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Freedom of Speech and Hate Speech on Social Media

~Kriti Jaiswal

Abstract

The development of social media has led to a change in the way people interact, express themselves, and engage in public debate. Facebook, X (previously known as Twitter), Instagram, YouTube, and WhatsApp are some of the mediums that can be used to share ideas and opinions and encourage participation in the democratic process. Though the development of these social media tools has improved the constitutional protection of the right to freedom of speech and expression, it has made the dissemination of hate speech, misinformation, cyberbullying, and calls to violence much faster.

In India, the right to freedom of speech and expression is guaranteed by Article 19(1)(a) of the Constitution, but is subject to reasonable restrictions as per Article 19(2). The judiciary has always maintained that democracy functions on the basis of free exchange of ideas, but acknowledged that the right to speech can be reasonably curtailed in case of any speech that incites violence, disrupts public order or expresses feelings of hatred. The emergence of social media has further increased the dilemma for the constitutional law of India in trying to strike a balance between individual rights and collective interest. Laws like Information Technology Act, 2000, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and Bharatiya Nyaya Sanhita, 2023 aim to counter hate speech and other illegal content on social media platforms.

The present paper aims to address the link between freedom of speech and hate speech in the realm of social media, especially in relation to the legal system of India. It focuses on analyzing constitutional and statutory provisions, judicial rulings, and international trends in terms of regulation of social media usage. In addition, the paper explores the obligations of social media

intermediaries as well as the issues that arise in conjunction with the use of artificial intelligence in content moderation.

Key words: Right to Speech, Hate Speech, Social Media, Constitution of India, Article 19, Regulation in Cyberspace, Information Technology Act, Bharatiya Nyaya Sanhita.

Introduction

The twenty-first century has seen a remarkable digital revolution which has completely transformed the manner in which people communicate and interact in society. The emergence of social media is one such space which allows people to voice their opinion, debate on political issues, exchange information, and mobilize social movements. Contrary to traditional means of communication, social media makes it possible for a person to communicate his/her idea to millions within seconds across geographical locations.

Freedom of Speech and Expression is an essential feature of any democracy. With this freedom, people can express their criticism against governments, suggest reforms, take part in political debate and discussion, and express themselves without fear of any retribution. The Indian Constitution acknowledges this by providing every citizen with the freedom of speech and expression through Article 19(1)(a)¹. But the Indian Constitution also realizes that this unlimited freedom of speech might pose a threat to the state, society, morality, or other individuals' rights.

There have been a number of instances in India in which the posting of provocative content on social media has resulted in communal tensions, lynch mobs, electoral misinformation, and cyber bullying. These trends have raised serious questions regarding the level of regulation that should be imposed on online speech. Overregulation poses a danger of stifling free speech, while under-regulation will allow hate speech to flourish.

It is well established that freedom of speech is fundamental for the working of a democratic form of government. However, it has been held that speech that provokes violence or incites hatred does not enjoy absolute protection under the Constitution of India. The seminal case of *Shreya Singhal v. Union of India* contributed to shaping the Indian jurisprudence on online free

¹ INDIA CONST. art. 19, cl. 1(a)

speech by declaring unconstitutional Section 66A of the IT Act, 2000, for violating the constitutional right to freedom of speech and expression.

The increasing weight carried by private technology firms in this discussion is a contributing factor. Private firms that run social media platforms decide what kind of content stays up online, gets deleted, and who loses their accounts. Content moderation policies from these digital intermediaries are implemented in a way that does not provide enough transparency or oversight by judges.

This research paper attempts to analyze the constitutionality, legality, and policy of freedom of speech and hate speech on social media in India. It will discuss the constitutional law of freedom of speech, laws of online hate speech, and the landmark judgments interpreting those rights. Further, it will compare India with other countries and analyze the modern-day problems such as the use of algorithms, artificial intelligence, and platform governance. This paper will finally recommend reforms that can create a balanced approach toward both freedom and harm.

Definition and Scope of Freedom of Expression

The freedom of speech and of expression is widely recognized as a basic human right. Freedom of expression gives people the opportunity to express themselves, share information, criticize authority, and take part in democratic processes. The absence of freedom of expression will undermine the functioning of democracy since the population will not be able to control the government and conduct public discussions.

