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BALANCING ACT: SOCIAL MEDIA, FREE SPEECH AND PRIVACY UNDER THE INDIAN CONSTITUTION

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Abstract

The rise of social media in India has dramatically transformed its political, social, and cultural landscape, with over 470 million users in 2022, predominantly youth. Platforms like Facebook, Twitter, WhatsApp, and Instagram, along with homegrown alternatives, have become crucial for communication, political mobilization, and empowerment of marginalized voices. However, this growth has brought challenges, including misinformation, cyberbullying, and privacy concerns. The Indian Constitution's framework, particularly Articles 19 and 21, safeguards fundamental rights like freedom of speech and privacy, though these rights face complex issues in the digital age. The Information Technology Act, 2000, and subsequent IT Rules, especially the 2021 amendments, aim to regulate digital content but have sparked debates about free speech and censorship. The Digital India Act, 2023, seeks to address these evolving challenges by updating regulatory frameworks. Judicial interventions, such as in the Digital News Publishers Association v. Union of India, highlight the judiciary's role in balancing regulation with constitutional freedoms, ensuring that digital media regulations protect democratic values while addressing misinformation and accountability concerns.

I. Introduction

The rise of social media in India has had a revolutionary impact, transforming the political, social, and cultural scene. With over 470 million active users as of 2022, accounting for around 33.4% of the population, India's social media user base has increased substantially, driven mostly by youth, who account for more than 75% of all users. The widespread availability of smartphones and affordable internet connection has permitted the quick adoption of platforms such as Facebook, Twitter, WhatsApp and Instagram, establishing India as one of the world's largest and most active social media markets.¹ Homegrown alternatives to Chinese applications, such as Tik

¹ Tanushree Basuroy, *Social media usage in India - statistics & facts*, statista (Mar. 25, 2024).

Tok, have broadened the digital scene. Government agencies, political parties and public institutions increasingly use social media for communication and engagement, democratizing information dissemination and empowering individuals across diverse socio- economic strata. Social media has become a powerful tool for political mobilization, enabling mass movements and protest, while also facilitating the spread of misinformation and polarizing discourse. It has unified cross- cultural communities, popularized issues and given marginalized voices a platform. However, the rise of social media has brought challenges, including the proliferation of misinformation and fake news, exacerbating communal tensions and posing threats to societal harmony and national security. The anonymity of these platforms has emboldened cyberbullying and hate speech. Leading to psychological distress and societal polarization. The interplay between social media and constitutional principles, particularly privacy concerns and data protection, is significant. The Supreme Court's recognition of the right to privacy underscores the need for balanced regulation to protect user's rights while maintaining digital ecosystem security. The recent reform to replace the Indian Penal Code (IPC), 1860 with the Bhartiya Nyaya Sanhita (BNS), 2023, aligns the legal framework with the evolving digital landscape, addressing contemporary challenges presented by social media.

II. The Constitutional Framework in India and Its Impact on Fundamental Rights

The constitution of India establishes a robust framework for the protection of fundamental rights and the maintenance of a democratic system of governance. The constitutional structure is designed to balance the powers of the Union government and the states, while ensuring the independence of the judiciary to serve as a check on the other branches of government. At the heart of the Indian constitution are the fundamental rights enshrined in Part III, which guarantee civil liberties and prohibit discrimination on the basis of race, religion, caste, sex or place of birth. These rights include the right to equality, freedom of speech and expression. Freedom of religion and the right to life and personal liberty. The Constitution also provides for the right to constitutional remedies. Allowing individuals to approach the courts for the enforcement of their fundamental rights. The framers of the Constitution were cognizant of the potential for abuse of power by the government, particularly during times of crisis. To address this concern, they included specific provisions in the Constitution that allow for the declaration of an emergency by the president under certain circumstances. However, the exercise of emergency powers is subject to certain limitations and safeguards, such as the requirement of parliamentary approval and the preservation of the federal structure of the government. The impact of the constitutional

