a human right. States must ensure to provide continuous internet access even during political instability. Article 19 of the UDHR and Article 19(2) of ICCPR protect the right to freedom of speech and expression, even on the internet and social media platforms. Internet plays a major role in accessing the information related to knowledge and education. In *Anuradha Basin v. Union of India*, the SC recognised the freedom of speech and expression through the internet as a part of Article 19(1)(a). It also held that indefinite restrictions on internet services are illegal, and any internet shutdown must comply with necessity and proportionality tests<sup>9</sup>. The Constitution of India guarantees freedom of speech and expression as a fundamental right, in whatever medium it is exercised. Internet and social media access are essential aspects of the freedom of speech and expression under Article 19(1)(a).

There is no specific law to regulate freedom of speech and expression but there are provisions in cyber law to address the violations or misuse of social media. The Information Technology Act, 2000 includes punishments for computer related offences which can be committed through social media. The Information Technology Act had timely undergone amendments in 2008, 2015, 2018, 2020. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules - 2021 evolved from Section 87 of the Information Technology Act, 2000<sup>10</sup>, includes the draft intermediate Rules, 2018, and the OTT Regulation and Digital Media Code of Ethics. Out of all provisions, the most contentious provision is Section 66A<sup>11</sup>, which was introduced by the Information Technology (Amendment) Act of 2008. There is an inherent conflict between the phraseology of Section 66A and Article 19(1)(a) of the Constitution, which grants right to freedom of speech and expression to Indian citizens. Article 19(2)<sup>12</sup> mentions the grounds for reasonable restrictions on freedom of speech and expression, but Section 66A places additional restrictions beyond the specified grounds of the Constitution. Section 66A contains several anomalies that contradict free speech principles. Terms like “grossly offensive”, “danger”, “insult”, “injury”, “menacing character”, “annoyance”, “obstruction” lacks clear definition. This led to misuse of the provision.

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<sup>9</sup> *Anuradha Basin v. Union of India* AIR 2020 SC 1308

<sup>10</sup> Information Technology Act 2000, s 87.

<sup>11</sup> Information Technology Act 2000, s 66A.

<sup>12</sup> Constitution of India 1950, art 19(2).

In 2012, a Public Interest Litigation (PIL) was filed in the Supreme Court of India by Shreya Singhal. The petition questioned the Constitutionality of the Section 66A of the Information Technology Act, 2000 as the vague phrasing violated Article 14, 19(1)(a) and 21 of the Constitution. The Supreme Court struck down Section 66A of the IT Act, 2000, ruling it unconstitutional as it infringed the freedom of speech and expression under Article 19(1)(a) of the Constitution of India. The Court also upheld the validity of the Section 69A<sup>13</sup> (power to issue directions for blocking for public access of any information through any computer resource) and section 79<sup>14</sup> (exemption from liability of intermediary in certain cases) of the IT Act, 2000. Section 69A allows the Central government to block access to information on the internet if it threatens the “sovereignty, integrity, defence, security of the state, friendly relations with foreign states, and public order”. This section enables the government to order internet intermediaries like social media platforms to restrict public access and to remove certain content from their platforms. Today, this has become a potent weapon of the government to curb the dissenting speech. Section 79 grants immunity to internet intermediaries from liability for third-party content, on the condition they take down such content upon knowing its illegality. Instead of striking this section as unconstitutional, the court interpreted the phrase “actual knowledge” to mean that intermediaries are required to act on content removal only when notified by a court order or government notification. Sections 69A and 79 are more focused on controlling rather than promoting the free and open public dialogue.

In recent times, the government has increasingly turned to sections 69A and 79 to take down content on the grounds of protecting state security and public order. Posts that were critical towards government were taken down from social media. This can be seen during the government’s handling of the covid-19 pandemic, farmers protest on three farm laws in 2020 and speeches on cow vigilantism. These instances show the government’s unrestricted power to curtail online speech without providing any reasons or judicial oversight. The Shreya Singhal judgement made a notable progress by removing section 66A of the IT Act but failed to restrain the State’s extensive control over citizens speech, assuming that the state would apply its authority in the larger public interest.<sup>15</sup> The Free Speech Collective report states that, India recorded at least 134 incidents of free speech violations as of first four months of 2024,

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<sup>13</sup> Information Technology Act 2000, s 69A.