The scope of freedom of expression is not limited only to speech and writing. It includes all forms of art, literature, movies, symbolic expression, digital communication, political campaigning, journalism, scientific research, and online activities. The modern interpretation of the Constitution provides for the realization of this right on the Internet and social media platforms. Thus, the restrictions on such expressions must be justified by law and proportionate.

Right to Freedom of Speech and Expression is guaranteed to all citizens under Article 19(1)(a) of the Constitution of India. Though there is no definition of this fundamental right in the Constitution, the judicial interpretation has greatly enlarged its meaning. Courts in India have held that this right not only means the freedom to speak but also the freedom to publish newspapers, disseminate information, criticize government policies, give voice to unpopular

opinions, have access to information and receive information from other persons. This right also includes artistic creation and political dissent, which are integral to any healthy democracy.

The Right to Freedom of Speech plays an important role in performing various democratic functions. Firstly, it helps in the discovery of the truth through debate on competing views. Secondly, it helps in self-development of individuals through expression of their views. Thirdly, it ensures accountability of the Government through criticism of the authorities. Fourthly, it helps in social progress through challenging of the existing norms.

On the other hand, freedom of speech has always been seen as non-absolute in democratic societies. Speech that provokes violence, compromises the security of the nation, insults individuals, or deliberately aims at promoting hate towards the disadvantaged groups may be restricted through laws. It is important to ensure that such laws are narrow in scope and not used to censor political speech.

The advent of social media has made the above constitutional right more significant than ever. Social media allows ordinary citizens to reach out to a national and international audience without having to go through media institutions. Social media have been successfully exploited by social movements including corruption crusades, environmental campaigns, and gender justice movements. On the downside, these media have served as vehicles for spreading misinformation, propaganda, and hate speeches thus posing constitutional challenges about regulation.

Hate Speech Understanding

Whereas freedom of speech is legally recognized through clear definitions in constitutions, "hate speech" is a term without any legal definition that would apply in all situations. The definition of the term varies across jurisdictions depending on their constitutional heritage, history, and policies. In general, hate speech is a type of expression which encourages hatred, discrimination, hostility, or violence against persons or groups on the grounds of race, religion, ethnic origin, caste, nationality, gender, disability, or sexual orientation.

Hate speech is not just offensive language. Offensiveness is a key component of speech that democratic systems allow because it helps to foster a vibrant debate. However, hate speech is much more than offensive language. It dehumanizes particular groups, encourages discrimination, and even violence against them.

Hate speech has become even more widespread due to social media. Algorithms aimed at engaging users favor sensationalistic or emotional content, allowing hate speech to circulate very quickly through various digital platforms. Anonymous accounts, bots, and propaganda techniques make it difficult to trace offenders and delete illegal content. Hateful materials posted online can be duplicated, circulated, and stored indefinitely, making regulation quite complicated.

Online hate speech produces not only negative effects within cyberspace but can also have an effect on society. Research has shown that prolonged exposure to hateful materials leads to social division, discrimination, psychological effects, and even physical violence in some situations. Victims of online hatred are mostly women, religious minorities, journalists, opponents of certain political leaders, and other historically disadvantaged groups.

On the other hand, hate speech is faced with numerous legal problems. The definition could be too broad and result in the suppression of the criticism of the government, religion, or any other institution. Vague provisions of the law can cause uncertainty in their application, and the executive powers could act arbitrarily. Therefore, constitutional states have to clearly draw the line between political expression and hate speech.

India's legal system is one of the approaches to the regulation of hate speech based on the balance between constitutional freedoms and prohibition of certain actions. First, the Indian constitution guarantees the freedom of speech, while at the same time it allows restrictions upon the speech which creates disorder or promotes enmity and violence. Judicial interpretation of this provision stressed that the State has the right to intervene only in case of clear relationship between the speech and disorder or crime.

Constitutional Framework for Freedom of Speech in India

Article 19(1)(a) of the Constitution of India confers freedom of speech and expression as a basic right. This clause embodies the vision of the founders of the Indian Constitution who saw freedom of expression as absolutely essential for the functioning of democracy. Under this, people have the liberty to express their views freely, criticize actions of government, communicate ideas and information and participate in public affairs without any interference. The Supreme Court has reiterated that a democratic government can be established only when citizens have the right to communicate their ideas and question the policies of the government.