framework on fundamental rights has been significant. The Supreme Court of India has played a crucial role in interpreting and expanding the scope of fundamental rights, often in response to challenges posed by the government. For instance, the Court has recognized the right to privacy as a fundamental right, despite its absence from the text of the Constitution. Similarly, the court has struck down laws that infringe on the freedom of speech and expression, such as those that impose unreasonable restriction on the press. At the same time, the constitutional framework has also faced criticism for its inability to adequately address certain social and economic inequalities. The directive principles of state Policy, which outline the goals of the state in terms of social and economic justices, are not enforceable in the courts.² This has led to concerns about the government's commitment to addressing issues such as poverty, illiteracy and healthcare. Despite these challenges, the Indian constitution remains a testament to the country's commitment to democracy and the rule of law. Its framework has provided a solid foundation for the protection of fundamental rights and the promotion of social and economic progress. As India continues to evolve and face new challenges, the Constitution will undoubtedly play a crucial role in shaping the country's future.

a. Freedom of Speech and Expression: Impact of The IT Rules

Freedom of speech and expression, a pillar of democratic society, incorporates individual's fundamental right to express their thoughts, views and ideas without fear of criticism or limitations. India is one of the world's largest countries and it respects all of its individual's fundamental rights. Every citizen has the freedom to express themselves through any means including social media. In comparison to fellow citizens in other countries, this image is extremely captivating. The function of social media in the 21st century has changed the lives of people all over the world and they have begun to voice their thoughts through the virtual world.³

“Article 19(1)(a): All citizens shall have the right to freedom of speech and expression.”⁴

This right enshrined in Article 19 (1)(a) of the Indian Constitution, not only permits individuals to engage in free speech but also acts as an encouragement for societal advancement and diversity. It incorporates the premise that the interactions of ideas promote intellectual progress, support different point of views and strengthens the democratic fabric. Article 19(2), however, provides for reasonable limits in the interest of national security, public order, decency and other

² Purti Vyas, *An Analytical Study on Media Laws in India With Reference to Constitutional Framework and Right to Information*, 3 SUPREMO AMICUS (2018).

³ Aleena Rose Jose & Anagha O, *Freedom of Speech and Expression and Social Media: An Exigency for Balancing*, 2 Indian Journal of Integrated Research in Law.

⁴ Constitution of India, 1949.

compelling considerations. Because social media has the ability to reach the public and share information, everyone has become a watchdog, examining the powerful and exposing mismanagement and wrongdoing. Several cyber-crimes such as defamation, invasion of privacy, incitement of offences, racist remarks, stalking, abuse, hacking and harassment, etc., can be easily committed through social media and once such objectionable content is uploaded, it becomes viral and as a result, extremely difficult to contain. As a result, the significance of the government regulating social media cannot be overstated.⁵ The interpretation of these limits is a regular cause of debate and dispute in India, with critics arguing that the government uses them to silence disagreement and critique. People or journalists have been harassed or arrested in several circumstances for expressing their opinions in the media or online. While the right to free speech and expression is guaranteed in India's constitution, its actualization and meaning are regularly changed by political, social and cultural circumstances and the relative relevance of free speech to other rights and interests is continually disputed. Recently in case of *Rakesh Shetty vs state of Karnataka, 2020*,⁶ Rakesh Shetty, managing director of Power TV news channel has been granted anticipatory bail in a criminal case filed against him by civil contractor after the channel aired a series of programs "exposing alleged corruption" involving family members of Chief Minister B.S. Yeddyurappa.⁷ The *Pulipati Vijay Kumar vs. State of Andhra Pradesh*⁸ case is significant in the area of freedom and speech in digital realm. Pulipati Kumar, the petitioner was detained for allegedly uploading inappropriate information on Facebook. The Andhra Pradesh High Court intervened to address the constitutional consequences of his detention. The court's ruling highlighted the delicate balance between the right to free speech and expression given by Article 19(1)(a) of the Indian Constitution and the responsibilities of both users and government to prevent the criminal use of internet platforms.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, commonly referred to as the IT rules, have raised significantly concerns regarding their impact on the fundamental right to freedom of speech and expression in India. The IT Rules grant the government broad powers to regulate digital media, including the ability to order the removal of content that is deemed objectionable. This has led to fears that the rules could be used to stifle legitimate criticism and dissent, as platforms may err on the side of caution and remove content to avoid potential penalties. Critics argue that the vague and subjective nature of the grounds for

⁵ Somalatha B, *Social Media and Constitution*, 45 Indian Journal of Law Management and Humanities 1146-1154 (2021).