<sup>14</sup> Information Technology Act 2000, s 79.

<sup>15</sup> Freedom of Speech & Expression under the Constitution of India’ (Free Law, 24 April 2024) <<http://www.freelaw.in/legalarticles/Freedom-of-Speech-Expression>> accessed 5 November 2024

impacting individuals like journalists, academics, YouTubers, and students<sup>16</sup>. The free speech violations include harassment, physical attacks, arrests and censorship directed at journalists, academics, YouTubers, students and various citizens<sup>17</sup>. Many journalists were arrested including Gautam Navlakha (human rights activist and journalist), Prabir Purkayastha (founder of NewsClick and editor-in-chief) and Aasif Sultan (Kashmiri journalist). Journalists like Nikhil Wagle were attacked by attackers after criticizing Prime Minister Narendra Modi and BJP leader LK Advani, while photojournalist Sanjay Kanera was assaulted by a mob in Haldwani, Uttarakhand. The report stated that the online debate during the Ram temple in Ayodhya in January led to the blocking of over hundred social media accounts. The farmer protests in Haryana in the month of February 2024 resulted in the blocking of at least 177 social media accounts and web links, following a request from the Minister of Home Affairs, the Ministry of Electronics and Information Technology under Section 69A of the IT Act. This period has recorded the most internet shutdowns. An Independent research project, Hindutva Watch, which records hate speech and hate crimes targeting religious minorities in India, had its social media account and website blocked in the country in January 2024, before the elections.

There have been 771 internet blackouts in India between 2016 and 2023 and 51 internet blackouts in 2024. India has ranked as the leading country in the world in the number of Internet shutdowns according to data from digital rights organization Access Now<sup>18</sup>. Recently, in Manipur in response to student led protests, imposed a five-day Internet shutdown. Internet shutdowns were seen during the farmers protests, to control agitation on Citizenship Amendment Act etc. Most shutdowns had occurred in Jammu and Kashmir in August 2019 with 552 days of internet blackout. Kashmir has seen more internet shutdowns in the year 2019. The internet shutdown disrupted the people's daily actions, and everything came to a standstill. Even journalists access to information was restricted, which violated their right to report news. The Internet access is considered as a basic human right. Blackouts disrupt education, employment, and social services, including access to food and healthcare. Shutdowns result in the obstruction of justice, emergency aid, and evidence preservation, as they cut off vital

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<sup>16</sup> Staff TW, 'India Has Seen at Least 134 Violations of Free Speech in 2024: Free Speech Collective' (The Wire, 1 May 2024) <<https://m.thewire.in/article/rights/india-134-free-speech-violations-2024-free-speech-collective>> accessed 2 November 2024

<sup>17</sup> ibid

<sup>18</sup> Deep A, 'India Records Highest Number of Internet Shutdowns Globally in 2023' (The Hindu, 15 May 2024) <<https://www.thehindu.com/sci-tech/technology/india-records-highest-number-of-internet-shutdowns-globally-in-2023/article68178061.ece>> accessed 9 November 2024

information when it's necessary<sup>19</sup>. This internet and social media shutdowns raise doubts on the freedom of speech and expression. The government justifies these steps as to maintain law and public order and to avoid the spread of misinformation and fake news. But the restrictions on free speech must be reasonable and many internet shutdowns lack transparency and implemented without reasonable justification.

