



## FREEDOM OF SPEECH AND EXPRESSION IN THE REALM OF DIGITAL MEDIA

By Adyasha Kar  
From Symbiosis Law School, Pune

### INTRODUCTION

Article 19(1)(a) of the Indian Constitution provides for the freedom of speech and expression. However, this freedom is not absolute and is subject to reasonable restrictions in the interests of the sovereignty and integrity of India, friendly relations with foreign states, public order, decency or morality or with regard to contempt of court, defamation or incitement of offence.<sup>1</sup> Digital space covers within its ambit a variety of electronic media and digital platforms. This paper would specifically deal with social media platforms.

Social Media began thriving as the most preferred platform for communication only about a decade and a half ago. The content available on social media can be classified into two primary types – high level and low level.

- 1) **High level communications** are mostly professionally produced with the intent of providing information to a wider audience.<sup>2</sup> Such information is generally expected to be well researched and well verified for its veracity. One can expect such information to exist in the form of newspaper articles or informative pieces.

- 2) **Low level communications** are more casual and amateur in nature, comprising conversations in the chat box, remarks in the comments' column or expression of personal opinion on a particular issue.<sup>3</sup>

This paper would specifically deal with low level communications in digital space. Digital space has become synonymous to a safe space where people can put across thoughts, however diverse in its subjects, without a second thought.<sup>4</sup> At the same time, uncensored communications in social media can have grave outcomes.

### WHY FREE SPEECH IS ESSENTIAL TO SOCIAL MEDIA?

Social media has always been a safe space for voicing one's opinion in a personal capacity. Of course, it essentially operates as a space where individuals share snippets of their personal lives but in the recent times, social media sites have emerged as a popular forum for creation and persistence of narratives that are political as well as social in nature. An individual need not be associated with a publishing house or news network; an individual does not need a license to publish his views online, neither is the number of words he posts or the subject he chooses to write upon is regulated in any manner. Not only written words but poems, pictures, short movies, posters, caricatures have found their due space for expressing strong ideas. Social media is a platform that has now concretised living room discussions or even casual conversations with friends in the internet space as well as mobilised these words to

<sup>1</sup> Article 19(2), Constitution of India, 1950.

<sup>2</sup> Jacob Rowbottom, *To Rant, Vent and Converse: Protecting low level digital speech*, The Cambridge Law Journal, Vol. 71, No. 2 (July 2012), pp. 355-383.

<sup>3</sup> Ibid.

<sup>4</sup> SMW Staff, *The Rise of Social Web And What It Means For Equality*, Social Media Week (Sept 21<sup>st</sup> 2017) <https://socialmediaweek.org/blog/2017/09/rise-social-web-means-equality/>.



reach ends of the globe. Be it Facebook, Instagram, Twitter or Reddit, the information disseminated in any of these sites transcend borders to reach people across the World. A by-product of globalisation, social media sites have championed universalisation of ideas. A strong example would be the Me Too Movement which gained momentum on social media and saw women across the world uniting and voicing a common evil.

### **RIGHT TO INFORMATION**

When we discuss about freedom of speech and expression on social media, a collateral right is the right to be informed. Advocates of free speech have often expressed how freedom of speech and right to information go hand in hand. Unrestricted speech welcomes criticisms, dissipation of unpopular opinions, broadcasting hushed truths and publicizing general complaints, troubles or issues that people may face on a daily basis. With scenarios of embedded journalism or news houses ‘playing too safe’ in fear of legal ramifications or to avoid the wrath of the majority or the powerful, low level communications have been a major source of information.

Right to be informed has been considered to be essential for the working of the institutions of the State<sup>5</sup>. Where a democratic institution envisages change in the government, the Indian Courts have also held that social media plays an important role to keep the citizens informed.<sup>6</sup> In the case of *S. Khushboo v. Kanniammal & Anr*<sup>7</sup>, it was asserted that in spite of the right to free

speech being not absolute, it was necessary for tolerating unpopular opinions. Further, it was averted that the right requires unhindered flow of ideas which attribute to the collective sustainability of the citizenry. Most importantly, the judgment highlighted that an informed citizenry is indispensable to *“meaningful governance, culture of open dialogue and is generally of social importance.”*

There are various facets to truth, often more than just two extremes, often what popular media might refrain from telling. The truth must reach people for them to understand an issue completely, by the presentation of different perspective on the same issue. It is normal for high level communications to be sources of such perspectives but social media and low level communications have amplified the number of perspectives available to particular topics. The questions raised during the release of the Bollywood movie, ‘Kabir Singh’ saw debates sparking across social media sites and unleashed views and opinions of diversified nature, coupled with personal incidents that opened up an avenue to ponder upon various issues related to patriarchy. Even during the wake of the passing of the Citizenship Amendment Act, 2019, facebook, Instagram and twitter bustled with strong opinions that, though were confined to larger brackets of ideologies, displayed different inputs from all users that stimulates those reading them to know, to think and to form an opinion.