⁶ W.P.No.11169 of 2020.

⁷ *Power TV head gets anticipatory bail*, The Hindu (Nov. 20, 2020).

⁸ 2014 SCC Online AP 929.

content removal, such as “sovereignty and integrity of India” and “public order,” provide the government with ample scope to suppress speech that is merely inconvenient or critical of the authorities. The requirement for digital news media to adhere to a “Code of Ethics” has also been criticized as a potential tool for censorship, as the code’s provisions are open to interpretation and enforcement.⁹ The IT Rules empower the government to order the blocking of online content without adequate safeguards or judicial oversight. This raises concerns about the potential for abuse and the undermining of the democratic principle of free speech.

b. Right to Privacy and Social Media Regulation

The right to privacy, which is seen as an important aspect of human dignity and personal liberty is basic right guaranteed by Article 21 of the Indian Constitution. This right recognizes an individual’s right to privacy free of arbitrary infringement, whether by the state or private enterprises. It extends beyond the physical realm to include the protection of personal information and having control over one’s life choices. The number of major decisions, the Supreme Court of India has acknowledged privacy as a safeguard against possible abuses of power and an essential component of individual liberties. In the digital era, when technology affects every area of life, the right to privacy takes on extra importance, demanding ongoing legal scrutiny and adaption to protect individuals from getting threats to their personal space and data integrity. Under Fundamental Rights, the “Right to Privacy” is an implicit right. The right to privacy is not specifically recognized in the Indian Constitution, but it has been laid down by our Supreme Court under article 21, which deals with the right to life and liberty. The Supreme Court of India has reaffirmed the “Right to Privacy” in several cases, however its relevance to online material has yet to be clearly established by a court order.¹⁰

Chief Justice of India Dr. D.Y. Chandrachud in *K S Puttaswamy v. Union of India*¹¹ opined that “Life and personal liberty can be considered as inalienable rights which an individual enjoys by virtue of being a human. These rights are inseparable from a dignified human existence.” Until recently, there was some uncertainty over the scope of the Indian Constitution’s guarantee right to privacy. However, in *Puttaswamy* case, a nine-judge bench of the Supreme Court declared that privacy is a fundamental right, as part of the right to life and personal liberty under Article 21. However, it cannot be deemed as an absolute right and is vulnerable to state invasion only if such

⁹ *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*, Wilmap (Mar. 26, 2021).

¹⁰ ayushi Jaiswal, *Essay on Social Media and the Constitution of India*, Bharati Law review (2015).

¹¹ (2017) 10 SCC 1.

invasion is founded on “legality, necessity and proportionality for safeguarding this cherished right”.

On the one hand, social media platforms give an excellent platform for freely expressing oneself to a broad audience, while on the other hand, user’s sensitive personal data may be exposed. In some cases, the user is aware that the social media networking sites are collecting information about him/her, yet there may be times when the user is entirely unconscious of the information trace he/ she is leaving online, over which he has no control. Potential perpetrators can utilize such knowledge to perpetrate physical crimes. Kristen bell, best known for her role in Frozen, was also a victim of deepfake manipulation when her face was exploited for improper content on the internet. The actress published a statement revealing that her face was put on another person’s body without her permission.¹² Same incident was witnessed by Indian actress Rashmika Mandanna, who rose to popularity as Shrivalli in the movie ‘Pushpa’, was taken aback on Monday when she noticed herself trending on social media for her deepfake video in which her face was merged onto a British- Indian influencer wearing a balck suit and seen boarding a life. Later on, her twitter account she stated that “we need to address this as a community and with urgency before more of us are affected by such identity theft”.¹³ The rise of social media has also brought to the forefront the issue of privacy rights in the digital age. The collection and use of personal data by social media platforms and the potential for surveillance and profiling have raised significant concerns about the right to privacy. The IT Rules attempt to address some of these concerns by requiring platforms to implement measures to protect user privacy, such as obtaining consent for data collection and providing users with the ability to access and correct their personal information. However, critics argue that these provisions are inadequate and that more robust privacy protections are needed to safeguard individual’s fundamental right to privacy. There are also concerns about the government’s ability to access user data through the IT Rules, which could potentially be used for surveillance and targeted monitoring of dissent or criticism. This raises questions about the balance between national security and individual privacy rights.¹⁴

c. Self- Censorship and Digital Media Platforms

Self- censorship on social media involves involves individuals suppressing their speech out of concern for other’s perceptions, without direct pressure from authorities. This phenomenon is

