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UNDERSTANDING CONSTITUTIONAL RIGHTS **PERSPECTIVE IN CYBERSPACE**

AUTHORED BY - YAALESWAR

INTRODUCTION

India is one of the successful and robust democracies in the world. Individual freedom is an integral part of democracy. However, such freedoms are not absolute. Cyber law is a contemporary legal system that deals with the computer systems, cyberspace, internet, and all other matters relating to cyberspace & information technology. Cyberspace is a virtual space capable of carrying worldwide jurisdiction. The rapid penetration of ICT in innovative ways has led to considerable development in India and globally with respect to people centered, inclusive and development-oriented Information Society¹. Also cyber-attacks cyber-crimes have resulted in transforming the dimension and aspects of individual freedoms and national security to a newer height. This has now become one of the serious threats to individual freedoms and rule of law which serves as the pillar of modern democracy. India has the second largest Internet consumer base in the world, after China, having recently overtaken the United States²

There exist several theoretical and conceptual issues that underpin the rights in cyberspace & right to internet; such as Whether it is a right held only by citizens or by people universally?, what is the *locus* of the right to internet? etc... At present certain rights related to cyberspace has evolved into constitutional, fundamental rights and even human rights. Since the 1960s the Internet has been in existence, and the World Wide Web since 1990s³. Cyberspace, however, remains a relatively new terrain in terms of the questions it raises about human rights and responsibilities.

FREEDOM OF SPEECH & EXPRESSION IN CYBERSPACE

The right to freedom of speech and expression is protected under international law; recognized under Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19(2) of International Covenant on Civil and Political Rights (ICCPR).

¹ Rachna Sharma, Shri Pradeep Kumar, INTERNET AND FREEDOM OF SPEECH, (2016), <https://loksabhadocs.nic.in/Refinput/New Reference Notes/English/FINAL INTERNET and FOS.pdf> (accessed on 28 June 2024)

² According to the Internet Trends Report by Mary Meeker

³ D Connolly, A little history of the World Wide Web, <http://www.w3.org/History.html>

The freedom to „seek, receive and impart information“ has become particularly very relevant in the context of the Internet & cyberspace. Efforts are needed to be taken in order to bridge the gap between those who have access to the Internet and those who don“t.

Reducing this „Digital Divide“ helps realize the right to free speech, as discussed during the World Summit for Information Society Review⁴.

Constitutional Perspective: - Article 19 (1)(a) of the Constitution of India guarantees to citizens the fundamental right to freedom of speech and expression. Article 19(2) also provides reasonable restriction which must be in the interest of state security, friendly relations with foreign states, public order, morality etc... In *Bennett Coleman v. Union of India*⁵; *Sakal Papers v. Union of India*⁶ cases, the majority struck down the Policy and regulations because according to them it amounted to a restraint upon the freedom of speech, which was not saved by any of the grounds under Article 19(2)

In relations to such constitutional restriction, there exists also certain legislative restriction. **Information Technology Act (IT Act 2000)**, which criminalizes certain online activity, such as the publication or transmission of obscene or sexually explicit content in electronic form, as well as the creation, transmission or browsing of child pornography.

Section 66A of the Act earlier had criminalized any information that could be considered gross, offensive, of a menacing character, or such information that is false, or causes “annoyance, danger, inconvenience, obstruction, injury, insult, criminal intimidation, hatred or ill will. Based on this provision several arrests were made for social media posts.

*Shreya Singhal v. Union of India*⁷, in the landmark judgment the Supreme Court struck down Section 66A of the IT Act 2000 on grounds that it violates Article 19 of the Constitution. It was categorically stated that the freedom of speech offline is equal to freedom of speech online, a principle that has been clearly stated by the UN as well. Section 66A was found to be an arbitrary and disproportionate restriction on the right to free speech, and outside the confines of the reasonable restrictions laid down in Article 19(2).

⁴ World Summit for Information Society Review (“WSIS+10 Review”), 15-16 December at the UN Headquarters in New York.

⁵ 1973 AIR 106,

⁶ 1962 SCR (3) 842

⁷ AIR 2015 SUPREME COURT 1523

The judgment embarked a critical step for free speech jurisprudence in India, especially in cyberspace context.

The UN Special Rapporteur on the promotion and protection of the Right to Freedom of opinion and Expression (Special Rapporteur) asserted that:

- “Unlike any other medium the internet facilitated the ability of individuals to seek, receive and impart information and ideas of all kinds instantaneously and inexpensively across national borders.
- By vastly expanding the capacity of individuals to enjoy their right to freedom of opinion and expression, which is an “**enabler**” of other human rights, the internet boosts economic, social and political development and contributes to the progress of human kind as a whole.⁸

Current scenario: The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 have caused a public agitation and criticism with the majority opinion being that these rules are unconstitutional on several grounds, fundamentally on the ground of violation of the right to free speech and expression. Also Through such rules, the government has brought OTT (over-the-top) platforms showcasing movies, films and audio-visual programs published by online content providers as well as the platforms which showcase news and current affairs content on them under its wing.⁹

The IT Act, with its subsequent amendments, extended its scope to govern the regulation of online content and digital communication in India.

