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# Silenced voices: unravelling India's dissent crisis through historical and contemporary analysis of free speech and suppression

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## ABSTRACT


In India, the world's largest democracy, the right to express dissenting opinions has come under increasing pressure due to governmental reactions to violent and non-violent activities and opposition. As well as direct suppression, a concerning trend has arisen whereby individuals and groups may choose to self-censor rather than risk the consequences of speaking out. These outcomes are related in this paper to the treatment of social media, where official policies and laws regulate and censor content on social media on the dubious basis that it is 'offensive' or 'objectionable'. These restraints often lack clear guidelines and are applied arbitrarily, leading to a chilling effect on free speech and the expression of dissenting views. Furthermore, India lacks a comprehensive legal framework to address hate speech, resulting in a patchwork of provisions within the Indian Penal Code that inadequately define and circumscribe hate speech. This article contends that the 'freedom to criticise' should be legally better protected to ensure that diverse opinions can be safely held and expressed in order to maintain and reflect the pluralistic nature of Indian democracy.

## KEYWORDS

India; freedom of speech and expression; freedom to criticise; Indian Constitution; democracy

## 1. Introduction

The increasing intolerance towards dissenting voices in India has raised concerns about the health of the world's largest democracy. A vibrant democracy thrives on the open exchange of ideas and diverse opinions, which allows for constructive criticism, accountability, and reform. However, recent events in India have led to a perception that the government is attempting to stifle dissenting voices, resulting in a less inclusive and democratic society.<sup>1</sup> For instance, in January 2023, the Indian government embarked on an extraordinary campaign to prevent its citizens from viewing a new documentary by the BBC that explores Prime Minister Narendra Modi's handling of religious riots in

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<sup>1</sup>Bhagwat, Ashutosh, and James Weinstein, 'Freedom of Expression and Democracy' in Adrienne Stone, and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech*, Oxford Handbooks (2021; online edn, Oxford Academic, 10 February 2021) <<https://doi.org/10.1093/oxfordhb/9780198827580.013.5>> accessed 22 July 2023.

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2002. The government officials apparently warned universities against screening the documentary, claiming it propagated an anti-government agenda.<sup>2</sup> Over the last few years, such heightened political sensitivity<sup>3</sup> has tested the meaning and scope of the freedom of speech and expression protected under the Constitution.<sup>4</sup>

Although a liberal legal system should provide constitutional protections against the abridgement of speech and expression, the right is rarely deemed absolute. It can be subject to restrictions which are susceptible to political manipulation. The decision in this paper to align with John Stuart Mill's traditional conception of the 'marketplace of ideas' is not only deliberate but also of significant importance.<sup>5</sup> This theoretical framework advocates unbounded freedom of speech, positing that every voice, no matter its viewpoint, enriches a dynamic marketplace of ideas.<sup>6</sup> This theory is relevant to the discussion on pluralistic democracy in India, where diverse perspectives are recognised as vital to a healthy democratic society.<sup>7</sup> It encompasses the principles expressed in the paper, such as (1) individual activism and choice and (2) the service of democracy.<sup>8</sup> These principles also align seamlessly with the Internet's limitless possibilities for access and capability, making dissemination far more approachable compared to other media.<sup>9</sup> Through the application of the Millian theory, this paper underscores the essential role of diverse and free discourse in fostering social, political, and intellectual advancement in India.

Moreover, the constraints delineated in Article 19 of the Indian Constitution, although designed to shield national interests, have faced criticism within India for their extensive scope and potential for abuse in suppressing dissent. The Indian state has the power to silence its citizens for a broad array of reasons, including but not limited to 'security of the state', 'public order', 'decency or morality', 'incitement to an offence', and 'friendly relations with foreign states'.<sup>10</sup> In the Indian context, these restrictions seem to undermine the core protective essence of the Constitution.

Although the Constitution, formulated in 1950, provides a comprehensive framework of individual rights and their boundaries, there have been subsequent attempts to expand its purview to include areas such as 'offensiveness'.<sup>11</sup> However, the prohibition of expression on these grounds has produced undesirable consequences for India, given its political, cultural, and religious diversity and sensitivities and the ever-present

<sup>2</sup>H Ellis-Peterson, 'What is the BBC Modi Documentary and Why is it so Controversial?' (*The Guardian*, 14 February 2023) <<https://www.theguardian.com/world/2023/feb/14/why-is-bbc-report-on-narendra-modis-handling-of-sectarian-riots-in-2002-so-controversial>> accessed 22 July 2023

<sup>3</sup>As of 2022, India ranks 150 in the World Press Freedom Index, which evaluates a total of 180 countries; Reporters Without Borders, 'World Press Freedom Index' (Reporters Without Borders, 2022) <<https://rsf.org/en/index>> accessed 20 February 2023.

<sup>4</sup>The Constitution of India, 1950, art 19(1)(a) (India).

<sup>5</sup>John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green, 1869; Bartleby.com, 1999).

<sup>6</sup>Mill (n 5).

<sup>7</sup>See I Cram, *Liberal Democracy, Law and the Citizen Speaker: Regulating Online Speech* (Bloomsbury Publishing 2022) 232; See also N Adams, *The Ideal Speech Situation, Habermas and Theology* (Cambridge University Press 2006).

<sup>8</sup>See Cram (n 7).

<sup>9</sup>The philosopher Habermas might characterise this as an ideal speech situation – untainted by internal and external constraints or coercion. See also Adams (n 7).

<sup>10</sup>The Constitution of India, 1950, art 19(2) (India). The First Amendment to the Constitution of India added some of these restrictions due to the Supreme Court's verdict in *Romesh Thappar v State of Madras* AIR 1950 SC 124 (India).

<sup>11</sup>Cram argues, although not directly linked to the Indian constitution, that there is no inherent right to avoid offence. He delves into the legality and constitutional validity of using 'offence' to justify limiting free speech via legal enforcement. He questions the limitation of expressive activities by national authorities on the grounds of offence to sincerely held religious beliefs. See Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford Academic 2009) 311–30.

possibility of slighting some cherished beliefs or views. Despite the governmental claims of democratic validity, a culture of intolerance towards criticism has been incubating among the paranoid nationalist and religious factions in the country, as they fail to accurately identify between those that threaten public order, decency, or morality and those that threaten their political or personal sensitivities. There have been several instances where individuals, groups, and media organisations have faced intimidation, harassment, and violence for expressing dissenting views.<sup>12</sup> The government and its supporters have been accused of suppressing dissenting voices using various means, such as legal action, internet shutdowns, arrests, and physical violence.<sup>13</sup>

The escalating incidence of internet shutdowns in India, ostensibly manipulated by the government to silence opposition and control public sentiment, warrants urgent and detailed scrutiny.<sup>14</sup> These shutdowns not only undermine core democratic values but also perpetuate a wider spectrum of human rights violations, such as curbing protests and concealing episodes of violence and injustices. The Indian state governments, irrespective of political affiliations, have conveniently embraced internet shutdowns to suppress dissent and project an illusion of decisive action to maintain law and order.<sup>15</sup> Regrettably, the Indian government prioritises its public image over preserving law and order, a reality evident on the ground. Moreover, these shutdowns hinder access to indispensable services like education, health-care, and crucial resources, inflicting disproportionate harm on vulnerable communities.<sup>16</sup> For example, in early 2023, Manipur witnessed appalling incidents where women were subjected to unspeakably heinous acts, including women being paraded naked,<sup>17</sup> gang-raped, and brutally murdered.<sup>18</sup> These incidents occurred during a total blackout of Internet facilities in the region for 80 days, suppressing this distressing news for nearly 3 months.<sup>19</sup>

The Supreme Court of India mandates that Internet shutdowns should adhere to necessity and proportionality, thus emphasising the importance of constitutional compliance.<sup>20</sup> However, repeated violations of these guidelines indicate a pressing accountability deficit. The Review Committee, responsible for monitoring shutdown orders, routinely displays a lack of transparency and neutrality.<sup>21</sup> Notably, there is no recorded instance

<sup>12</sup>See Human Rights Watch (2021) India: Government Policies, Actions Target Minorities, <<https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities>>.

<sup>13</sup>See Freedom House (2023) India Report <<https://freedomhouse.org/country/india/freedom-world/2023>>; See also R Kumar, G Bhatia, N Roy, E Wadsworth-Jones, S Tripathi, C McCann, and E Riddell Bamber (n.d.). *India Pursuing Truth in the Face of Intolerance* (Pen International, 2018).

<sup>14</sup>See, 'Internet Shutdowns in India 2022 • Software Freedom Law Center, India' (*Software Freedom Law Center, India • Defender of Your Digital Freedom*, 17 May 2023) <<https://sflc.in/internet-shutdowns-india-2022/>> accessed 24 July 2023.

<sup>15</sup>R Kathuria, M Kedia, G Varma, K Bagchi, and R Sekhani, 'The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India' (2018) Indian Council for Research on International Economic Relations (ICRIER) 31 <[http://icrier.org/pdf/Anatomy\\_of\\_an\\_Internet\\_Blackout.pdf](http://icrier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf)> accessed 24 July 2023.

<sup>16</sup>J Bajoria, "No Internet Means No Work, No Pay, No Food" (*Human Rights Watch*, 14 June 2023) <<https://www.hrw.org/report/2023/06/14/no-internet-means-no-work-no-pay-no-food/internet-shutdowns-deny-access-basic>> accessed 24 July 2023.

<sup>17</sup>'Human Rights Commission Issues Notice to Manipur on Women Being Paraded Naked' (*India Today*, 20 July 2023) <<https://www.indiatoday.in/india/story/human-rights-commission-issues-notice-to-manipur-on-women-being-paraded-naked-2409540-2023-07-21>> accessed 24 July 2023.

<sup>18</sup>Saraswat Kashyap, 'Manipur Violence: 2 Women Gang-Raped, Killed on Same Day of Video Incident' (*India Today*, 22 July 2023) <<https://www.indiatoday.in/india/story/manipur-violence-alleged-rape-abduction-murder-of-two-women-2410387-2023-07-22>> accessed 24 July 2023.

