

# THE COMPLEXITIES OF FREEDOM OF SPEECH AND EXPRESSION IN CYBERSPACE IN DIGITAL INDIA

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## I. INTRODUCTION

Freedom of speech and expression means that one has the right to express one's ideas and opinions freely through speech and other forms of media communication but not at the cost of causing damage to reputation of others and not being against the law by means of false, misleading or mischievous statements. The print, radio television and film medias have been in existence for quite some time but there has emerged the global media of cyberspace in recent times due to great advancements in technology. We are now in an age of Information where the technology is challenging established legal institutions, social practices, and human rights of an individual including freedom of speech and expression. Cyberspace is not a physical space which can be identified and regulated by a State but it is a virtual world created by the combined use of communication and computers. It is a notional environment in which communication over computer network occurs. It is an imaginary place where electronic messages, pictures etc exist while they are being sent between computers located at different places in the world. With growth of technologies the cyberspace is becoming very complex and very different as compared to other public domains like land, sea etc. Cyberspace is virtual world and based on advancing technologies like internet, e-mail, smartphone, personal digital assistants and computers, it is witnessing complex activities and brings unforeseen challenges including threat to freedom of speech in cyberspace. The cyberspace is an electronic media which is global, borderless, inexpensive, easily accessible and providing uncomplicated anonymity. There are various legal challenges posed by the creation of cyberspace which include the exercise of jurisdiction, sovereignty, choice of law applicable and varying social, cultural and legal standards in different countries. The State as well as private citizens use cyberspace for various activities like freedom of speech and expression, e-commerce, e-governance, e-communication. In India, first internet service was started by VSNL (Videsh Sanchar Nigam Limited), a Govt of India enterprise, on 15 Aug 1995. A Press Release note No. 35/2018<sup>1</sup> issued by the Telecom Regulatory Authority of India on 23<sup>rd</sup> March 2018 stated that as on 31<sup>st</sup> January 2018 total telephone subscribers (wireless + wireline) stood at 1175.01 million. The total broadband subscribers as on 31<sup>st</sup> January 2018 was 378.10 million. These figures will only increase in the future thus making computer and internet available in almost every home in India and affecting basic human rights and fundamental rights including freedom of speech and expression in cyberspace. In 1948 the United Nations proclaimed the Universal Declaration of Human Rights (UDHR)<sup>2</sup>, a milestone document in the history of human rights which was drafted by representatives from different legal and cultural backgrounds. It set out, for the first time, fundamental human rights to be universally protected. Article 19 of UDHR states that everyone has the right to freedom of opinion and expression which right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. In December 2013 the United Nations adopted draft resolution to the effect that the same rights people have offline must be protected online which included right to freedom of speech and expression. In December 2016 the United Nations adopted the above mentioned draft resolution. The United Nations Human Rights Council (UNHRC) in its report dated 24<sup>th</sup> March 2017<sup>3</sup> has recognizing that the effective exercise of the right to freedom of opinion and expression, is essential for the enjoyment of other human rights and freedoms and constitutes a fundamental pillar for building a democratic society and strengthening democracy, bearing in mind that all human rights are universal, indivisible, interdependent and interrelated. However, there is no effective protection to an individual against misuse of cyberspace by others.

## II. DIGITAL INDIA PROGRAMME

Use and misuse of Freedom of Speech & Expression becomes more relevant as India gallops ahead towards becoming Digital India. The Digital India programme is a Govt of India programme which started on 1<sup>st</sup> July 2015. The Govt of India seeks to transform India into a digitally empowered society and a knowledge economy.<sup>4</sup> This programme is towards ensuring that the Govt services are available to citizens ONLINE through high speed internet and sophisticated online communication infrastructure. Digital India programme is to prepare India for a knowledge future based on advancement of information technology & its easy availability to the general public even in rural areas. This will provide easy access to an individual to propagate his ideas by way of speech & expression on the internet without any censoring from the Govt of India. The progressive Digital India programme will result in creation of Broadband Highways based on national optical fibre network in all gram panchayats which will further ensure that internet facilities is easily available to people even in rural areas. However, it would also result in greater opportunities for bad elements to be able to misuse cyberspace and propagate defamatory and hateful speech and expression on internet against which an individual has no protection.