The rise of social media and internet has seen an increase in the number of hate speeches and became a platform for the spread of hate speech. During the time of election campaigns, political leaders often use hate speeches targeting particular communities, has been regarded as a possible cause of ethnic conflagrations and atrocities, having devastating consequences. Politicians were aware of the consequences, but this doesn't stop some of them from using hate speech. Some leaders post their views on social media platforms, which sometimes causes ruckus in the society. Removing of inciting, offensive content during this time can help to not cause any public disorder. Political Leaders sometimes use their right of free speech in a way that led to disharmony in the society. The hate speeches in India are tackled under section 153A (encouraging enmity between groups based on religion, race, etc) and 295A (offending religious feelings) of the IPC and under the Information Technology Act, 2000. In BNS, the hate speeches are dealt under section 150, 196. Understanding these provisions in a correct way and applying them accordingly can help to overcome the problems and protects individuals right to free speech.

Many people were arrested in the previous years under section 124A of IPC<sup>20</sup> i.e. Sedition. The debate over Sedition has increased with the introduction of new criminal law i.e. Bharatiya Nyaya Sanhita, 2023 (BNS).<sup>21</sup> Even though the word "sedition" has been removed from the new penal code, its impact has been widened with the inclusion of the broad language under the phrase "endangering the sovereignty, unity, and integrity of India". Section 124A of the IPC defined Sedition, whereas Section 152 of BNS provides for similar offence. Section 152 of the BNS<sup>22</sup> does not involve the word sedition but characterizes the offence as "acts endangering the sovereignty, unity and integrity of India". This phrase is wide and could be

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<sup>19</sup> *ibid.*

<sup>20</sup> Indian Penal Code 1860, s 124A.

<sup>21</sup> Taori S and Damania T, 'Balancing Free Speech and National Security: A Critical Analysis of Section 152 of the Bharatiya Nyaya Sanhita and Section 124-A of the IPC' (Live Law, 3 June 2024) <<https://www.livelaw.in/lawschool/articles/balancing-free-speech-national-security-critical-analysis-section-152-bhartiya-nyaya-sanhita-section-124-a-ipc-259465>> accessed 8 November 2024

<sup>22</sup> Bharatiya Nyaya Sanhita 2023, s 152.

misused as it doesn't list any particular activities that could be deemed a threat to national sovereignty, unity, and integrity and does not provide any examples or illustrations that could help interpret what may be seen as a threat, which leading to ambiguity. If any individual or group of people are protesting peacefully against any government policy or any other issue, they could be charged under section 152, citing reason as their action pose threat to national unity or integrity. Even peaceful protests, criticism could be seen as endangering national security. The provision section 152 of BNS is prone to misuse and violates people's right to freedom of speech and expression. The tenure of punishment which was 3 yrs in Section 124A has been increased to 7 yrs in Section 152. The government claimed the BNS excludes sedition, but it actually broadened the scope of the previous sedition law and enhanced the severity of punishment. Some changes include the addition of the words "electronic communication" and "financial means" in section 152 of BNS. Electronic Communication is defined under the Section 2(d)(I) of the BNSS. It includes the content over emails, text messages, WhatsApp messages and Instagram, Facebook, X (formerly Twitter). Financial means is not defined in BNS, but its interpretation has been left to the courts. Article 19(1)(a) of the Constitution includes right to dissent too. Freedom of speech and expression includes freedom to express one's own views, dissenting opinions, regardless of however critical they are. The Supreme Court in the landmark case *Kedar Nath Singh v. State of Bihar*,<sup>23</sup> interpreted the validity of the sedition. The Court affirmed that sedition laws should not infringe the citizens right to dissent and also held that sedition applies only when the act is likely or intended to cause public disorder and any act that merely express disapproval or opposition towards the government, without any tendency to disrupt public order or harm state security, do not constitute sedition. Thus, the Intention to incite public disorder is important to sedition. The judgement must be strictly followed by the authorities to not cause any misuse. Despite the absence of individual's intention to incite public disorder, they are arrested for being critical towards the government. India is a democratic country; individuals are allowed to express their opinion freely. Positive criticism is important for the well-being of the society and government has to accept it and change accordingly.