<sup>5</sup> *Benett Coleman & Co. & Ors. v. Union of India & Ors* [1973] 2 SCR 757.

<sup>6</sup> *Sakal Papers (P) Ltd. & Ors. V. Union of India* [1962] 3 SCR 842.

<sup>7</sup> *S. Khushboo v. Kanniammal & Anr.* (2010) 5 SCC 600.



### DISCUSSION, ADVOCACY AND INCITEMENT

In the case of *Shreya Singhal v. Union of India*<sup>8</sup>, the court analysed various facets of low level communications in digital media. The Court acknowledged social media as a facilitator of free speech and a market place of ideas. At the same time, the Court also highlighted the potential threats posed by unregulated communications in social media. The threats are attributable to the easy accessibility of information on social media sites. A single click can publish any sort of content on social media, making it available to billions of people. Low level communications on the internet can further be classified into discussion, advocacy and incitement and stressed upon the fact that discussion and advocacy, notwithstanding its unpopularity, lies at the heart of Article 19(1)(a) of the Indian Constitution.

In *Whitney v. California*<sup>9</sup>, imminence of danger was considered as a reasonable ground to curtail freedom of speech. It was further highlighted that there may be cases where the line demarcating advocacy and incitement would be bleak. However, it was asserted that irrespective of how morally reprehensible advocacy of a certain idea may be, it would be unjustified to curtail free speech as long as it falls short of incitement and nothing is incitement if it does not call for immediate action.

The point of concern here is the acute subjectivity of the matter. In *Whitney's* case,

the Court specified 'imminence of immediate danger' as the recognizing factor of incitement. Hence, the Courts look for words that call for immediate action that can have serious repercussions. However, the Courts have ignored the idea of building up a narrative that finally results in unforeseen action.

### NOXIOUS SPEECH & PROPAGANDIST CONTENT

Andrew Marantz, a columnist for the *New Yorker* and the author of the book *Antisocial* had conducted extensive empirical research to determine the extent to which social media can affect the actions of normal individuals and in that way. He strongly criticises the common apathy towards the possibility of noxious speech online metastasizing into violent action and endeavours to draw the readers' attention towards incidents such as Christchurch shootings, Charlottesville Violence, El Paso Violence and various other that can be traced back to noxious speech online.<sup>10</sup> The concerns of Andrew Marantz are not baseless:

8chan is a messaging board that provides for absolute free speech while maintaining anonymity but at the same time contains users with far right ideologies and has grown to be a hub nurturing hate speech.<sup>11</sup> The attacker who carried out the El Paso massacre had posted a 'white nationalist chant' on the platform prior to opening fire in a Walmart store and killing 22 people.<sup>12</sup>

<sup>8</sup> *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

<sup>9</sup> *Whitney v. California*, 71 L. Ed. 1905.

<sup>10</sup> Andrew Marantz, *Free Speech is Killing Us*, *New York Times* (Oct. 2, 2019) <https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html>.

<sup>11</sup> Mike Wending, *What is 8chan?*, BBC Trending (5 Aug 2019) <https://www.bbc.com/news/blogs-trending-49233767>.

<sup>12</sup> Julia Carrie Wong, *8chan: The Far Right Website linked to the Rise in Hate Crimes*, *The Guardian* (5 Aug 2019, 03.36 BST) <https://www.theguardian.com/technology/2019/aug/05>



- Prior to killing dozens of people in the notorious Christchurch Shootings, the attacker had posted an 87 pages long ‘anti-immigrant, anti-Muslim’ Manifesto on facebook.<sup>13</sup>
- In 2013, a fake video doing rounds in facebook, intensified the growing tensions between the Jat and Muslim Communities of Muzaffarpur, resulting in riots that claimed nearly 50 lives and forced about 40,000 people to flee from their homes.<sup>14</sup>
- Circulation of tailored videos on child snatchers and alleged cow poachers in whatsapp saw an unprecedented rise in lynching cases in India over the last two years, with 33 killed and 60 instances of mob violence between January 2017 and July 2018.<sup>15</sup>
- Recently during the anti-CAA protests, a number of inciting materials were circulated online, mostly in the form of memes. The content called for hatred towards a particular community such as rebuking the ones protesting against CAA as defenders of a religion that propagates violence or even absurd arguments such as India was originally not meant to be a secular nation since the word ‘secular’ was introduced in the preamble in 1976.