## III. FREEDOM OF SPEECH AND EXPRESSION UNDER THE CONSTITUTION OF INDIA

The preamble of Constitution of India states that there would be liberty of thought & expression. The Indian Constitution lays down in its Article 19(1)(a) to the effect that an Indian citizen has the freedom of speech & expression as part of his fundamental rights. However, the Constitution also states through Article 19(2) that certain restrictions can be placed on the freedom of speech in the case of national interests, public order, decency, morality, defamation, incitement to an offence etc. Various Judgements of Supreme Court of India have upheld the importance of freedom of speech & expression from the point of view of fundamental right of an individual & also from the point of view of national sovereignty & national interests in a democratic set up. In the case of Ramesh Thaper vs State of Madras<sup>5</sup> the Supreme Court held that the freedom of speech lay at the foundation of all democratic organizations. In Sakal Papers vs. Union of India<sup>6</sup> the Supreme Court Constitution Bench held that freedom of speech was of paramount importance under a democratic constitution even when

the composition of legislature & governments changed from time to time. It further held that though the State had the power to put restrictions on the activities of the citizen to carry on business but it was not open to the state to achieve this object by directly & immediately curtailing any other freedom of that citizen guaranteed by the constitution. The Supreme Court stated that the freedom of speech can be restricted only in the interests 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. The scheme of Article 19 is to enumerate different freedoms separately & then to specify the extent of restrictions to which they may be subjected & the objects for securely which this could be done. A citizen is entitled to enjoy each & every freedom together & Article 19(1) of the Constitution does not prefer one freedom to another. In *Kedar Nath Singh case*<sup>7</sup>, the Supreme Court upheld Section 124 of the Indian Penal Code and stated that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. The Supreme Court further hold that merely creating disaffection or creating feelings or enmity in certain people was not good enough and it would violate the fundamental right of free speech under Article 19 (1)(a) of the constitution of India.

In *Bennett Colman case*<sup>8</sup> the Supreme Court held that the freedom of speech & the freedom of press was the arc of the Covenant of Democracy as public criticism was essential to the proper functioning of National Institutions. In the case of *Rangarajan*<sup>9</sup>, the Supreme Court held that there has to be a compromise between the interest of freedom of expression & national interests. These two conflicting interests cannot be given equal weightage & the final say will depend upon the facts & circumstances of each case. Freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom pressing & the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched and it should have proximate & direct nexus with the expression. Recently, in the case of *Khusboo*<sup>10</sup>, the Supreme Court held that the freedom of speech & expression, though not absolute, but was necessary as there was a need to tolerate views which were very unpopular. The Supreme Court stated that if someone disagreed with the Appellant's views of social acceptability of pre-marital sex then they should have contested their views through the media and the law should not be used in a manner that has chilling effects on the freedom of speech & expression. The right of freedom of expression ensures the free flow of opinions & ideas which are essential for the survival of Indian democracy. An informed Citizen ensures meaningful governance by the government, the availability of space for open dialogue is of great social & cultural importance.