<sup>19</sup>S Kodali, 'We Can't Look Away from Internet Shutdowns in Manipur' (*The Wire*) <<https://thewire.in/rights/we-cant-look-away-from-internet-shutdowns-in-manipur>> accessed 24 July 2023.

<sup>20</sup>Anuradha Bhasin v Union of India WP (Civil) 1031 of 2019.

<sup>21</sup>Indian laws regulating internet shutdowns employ vague language and lack sufficient checks to uphold necessity and proportionality principles. The absence of effective accountability or judicial and parliamentary oversight allows

where the Review Committee has reversed an internet shutdown or issued criticism, even in the face of overt infractions. Recent trends show a shift towards banning specific social media applications rather than enforcing complete internet shutdowns.<sup>22</sup> However, this approach only marginally alleviates the negative impact on free speech. Instead, it provides the government with a new method to limit expression and exploit shutdowns for self-promotion and image management.

India is far from being the only country resorting to internet shutdowns. In 2022, an unprecedented 35 countries experienced at least 187 instances of internet disruptions, with over 100 reported shutdowns across various countries, including Bangladesh, Iran, Jordan, Libya, Myanmar, Sudan, Turkmenistan, and Ukraine.<sup>23</sup> These shutdowns, frequently coinciding with violence, have increased in duration and are also used strategically during periods of greatest need for connectivity – such as humanitarian crisis, mass protests, conflicts, elections, and political instability, to control and silence dissent.

This article argues that the ‘freedom to criticise’ should be better protected to ensure that diverse opinions can be sincerely held and expressed to maintain and reflect the pluralistic nature of Indian democracy. In the world’s largest democracy, people should be able to speak out but instead are gradually losing the right to express their opinions through fear of mob persecution and government sanctions. In several cases relating to social media, there have been efforts to regulate or censor social media content on the dubious basis that it is ‘offensive’ or ‘objectionable’.<sup>24</sup> This is compounded by the fact that India has no formal legal framework to deal with hate speech. The Indian Penal Code (IPC), established during British colonial rule in 1860, contains several provisions that loosely define hate speech and so have been criticised for their impact on free speech. These colonial-era laws were designed to maintain control and prevent dissent against the colonial administration. However, they continue to exist in India’s legal system today and are sometimes used to stifle dissent and free speech.<sup>25</sup>

What is disappointing is that Indian independence leaders fought against British colonial laws which suppressed freedoms, but after independence, they adopted, reproduced and reinforced such laws. In some situations, courts have attempted to protect the right to dissent.<sup>26</sup> However, in most instances, several underlying factors have led to a patchy and limited protective stance, which is exacerbated by a notable rise in right-wing online

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frequent misuse and arbitrary decisions. India’s central and state governments are permitted to restrict or temporarily suspend internet services using the Indian Telegraph Act, 1885, and the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. Three-member Review Committee headed by Cabinet Secretary at the central level and Chief Secretary at the state level reviews the telecom/internet shutdown orders by the central government and the state government, respectively <<https://prsindia.org/policy/report-summaries/suspension-of-telecom-services-internet-and-its-impact#:~:text=Review%20Committee%3A%20Under%20the%202017,and%20the%20state%20government%2C%20respectively>>.

<sup>22</sup>C Thathoo, ‘Social Media Platforms Banned in Bihar’s Saran District until Feb 8’ (*Inc42 Media*, 7 February 2023) <<https://inc42.com/buzz/social-media-platforms-banned-in-bihars-saran-district-until-feb-8/>> accessed 24 July 2023.

<sup>23</sup>Weapons of control, shields of impunity: Internet shutdowns in 2022, See <<https://www.accessnow.org/internet-shutdowns-2022/>>.

<sup>24</sup>Knee-jerk reaction from the Government of India allowed the prosecution of executives from intermediaries like Twitter, Google and Facebook for objectionable content posted online; See Ministry of Electronics and Information Technology, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

<sup>25</sup>Indian Penal Code was enacted in 1860 by the British colonial administration. It contains provisions to act against threats of sedition, and obscenity to impose Victorian values. The objective of these provisions was to subjugate and control the Indian subjects. In Independent India, these same provisions are used to crack down on social liberalism and dissent.

<sup>26</sup>*Shreya Singhal v Union of India* AIR 2015 SC 1523 revolves around the fundamental right of ‘Freedom of Speech and Expression enshrined under Article 19(1) (a) of the Indian Constitution.

vigilantism and an increasing intolerance promoted by divisive elements on social media based on a deep-rooted communal hatred that challenges the secular foundation of Indian democracy<sup>27</sup> and fosters an environment of 'cultural policing'.<sup>28</sup>

Social media has become a driving force behind religion-oriented political polarisation in India. Although there are no legal restraints on 'thought' as such in India, the growth of right-wing populism, in particular, has led to an uproar against<sup>29</sup> opinions or expressions that do not adhere to 'Hindutva' politico-ideological beliefs (the political-religious ideology of Hindu supremacy).<sup>30</sup> This ideological narrative has been mobilised in pursuit of excluding minorities and imposing a narrow, rigid version of Hinduism. We are even witnessing concerted efforts by Hindu revivalists to rewrite history by distorting facts and forcefully legitimising extreme opinions.<sup>31</sup> In 'saffronised' India,<sup>32</sup> Hindu syncretism, eroticism, dissent, and secular practice are constructed rhetorically as 'impure' or 'foreign'<sup>33</sup> imports while simultaneously providing a cover for Hindutva to claim tolerance as its abiding virtue in venues where the rhetoric of diversity proves profitable.<sup>34</sup>

This article analyses the current crisis of dissent in two distinct phases. *First*, we develop a critical insight into the historical debates and discussions surrounding the right to free speech, specifically in the Constituent Assembly, which deliberated upon the Constitution from 1946 to 1950. We analyse the early cases that led to the First Amendment to the Indian Constitution. This amendment substantially expanded the scope of restrictions to Article 19 of the Constitution and, in the process, sought to impose the necessity for such restrictions to be 'reasonable'. *Second*, we discuss more contemporary cases and instances that have led to the curtailment of expressive rights. Several loopholes have been exploited to devise and establish grounds to suppress dissent and critical societal engagement. Moreover, this part highlights the underlying common thread of these developments by examining specific types of speech and opinions that have been censored and repressed. In this segment of our analysis, we also focus on the existing policies that are in place for social media companies and their intermediaries. These policies aim to regulate discourse, ensure the maintenance of public order, and limit the spread of hate speech. An important aspect we bring to light is the intense and consistent scrutiny which faces those voicing secular ideologies. These secular perspectives are often labelled

<sup>27</sup>See, PR Brass, *Production of Hindu-Muslim Violence in Contemporary India* (Univ of Washington Press 2015).

<sup>28</sup>Christophe Jaffrelot, 'India's Democracy at 70: Toward a Hindu State?' (2017) 28(3) *Journal of Democracy* <<https://www.journalofdemocracy.org/articles/indias-democracy-at-70-toward-a-hindu-state/>> accessed 23 July 2023; See also, Zoya Hasan, 'Mass Violence and Wheels of Indian [In]justice' in Amrita Basu and Srirupa Roy (eds), *Violence and Democracy in India* (Seagull Books 2006).

<sup>29</sup>Edward Anderson and Christophe Jaffrelot, 'Hindu Nationalism and the "Saffronisation of the Public Sphere": An Interview with Christophe Jaffrelot' (2018) 26(4) *Contemporary South Asia* <<https://www.tandfonline.com/doi/abs/10.1080/09584935.2018.1545009>> accessed 23 July 2023.

<sup>30</sup>Taniya Sarkar, 'Hindutva: The Dominant Face of Religious Nationalism in India' in Nadim N Rouhana and Nadera Shalhoub-Kevorkian (eds), *When Politics are Sacralized: Comparative Perspectives on Religious Claims and Nationalism* (Cambridge University Press 2021); See also Aditi Bhatia, 'The "Saffronisation" of India and Contemporary Political Ideology' (2020) 39(4) *World Englishes* <<https://onlinelibrary.wiley.com/doi/abs/10.1111/weng.12494>>

<sup>31</sup>Audrey Truschke, 'Hindutva's Dangerous Rewriting of History' (2020) 24/25 *South Asia Multidisciplinary Academic Journal* <<https://doi.org/10.4000/samaj.6636>> accessed 19 February 2023.

<sup>32</sup>Jaspal Singh, 'The Sociolinguistic Saffronisation of India' in Irene Theodoropoulou and Johanna Tovar (eds), *Research Companion to Language and Country Branding* (Routledge 2020).

<sup>33</sup>See Martha C Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* (Harvard University Press 2007).

<sup>34</sup>Shakuntala Banaji, 'Vigilante Publics: Orientalism, Modernity and Hindutva Fascism in India' (2018) 25(4) *Journal of the European Institute for Communication and Culture* <<https://www.tandfonline.com/doi/full/10.1080/13183222.2018.1463349>> accessed 23 July 2023.

‘anti-national’ and are perceived as a substantial threat to public order. The primary reason for the suppression of such viewpoints is that they contradict the widely held beliefs of the majority in the nation. Our analysis further explores this dynamic in detail, shedding light on the struggle faced by secular voices in the current socio-political landscape. Even though various courts have attempted to protect speech in certain circumstances, they have failed due to the lack of functional independence when scrutinising institutions<sup>35</sup> due to the permeation of the ultra-nationalist ideology into state machinery.<sup>36</sup> In what is perhaps a continued repercussion of the ‘9/11 effect’, the fear of the ‘other’ has led countries like India to impose restrictive laws, not only on potential terrorist activity but also on political dissent.<sup>37</sup> We conclude that in India’ dissent is no longer treated as a virtue, and enforcement of arbitrary regulations that target speech has created a suppressive environment with unacceptable, chilling effects on freedom of expression.