Content moderation is necessary to ensure public safety and in maintaining public order, but excessive regulation might undermine democratic values. Recently, in September 2024, the Bombay High Court struck down the amended Information Technology (IT) Rules, 2021 as

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<sup>23</sup> *Kedar Nath Singh v. State of Bihar* 1962 AIR 955

“unconstitutional” and “vague”. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023, were introduced by the Ministry of Electronics and IT (MEITY), by amending the 2021 IT Rules. The IT Rules, 2021, empowered the Centre to set up a “Fact Check Unit” (FCU) for detecting online content about government and its establishments that is “fake, false, or misleading”. It empowers the Union government to classify any information concerning the affairs of the Central government as fake, false, or misleading. As per the revised Rule 3(1)(b)(v), social media intermediaries are required to stop users from sharing content flagged by the Centre’s FCU as false information. Intermediaries are required to remove such content within 36 hours to retain “safe harbour” protection. The Constitutional validity of the 2023 Rules was challenged before the Bombay High Court. Justice Patel argued that the amended rules-imposed censorship and went beyond the reasonable restrictions under Article 19(2) of the Constitution. This notification of the government imposes arbitrariness and restrictions on freedom of speech and expression. The terms “fake, false or misleading” allow for potential room for misuse.

India’s approach in regulating social media is that the IT Rules allows social media platforms like Facebook, X, Instagram to take down content when it violates rules and regulations, based on the grounds of violation of law, obscenity, morality, invasive of privacy, misinformation, threatens the unity, defence, integrity, sovereignty of the nation etc. Maintaining balance and transparency in content regulation is important. Let’s observe the laws followed by the EU in regulating internet and social media. The EU has two major laws- the Digital Services Act (DSA) and the Digital Markets Act (DMA), enabling Internet intermediaries to regulate the online content effectively. The DMA regulates the “gatekeeper” roles of the largest digital companies. Gatekeeper role is defined as providing essential digital services like online search engines, app stores, and messaging platforms and has mandated to adhere to specific obligations and prohibitions listed in the act<sup>24</sup>. The DSA monitors the online intermediaries and platforms like social networking, content-sharing platforms, etc and its aim is to restrict illegal and harmful online content, combating disinformation, and ensuring a safe and open online platform space that respects users fundamental rights and safety. Under the DSA, online platform providers and intermediary service providers, must inform users about the reason behind the removal of content or restricting their account. The Act imposes a legal duty on

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<sup>24</sup> Walia U, ‘Freedom of Speech in the World of Social Media’ (Mondaq, 8 April 2024) <<https://www.mondaq.com/india/social-media/1448526/freedom-of-speech-in-the-world-of-social-media>> accessed 10 November 2024

online platforms to provide clear and specific reasons for their content moderation and also allows users to challenge these decisions through an out-of-court mechanism. To maintain transparency, the European Commission has created the DSA Transparency Database, that allows public access to the reasons behind their content moderation decisions. India can take lessons from these legislation by imposing only reasonable restrictions on the freedom of speech and expression. Social media intermediaries or the government should provide their reasons for content moderation decisions in writing and making them accessible to public. Taking down the content from social media platforms or internet on the basis of indecency or immorality has to be justified. Social media is a powerful tool to express views, ideas and to share information, but it must be regulated to protect free speech and to curb the influence of trolls and to prevent the individuals from spreading bigoted and ignorant views. Social media should be used as a platform to express views and not to misuse it.

### **CONCLUSION –**

Article 19(1)(a) of the Constitution of India guarantees Right to freedom of speech and expression. Social media plays an important role in people's exercising their right to free speech and expression. As the growing use of it for illegal purposes, has made to regulate social media. Certain provisions in IT Rules like Section 69A, 79 are often prone to misuse by the government. The existing laws in India are neither appropriate nor sufficient enough in addressing the issues. Public suggestions can be invited and established regulative practices of other countries can be incorporated. Forming a committee consisting of technical experts could help the government to evaluate social media's use and misuse without hampering civil rights of citizens.

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