#### IV. COMPLEXITIES OF FREEDOM OF SPEECH IN CYBERSPACE IN DIGITAL INDIA

A citizen's personal opinions, expressed in a print media or television media or film media is subject to public & State scrutiny and the author of such opinion is also subject to civil and criminal liabilities. However, this is not possible in the case of freedom of expression on the internet or electronic media due to factors like anonymity, jurisdiction and varying cultural and social standards. Internet denotes an inexpensive social media for exchange of information & communication. It implies freedom to express one's thoughts & views on the internet but this freedom can also be misused. After the public distribution of US governments communications relating to various political & other activities in different countries in world, Julian Assange, editor in chief of Wikileaks started a website & used internet to exercise his right of free speech by way of disclosing such world- wide sensitive information. USA is extremely liberal where the freedom of expression of an individual is protected with great vigour. However, in India, the freedom of expression is not absolute and is subject to certain State restrictions. In India, Section 69A of the Information Technology Act, 2000 empowers the Central Government to block from public access information which it considers necessary to do in the interest of sovereignty & integrity of India, security of State, friendly relations with foreign states or disturbance to public order. While some may say that this amounts to censorship by the State and is contrary to the guaranteed freedom of expression to the citizens of India there are others who feel that the State should ensure that such Internet platform should not be permitted to be misused by anti-social elements who wish to create disharmony amongst various sections of the society. Recently in a *Shreya Singhal case*<sup>11</sup>, the Supreme Court of India discussed Indian, English & US jurisprudence on free speech and struck down Section 66 A of the IT Act, 2000 as being violative of freedom of speech & expression on the internet. Section 66A of The IT Act which laid down criminal liability of a person who sends offensive message or e mail on internet or other electronic media. Recently, the Indian Govt has found the speeches of Dr Zakir Naik, a Muslim preacher on the internet, to be offensive in nature and creating incitement to anti national elements. His preachings are banned in India, Bangladesh, UK and Canada. The issue of freedom of speech and expression in cyberspace and its possible misuse, is very scantily covered under the provisions of The IT Act which was enacted primarily to facilitate e-commerce and Electronic Governance. The statement of objects and reasons mentioned therein stated that there was a need for bringing in suitable amendments to facilitate e-commerce. It further stated that to prevent misuse over transactions in electronic medium, it was proposed to create civil and criminal liabilities for contravention of provisions of the IT Act. Section 79 of The IT Act contained provisions for liabilities of intermediaries only under certain circumstances. Later The IT Act was amendment, 2008 was passed ( notified in 2009) to keep pace with the changing online scenario with technological advancements but the issue of protection of individual's reputation or defamation on the internet was still not adequately addressed due to certain limitations of State control over cyberspace. The new section 69A of the IT Act empowers the Govt to issue directions for blocking public access to any information through any computer resource. If an intermediary fails to comply with Govt directions, then such intermediary can be subjected to imprisonment for seven years and fine. Govt of India has framed The Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules, 2009 whereby any program or information on internet or other social media can be blocked. However, in cases of defamation or hate speeches on internet the existing police structure, the Criminal Procedure Code and Civil procedure Code are totally ineffective due to complex nature of cyberspace. It is difficult to define even the cause of action in the case of internet and its resultant issue of jurisdiction in the matter.

#### V. CONCLUSION

An Indian citizen defamed on the internet has no effective mechanism to ensure that the offender gets punished. An individual has no protection against harm to his reputation on the internet. The State is helpless against hate speeches and offensive material on the internet. Such misuse of freedom of speech on the internet will keep on increasing as India continues to march towards becoming Digital India. The issue of use and misuse of freedom of speech and expression in cyberspace is a complex global phenomenon involving social, technical and legal perspectives. This issue has to be tackled at International, and national level. There should be globally acceptable United Nations resolutions acceptable to all stakeholders. India should be technically self sufficient so that it can have its own servers and the state does not have to depend upon foreign servers and foreign service providers. India should strive hard for technology development so as to make it self sufficient to be able to protect its citizens against misuse of cyberspace. There should be suitable legislation e.g. Cyber Justice system or Cyber Law of India covering civil and criminal aspects, procedural as well as substantive legislation for providing suitable protection to an

individual and for punishing the offender. There should be special police task forces and special adjudicating authorities / institutions / cyber tribunals set up to be able to provide real time online protection to citizens. The Govt, Non Govt Organisations and the private industries will have to be involved and given certain policing and adjudication powers for protection of an individual against victimisation due to misuse of speech and freedom of expression on the internet.

<sup>1</sup> www.trai.gov.in ( visited on March 31, 2018)

<sup>2</sup> <http://www.un.org/en/universal-declaration-human-rights/> ( visited on March 31, 2018)

<sup>3</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/246/51/PDF/G1724651.pdf?OpenElement>

<sup>4</sup> www.digitalindia.gov.in/content/about-programme ( visited on March 31, 2018)

<sup>5</sup> 1950 SCR 594

<sup>6</sup> (1962) 3 SCR 842

<sup>7</sup> (1962) Supp (2) SCR 769

<sup>8</sup> (1973 ) 2 SCR 757

<sup>9</sup> (1989) 2 SCC 574

<sup>10</sup> (2010 ) 5 SCC 600

<sup>11</sup> AIR 2015 SC 1523