## II. Freedom of speech: historical background

### *A. Navigating the turbulent genesis: unraveling the function of free speech in the Indian Constituent Assembly*

In India, during British colonial rule, which lasted from 1858 to 1947, the colonial rulers imposed four significant restrictions on the people’s freedom of speech and expression. These restrictions included laws targeting (i) sedition, (ii) contempt of court, (iii) hate Speech (iv) defamation.<sup>38</sup> The Vernacular Press Act of 1878 required newspapers in local languages to obtain a license from the colonial government before they could be published. This Act aimed to prevent the Indian press from publishing anti-colonial sentiments and opinions. The Indian Sedition Act of 1870 made it a criminal offence to criticise the British colonial government or to promote feelings of disaffection among the Indian population. This Act was often used to silence political dissidents and suppress freedom of speech. The Rowlatt Act of 1919 gave the colonial government the power to arrest and detain individuals without trial or due process. This Act was passed in response to a growing Indian nationalist movement and was used to suppress political opposition and dissent. The Press and Registration of Books Act of 1867 required newspapers and publishers to register with the colonial government and submit to government censorship. This Act was used to control the content of newspapers and publications and prevent the spread of anti-colonial sentiments. These restrictions on freedom of speech and expression were a means for the British colonial rulers to maintain control over the Indian population and prevent the growth of nationalist sentiment.

Despite the end of colonial rule in 1947, some of these restrictions continued to be used by the Indian government after independence, leading to ongoing debates about

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<sup>35</sup>The authors of the book, *‘Majoritarian State’* argue how Hindutva activists exert control over civil society via vigilante groups, cultural policing and violence. As this majoritarian ideology pervades the media and public discourse, it also affects the judiciary, universities and cultural institutions, increasingly captured by Hindu nationalists. Angana P Chatterji, Thomas Blom Hansen and Christophe Jaffrelot (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (Oxford University Press 2019).

<sup>36</sup>*Ibid.*

<sup>37</sup>Kent Roach, *The 9/11 Effect* (Cambridge University Press 2011).

<sup>38</sup>Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (Penguin Books 2017) 13.

the balance between individual rights and state interests. There was much serious debate about these restrictions and the scope of the right to expression in post-independent India. For instance, during the drafting of the Constitution, which took place between 1946 and 1949, sedition, as an offence, was particularly controversial. Several freedom fighters, including Balgangadar Tilak<sup>39</sup> and Mahatma Gandhi, were victims of this oppressive law.<sup>40</sup> The colonial rulers saw the freedom of speech and the right to dissent as a threat to their rule in India and imposed such restrictions rigorously. Despite stern opposition by a few members of the Constituent Assembly,<sup>41</sup> ultimately, the framers of the Constitution decided to include sedition as an offence.

In 1962 the Supreme Court of India upheld the validity of Section 124A, the provision dealing with sedition in the Indian Penal Code 1860 in the case of *Kedar Nath Singh v State of Bihar*,<sup>42</sup> recently reaffirmed in the case of *Vinod Dua v Union of India*.<sup>43</sup> On May 2022, while reevaluating the validity of the *Kedar Nath* decision in the case of *S.G. Bhatkare v Union of India*,<sup>44</sup> a 3-Judge Bench of the Supreme Court passed an ambiguous order without staying the operation of the provision. As per the order, the court would 'hope and expect' that Union and State Governments take no coercive action while it re-examines the constitutional validity of Section 124A.<sup>45</sup> However, the ambiguity of the order and the lack of a clear directive on the validity of Section 124A has led to criticism. Despite the passage of 75 years since India's independence, it is ironic, given the bitter remnants of the enforcement of sedition law during the colonial regime, that it continues to find its place in the Indian Penal Code, and the provision still continues to be used to suppress dissent and criticism of the government.<sup>46</sup>

The framers of the Indian Constitution engaged with three broad themes related to the freedom of speech and expression. Firstly, they deliberated whether the right should be restricted to citizens or non-citizens. Secondly, they discussed the rights, if any, that should be granted to the press. The third topic of discourse involved the restrictions on the right to freedom of speech and expression.<sup>47</sup> These points of immediate concern for the Constituent Assembly of the nascent democracy seem apposite if considered against the backdrop of the intriguing circumstances leading up to the independence of India – the devastating consequences of partition and consequent turmoil and fear about the country's future unity, strength, and independence.

The freedom of speech and expression was initially encompassed in Article 13 of the Indian Constitution. It was originally made subject to restrictions imposed by Federal Law to protect aboriginal tribes' backward classes and preserve public safety and

<sup>39</sup>*Queen Empress v Bal Gangadar Tilak* ILR (1898) 22 Bom 112.

<sup>40</sup>Nivedita Saxena and Siddhartha Shrivastava, 'An Analysis of the Modern Offense of Sedition' (2014) 7(2) NUJS Law Review <<http://nujslawreview.org/2016/12/03/an-analysis-of-the-modern-offense-of-sedition/>> accessed 23 July 2023.

<sup>41</sup>James Chiriyankandath, "'Creating a Secular State in a Religious Country': The Debate in the Indian Constituent Assembly' (2000) 38(2) Journal of Commonwealth & Comparative Politics <<https://www.tandfonline.com/doi/abs/10.1080/14662040008447816>> accessed 23 July 2023.

<sup>42</sup>(1962) Supl.(2) SCR. 769.

<sup>43</sup>W.P. (Criminal) No. 154/2020.

<sup>44</sup>W.P. (C) No. 682/2021.

<sup>45</sup>*ibid*.

<sup>46</sup>In 2020, several activists and students were charged with sedition for their alleged involvement in the protests against the Citizenship Amendment Act (CAA) and the National Register of Citizens (NRC). See Kapoor (2022).

<sup>47</sup>Constitutional Assembly Debates, 7 December 1948, speech by DAMODAR SWARUP SETH <[https://eparlib.nic.in/bitstream/123456789/762993/1/cad\\_07-12-1948.pdf](https://eparlib.nic.in/bitstream/123456789/762993/1/cad_07-12-1948.pdf)> accessed 20 February 2023; See also Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury Publishing 2017).

peace.<sup>48</sup> However, conflicting ideologies existed among Constituent Assembly members who attempted to strike an optimal balance between rights and restrictions. On the one hand, some members argued that the very purpose of the rights is rendered infructuous by imposing such restrictions. For instance, KT Shah claimed that: *'what is given by one right hand seems to be taken away by three or four or five left hands. Therefore, the article is rendered nugatory (...).'*<sup>49</sup> Another member of the Constituent Assembly, Somnath Lahiri, expressed concern about the vague and arbitrary nature of certain restrictions imposed on free speech. Specifically speaking about the emergency provisions, the use of words such as 'security', he believed, granted the executive power to decide what constituted an emergency or a threat to security, thereby extending their ability to curtail the fundamental rights of the citizens.<sup>50</sup> On the other side were the lawmakers like Dr BR Ambedkar, who was against granting absolute versions of rights.<sup>51</sup> He was influenced by the American case of *Gitlow v. New York* (1925). He argued that pernicious speech existed beyond the purview of protection, even in a democratic state seeking to protect this right.<sup>52</sup> While quoting from the case of *Gitlow v New York*,<sup>53</sup> he said: *'the freedom of speech and the press does not confer an absolute right to speak or publish without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language'*. Indeed, the challenge for lawmakers and the judiciary in a democratic society is to strike the right balance between protecting the freedom of speech and ensuring that it does not lead to harm or infringe upon the rights of others. This delicate balance requires careful consideration of the potential consequences of both overly restrictive regulations and overly permissive policies.<sup>54</sup>

The Indian Constitution contains restrictions on the grounds of (i) interest of sovereignty and integrity of India, (ii) friendly relations with foreign states, (iii) public order, (iv) decency or morality, (v) contempt of court, (vi) defamation (vii) incitement of an offence.<sup>55</sup> Though restrictions must be 'reasonable restrictions' in every case, it might be argued that the list of grounds is longer than other formulations and contains inherent tendencies to repression. The original draft of the Constitution did not include public order as a restriction and was only enacted post the First Amendment to the Indian Constitution.<sup>56</sup> Thus, while the Constitution was expected to be a transformative document in independent India, the rights and restrictions linked to this individual freedom reflected a considerable amount of colonial continuity.<sup>57</sup>

Concurrent with the freedom of speech lies the freedom of the press. However, this was not included as an explicit provision in the Constitution and continues to be read as an implicit right under Article 19. The Drafting Committee of the Indian Constitution construed Free Speech as an individual right and did not see the need to expand it or

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<sup>48</sup>Ibid.

<sup>49</sup>Constitutional Assembly Debates, 1 December 1948, *speech by KT SHAH*.

<sup>50</sup>Constitutional Assembly Debates, 29 April 1947.

<sup>51</sup>Constitutional Assembly Debates, 4 November 1948.

<sup>52</sup>Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), 137.

<sup>53</sup>*Gitlow v New York* 286 US 652 (1925).

<sup>54</sup>Ronald J Krotoszynski, *The First Amendment in Cross-cultural Perspective* (New York University Press, 2006); Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018).

<sup>55</sup>The Constitution of India, 1950, art 19(2) (India).

<sup>56</sup>This will be looked at in the next subsection.

<sup>57</sup>Chandrachud, *supra* note 21, p.30.

recognise the press as a distinct entity.<sup>58</sup> In turn, while recognising the importance of the freedom of the press, different courts have contended that it was equivalent to that of an individual citizen.<sup>59</sup> There needs to be more engagement in the protection, rights and restrictions accorded to the press as an independent and distinct institution.

Nevertheless, the right has different implications for an individual on the one hand and the press on the other. The press is crucial in disseminating information to the public, keeping democracy functioning effectively. With the advent of majoritarian religious ideologies, the imposed restrictions are misused and often interpreted expansively. While the restrictions may be necessary for a democratic society, in India, the state has misused these restrictions and adopted disproportionate responses to activities and ideologies that counter the majoritarian paradigm on several occasions.<sup>60</sup> This has led to a narrowing public discourse and a lack of accountability for those in power.