¹² Julius Young, *Kristen Bell reveals shock of learning her face was used in pornographic deepfake: ‘I’m being exploited’*, Fox News (June 10, 2020).

¹³ Sangeeta Yadav, *Deepfakes: New Weapon to Extort, Blackmail & Harass Women*, (Nov 11, 2023).

¹⁴ Ashwin, *Right to Privacy and its Significance in Social Media*, enhelion blogs (Mar. 11, 2022).

significant in both private and public context, with individuals often choosing not to post content due to fear of offending others, starting arguments or presenting an unwanted image. Studies show that a substantial portion of social media users engage in last-minute self-censorship, influenced by the difficulty of defining their audience and the potential repercussions of their posts. The potential for self-censorship among users and digital media platforms is another area of concern in the context of the IT Rules and the broader regulation of online content. The fear of facing legal consequences or platform sanctions for posting or hosting certain types of content may lead users to self-censor their speech, limiting the free exchange of ideas and opinions.¹⁵ This could have a chilling effect on public discourse, as individuals may become hesitant to express views that could be deemed controversial or objectionable. Similarly, digital media platforms may also engage in self-censorship to avoid potential penalties or legal action, leading to the removal or suppression of content that falls within the broad and subjective grounds for content moderation under the IT Rules. This could result in the narrowing of the online public sphere and the exclusion of diverse perspectives.¹⁶ The challenge lies in striking a balance between the legitimate need to address the spread of misinformation, hate speech, and other harmful content, and the preservation of the fundamental right to freedom of speech and expression. Ongoing dialogue and collaboration between the government, civil society, and technology companies will be crucial in developing a regulatory framework that upholds democratic principles while addressing the evolving challenges of the digital age.

III. Evolution of Social Media Regulation in India

Initial Regulatory Frameworks

a. *The Information Technology Act, 2000*

The Information Technology Act, 2000 is an important regulation of law in India that tackles several areas of electronic governance and digital technology use including the implications for social media. Electronic documents and digital signatures are legally recognised under the IT Act. This has consequences for social media transactions and communication as electronic documents and digital signatures may be used in many capacities. The Act targets a variety of cybercrimes including unlawful computer system access, data theft and the transmission of objectionable or dangerous information. These regulations apply to social media sites particularly when they are exploited as an instrument for cybercrime. Section 43A of the Information Technology Act requires

¹⁵ Aysenur Dal, *Walking Through Firewalls: Circumventing Censorship of Social Media and Online Content in a Networked Authoritarian Context*, Sage Journals (2022).

¹⁶ Chelcie Agrawal, *Censorship of Over the Top Platforms in India: A Comparative Study of India and Singapore*, SSRN (2022).

anybody corporate that has, deals with or manages any sensitive personal data or information on a computer resource to adopt and maintain acceptable security standards and procedures. If the body corporate fails to do so and a person suffers a wrongful loss or gain as a consequence, the body corporate might be ordered to pay damages to the affected person. The section goes on to define ‘body corporate’ and “reasonable security practices and procedures”.¹⁷ Furthermore, Section 69A of the IT Act empowers the Central Government to restrict public access to any material through any computer resource on specific circumstances.¹⁸ The government has used this law to ban many Chinese applications, notably the social networking site TikTok due to privacy concerns. The Supreme Court of India struck section 66A of the Information Technology Act, which criminalized the sharing of ‘offensive’ information online, in the landmark judgement of *Shreya Singhal vs UOI*.¹⁹ The decision emphasized the importance of maintaining free speech and expression on the internet as well as the limitations of state meddling in online material.

