



# DIGITAL RIGHTS UNDER THE INFORMATION TECHNOLOGY LAW IN INDIA: ISSUES AND CONCERNS

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**Abstract:** India brought a law on information technology in 2000. Even after twenty-four years of the legislation, digital rights in India are at a nascent stage. This paper explores five digital rights in India, namely, right to access, right to freedom of speech and expression in the digital world, right to privacy, right to data protection and right against harassment and abuse in the digital world. The paper attempts to look at the current status of digital rights in India, examine the issues and concerns surrounding these rights and provide suggestions on how to strengthen these rights in India.

**Index Terms:** Information Technology, Digital Rights, Data Protection, Right to Privacy, Right to Access

## 1. Introduction

India brought its Information Technology legislation in 2000. There were many reasons behind bringing the law, firstly, internet came to India in 1995. Although there were earlier laws in existence but the coming of the internet posed new legal issues. Moreover, e-commerce started in India in early nineties and it needed to be regulated. Also, none of the existing laws gave legal validity to the activities in cyberspace. An e-mail or an e-contract was not legally valid. Thus, it was felt that a separate legislation was required as “internet required a legal infrastructure which other laws could not provide.” The preamble to the IT Act, 2000 states that “the Act is based on the Model Law on Electronic Commerce adopted by the UNCITRAL<sup>1</sup> which was later adopted by the General Assembly of United Nations.” Hence, it also cannot be denied that international pressure and obligation was vital in adoption of this legislation.

One term that is frequently in discussion today is ‘digital rights.’ There have been different meanings and interpretations given to this word. A basic analysis of digital rights reveals that it is an umbrella term that includes different kinds of rights that a person requires in the virtual world. It is stated that, “Digital Rights is an all-encompassing term which includes basic rights in the digital world to advanced rights that might be required in the digital world. It includes the right to access the digital world, freedom of speech and expression in the digital world,

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<sup>1</sup> United Nations Commission on International Trade Law.

protection from abuse and harassment in the digital world. Also, right to privacy including data protection comes within the purview of this right.”

In India, there are legislative and judicial attempts made to protect these digital rights. The attempt in this paper is to look at the digital rights in India and examine the issues and concerns surrounding these rights and provide suggestions on how to strengthen these rights in India.

## **2. Digital Rights in India**

### **2.1 Right to Access**

The first and most basic right digital right is the right of equal access to the digital world or right to access to internet. The problem pertaining to this right is that everyone does not have equal access to computers and internet. Some of the major concerns in realizing this right are “affordability, accessibility, quality of service and expertise of the people.”

### **2.2 Right to Freedom of Speech and Expression**

The second right is the Freedom of Speech and expression in the digital world. Freedom of speech and expression is protected by Article 19 of the constitution of India but Article 19 is not an absolute right. It has got certain limitations which are given in article 19(2) which includes “security and sovereignty of India, friendly relations with Foreign States, public order, decency or morality in the relation to contempt of court, defamation or incitement to an offence.” Along with the constitutional limitations, ‘right to freedom of speech and expression’ in an online platform has to be regulated under the information technology law and the copyright law

### **2.3 Digital Rights: Right to Privacy**

The third and an important digital right is the right to privacy in the digital world. There are major Privacy concerns in the digital world like “Cookies, Web bugs, Spyware, Online Digital Profiling.” The Information Technology Act only provides very limited protection to the privacy under section 72 and section 72A of the Act.

### **2.4 Digital Rights: Data Protection**

A closely related concept to right to privacy is right to data protection. Although before 2023 there was a provision and a regulation in India on data protection but it had very small jurisdiction. It was only related to sensitive personal data. “Sensitive personal data or information” is defined to be a further sub-category of this information, to include items such as individual’s user name/passwords, individual’s financial information, individual’s health conditions/biometric, individual’s sexual orientation etc.”<sup>2</sup> Section 43A(repealed) of the IT Act explicitly provides that “whenever a corporate body possesses or deals with any sensitive personal data or information, and is negligent in maintaining a reasonable security to protect such data or information, which thereby causes wrongful loss or wrongful gain to any person, then such body corporate shall be liable to pay damages to the person(s) so affected.” In 2023, a legislation wholly devoted to data protection has been passed by the Parliament.

<sup>2</sup> It was defined under s. 3 of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

## 2.5 Digital Rights: Protection from Online abuse and harassment

The Information Technology Act includes provisions on both Cyber Torts and Cyber Crimes. The Cyber Tort provisions provided under section 43 of the Act provides for compensation but the provisions do not provide relief for online abuse and harassment. Cyber crime provisions are extensive in the Act but with growing newer forms of cyber-crimes, there are questions raised on the effectiveness of the provisions.

### 3. Digital Rights: Issues and Concerns

There are many concerns relating to the digital rights. If we discuss the first right, that is, the right to access, the concerns in India are on availability and affordability. Also, the quality of service differs depending on the user's location, for a person in an urban area the availability and quality of service is better as compared to a person living in a remote area. Also, there are issues such as the required skill, interest and understanding of internet access. So, as far as the first digital right in concerns, the digital divide among the "have and have nots" is a major concern.