### ***B. Changing frontiers: the first amendment to the Indian Constitution***

The introduction of the First Amendment in 1951 brought about multiple changes in the Indian Constitution, including three new restrictions under Article 19(2).<sup>61</sup> It is critical to look at the original stance of the Indian judiciary to see how the First Amendment brought in a change, which was allegedly deemed necessary at that time. In the case of *Brij Bhushan*<sup>62</sup> and *Romesh Thappar*,<sup>63</sup> the respective courts struck down a state order restricting certain content from being published on the grounds of needing to promote public order and safety. Public order was not listed as an explicit ground under Article 19(2), so it could not be a reasonable explicit restriction on the right to free speech. After the respective court orders, the First Amendment introduced an additional restriction under Article 19(2).<sup>64</sup> This amendment introduced public order as a valid ground for limitation under Article 19. Subsequently, in the case of the *State of Bihar v Shailabala Devi*,<sup>65</sup> the court disagreed with the previous judgments. It iterated that such an amendment was not required in the first place because such restrictions were implicit in the text of the Constitution itself.<sup>66</sup>

The effects of the public order restriction seeped into other forms of statutory control. For instance, in the *Ranjilal Modi* case,<sup>67</sup> the court held that speech that offended a

<sup>58</sup>Bidyut Chakrabarty, 'BR Ambedkar and the History of Constitutionalizing India' (2016) 24(2) Contemporary South Asia <<https://www.tandfonline.com/doi/abs/10.1080/09584935.2016.1195338>> accessed 23 July 2023; See also R Kruthika, 'Freedom of The Press: A Constitutional History – Centre For Law & Policy Research' <<https://clpr.org.in/blog/freedom-of-the-press-a-constitutional-history/>> accessed 17 August 2022.

<sup>59</sup>See e.g. *Romesh Thappar v State of Madras* AIR 1950 SC 124; *Express Newspapers (Pvt.) Ltd. v Union of India* AIR 1958 SC 578; *Bennett Coleman & Co. Ltd. v Union of India* AIR 1973 SC 106.

<sup>60</sup>See *Indibility Creativity v State of West Bengal* AIR 2019 SC 191, the bench consisting of DY Chandrachud and Hemant Gupta noted that contemporary events revealed that there was a growing sense of intolerance, which curtailed and threatened the freedom of speech in the country.

<sup>61</sup>The Constitution of India, 1950, art 19(2) (India); The Constitution (First Amendment) Act, 1951, cl 3.

<sup>62</sup>*Brij Bhushan v State of Delhi*, AIR 1950 SC 129 (India).

<sup>63</sup>*Romesh Thappar v State of Madras* AIR 1950 SC 124 (India).

<sup>64</sup>The Constitution of India, 1950, art 19(2) (India); The Constitution (First Amendment) Act, 1951, cl 3.

<sup>65</sup>*The State of Bihar v Shailabala Devi* AIR 1952 SC 329 (India).

<sup>66</sup>The judgement points out the fact that discerning whether certain speech would threaten public order and peace is subjective. For instance, Mukherjea J stated that the phrases used would be capable of either interpretation and that an ordinary person would in all probability not be incited by the passage.

<sup>67</sup>*Ranjilal Modi v The State of U.P* AIR 1957 S.C 620 (India).

religious group or a class of people could be restricted. This removed the effects-based approach often applied to limiting speech and expression in liberal democracies and requiring evidence of tangible deleterious consequences such as the likelihood of public violence. One can see how this reasoning has played out over time, especially in the country's recent history, where restrictions on speech and dissent are being imposed to curtail any dissent or opinion opposed to what the majority propagates. There is rampant misuse of provisions such as sedition and public order to curb the diagonal or discursive levels of accountability by media houses, universities, civil societies and NGOs.<sup>68</sup>

The increasing restrictions are not limited to political dissent or expressing opinions against government policies. India has seen a gradual move towards censorship and limitation of artistic creativity when opposed to specific standards of morality.<sup>69</sup> In *Sahara India Real Estate Corpn. Ltd. v. SEBI*, the Supreme Court held that freedom of expression under the Constitution of India is not an 'absolute value'.<sup>70</sup> The Law Commission, in its 267th report, observed that the right of freedom of speech and expression requires restrictions to avert any harmful or destructive effects that the exercise of this right may cause.<sup>71</sup> In *Laxmi Khandsari v. State of UP*, the court held that the fundamental rights laid down in the Constitution of India are neither absolute nor unlimited but are subject to reasonable restrictions that the state can place under Article 19(2) to 19(6).<sup>72</sup> The scope and ambit of these restrictions have never been laid down in concrete terms; they are interpreted arbitrarily by those in power. Instances of this range from the pre-First Amendment stifling of communist newspapers (like *Crossroads*, the subject of *Romesh Thappar v State of Madras*<sup>73</sup>) and the post-Amendment indirect restrictions on newsprint and journalistic welfare.<sup>74</sup>

### III. Freedom of speech: contemporary scenario

The incremental suppression of dissent signals a gradual and persistent undermining of democracy within a nation. Mill argues that personal liberty enables individuals to seek their own vision of a good life, provided it does not inflict harm upon others. This pursuit encompasses several key aspects: (a) the right to express oneself freely without inflicting harm, (b) advocating for fundamental political changes, (c) improving personal well-being and liberty, and (d) broadening knowledge and discerning truth.<sup>75</sup> As previously discussed, Mill's philosophy promotes unrestricted freedom of opinion and expression, emphasising the importance of actively protecting the 'passive' aspect of freedom of expression. This means that individuals should be able to express themselves freely and without limitation, even if their opinions are not widely supported. This

<sup>68</sup>Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 Law & Ethics of Human Rights 49.

<sup>69</sup>Subhradipta Sarkar, 'Right to Free Speech in a Censored Democracy' [2009] 7 Sports and Entertainment Law Journal 62.

<sup>70</sup>(2012) 10 SCC 603, para 25.

<sup>71</sup>Law Commission of India, *Hate Speech* (Report No. 267, 2017) para 6.27.

<sup>72</sup>(2012) 5 SCC 1, para 35.

<sup>73</sup>(1950) SCR 594 (India).

<sup>74</sup>See *Express Newspapers (Private) Ltd. v Union of India* AIR 1958 SC 578 (India); See also *Sakal Papers (P) Ltd. v Union of India* AIR 1962 SC 305 (India).

<sup>75</sup>David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (2nd edn, Hackett Publishing Company 2008) 605

principle is crucial for a thriving democracy, and any actions that threaten it should be cause for concern.<sup>76</sup>

The First Amendment to the Indian Constitution and the subsequent limitations on free speech has led to ambiguity, creating opportunities for both externally imposed restraints and self-imposed censorship. This section examines specific cases in which courts, governments, and even the general public have suppressed dissent on various grounds. It emphasises the commonalities among restrictions placed on different forms of speech, such as constraints on speech that threatens public safety, as well as the criticism and censorship of artistic and literary expressions. As shown in the previous section, the First Amendment introduced an additional constraint to the freedom of speech and expression under Article 19, leading to widespread confusion and the emergence of ambiguous and arbitrary enforcement of this limitation. This part of the paper will highlight how the term ‘public order’ has been construed in different circumstances and how its application has been misused<sup>77</sup> due to the implementation and enforcement of acts such as the Unlawful Activities (Prevention) Act (‘UAPA’)<sup>78</sup> and the Armed Forces Special Powers Act (AFSPA).<sup>79</sup> These acts have been used to suppress dissent and to curtail freedom of expression, association, and assembly, often under the guise of protecting ‘public order’ or national security.<sup>80</sup> Under the UAPA, for example, individuals can be arrested and detained without trial for up to six months for alleged involvement in ‘unlawful activities’. The Act’s broad and ambiguous definition of ‘unlawful activities’ has been criticised for being overly expansive and open to abuse, with some activists and journalists targeted simply for expressing dissenting views or advocating for the rights of marginalised groups. Similarly, the AFSPA has been criticised for providing sweeping powers to security forces, including the power to use deadly force and arrest individuals without a warrant, to maintain ‘public order’ in areas designated as ‘disturbed’.

The law of sedition, the UAPA and other security laws have led to the imprisonment of several social rights leaders, activists, and peaceful protestors without evidence of participation.<sup>81</sup> Alarmingly, the number of cases registered under the UAPA has increased significantly in the last decade.<sup>82</sup> In addition to the UAPA, charges of sedition under the Indian Penal Code have also been used to suppress dissent. This 150-year-old colonial law aims to restrict those who incite dissatisfaction against the country and is outlined in Section 124(A) of the Indian Penal Code.<sup>83</sup> Numerous incidents have occurred in recent years where individuals, including students voicing slogans during seemingly

<sup>76</sup>Wootton (n 75).

<sup>77</sup>Mayur Suresh, ‘The Slow Erosion of Fundamental Rights: How Romila Thapar V. Union Of India Highlights What is Wrong With The UAPA’ (2019) 3 Indian Law Review <<https://www.tandfonline.com/doi/abs/10.1080/24730580.2019.1640593>> accessed It has been noted that even though there might not be statistics to show the numerous people convicted of offenses under these acts, the primary purpose of anti-terror provisions is to detain the prisoners as opposed to obtaining conviction. The mere apprehension caused due to the numerous detentions under these provisions prove that there is an inherent risk to this freedom in the country.

<sup>78</sup>Unlawful Activities (Prevention) Act, 1967 (India).

<sup>79</sup>The Armed Forces (Special Powers) Act, 1958 (India).

<sup>80</sup>Dolly Kikon, ‘The Predicament of Justice: Fifty Years of Armed Forces Special Powers Act in India’ (2009) 17(3) Contemporary South Asia 271–82, doi:10.1080/09584930903108937, see also S Baruah, ‘Routine Emergencies: India’s Armed Forces Special Powers Act’ in *Civil Wars in South Asia: State, Sovereignty, Development* (2014) 189–211.

<sup>81</sup>Anushka Singh, ‘Criminalising Dissent: Consequences of UAPA’ (2012) 47(38) Economic and Political Weekly <<https://www.epw.in/journal/2012/38/commentary/criminalising-dissent.html>> accessed 24 July 2023

<sup>82</sup>The Wire, ‘UAPA: 72% Rise in Arrests between 2015 and 2019’ *The Wire* <<https://thewire.in/government/uapa-72-rise-in-arrests-between-2015-and-2019>> accessed 20 February 2023.