Unlike the First Amendment of the Constitution of the United States of America, freedom of speech in the Constitution of India is not an absolute right. The founding fathers deliberately included certain restrictions so that the exercise of individual rights does not undermine the rights of the other people. Therefore, Article 19(2) empowers the government to impose restrictions on freedom of speech in the interest of the sovereignty and integrity of India, security of the State, friendly relations with foreign countries, public order, decency or morality, contempt of court, defamation, and incitement to an offence.

The problem of regulation of social media from the standpoint of the Constitution is that these interests are in conflict. Unregulated communication on the Internet increases the democratic nature of the society through participation in the political process and the government being held accountable, but at the same time rapid spread of the information in the form of hate speech, propaganda, or incitement of violence may be seen as jeopardizing social peace and constitutional values. Therefore, the courts should consider the reasonableness and proportionality of restrictions introduced by the government before imposing limits upon freedom of speech.

The Supreme Court has been repeatedly declaring that those restrictions could not be arbitrary or excessive. Restrictions should be directly related to one of the categories mentioned in Article 19(2). Disagreement with the policy of the government or unpopular opinions could not be used as an excuse for censorship.

Freedom of Expression Through Social Media

The evolution of the internet has changed freedom of expression from a conventional constitutional right to a worldwide digital trend. Through social media networks like Facebook, X (former Twitter), Instagram, YouTube, WhatsApp, and Reddit, people can communicate instantly to audiences all around the globe. Unlike newspapers and television channels, such social media platforms give an opportunity to each individual to be an information provider.

Social media has made democracy stronger in India. Through social media, people have criticized public policies, have protested, have campaigned for awareness, exposed corrupt practices, and even participated in election debate. Digital activism has made a huge contribution to issues related to women's rights, environment, and anti-corruption campaigns.

Nevertheless, despite such democratic advantages, there emerged unprecedented regulatory issues associated with social media. False news, fake videos, hate campaigns, cyber-bullying, community propaganda, and disinformation campaigns take place at an exceptional pace. Algorithms used by social networks to increase engagement among users tend to favor controversial or emotional information.

The lack of editorial control also differentiates social media from conventional media. Print media and TV channels usually adhere to the norms of journalism and are responsible for the publication of information. In case of social media, users can post anonymous information without any prior verification. This leads to the complexity in identifying the person responsible for posting the illegal information.

This situation has resulted in the introduction of laws regarding the regulation of online content by different countries.

Hate Speech Under Indian Law

Despite the absence of an express definition of hate speech under the Constitution, Indian criminal law provides for various provisions meant to prevent any speech that seeks to incite hostility or violence toward specific communities.

The Bharatiya Nyaya Sanhita, 2023 (BNS) has provisions relating to speech that incites enmity between members of different religions, races, languages, regions, and castes. This is due to India's commitment to fraternity, secularism, and equality through its constitution.

Likewise, an intentionally provocative language designed to insult religious sentiments, instigate public disorder, and create violence can be made a subject of criminal sanctions under BNS as well. The provisions mentioned above aim to maintain peace in society without restricting any critical evaluation of religions, ideologies, and government policies.

The Indian judiciary has stated in numerous decisions that every abusive utterance does not amount to hate speech. The constitutional guarantees provided under Article 19(1)(a) protect every type of expression except for that which incites violence, hatred, or discrimination or creates the danger of public disorder. It is of crucial importance since a vague definition of hate speech can stifle freedom of expression.

The Information Technology Act, 2000 and Freedom of Expression Online

The Information Technology Act, 2000 is the main legislative framework related to electronic communication and cybercrimes in India. Though initially introduced as a tool to foster electronic commerce and governance, this Act has become increasingly used as one of the means to regulate freedom of expression online.

The most controversial section of this law was Section 66A, under which sending any information deemed offensive or annoying via electronic means could be criminalized. This section contained extremely vague terms, like "grossly offensive," "menacing," and "annoyance," without any objective criteria provided. The section was commonly applied by police officers against citizens who criticized politicians online.

Section 66A of the Act was declared unconstitutional by the Supreme Court of India in the case of *Shreya Singhal v. Union of India* (2015)². In unanimous agreement, the Supreme Court struck down the section on account of its violation of Article 19(1)(a) of the Constitution because the vague wording of the section left citizens with no way of knowing what constituted prohibited speech.