Section 69A empowers the government to block public access to any online content that it deems necessary in the interest of sovereignty and integrity of India, defence of India, security of the state, friendly relations with foreign states, or public order.

In *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*¹⁰ the Supreme Court held that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible through the medium of television broadcasts.

⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, United Nations General Assembly, 16 May 2011, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (accessed on 29 Jun 2024)

⁹ Nikara Liesha Fernandez, Freedom of speech and expression in the digital era, (2021), <https://blog.ipleaders.in/freedom-speech-expression-digital-era/>

¹⁰ 1995 AIR 1236

In *S. Rangarajan v. P. Jagjivan Ram*¹¹ The Supreme Court emphasized that freedom of speech and expression extends to ideas that may be repugnant to many people, stating that the public's right to know is directly affected by the freedom of the press.

This new internet censorship in India has raised concerns about the erosion of freedom of speech online. Critics debate that the government's extensive powers to block online content can be misused to crush dissenting voices and suppress even political opposition. There has also been instances where the government has blocked access to websites and social media platforms during periods of political protests, raising questions about the validity and proportionality of such actions. Moreover it leads to lack of transparency and arbitrariness.

RIGHT TO ACCESS TO INTERNET

The right to internet espouses two facets of the right to internet access and the right to. The right to meaningful access to internet can be brought if the State chooses to frame laws & regulations with regard to distribution of resources with a view to enable equitable access to all. This aspect has roots in Article 19(1)(a) and 21 of the Constitution. The second advocates that the right to internet be recognized by the State in the form of a statutory & *sui generis* right to internet access arising from existing international human rights obligations.

In *Anuradha Bhasin v. Union of India*¹² The Court ultimately held that the freedom of trade and commerce through the internet is constitutionally protected by Article 19 and that the State could not indefinitely impose an internet shutdown¹³. The judgment enshrines Constitutional protection under Article 19(1)(a) and Article 19(1)(g), but the restriction of such fundamental rights should be according to Article 19(2) and (6) of the Constitution, inclusive of the test of proportionality. Internet in modern day is an inevitable & imperative tool for trade and plays an important role in carrying e-commerce business as it provides a virtual platform to a businessman which is more affordable.

In recent case of *Faheema Shirin v. State of Kerala*¹⁴, the High court has recognized that access to internet & mobile phones are part and parcel of the day to day life. The court looked at resolutions adopted by the United Nations Human Rights Council and the General Assembly &

¹¹ 1989 SCR (2) 204

¹² AIR 2020 SUPREME COURT 1308

¹³ Anuradha Bhasin v. Union of India, <https://www.calj.in/>, (accessed on 30 June 2024),

¹⁴ (2019) 4 KER LJ 634

interpreted right to internet under Article 21 of the Indian constitution. The right to be able to access the internet has been read into the fundamental right to life and liberty.

As opposed to this is the argument of one of the fathers of the internet, Mr. Vinton G. Cerf. He argued that while the internet is very important, however, it cannot be elevated to the status of a human right. Technology, according to him, is an enabler of rights and not a right in and of itself.¹⁵

Legislative restrictions: Before 2017, any such measure restricting or shutting down the internet was passed under Section 144 of Criminal procedure code, granting a wide range of powers. But after based on rules under Section 7 of The telegraph Act, procedure has to be followed for such suspension. *PUCL v. Union of India*¹⁶. The Court rules that a suspension order can be passed only if there is some “public emergency” or if such an order is “in the interest of public safety”.

Also in many cases the Court emphasised that the government cannot justify the shutdown under Section 69A of the Information Technology Act, 2000 for blocking access to the internet, because such provisions authorise the state to block access to particular websites on the internet, while in the present case, the government had imposed a blanket ban on the internet.

In 2016, UNHRC General Assembly articulated access to the Internet an essential human right. Web could be a key for protecting the other fundamental human rights, as it not only provides a variety of information but also helps to live life with ease.

RIGHT TO PRIVACY AND DATA PROTECTION IN CYBERSPACE

Right to privacy is nowhere cited directly in the Indian Constitution in specific and express words. However, this right is culled from Article 21. Privacy is not just confined to some specific place or domain, and also not absolute right. Right to privacy evolved through landmark judgements in Kharak singh case, Maneka Gandhi case, PUCL case. In *R. Rajagopal v. State of Tamil Nadu*¹⁷, the Supreme Court gave an elaborative appraisal to right to privacy. It got constitutional status and flows in the right to life and liberty provided under Article 21 of the Constitution.

¹⁵ Don Reisinger, Vint Cerf: Internet access isn't a human right, (2012) <https://www.cnet.com/home/smart-home/vint-cerf-internet-access-isnt-a-human-right/>

¹⁶ (1997) 3 BOM CR 38

¹⁷ AIR 1995 SC 264

The case of Justice K.S. Puttaswamy and ors. v. Union of India, evolved as a landmark judgment in the history of India with respect to the status of Privacy and data protection rights. Right to privacy is a fundamental right guaranteed in part III of the Indian Constitution. Further, the case explored the dimension of privacy with technology. The court emphasised that privacy is essential element to liberty and dignified life. Privacy is also linked with freedom of thought.