<sup>83</sup>§124A, The Indian Penal Code, 1860, No 45, Imperial Legislative Council, 1860.

peaceful protests, have been arrested under this provision. However, in *Balwant Singh v State of Punjab*, the court held that chanting slogans does not amount to sedition.<sup>84</sup> It further iterated that for someone to be charged with sedition, showing a direct and imminent threat of violence was crucial. In subsequent cases, the courts upheld this principle, reiterating that ‘anti-national’ or offensive speech would not automatically amount to an act of sedition.<sup>85</sup>

The Supreme Court in *Kedar Nath Singh v State of Bihar* had held that the use of the law of sedition must be limited only where there is instigation to commit violence or intention to create ‘public disorder’ or disrupt ‘public peace.’<sup>86</sup> However, in recent protests, numerous student leaders, activists, social workers, and civilians have been apprehended under these anti-terror and sedition laws. Law enforcement agencies have often overlooked the distinction between hate speech, incitement of violence, and peaceful protests to critique government policies and actions. The capricious application of these laws, particularly in situations involving differing opinions against the government and its policies, has resulted in a climate of fear and self-censorship within the country. The untampered usage of such restrictive legislation stifles rather than regulates, creating a punitive rather than protective legal environment.<sup>87</sup> For the restriction to be legitimate, it must be established that there is an inevitable and compelling social need to implement it, meaning that such a legitimate and persuasive objective cannot reasonably be achieved by employing less restrictive means.

The act of sedition can rightfully be attributed to clear instances of public violence, as exemplified by the January 6 insurrection in the United States. In relation to this event, Elmer Stewart Rhodes III, the founder and leader of the Oath Keepers, and Kelly Meggs, the chief of the group’s Florida division, were both found guilty of seditious conspiracy and other charges tied to the breach of the U.S. Capitol.<sup>88</sup> However, in the Indian context, the socio-legal trends associated with the application of sedition law seem to suggest a different objective. It appears primarily geared towards constructing majoritarian narratives in the realm of identity politics and penalising general dissatisfaction against the government.<sup>89</sup> These narratives are frequently juxtaposed against individual rights and liberties, creating a situation where nationalism can be manipulated to enforce societal control.<sup>90</sup> In other words, the deployment of sedition laws often serves more to control and suppress dissenting voices rather than uphold the principles of national security and public order.<sup>91</sup>

<sup>84</sup>*Balwant Singh v State of Punjab*, 1994 Supp (2) SCC. 67.

<sup>85</sup>*Shreya Singhal v Union of India* AIR 2015 SC 1523.

<sup>86</sup>AIR 1962 SC 955, para 27.

<sup>87</sup>Nalin Mehta, ‘Redefining ‘Azadi’ in India: The Prose of Anti-Sedition’ (2016) 7(3) South Asian History and Culture 322.

<sup>88</sup>See *United States v. Rhodes*, 610 F. Supp. 3d 29 (D.D.C. 2022); See also *US v Bertino* 1:22-cr-00329 (DC) (United States); *US v Lebron* 222 F 2d 531 (1955) (United States).

<sup>89</sup>Ayesha Pattanaik, ‘Loyalty, Liberty, and the Law: Analysing the Juxtaposition of Nation and Citizen in the Indian Sedition Law’ (2022) 31(6) Social and Legal Studies <<https://doi.org/10.1177/09646639221086859>> accessed 22 February 2023.

<sup>90</sup>*ibid*.

<sup>91</sup>On 11th August 2023 Government of India introduced two new Bills to reform IPC (1857), CrPC (1858), Indian Evidence Act (1872). Bharatiya Nagarik Suraksha Sanhita, which will replace the Code of Criminal Procedure, and the Bharatiya Sakshya, which will replace the Indian Evidence Act. Bharatiya Nyaya Sanhita, which will replace the Indian Penal Code. Section 150 Bharatiya Nyaya Sanhita proposes to replace Section 124A of IPC. The proposed section is focused on acts that promote secession, armed rebellion, subversive activities, or endanger the sovereignty, unity, and integrity of India. It is broader in scope, capturing a wider array of activities beyond just ‘disaffection’. Specifies that the acts should be done ‘purposely or knowingly’, indicating a clear and deliberate intent. In addition to the it specifically includes ‘electronic communication’ and the ‘use of financial means’, making it more comprehensive in today’s digital and financial

In contrast to the court's apparent indifference towards public order and security cases, Indian courts have been more proactive in protecting creative and artistic integrity. For instance, in the case of *Indibility Creativity v State of West Bengal*, the Supreme Court ruled that removing a film due to a potential threat to public order would not be valid.<sup>92</sup> Justice Chandrachud also asserted that state certification, primarily through covert and indirect means, should not be conducted alongside accreditation from the Central Board of Film Certification. Most notably, he emphasised that the responsibility of managing public disorder rests with the state, and it is not up to the artist or director to withdraw the film from publication. This decision reinforces the idea that the mere anticipation of discontent or conflict among specific groups should not impede freedom of speech. Controversial and bold content is meant to spark public curiosity and stimulate debate. Imposing a ban or removing content could create a chilling effect in a nation characterised by diverse opinions and a multitude of ideologies. However, this stance is being jeopardised by the introduction of draft amendments to the Cinematograph Act 1952.<sup>93</sup> These amendments grant the Union Government the authority to direct the Central Board of Film Certification (CBFC) to reconsider a specific certificate issued to a film.<sup>94</sup>

The courts have also said that freedom under Article 19 is not merely a negative right where the state should not interfere but also a positive right to protect free speech. This was first decided in the case of *S Rangarajan v P Jagjivan Rao*,<sup>95</sup> which dealt with a Tamil film criticising the state's reservation policy. It was iterated that freedom of expression cannot be suppressed because of a 'threat of a demonstration' as it would undermine the rule of law in the nation. In *Laxmi Khandsari v. State of UP*, the Supreme Court held that the restriction must be in the public interest and maintain a balance between deprivation of a right and evil sought to be averted by that restriction.<sup>96</sup> Despite this strong protection guaranteed to artists and filmmakers, it has recently come under threat due to the 'heckler's veto'. For instance, despite the courts protecting Perumal Murugan,<sup>97</sup>

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world. However, it broadens the scope to include exciting secession, armed rebellion, subversive activities, encouraging feelings of separatist activities, and endangering the sovereignty, unity, and integrity of India. Although this is a welcome development, but it still does not guarantee that the proposed law will not be misused to suppress dissent and infringe freedom of speech and expression. Ultimately, the courts will play a vital role in determining how this section is applied. If they interpret it narrowly, then only severe, and clear acts against the state would be penalised, potentially leaving room for dissent and free expression. However, a broad interpretation could curtail such freedoms.

<sup>92</sup>*Indibility Creativity v State of West Bengal* AIR 2019 SC 1918.

<sup>93</sup>The Cinematograph (Amendment) Bill, 2021.

<sup>94</sup>Proviso to Section 6(1) of the Bill deals with such revisional powers of the Central Government. It states that the Central Government has the power to direct the CBFC to re-examine the film in it feels that the principles enshrined in Section 5B of the Cinematograph Act are violated by such certification.

<sup>95</sup>*S. Rangarajan and Ors. v P. Jagjivan Ram and Ors* (1989) 2 SCC. 574. A similar resonance is also observed in Justice DY Chandrachud's judgement in *Indibility*. He holds,

Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing 'negative' restraints on the state, these freedoms also impose a positive mandate. In its capacity as a public authority enforcing the rule of law, the state must maintain the conditions in which these freedoms flourish. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organised interests threaten the existence of freedom. The state is duty-bound to ensure the prevalence of conditions in which those freedoms can be exercised. The instruments of the state must be utilised to effectuate the exercise of freedom.

<sup>96</sup>(1981) 2 SCC 600, para 16.

<sup>97</sup>Arunava Sinha, 'Perumal Murugan and the Politics of Literary Oppression' (*Sydney Review of Books*, 28 April 2015) <<https://sydneyreviewofbooks.com/essay/perumal-murugan-and-the-politics-of-literary-oppression/>> accessed 24 July 2023; See also *S. Tamilselvan v Government of Tamil Nadu* (2016) SCC Online 5960 (Madras). The Learned

the author of the book 'one part woman' and Wendy Doniger's book 'Hindu',<sup>98</sup> pressure from third parties has created a hostile environment for artists and authors. Due to the widespread threats and harassment faced by Perumal Murugan, the author voluntarily resigned and announced that he, as an author, was dead. The severity of the situation has intensified, with majoritarian ideologies being enforced arbitrarily and without legal support. For instance, the creators of movies such as 'Laxmi Bomb'<sup>99</sup> and 'Padmavat' had to issue public apologies and face severe backlash from people who considered the movies offensive toward their religion.<sup>100</sup> Even business houses have faced backlash for their advertisements, some of which were deemed offensive to the religious sentiments of the people in the country.<sup>101</sup> Despite there being no constitutional restriction on such advertisements, mass boycotts in India have prompted companies to issue public apologies and retract their initial advertisements. The Indian state commonly backs these grievances, leaving minority community members, writers, artists, and scholars susceptible to threats of violence and legal proceedings.<sup>102</sup> This culture of intolerance is not an isolated occurrence. In fact, a plethora of round-the-clock television news channels, millions of WhatsApp groups, and innumerable TikTok videos consistently inundate the populace with widespread prejudice and meticulously manufactured 'disinformation'. For instance, the streaming platform Netflix was subjected to a significant backlash in India over a scene in the series 'A Suitable Boy', based on the acclaimed novel by Indian author Vikram Seth. The controversy was sparked by a sequence in which a Muslim man kisses a young Hindu woman at a Hindu temple.<sup>103</sup>

Sedition is not the only area that has generated significant legal debate in recent years; criminal defamation, defined under Section 499 and punishable under Section 500 of the Indian Penal Code, has also drawn considerable attention. The constitutionality of this provision was challenged in the Supreme Court case *Subramanian Swamy v. Union of India*. The Court, while emphasising the importance of the Fundamental Duties that strive to preserve the spirit of 'Constitutional Fraternity', articulated the need to balance an individual's freedom of speech with another's Right to Reputation and

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Judge, while firmly asserting the positive responsibility of the State to protect the rights of alternative voices like Murugan, asserted,

We do believe that a clear distinction has to be carved out between situations involving the right to expression of an individual or a body of individuals as opposed to a routine law and order tension. Even in matters of this nature, the State may endeavour to diffuse the situation but not permit proponents of free speech, authors and artists, as the case may be, to be put under pressure by surrounding circumstances. On the other hand, the endeavour should be to preserve the rights of expression through other modes.