b. IT (Intermediaries Guidelines) Rules, 2011

The IT (Intermediaries Guidelines) Rules, 2011 were introduced under the Information Technology Act, 2000, to establish protocols for intermediaries, including social media platforms, to retain their “safe harbour” protection. These rules mandate intermediaries to inform users not to host, display, upload, modify, publish, transmit, update or share any content that is obscene, defamatory or violates any law. The intermediaries were required to remove content within 36 hours of receiving complaint from an affected party or a government agency. This regulation aimed to ensure accountability while safeguarding the rights of users on digital platforms, marking a significant step in India’s digital governance framework. In the case of *Shreya Singhal v. Union of India*, the SC stated the need for precise regulations to prevent misuse and protect individual rights, indirectly reinforcing the necessity for intermediaries to follow due diligence without compromising fundamental freedoms. Another case of *Facebook v. Union of India*,²⁰ dealt with the issue of traceability of originators of messages on encrypted platforms like WhatsApp. The SC intended the need for balancing national security and public order with privacy and free speech. The Court directed the government to ensure that the guidelines for intermediaries protect user privacy while also enabling the identification of individuals responsible for spreading harmful content. This case highlighted the challenges in regulating digital platforms without infringing on constitutional rights.

¹⁷ Section 43A of Information Technology Act, 2000.

¹⁸ Section 69 of Information Technology Act, 2000.

¹⁹ AIR 2015 SC 1523.

²⁰ 2021 SCC Online SC 66.

c. IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 were notified by the Government of India and they replaced the information Technology (Intermediary Guidelines) Rules, 2011. The rules compel the intermediary to disclose its privacy policy on its website. Furthermore, the intermediary is obligated to notify its users on a regular basis that if they violate the privacy policy, the intermediary has the authority to terminate their accounts. However, given the lack of a privacy and data protection framework in India, the rules do not discuss the parts and features of the privacy policy, leaving it to the whims and fancies of the intermediaries. IT Rules, 2021 supersede the 2011 rules, bringing in more stringent requirements for intermediaries. These rules mandate intermediaries to disclose their privacy policies on their websites and notify users that violations can lead to account termination.²¹ However, in the absence of a comprehensive privacy and data protection law in India, the specifics of these privacy policies are left to the discretion of the intermediaries, leading to potential inconsistencies and arbitrary enforcement. In case of *Anuradha Bhasin*,²² the SC laid down guidelines for internet shutdowns, stating that any restriction on internet access must be temporary, based on necessity and proportionate. This ruling underscores the need for balanced regulations that protect both national security and individual freedoms.

Recent Amendments (2023)

a. The Ministry of Electronics and Information Technology (MeitY)

The Ministry of Electronics and Information Technology is the nodal agency of the Government of India responsible for formulating and implementing policies related to information technology, electronics and the internet. Established in 2016, MeitY emerged from the restructuring of the Ministry of Communications and Information Technology. Its primary objectives include promoting e-governance, developing and regulating the IT industry, fostering digital infrastructure and enhancing cybersecurity. MeitY has played a pivotal role in the implementation of major initiatives like Digital India, which aims to transform India into a digitally empowered society and knowledge economy. Under this initiative, MeitY has spearheaded projects like BharatNet (rural broadband connectivity), Digi locker (digital document storage) and UMANG (unified mobile application for new-age governance).²³ MeitY is actively involved in the legislative process for

²¹ *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code), Rules, 2021* | National Portal of India, (Nov. 11, 2021).

²² (2020) 3 SCC 637.

²³ Ministry of Electronics and Information Technology (MeitY), Ministry of Electronics and Information Technology, Government of India, <https://www.meity.gov.in/>.

the Personal Data Protection Bill, which seeks to establish a comprehensive framework for data protection and privacy in India. This initiative aligns with the SC's recognition of privacy as a fundamental right in the *KS Puttaswamy v. Union of India*, 2017 judgment.