The landmark decision is one of the most important cases of Constitutional law dealing with digital rights. The Court held that any limitation to freedom of speech should necessarily conform to Article 19(2) and it is not enough for a speech to cause annoyance or inconvenience for limiting freedom of speech and expression.

Meanwhile, the Supreme Court supported the validity of Section 69A of the Information Technology Act that gives the Government the power to block online material in certain conditions. It was deemed to be constitutionally valid as it provides the procedural mechanism for taking such action. It means that the Information Technology Act tries to combine constitutional liberties and other governmental interests.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

With the exponential increase in the usage of digital platforms, the Government of India came up with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These rules impose certain responsibilities on social media intermediaries like

² *Shreya Singhal v. Union of India* (2015) 5 S.C.C. 1

Facebook, X, Instagram, and YouTube, among others. Under these rules, intermediaries will be required to ensure due diligence on their part by taking down any illegal content when a valid governmental or judicial notice is provided to them.

One of the most controversial clauses relates to the need for significant social media intermediaries to trace the "first originator" of information in specific cases of offenses relating to national security, public order, or serious crimes. The requirement is controversial since it is said to be a threat to the end-to-end encryption of the information and user privacy. But the supporters claim that traceability is needed in order to investigate terrorism, child pornography and misinformation.

The Rules have raised constitutional controversies with respect to intermediary liability, government monitoring, freedom of speech and privacy protected in Justice K.S. Puttaswamy v. Union of India (2017).

Liability of Social Media Intermediaries

Social media companies hold a unique status in the modern world of constitutional democracies. While they operate as private companies, their platforms have emerged as the primary places where politics is discussed, news is spread, and debates take place. As a result, the decisions regarding content moderation affect the freedom of speech.

In accordance with the Information Technology Act, intermediaries usually enjoy safe harbour from liability in case of third-party content so long as they follow the due diligence standards set by law.

However, intermediaries risk losing their statutory immunity in cases where they continue to allow the presence of the illegal content online despite having received proper statutory notice or failure to meet statutory requirements. Therefore, more digital platforms are using technology such as artificial intelligence and human monitors in order to find and remove the illegal content online.

Nevertheless, there are some challenges involved in algorithmic monitoring. In many instances, algorithms tend to be unable to distinguish between hate speech and satire, political commentary, news, and scholarly analysis. The effect of this is that constitutional speech tends

to be banned while harmful content continues to be posted on websites. Transparency is yet another issue. In most cases, social media companies remove or limit access to content according to internally generated guidelines and not the Constitution.

In light of this, many academicians call for increased transparency within the process of moderating content, an impartial appellate process, regular publication of transparency reports, and procedural guarantees to avoid the suppression of legitimate expression.

Constitutional Interpretations by the Judiciary on Freedom of Expression and Hate Speech

The Indian judiciary has had an important part in determining the extent of freedom of expression and its constitutional constraints. Various landmark judgments have been delivered to achieve the delicate balance between the protection of freedom and public order.

Romesh Thappar v. State of Madras (1950)

The first constitutional interpretation of freedom of expression was in the case of *Romesh Thappar v. State of Madras*. The Supreme Court held that freedom of expression is the bedrock of democracy and any restriction imposed on such freedom must be strictly constitutional. It was made clear that any public disapproval of government policy is not curable merely on the ground that it is inconvenient and unpopular.

Brij Bhushan v. State of Delhi (1950)

In *Brij Bhushan*, the Supreme Court struck down governmental censorship imposed on a newspaper through pre-censorship orders. The Court held that prior censorship of publications amounts to an excessive violation of the constitutional right of freedom of expression. While there could be certain limitations on such a right, prior censorship would be a rare exception.

Shreya Singhal v. Union of India (2015)

Shreya Singhal v. Union of India has been deemed to be the landmark judgment relating to freedom of speech on the Internet in India. In this case, the petitioner challenged the constitutional validity of Section 66A of the Information Technology Act, 2000, that made transmission of offensive electronic messages a criminal offense.

Section 66A was found to be unconstitutional in view of the vagueness of its provisions, which used undefined terms like “grossly offensive,” “annoying,” and “menacing.” As noted by the Court, vague laws are ambiguous in respect of what forms of expression are legal, thereby leading to arbitrary law enforcement on the part of the officials, who may impose an unconstitutional ‘chilling effect’ on the freedom of expression due to the fear of legal prosecution.