<sup>98</sup>Ananya Vajpeyi, 'The Triumph of the Hindu Right: Freedom of Speech and Religious Repression in Modi's India' 93 *Foreign Affairs* 150.

<sup>99</sup>Quint Entertainment, 'After Controversy, Akshay's 'Laxmmi Bomb' Renamed To 'Laxmii' (*The Quint*, 2020) <[www.thequint.com/entertainment/bollywood/after-controversy-akshay-kumar-laxmmi-bomb-renamed-laxmii](http://www.thequint.com/entertainment/bollywood/after-controversy-akshay-kumar-laxmmi-bomb-renamed-laxmii)>

<sup>100</sup>See J Maria Agnes Sasitha, 'Youth Perception on Hate Crimes, Hate Speeches and Nationalism in Contemporary India' in H Kury and S Redo (eds) *Crime Prevention and Justice in 2030* (Springer, Cham 2021) <[https://doi.org/10.1007/978-3-030-56227-4\\_3](https://doi.org/10.1007/978-3-030-56227-4_3)>

<sup>101</sup>See Ektaa Malik, '#boycottFabIndia: Clothing brand pulls ad after latest campaign sparks row' (*The Indian Express*, 20 October 2021) <<https://indianexpress.com/article/lifestyle/fashion/boycottfabindia-trends-after-clothing-brands-latest-ad-campaign-goes-viral-fabindia-jashn-e-riwaaz-diwali-7579103/>> accessed 20 February 2023.

<sup>102</sup>See C George, *Hate Spin: The Manufacture of Religious Offense and its Threat to Democracy* (MIT Press 2016) 83–110.

<sup>103</sup>#BoycottNetflix had been trending on Twitter in India. A youth leader from the ruling party, Gaurav Tiwari, told reporters that he had complained against it. The complaint accuses Netflix of committing 'deliberate or malicious acts intended to outrage religious feelings'. See Michelle Toh, 'Netflix faces boycott calls in India over 'A Suitable Boy' kissing scene' (*CNN*, 25 November 2020) <<https://edition.cnn.com/2020/11/23/media/a-suitable-boy-netflix-india-intl-hnk/index.html>> accessed 20 February 2023.

Dignity, which fall under the broad expression 'Life and Personal Liberty' in Article 21.<sup>104</sup> In recent months, there has been a striking application of criminal defamation law when the Chief Judicial Magistrate's Court in Surat, invoking these provisions, convicted Congress Member of Parliament Rahul Gandhi and sentenced him to a two-year imprisonment term for making a sarcastic remark at one of his election rallies.<sup>105</sup>

The conviction of Mr Gandhi and its implications for his political career, in light of the Supreme Court judgement in *Lily Thomas v. Union of India*,<sup>106</sup> further highlights the crucial role of the judiciary in upholding the rule of law and ensuring fair and impartial justice. According to the judgment, a Member of Parliament faces immediate disqualification if they receive a sentence of two years imprisonment or more unless the Supreme Court stays the conviction. In Mr Gandhi's case, his disqualification from Parliament membership would be a significant development, given his political prominence and role in challenging the current government. The timing of this conviction and its immediate consequences warrant close scrutiny, as in recent months, Mr Gandhi has played a crucial role in achieving considerable political and ideological consolidation, both domestically and internationally, against the Government on issues related to the gradual erosion of the democratic foundation. When defamation laws are used to stifle dissent, it limits the scope for constructive debates and checks on potential misuse of governmental power.<sup>107</sup> Walker and Weaver, in their article 'Libelocracy', argue that where defamation laws are used as a tool to suppress dissent and silence critics, has detrimental consequences for democratic values, free speech, and public participation.<sup>108</sup>

We argue that in times of challenge or perceived threats to democratic values and institutions, the role of Constitutional Courts becomes even more crucial. Progressive interventions by these courts can offer reassurance and hope that the judiciary remains committed to preserving democratic values and safeguarding citizens' rights. A recent exemplification of this transpired when a two-judge Bench of the Supreme Court overturned a Kerala High Court decision that had upheld the Union Government's revocation of MediaOne News Channel's broadcasting license due to alleged links with an Islamic extremist group and its purported anti-establishment views.<sup>109</sup> Chief Justice DY Chandrachud's judgment, which emphasised the effectiveness of public interest inquiry proceedings over questionable 'sealed cover' disclosures made by the government to the courts ostensibly on national security grounds, strongly criticised the use of terms like 'anti-establishment' to describe the media. It is crucial to highlight that the utilisation of such terminology suggests an underlying expectation for the press to align with the establishment. The Ministry of Information and Broadcasting's decision to deny security

<sup>104</sup>(2016) 7 SCC 221.

<sup>105</sup>See Mahesh Langa and Sandeep Phulkan 'Rahul Gandhi gets two-year jail term in defamation case' (*The Hindu*, 23 March 2023) <<https://www.thehindu.com/news/national/modi-surname-remark-surat-court-convicts-rahul-gandhi-in-defamation-case/article66651933.ece>> accessed 24 July 2023.

<sup>106</sup>(2013) 7 SCC 653.

<sup>107</sup>India's Supreme Court suspended Mr Gandhi's conviction on the 4th of August 2023. Supreme Court noted that the reasons the trial judge gave the maximum punishment of two years to Mr Gandhi 'are without sufficient reasons and grounds'. The Court stayed his two-year jail term till the larger questions in the appeal were decided by the appellate High Court <<https://www.scobserver.in/journal/rahul-gandhis-criminal-defamation-conviction-and-sentencing-unjustified-says-supreme-court/>>.

<sup>108</sup>Walker and Weaver (2014).

<sup>109</sup>*Madhyamam Broadcasting Limited v. Union of India*, 2023 SCC OnLine SC 366 <[https://main.sci.gov.in/supremecourt/2022/6825/6825\\_2022\\_1\\_1501\\_43332\\_Judgement\\_05-Apr-2023.pdf](https://main.sci.gov.in/supremecourt/2022/6825/6825_2022_1_1501_43332_Judgement_05-Apr-2023.pdf)>

clearance to the media channel based on views it is constitutionally authorised to hold contributes to a chilling effect on free speech, especially press freedom. Critiquing government policy cannot, under any reasonable interpretation, be encompassed within the scope of any grounds stipulated in Article 19(2).<sup>110</sup> This intervention by the Supreme Court illustrates that the judiciary can serve as a check and balance against potential government overreach. By meticulously examining the facts and legal aspects of each case, Constitutional Courts can ensure that the delicate balance between freedom of speech and the need for reasonable restrictions is upheld.

### ***A. Regulating the internet: selective oversight?***

The Indian government has faced accusations of selectively regulating the Internet, which is seen as an attempt to control and monitor online activity without transparency and accountability. There have been instances where the government has obstructed access to websites and online content without following due process or providing a coherent explanation for such actions. The central challenge to creative expression in India is not simply religious intolerance, as previously highlighted, but, more fundamentally, the presence of weak institutions that fail to uphold liberal values.

Freedom of expression is primarily negative, as much as it constrains the state's ability to limit expression. However, it also should have an essential positive dimension. One cannot choose to be tolerant along partisan lines. In this aspect, the right requires States to take positive action to protect it. Censorship should not be expedient in any civilised society.<sup>111</sup> Unrestricted expression of diverse ideas is essential for citizens to effectively exercise their political sovereignty, which serves as the foundation for a wide range of political and civil liberties. However, as previously mentioned, India's hate speech and sedition laws are so vague that they infringe on peaceful speech and fail to meet international standards.<sup>112</sup> Instead of protecting minorities and the vulnerable, these laws are often exploited by influential individuals or groups claiming to be offended to silence speech they dislike.<sup>113</sup> Many have accused the ruling party of hypocrisy, pointing out that journalists and publications publishing critical pieces of the Federal government are regularly named 'anti-nationals' and arrested or charged under criminal law. During the COVID-19 crisis, more than 50 journalists were detained for critical coverage.<sup>114</sup>

As already highlighted, India holds an unfortunate record for executing the most internet shutdowns worldwide.<sup>115</sup> This trend reached a critical point with the total communication blockade in Jammu and Kashmir in 2019, implemented just before the revocation of Constitutional Article 370. Alongside constraints on freedom of movement, this action

<sup>110</sup>*Madhyamam Broadcasting Limited v. Union of India*, 2023 SCC OnLine SC 366. <[https://main.sci.gov.in/supremecourt/2022/6825/6825\\_2022\\_1\\_1501\\_43332\\_Judgement\\_05-Apr-2023.pdf](https://main.sci.gov.in/supremecourt/2022/6825/6825_2022_1_1501_43332_Judgement_05-Apr-2023.pdf)>

<sup>111</sup>David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (2nd ed, Hackett Publishing Company 2008) 605.

<sup>112</sup>The Indian government is evidently concerned about the reach of the platforms like Netflix and Amazon Prime, as these platforms perhaps unwittingly have become a space for dissent and critique.

<sup>113</sup>Human Rights Watch, 'World Report 2021: India Events of 2020' <[www.hrw.org/world-report/2021/country-chapters/india](https://www.hrw.org/world-report/2021/country-chapters/india)> accessed 29 July 2022.

<sup>114</sup>*Ibid.*

<sup>115</sup>Nishant Shah, 'Digital Infrastructure, Liminality, and World-Making Via Asia: (Dis) information Blackouts: Politics and Practices of Internet Shutdowns' (2021) 15 *International Journal of Communication* 2693.

severely affected the right to free speech and expression, safeguarded under Article 19. Adding to the complexity, the state, which sanctioned these orders under the 'Telecom suspension rules' and Section 144 of the Code of Criminal Procedure, refrained from making them publicly accessible. Consequently, a writ petition was filed under Article 32 before the Supreme Court, contending that these restrictions made it impossible for the press to function effectively and independently.<sup>116</sup> This petition was clubbed with an individual petition by Ghulam Nabi Azad, fighting for the individual's right to free speech.<sup>117</sup> The ensuing judgment and its underlying rationale offer a compelling insight into the contemporary situation. The court ruled that access to the Internet is integral to upholding and safeguarding the right to free speech and expression under Article 19 of the Constitution. It further asserted that any orders for an internet shutdown must meet the criteria of necessity and proportionality. Therefore, while the right to internet access could be reasonably curtailed in response to a national security threat, an indefinite suspension of internet services would be unlawful.