The second digital right, that is, the right to freedom of speech and expression in the digital platform is not an absolute right. They are restricted by the grounds provided in article 19(2) of the constitution of India. Freedom of speech and expression in an online platform has to be regulated under the information technology law and the copyright law. Under the Copyright Act, if any copyrighted content is infringed by a user, then the defence of freedom of speech and expression will not come to rescue until and unless it comes under fair use.<sup>3</sup> For the infringement of the copyright content, not only will the content creator/ user be held responsible but the liability of the intermediaries will also come under scanner for the infringements of copyright of online contents under two legislations, that is, Information Technology (IT) Act, 2000 and Copyright Act, 1957. The definition of intermediaries under IT Act includes "anyone who receives, stores, transmits or provides any service with respect to electronic message. (It is a wide definition including telecom provider, ISPs, web hosting service providers, search engines, online payment, online auction, cyber cafes etc)."<sup>4</sup> Under the proviso to section 52(c) of the Copyright Act, 1957, "if the person responsible for the storage of the copy receives a written complaint from copyright owner, it shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court. It is important to note that in case no such order is received before the expiry of such period of twenty-one days, it may continue to provide the facility of such access."<sup>5</sup> Under the IT Act, 2000 if Materials placed by intermediaries are held unlawful and the government or its agency notifies<sup>6</sup> the same and the Intermediary does not expeditiously remove or disable access to the material under section 79(3)(b) of the Act<sup>7</sup>, they will be held responsible. The intermediary can only escape responsibility under Section 79 (2) of IT Act if "it merely provides access to third party information which is transmitted or temporarily stored or hosted

<sup>3</sup> Copyright Act, 1957, s. 52.

<sup>4</sup> See, Aakash Kumar, "ISP liability for contributory copyright infringement in USA and India: Lack of uniformity as trade barrier", 19 JIPR 272 (July, 2014).

<sup>5</sup> See, Alka Chawla, *Law of Copyright, Comparative Perspectives* (Lexis Nexis, Gurgaon, 2013).

<sup>6</sup> Provided in Regulations

<sup>7</sup> Also see, Vakul Sharma, *Information Technology Law and Practice*, (Universal Publishing House, Delhi, 2012).



or Acts as a facilitator and does not initiate, select the receiver or select or modify information contained in the information or had served ‘due diligence’ while discharging duties.” Because of a host of ambiguous provisions in both the legislations, at times, the provisions may be misutilised and it may directly impact the “right to freedom of speech and expression” of a legitimate user. Along with measures for blocking access, provisions for safeguards to protect “freedom of speech and expression” should be there and there should be fair compensation and fair remedies on violation of such right.

As to the third right, that is, the right of privacy in the digital world, there are only limited provisions to protect the interest of users. The only two provision which deals with privacy are: Section 72 which provides for Penalty for Breach of confidentiality and privacy only “if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder....has secured access to any electronic record.”<sup>8</sup> The other provision is Section 72A titled “Punishment for disclosure of information in breach of lawful contract.” This provision provides for “imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both to any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person.” These limited rights are not sufficient to protect the right of privacy in today’s time and era.

Data protection which is the fourth digital right has an extensive legislation now titled Digital Personal Data Protection Act, 2023 (DPDPA). Although the legislation is quite elaborate, however, there are many shortcomings. To note a few, the state has been given a lot of exemptions under the Act, be it for “in the interest of aims such as the security of the state and maintenance of public order” or “for provision of benefit, service, license, permit, or certificate. It specifically allows use of data processed for one of these purposes for another. It also allows use of personal data already available with the State for any of these purposes.”<sup>9</sup> Also an important right, “right to be forgotten” is not specifically mentioned in the legislation.

Coming to right against online abuse and harassment, there are cyber crime provisions in the Act. There are also specific provisions for cyber-crimes against women and children. However, there are many shortcomings too. For example, cyber stalking and cyber bullying are still not specifically included in the IT Act.<sup>10</sup> Cyber trolling is a major cyber abuse and yet there are no provisions to prevent this crime. Moreover, many of the cyber-crime provisions are not very clear and legislative amendments are required to give clarity to the provisions.

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<sup>8</sup> Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend tot wo years, or with fine which may extend to one lakh rupees, or with both.

<sup>9</sup> <https://prsindia.org/billtrack/digital-personal-data-protection-bill-2023>

<sup>10</sup> Although IPC deals with cyber stalking.

## 4. Conclusion and Way Forward

To conclude, digital rights in India are at a nascent state. All the digital rights discussed above comes with its own issues and challenges. Firstly, until and unless there is equal and fair access to internet and digital world, the whole discussion remains futile. Also, equally important is digital literacy. Secondly, the passing of the DPDPA is a positive step, however, in the coming days, the implementation of the Act would remain a challenge. Harassment and abuse are a major problem in the digital world. Cyber harassment and abuse can be controlled only if stricter laws/ guidelines are brought in place.

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