Notably, the Court made a distinction between discussion, advocacy, and incitement, stating that discussion and advocacy were protected acts while only incitement could be regulated under the purview of Article 19(2).

Comparative Approaches to the Regulation of Hate Speech

The regulation of hate speech varies greatly in constitutional democracies due to differences in their history, values, and tradition.

USA

One of the best constitutional protection of the right to free speech is the First Amendment in the United States. The courts in America tend to protect offensive, hateful and extremist speech, unless it incites to an immediate lawless action. Such approach was outlined in the case of *Brandenburg v. Ohio*, where the court stated that advocacy could be prohibited when it was meant to and likely to produce such immediate unlawful activity.

This approach is grounded on the understanding that open public discussion, rather than governmental regulation, is the most efficient remedy against dangerous ideas.

United Kingdom

The United Kingdom has a relatively tougher stance when it comes to hate speech regulations. Laws such as Public Order Act prohibit intentional promotion of hatred based on race and religion. The laws in Britain emphasize more on protecting vulnerable groups from discrimination and maintenance of public order.

Germany

Germany has one of the most detailed hate speech regulations in the world, partly due to its historical experience during the Second World War. Holocaust denial, Nazi propaganda, and incitement against protected groups are punishable under German laws.

Network Enforcement Act (NetzDG) has also been implemented in Germany which obligates major social media companies to remove illegal content in a given period of time. Failure to do so will attract heavy fines.

European Union

On the one hand, the European Union holds freedom of expression to be an inviolable human right. On the other hand, EU member states have the responsibility to enact laws to prevent hate speech, racial discrimination, xenophobia, and encouragement to violence. The recent legislations, such as the Digital Services Act, oblige internet platforms to employ transparent ways of handling illegal content without undermining users' due process rights.

Lessons for India

India's legal system lies in the middle way between America and Europe on this question. In the Indian Constitution, Article 19(1)(a) safeguards freedom of speech but Article 19(2) provides for some restrictions on it in the public interest.

Unlike in the USA, India allows regulating hate speech, but unlike some countries in Europe, Indian judicial system still insists on keeping the restrictions well-proportioned and narrowly-tailored.

Regulation of Hate Speech on Digital Media Platforms: Challenges

Despite the presence of laws to address such situations, regulating hate speech in digital media involves various practical and constitutional issues.

Lack of Definition of Hate Speech

The lack of a standardized legal definition makes enforcement difficult. Certain expressions that could be considered as criticism in some cases may be termed hate speech in others. The vagueness in legal definition poses an issue for arbitrary governmental action.

Algorithmic Amplification

In today's world, social networking sites use recommendation algorithms aimed at increasing engagement from users. Such algorithms tend to promote content that is sensational in nature, and as a result, inflammatory language receives far more amplification than factual content.

AI and Moderation of Content

Technology firms use artificial intelligence to filter out harmful content from online spaces. However, although AI-based systems work on large amounts of data quite effectively, they still cannot fully understand the context, sarcasm, irony, regional languages, and cultural subtleties.

Thus, AI filters may delete legitimate political criticism but fail to recognize hate speech encoded in specific symbols. Human intervention is thus essential for proper content moderation decisions.

Cross-Border Jurisdiction

Social media transcends national borders. At the same time, criminal law is territorial. The content posted by a person in one state may be used against another person in another jurisdiction. It poses major problems of investigation, evidence collection, jurisdiction, and enforcing judicial orders.

Anonymous Communication

Online users create many anonymous and pseudonymous accounts. That complicates efforts by law enforcement officials to find out who has spread the illegal content on social media platforms. Anonymous communication ensures safety of whistleblowers and dissidents but may be used to conduct hate campaigns.

Today's digital media platforms have recommendation algorithms to engage users. These algorithms end up giving precedence to emotionally charged content, resulting in the spread of hate speech rather than facts.

Conclusion

Freedom of speech and hate speech on social media have become one of the greatest challenges for constitutionality in the digital age. Social media have made democracy more powerful by giving people an opportunity to share their views and engage in discourse. The technology has made citizens stronger and increased political accountability. In addition, it helped initiate many social movements that fight for equal treatment and human rights. Unfortunately, the development of social media technology has also brought some problems, such as the spread of hate speech and online harassment.