The primary criticism of this judgment is the lack of an objective definition for 'reasonableness'. The test of reasonability is particularly contentious, as it enables the state to impose arbitrary shutdowns in such situations. The court refrained from lifting the restrictions but instead directed a specially constituted committee to review and implement its directions.<sup>118</sup> Furthermore, it was observed that a perpetual internet shutdown did not meet proportionality standards. The state was obligated to employ the least intrusive method while ensuring safety and public peace. A comprehensive and indefinite internet shutdown would not be the least invasive approach, and several other alternatives were available for the state to consider. At first glance, this judgment appears to protect the freedoms enshrined in Article 19(1)(a); however, a closer examination of the legal provisions exposes the underlying loopholes. The decision itself is disconnected from reality and falls short in its implementation. There was no definitive ruling on the validity of the internet shutdown. The most notable change to the situation was the restoration of broadband services and the gradually reintroducing of social media sites. Nevertheless, most of Jammu and Kashmir still require access to 4G services.<sup>119</sup>

The COVID-19 pandemic brought a complete overhaul in the functioning of society, with everything shifting to the online platform. Despite the situation and dependence of health care and education on the Internet, 4G services were briefly reinstated.<sup>120</sup> The courts have constantly delegated the responsibility of reviewing the orders and situation in Jammu and Kashmir to special committees, consisting of members of the executive, who were responsible for imposing the restrictions in the first place. This violates the principles of natural justice and the doctrine of separation of powers. It grants the authorities in question the ability to judge and analyse their case, raising questions of impartiality and transparency. The numerous internet shutdowns, including those in regions of the

<sup>116</sup>*Anuradha Bhasin v Union of India*, AIR 2020 SC 1308.

<sup>117</sup>*Ghulam Nabi Azad v Union of India and Anr.* W.P. (C) No. 1164/2019 (India).

<sup>118</sup>*Anuradha Bhasin v Union of India*, AIR 2020 SC 1308.

<sup>119</sup>Devdutta Mukhopadhyay and Apar Gupta, 'Jammu & Kashmir Internet Restrictions Cases: A Missed Opportunity to Redefine Fundamental Rights in the Digital Age' (2020) 9 *Indian Journal of Constitutional Law* 207.

<sup>120</sup>Manish Singh, 'India is restoring 4G internet in Jammu and Kashmir after 18 months' (*Tech Crunch*, 5 February 2021) <<https://techcrunch.com/2021/02/05/india-is-restoring-4g-internet-in-jammu-and-kashmir-after-18-months/>> accessed 20 February 2023.

National Capital Territory of Delhi during the farmers' protests in 2021,<sup>121</sup> starkly indicate the crackdown on dissent and active participation. Additionally, the manner and extent of the shutdown highlight that the measures adopted were done with the primary view of curtailing dissent and peaceful protests. Even though the court pointed out that a perpetual internet shutdown was not justified in the given scenario, the revocation of the restrictions did not follow.

In 2022 alone, Internet shutdowns became a significant point of contention in multiple litigations. The Calcutta High Court struck down a suspension order of the Government of West Bengal, which suspended all forms of the Internet for eight days based on intelligence suggesting that it may be used for 'unlawful activities' during the said period.<sup>122</sup> It noted that the order lacked the authority of law and explicitly violated the apex Court's directions in *Anuradha Bhasin* and *PUDR v. Union of India* since it was disproportionate and due to the availability of alternative efficacious remedies.<sup>123</sup> On the other hand, when the Government of Assam issued an internet suspension order for two days to control malpractice during government recruitment examinations, the Gauhati High Court refused to stay the order not to disrupt the examination.<sup>124</sup> It did not examine the case on its merits, instead finding the petition lacking factual support.<sup>125</sup>

In September 2022, the Supreme Court considered a petition that challenged the frequency of internet Suspension Orders under Section 144 of the Code of Criminal Procedure.<sup>126</sup> The petition challenged the constitutionality of internet shutdowns as a whole, arguing that they violated the fundamental rights of citizens, including the right to freedom of speech and expression and the right to carry out trade and commerce. At the preliminary stage, the court issued a notice to the Ministry of Electronics Communication and Information Technology (MEITY) to submit its response and explain the existence (or lack thereof) of a standard protocol governing internet shutdowns.<sup>127</sup> MEITY submitted its response to the court, stating that it had issued guidelines on internet shutdowns in 2017, which required state governments to follow specific procedures before issuing such orders. However, the guidelines were not binding, and there was no standard protocol for internet shutdowns at the national level. The Supreme Court is yet to issue a final judgment on the matter, and the case is still pending.

As previously discussed, Internet shutdowns have become a contentious issue in India, with frequent orders issued by government authorities to suspend Internet services in certain regions or during certain events. These shutdowns have been criticised as a violation of the fundamental right to freedom of speech and expression, as well as for their impact on the economy and the ability of individuals to access essential services. In September 2021, the Supreme Court of India considered a petition challenging the frequency of Internet suspension orders. The petitioners argued that the frequent use of internet

<sup>121</sup>Sonal Rawat and Dritih Ganjoo, 'Farmers Protests in India Lead To Unconstitutional Internet Shutdown' (*Human Rights Pulse*, 22 March 2021) <[www.humanrightspulse.com/mastercontentblog/farmers-protests-in-india-lead-to-unconstitutional-internet-shutdown](http://www.humanrightspulse.com/mastercontentblog/farmers-protests-in-india-lead-to-unconstitutional-internet-shutdown)> accessed 20 February 2023.

<sup>122</sup>*Ashlesh Biradar v State of West Bengal* W.P.A.(P) No. 104/2022 (India).

<sup>123</sup>*People's Union For Civil Liberties v Union of India* (1997) 1 SCC 301.

<sup>124</sup>*Raju Prosad Sarma v State of Assam* W.P.(C) No. 5527/2022 (India).

<sup>125</sup>*ibid*

<sup>126</sup>It was alleged that between 2018 and 2021, State Governments like Gujarat, Rajasthan, Arunachal Pradesh, Assam and West Bengal had issued around fifteen suspension orders. The Software Freedom Law Centre challenged the arbitrary imposition of these shutdowns.

<sup>127</sup>*Software Freedom Law Center, India v State of Arunachal Pradesh & Ors* W.P.(C) No. 314/2022 (India).

shutdowns was unconstitutional and violated the fundamental rights of citizens. The Supreme Court expressed concern over the widespread use of internet shutdowns and observed that they should only be used as a last resort and in situations where there was a clear and present danger to public order. The Court emphasised that the right to access the Internet is a fundamental right and that any suspension of Internet services must be justified by compelling reasons. The Court also directed the government to establish a Review Committee to examine the necessity of internet shutdowns and ensure they are only used in exceptional circumstances. The committee was asked to review all existing orders for internet shutdowns and ensure that they comply with the guidelines laid down by the Court. The Supreme Court's decision was welcomed by civil society organisations and activists who have been campaigning against the frequent use of internet shutdowns in India. The decision is expected to impact how internet shutdowns are used in India significantly. It may help ensure that they are only used in exceptional circumstances and are subject to strict scrutiny by the judiciary.

The Indian government's demands for content removal have been increasingly scrutinised in the global media. However, there is a noticeable lack of data to accurately gauge the extent of such censorship. These internet censorship and user data orders from the Government of India do not originate from a judicial or independent administrative process. Still, rather, they result from the unilateral commands of executive authorities. Under Section 69A of the Information Technology (IT) Act, the Central Government is granted the power to instruct intermediaries, which include Internet Service Providers (ISPs), to block online content based on a variety of reasons as long as the government deems it 'necessary or expedient'. These reasons can encompass national security, public order, and the prevention of cognisable offences. However, the term 'necessity' implies that the restrictions on rights should not exceed what is strictly required to ensure the full exercise and scope of these rights. Anything beyond this could be construed as an abusive exercise of state power. The 2009 Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules were enacted under this legislation. This process is purely executive-driven: a committee comprised of secretaries from various ministries reviews blocking requests from multiple government departments and ultimately instructs intermediaries to block the specified content. The concerns surrounding such a non-transparent content removal mechanism have never been more pronounced. A notable example is the case involving the blocking of Dowrycalculator.com. In this case, the Delhi High Court granted the petitioner, Tanul Thakur, a post-decisional hearing and a copy of the blocking order related to his blocked website, thus highlighting the issues with an opaque content removal mechanism.<sup>128</sup>

## ***B. Regulations of intermediaries, publishers and OTT platforms***

Social media companies and organisations have been caught up in a contentious quagmire. This is because social media companies carry both advantages and disadvantages

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<sup>128</sup>W.P.(C) 13037/2019 (Delhi). Another indicator of intolerance is requests by the government to social media platforms to take down materials. IT Rules of 2021 (formally known as the Information Technology (Guidelines for Intermediaries and Digital Media Code of Ethics) Rules, 2021) Section 16 allows for content to be blocked in emergencies. Using this provision Ministry of Information and Broadcasting filed takedown requests to prevent access to a BBC documentary series titled India: The Modi Question that investigates prime minister Narendra Modi's policies and actions toward India's Muslim minority.

with them. Benefits include disseminating various information and opinions, better access to news and current affairs, and multiple platforms to raise awareness. In contrast, disadvantages include, among other things, the threat of hate speech, propaganda, cyber-crimes and fake news. The question of balancing these two concerns has grappled countries across the world. In India, we see that the authorities concerned have intervened in the operation of intermediaries and have attempted to impose regulations that threaten the dissemination of free speech in the country. This part of the paper looks into the gradual increase in these restrictions imposed on intermediaries.