### ANALYSIS OF RELEVANT LEGAL PROVISIONS

The Court has upheld the constitutionality of creation of penal provisions with regard to content posted online but also struck down section 66A of the IT Act for being too vague<sup>16</sup>. The Courts have endeavoured to maintain balance between free speech and its restrictions and so have the laws. Section 153A of IPC<sup>17</sup> which penalises promoting enmity within classes and section 295A of IPC<sup>18</sup> which penalises the act of outraging religious sentiments are wide enough to cover all kinds of hate speech pertaining to the prescribed subjects, including content posted on social media platforms. Section 79 of the IT Act<sup>19</sup> exempt the intermediaries from liability for any information or content disseminated by a third party but holds the intermediary responsible if it abets or conspires the commission of an unlawful act or if it fails to remove any information from its domain that an agency of the government directs to be removed.

Section 67 of the IT Act<sup>20</sup> makes it an offence to publish or transmit or cause to be published or transmitted in electronic form, any matter that might be considered as obscene. The words used in the section attribute to obscenity refers to material that may likely deprave or corrupt individuals, under

4/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website .

<sup>13</sup> Ben Westcott, Dozens killed in Christchurch mosque attack, CNN (Mar 17 2019) [https://edition.cnn.com/asia/live-news/new-zealand-christchurch-shooting-intl/h\\_d311bee77f1e9671f04fc3a16c3b2002](https://edition.cnn.com/asia/live-news/new-zealand-christchurch-shooting-intl/h_d311bee77f1e9671f04fc3a16c3b2002) .

<sup>14</sup> Soutik Biswas, Muzaffarnagar: Tales of Death and Despair in India’s Riot-Hit Town, BBC News (25 Sept 2013) <https://www.bbc.com/news/world-asia-india-24172537> .

<sup>15</sup> Timothy McLaughlin, How Whatsapp Fuels Fake News and Violence in India, The Wire (12 Dec 2018, 07:00 am) <https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/> .

<sup>16</sup> Shreya Singhal v. Union of India, AIR 2015 SC 1523.

<sup>17</sup> Indian Penal Code, Act no. 45 of 1860.

<sup>18</sup> Ibid.

<sup>19</sup> Information and Technology Act, (No. 21 of 2000).

<sup>20</sup> Ibid.



particular circumstances. The question that now surfaces is whether a person who merely shares a piece of information causing its spread but not contributing anything to the original information can be held liable under this section or in simple words whether such a person be considered as a publisher. Section 230 of the Communications Decency Act, 1996, a US legislation, gives immunity from liability to users for merely sharing a piece of information. Section 230 has been worded with definite terms that leave scope only for literal interpretation. Besides like section 66A, the provision is vague and makes it rather subjective to determine what material may 'deprave' or 'corrupt' individuals. With changing social dynamics, the provision seems rather couched with words that serve majoritarian comforts.

Section 69A of the IT Act<sup>21</sup> empowers the central government or any officers specially authorised by it to direct any agency to block information from public access if it is satisfied that it is expedient to do so in the interests of the defence and security of the state, maintenance of friendly relations with foreign states and most importantly, for public order and the prevention of **incitement of commission of any cognizable offence related to the aforementioned heads**. Even though the Act contains provisions for taking down of material that may cause incitement, which is the third facet of communications in digital media and warrants immediate curtailment, it empowers only the Central government to do so and also makes it conditional upon the **satisfaction of the Central government or the officers appointed by it**. The provision does not empower the Court to direct blocking of any information from public

access or to take down any content that may cause incitement to real world crimes which also translates to the fact that individuals have limited opportunities to bring related issues under scrutiny of the Court and cause the information to be taken down, in cases where it does not affect them personally but incites the commission of acts of violence.