The **Information Technology Act, 2000** was enacted to deal with cyber crimes and cybercriminals. IT Act lays down penalty and punishment provisions for violation of certain laws which amounts as an offense. It is to be noted however, that every act of infringement of privacy is not made a cyber crime¹⁸.

Under **section 43A of the Information Technology Act, 2000**, a legal person or body corporate who is possessing, dealing or handling any sensitive personal data or information of an individual, and is negligent in maintaining reasonable security practices to protect the data and results in wrongful loss or wrongful gain to any person, then such person or body corporate shall be held liable to pay damages to the person so affected. Under **section 72A of the Information Technology Act, 2000**, disclosure of information, intentionally and knowingly, without the consent of the concerned person and in breach of the lawful contract shall be punishable with imprisonment for a term extending to three years and fine extending to Rs 5,00,000.

Section 66 C deals with “punishment for identity theft”. Section 66 D mentions provision for “punishment for cheating by personation by using computing resource. Section 66 E provides punishment for violating privacy. Section 67 punishes for publishing obscene material in electronic form Section 69 of the act provides exception to the general rule of right to privacy, such as to protect sovereignty, security of state, public order etc...

In the context of interception of phone calls in the case of *Amar Singh v. Union of India*¹⁹, the court observed that it is the duty of the service provider marks the importance given to the right of privacy of an individual.

In India, till now there is no exclusive law pertaining to the rights of an individual’s privacy. Only there is Information Technology act, 2000, which deals with cyber crimes and provides remedies against the violation of the act. **Information Technology (Reasonable Security Practices and**

¹⁸ Deepthi Arivunithi, CYBER SPACE VIS-A-VIS RIGHT TO PRIVACY, <https://www.tnsja.tn.gov.in/article/Cyber%20space%20vis%20-%20corrected%20new%2012082018.pdf> (accessed on 31 June 2024)

¹⁹ 2011 AIR SCW 3297

Procedures and Sensitive Personal Data or Information) Rules, 2011 deals with the protection of “Sensitive personal data or information of a person²⁰. In 2018, the central government had presented the personal data protection bill in the parliament but subsequently, this bill was replaced by the personal data protection bill, 2019. These days a term data protection has become synonymous with other rights of the citizens which are guaranteed by the state.

The recent controversy around the **Pegasus Project** (Pegasus spyware case) is one of the most serious threats to the privacy, freedom of humans across the world. The court highlighted that the Right to Privacy breach needs to be probed and also spoken about the serious concern of foreign agency involvement by surveilling Indians²¹

Above mentioned legal framework touches the several dimensions of the idea of privacy. Right to privacy is a part of Article 21 of the constitution which guards the right to privacy as an essential feature of right to life and personal liberty. Personal data or information is protected by the Information Technology Act, 2000. The Indian Penal Code, 1860 is the main criminal law of the country protects people from different offences related to property and body etc. The Law of Evidence extends protection to the privileged communication. Indian Telegraph Act, 1885 protects messages. Thus, the present laws contribute in protecting privacy from all the corners.²²

CONCLUSION:

With the rapid increase in development in the technology, the interference of it in the human life of human beings has been increasing. In modern times the more substantive vision is that the socio-democratic theory of free speech espouses, the right to internet needs to be recognized expressly by the State. Every internet user and a player in cyberspace intentionally or unintentionally leaves a digital footprint in the form of personal data. In such a scenario it becomes utmost important to have exclusive legislation like GDPR to regulate data protection and data privacy.

Article 21 & 19 from part III of the Indian constitution, guarantees several such cyberspace related

²⁰ [Shubhang Gupta](https://blog.ipleaders.in/data-protection-and-privacy-policies-in-cyber-law/#_ftn3), Importance of Data Protection and Privacy Policies in Cyber Law, (2020) https://blog.ipleaders.in/data-protection-and-privacy-policies-in-cyber-law/#_ftn3

²¹ Times Now Digital, “Pegasus Spyware Case: Supreme Court Forms Three members Committee by Retired SC Judge to probe Snooping Allegations,” Times now, Oct 27, 2021. <https://www.timesnownews.com/india/article/pegasus-spyware-case-supreme-courtorder-judgment-today/826928>.

²² Manjula Raghav , Sanjana Sharma Marwaha, Indian Legal Framework on the Right to Privacy in Cyberspace- Issues and Challenges, (2022), <https://jurnal.fh.unila.ac.id/index.php/flat> , (accessed on 31 June 2024)

rights , which are also embodied in several international human rights instruments. In recent days, courts also find several cases pertaining to rights of individual in cyberspace. Hence it became need of the day for such legislations like Information & technology Act 2000, Data protection act, etc... to regulate the digital space and uphold the people"s rights.

People started depending more on online medium for sharing data or transferring information and e-commerce transaction or any other communication purpose. So privacy in digital space and personal freedom became important areas of concern. It is further required that every e-organization privacy practices should be bench marked against national and international standards for privacy and fair information practices to meet the emerging challenges.

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