b. *Digital India Act, 2023*

Governments throughout the world have embraced digital efforts to use the power of social media for better government, communication and citizen involvement. Official social media profiles on platforms such as Twitter, Facebook and Instagram have become commonplace giving direct means for sharing news, updates and crucial data. Online citizen services are expedited through systems that link with social media logins making government services more accessible. Public awareness campaigns particularly during emergencies use of social media's real-time ability to quickly communicate essential data. Governments also utilize social media for crowdsourcing, citizen involvement and consultations which helps to create inclusion in decision-making processes. Regular updates and disclosures on government social media accounts improve transparency and accountability, while digital diplomacy on these channels allows global participation. Furthermore, digital literacy initiatives and online town halls help to enlighten citizens, reflecting social media's complex role in modern politics. Recently government announced Digital India Act, 2023 (DIA) is an important step in establishing a future ready legislative framework for the country's growing digital economy. The Digital India Act, 2023 is a progressive legislative proposal aiming at upgrading India's regulatory structure in order to adapt to the changing digital world. Its primary goals include developing flexible regulations offering an accessible adjudicatory system for online infractions and giving citizens with quick remedies while constructing a thorough legislative framework for compliance. The Act addresses the shortcomings of the Information Technology Act, 2000 which was drafted at a time when the internet had many fewer users. Given the internet's revolutionary expansion, the DIA focuses on regulating new-age technologies such as AI and blockchain, with the goal of governing e-commerce, online content and complying with global norms as India attempts to successfully operate in the global digital arena.²⁴ However, the DIA's implementation faces problems including as potentially costly compliance requirements, worries about the impact on free expression as a result of the assessment of the "safe harbour" concept and the need for significant resources and infrastructure. Striking a delicate balance between stakeholder interests including those of digital giants and people's rights is as critical as is dealing with concerns of surveillance, privacy and

²⁴ India Briefing, *Digital India Bill 2023: Key Provisions and Stakeholder Concerns*, (July 3, 2023), <https://www.india-briefing.com/news/digital-india-bill-2023-key-provisions-stakeholder-perspectives-28755.html/>.

cross- border data flows. Moving forward, thorough stakeholder engagement, corporation, capacity building and public awareness campaigns are required to strike the proper balance between regulation and innovation, ensuring India's digital future corresponds with global best practices.²⁵

IV. Digital News Publishers Association (DNPA) & Anr. V. Union of India, 2021.

The Digital News Publishers Association and various other digital news entities filed petitions challenging the constitutionality of the IT Rules, 2021. These rules were framed under the IT Act, 2000, with provisions specifically targeting digital news media, imposing new obligations on intermediaries and digital media publishers to regulated content. The Kerela High Court, in an interim order dated June 23, 2021, restrained the central government from taking any coercive action against members of the DNPA under Part III of the IT Rules, 2021, pending a final decision. The court noted that the rules imposed significant control over digital news media. Potentially infringing on their freedom of expression. Similarly, the Bombay High Court, in its interim order, stayed the enforcement of certain provisions of the IT Rules, 2021, concerning digital news publishers, citing overreach beyond the IT Act's scope and imposing unreasonable regulatory burdens on the media.²⁶

The interim orders from the Kerela and Bombay High Courts underscore the judiciary's role in balancing regulatory measures with constitutional freedoms. The court's concerns over the IT Rule's impact on free speech and press freedom reflect a cautious approach to ensure that regulatory frameworks do not overstep legal boundaries and infringe on fundamental rights. The ongoing legal scrutiny of these rules underscores the need for a nuanced approach to digital media regulation that protects democratic values while addressing legitimate concerns about misinformation and accountability.

V. Conclusion

The intersection of social media regulation and constitutional rights in India presents a dynamic challenge. While social media democratizes information, it also raises concerns over privacy and misinformation. The Supreme Court's ruling focuses on protecting freedom of speech and privacy.

²⁵ Agatha Poon, *India's digital agenda for 2023 and beyond: Harnessing the power of collaborative innovation*, S&P Global (Jan. 24, 2023).

²⁶ Akshaya nath, *Madras HC issues notice to Centre on Digital News Publishers Association's plea against new IT Rules*, india today, (June 23, 2021).

However, regulatory frameworks like the IT Rules, 2021, face criticism for potential overreach. Balancing individual rights with state interests requires precise regulations and active judicial oversight. A collaborative approach among the government, civil society and tech companies is essential to ensure a balanced digital future that upholds democratic principles and protects fundamental rights.