### CONCLUSION

Internet operates as a market place of ideas. The paper has previously explained how freedom of speech is a necessity as well as an evil. For the same reasons, it becomes particularly difficult to determine the standards for the curtailment of free speech. General jurisprudence warrants curtailment of free speech only when it incites immediate violence but the examples stated above show how a very thin line exists between advocacy and incitement. A major question that persisted in most cases where aggressive advocacy of a particular ideology translated into violence is why nothing was done to take down the content. There is scepticism as to how well equipped even the Indian laws are to take down offence that incites violence. Any content that calls for acts of violence poses a grave risk for the strong impact that words have. Can a normal citizen file a complaint, stating that online content poses grave risk to the security of his community? Would such information be taken down and would the creator, if identified, be apprehended by law enforcement authorities?

A constant vigil or policing of social media sites would raise questions of infringement of privacy. Besides, it would result in excessive power in the hands of particular agencies and rise up the probability of filtering content based on their own subjective satisfaction.

<sup>21</sup> Ibid.



Sure enough, no objective test can be constructed to determine what content is potentially dangerous, there has to be certain degree of subjectivity. What is required is ample opportunity for vigil citizens to bring potentially dangerous content under the scrutiny of the Court and the scope for the Court to take down such content. The law in New Zealand provides for civil as well as criminal ramifications. The Harmful Digital Communications Act envisages penalties that range from supervision to eleven months of imprisonment. The civil remedies only include removal of noxious content. It is definitely a safe structure that can be adopted by the Indian law. Non-inclusion of damages in civil remedies is a guarantee against potential chilling effect.

Nevertheless, the last safeguard lies on the constant awareness of the viewer or the reader to understand when the content viewed can be manipulative and to not act upon such information. Post the cases of lynching in India on the basis of whatsapp forwards, several advertisements were aired on television as well as on radio asking people not to be affected and convinced by whatever they read on social media sites. This is an effective approach to tackle the problem at hand.

Lastly, a differentiation needs to be drawn between a free speech advocate and a free speech absolutist to understand the problem at hand. Varied rights rest with individuals and with the broader society. Regulations come into picture to determine non-conflict of such rights. In a society that is shared by people who nurture differences, as much as it is important for them to propagate their own culture and associated ideologies, the cost paid must not be innocent lives of people who happen to be different.

### REFERENCES

1. Article 19(2), Constitution of India, 1950.
2. Jacob Rowbottom, *To Rant, Vent and Converse: Protecting low level digital speech*, The Cambridge Law Journal, Vol. 71, No. 2 (July 2012), pp. 355-383.
3. SMW Staff, *The Rise of Social Web And What It Means For Equality*, Social Media Week (Sept 21<sup>st</sup> 2017) <https://socialmediaweek.org/blog/2017/09/rise-social-web-means-equality/> .
4. Benett Coleman & Co. & Ors. v. Union of India & Ors [1973] 2 SCR 757.
5. Sakal Papers (P) Ltd. & Ors. V. Union of India [1962] 3 SCR 842.
6. S. Khushboo v. Kanniammal & Anr. (2010) 5 SCC 390.
7. Shreya Singhal v. Union of India, AIR 2015 SC 1523.
8. Whitney v. California, 71 L. Ed. 1905.
9. Andrew Marantz, *Free Speech is Killing Us*, New York Times (Oct. 2, 2019) <https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html> .
10. Mike Wending, *What is 8chan?*, BBC Trending (5 Aug 2019) <https://www.bbc.com/news/blogs-trending-49233767> .
11. Julia Carrie Wong, *8chan: The Far Right Website linked to the Rise in Hate Crimes*, The Guardian (5 Aug 2019, 03.36 BST) <https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website> .
12. Ben Westcott, *Dozens killed in Christchurch mosque attack*, CNN (Mar 17 2019) [https://edition.cnn.com/asia/live-news/new-zealand-christchurch-shooting-intl/h\\_d311bee77f1e9671f04fc3a16c3b2002](https://edition.cnn.com/asia/live-news/new-zealand-christchurch-shooting-intl/h_d311bee77f1e9671f04fc3a16c3b2002) .
13. Soutik Biswas, *Muzaffarnagar: Tales of Death and Despair in India's Riot-Hit Town*,



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BBC News (25 Sept 2013)  
<https://www.bbc.com/news/world-asia-india-24172537> .

14. Timothy McLaughlin, How Whatsapp Fuels Fake News and Violence in India, The Wire (12 Dec 2018, 07:00 am)  
<https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/> .
15. Shreya Singhal v. Union of India, AIR 2015 SC 1523.
16. Indian Penal Code, Act no. 45 of 1860.
17. Information and Technology Act, (No. 21 of 2000).

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