One of the first significant cases which brought under scrutiny the restrictions placed on the dissemination of speech was the case of *Shreya Singhal v Union of India*.<sup>129</sup> The Supreme Court, in this case, held that Section 66A of the Information Technology Act (2000) ('IT Act') was unconstitutional because speech could not be curtailed on grounds such as annoyance, obstruction, or danger.<sup>130</sup> The vague grounds would have a chilling effect on the freedom of expression and would not come under any restrictions under Article 19(2) of the Constitution. Most importantly, the court, in this case, read down the meaning of 'actual knowledge' as well as 'obtaining knowledge' under the Information Technology (Intermediary) Rules, 2011 ('IT Rules').<sup>131</sup> It removed the obligation on intermediaries to take down and monitor content and stated that intermediaries would not be liable to take down content unless directed by courts and other authorities. However, it upheld the constitutionality of Section 69A of the IT Act, which gives power to the government to require intermediaries to take down specific content on the grounds of threat to security and public order. In another case,<sup>132</sup> it was held that 'plurality of opinion' was a prerequisite in forming informed judgements. This would not be possible if a monopoly controlled the medium of dissemination of information, either the state or private organisations.

These cases show the importance of a free regime for platforms that disseminate information and opinions. Excessive state control and regulation over social media platforms and intermediaries would inevitably curtail the freedom of speech. Further, in the case of *Myspace Inc v Super Cassettes*, it was held that even a 'general knowledge' of 'ubiquitous infringement' would not impose a duty on the intermediary to monitor and regulate the service.<sup>133</sup> Over time, it was established that the due diligence needed from intermediaries would be limited to publishing periodic updates of their policies to users and taking down content upon receiving 'actual knowledge' by court order, as laid down in *Shreya Singhal*.<sup>134</sup> The courts have also ensured timely intervention to regulate specific content posted on intermediary platforms. For instance, in the case of *Sabbu Mathew George v Union of India*,<sup>135</sup> the court directed search engines to filter out content relating to prenatal sex determination activities. Section 79 of the IT Act, 2000 also provides safe harbour provisions for intermediaries as long as they comply with the requirements. It provides intermediaries that are 'passive', i.e. if they do not initiate the transmission of

<sup>129</sup>*Shreya Singhal v Union of India* AIR 2015 SC 1523.

<sup>130</sup>Information Technology Act, 2000, s 66A (India).

<sup>131</sup>Information Technology (Intermediary) Rules, 2011, 314E (India).

<sup>132</sup>*Secretary, Ministry of Information and Broadcasting, Government of India and others v Cricket Association of Bengal and others* (1995) 2 SCC 161.

<sup>133</sup>*Myspace Inc v Super Cassettes* (2017) 236 DLT 478 (DB).

<sup>134</sup>*Amazon Seller Services Pvt. Ltd. v Amway India Enterprises Pvt. Ltd* (2020) 267 DLT 228 (DB).

<sup>135</sup>*Sabbu Mathew George v Union of India* W.P. (C) No. 341/2008 (India).

information or messages, select the receiver or modify the message in question, they would be exempt from liability for the content posted or transmitted via their platform. Thus, judicial opinions and statutes initially reflected minimal intervention and surveillance by intermediaries.

The Information Technology (Digital Media and Ethics) Rules, 2021 ('New Rules') have changed this dominant position.<sup>136</sup> Firstly, the Rules differentiate between social media companies and significant social media companies ('SSMC'). SSMCs are larger and have a more substantial number of users. The New Rules impose additional obligations on these entities.<sup>137</sup> For instance, Rule 4(4) lists due diligence requirements, such as proactive filtering of content that displays child sexual abuse and rape. This inevitably contradicts *Shreya Singhal* as it provides for internal monitoring and taking down content by intermediaries instead of the courts or legal authorities. It poses the risk of excessive intervention as the discretion is left entirely in the hands of the intermediaries and sets in place an undemocratic censorship mechanism.

Further, it is difficult to accurately ascertain what type of content is being filtered out, as automated filters are unlikely to distinguish between different kinds of material. For instance, the filter might be able to flag explicit child pornography but might not be able to differentiate between that and a scholarly paper on the topic. There also exists a possibility that intermediaries would become overly cautious and take down all content without adequate review and deliberation because of the underlying apprehension of being exempted from safe harbour protection.

The Rules also brought in increased scrutiny and grievance redressal mechanisms. This indirectly gives the government and individuals more power to direct intermediaries to take down content within thirty-six hours. The Rules lay down provisions for identifying the first originator of a message, bringing end-to-end encryption to an end in India. This regime not only interferes with the privacy of individuals but also creates a chilling effect on people's freedom of speech as it creates a system of pre-censorship by instilling apprehension in people.<sup>138</sup> For instance, Twitter and the government have been conflicted ever since the introduction of these rules. Several tweets during the farmers' protests were directed to be taken down because the Indian government felt they were a threat to the security and public order in the country.<sup>139</sup>

Rule (9) of the Rules imposes obligations on online publishers to adhere to the ethics code in the management and establishes a three-tier grievance redressal mechanism. Level I is self-regulation by publishers, II includes self-regulation by self-regulating bodies of the publishers, and III provides an oversight mechanism by the central government. This rule has been challenged in the Bombay High Court by the news

<sup>136</sup>Information Technology (Digital Media and Ethics) Rules, 2021, 139(E) (India).

<sup>137</sup>Another indicator of intolerance is the 'selective' requests by the government to social media platforms to take down materials under IT Rules of 2021 Section 16 allows for content to be blocked in emergencies. Using this provision Ministry of Information and Broadcasting filed takedown requests to prevent access to a BBC documentary series titled India: The Modi Question that investigates prime minister Narendra Modi's policies and actions toward India's Muslim minority.

<sup>138</sup>Internet Freedom Foundation, 'Explainer: Why India's new rules for social media, news sites are anti-democratic, unconstitutional' (*Scroll.in*, 27 February 2021) <<https://scroll.in/article/988105/explainer-how-indias-new-digital-media-rules-are-anti-democratic-and-unconstitutional>> accessed 20 February 2023.

<sup>139</sup>Rishi Iyengar, 'Twitter is Stuck between a Rock and a Hard Place in India' (*CNN Business*, 10 February 2021) <<https://edition.cnn.com/2021/02/09/tech/twitter-india-government-farmer-protests/index.html>> accessed 20 February 2023.

publisher – Leaflet<sup>140</sup> because it violates Article 14, 19(1)(a), (g) of the Constitution. In this case, the court opined that Rule 9 threatened Article 19 as the code of ethics in the New Rules referred to compliance with other statutes, i.e. the Press Council Act, 1978 and the Cable Television Networks (Regulation) Act, 1955, both these acts provide an independent mechanism for violating any rights, which would put the publisher of online content at risk if their opinion contradicted the inter-governmental body. In their judgement, the bench emphasised the importance of dissent in a democracy and held that this rule would inevitably create a chilling effect on this right.

The Rules also bring over-the-top (OTT) service providers under their ambit who have previously never been under the purview of any regulation. According to the Indian government, one purported aim of these rules is to create a level playing field between traditional TV and film producers and their newer, digital counterparts. As per the regulations, OTT platforms are now required to categorise their content based on age groups, in addition to implementing a three-tier grievance redressal mechanism, much like their counterparts in online publishing. While these guidelines are presented as an attempt towards self-regulation, they subtly enhance the government's power to oversee the functioning of these platforms. For the first time, OTT platforms find themselves within the sphere of governmental oversight, potentially threatening the unique creative niche they have developed over the years, unrestricted by traditional regulations. These unfolding developments emphasise that rules and regulations pertaining to content management are at risk of encroaching upon the freedom of speech and expression, potentially inhibiting creativity and innovation. However, we must also acknowledge the necessity for a certain degree of regulation in the digital space. The challenge lies in finding the right balance – a regulatory framework that can mitigate the risks associated with an entirely unregulated digital sphere without stifling the vibrancy and dynamism that characterises OTT platforms and similar digital intermediaries.

#### IV. Conclusion: no way forward?

India's rich cultural diversity has long been a point of pride, as it represents a nation where people of different backgrounds coexist peacefully. The celebration of pluralism is essential for maintaining the social fabric of a country as diverse as India. However, the rise of sectarian politics and ethnic nationalism has shifted this perception, with some groups seeking to establish a sense of cultural superiority. Appeasement politics has been argued to have contributed to a sense of grievance among certain sections of society, particularly Hindus, who feel that they have been subjected to injustices. This feeling has been exploited by some political factions, which use it to propagate their agenda and further divide the nation.

India should strive to be an inclusive nation that embraces diversity and promotes harmony among its citizens. A fundamentalist or theocratic state would not only undermine India's democratic values but also jeopardise its social cohesion and progress. The Constitution of India guarantees fundamental rights, such as the freedom of speech and

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<sup>140</sup>Devika Sharma, 'People Would Be Starved of Liberty of Thought if ... Know Why Bombay HC Partly Stayed the IT Rules, 2021' (SCC Online, 16 August, 2021) <<https://enalsar.informaticsglobal.com:2167/blog/post/2021/08/16/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-4/>> accessed 20 February 2023.

expression and the right to dissent, which form the basis of a vibrant democracy. The suppression of dissent is a serious concern, as it threatens these fundamental rights and weakens the foundation of democracy. In a democratic society, it is crucial for citizens to have the ability to question and criticise their government and hold those in power accountable. A vibrant public discourse and open debate are essential for a healthy democracy, as they allow for the exchange of ideas and the identification of better solutions to societal problems.

Indian culture may be ancient and richly varied, but its political unity is rare and recent. Only in the twentieth century, with the struggle for independence from British rule, the idea of a unified Indian nation gained widespread acceptance. Hence in India, various interests must monitor the government, given the intricate, plural, and contradictory aspirations of a socially divided, hierarchical society. The propagation of extreme religious nationalism suggests religious-nationalist groups' desire to infringe upon government power. Thus, enforcing certain ideologies by religious-nationalist groups manifests their desire for power-sharing and taking control over people's lives in a non-democratic manner. This progress is undoubtedly challenging for a society based on secular-liberal democratic values. Unfortunately, the communalisation of politics in India is a product of the democratic system prone to degenerative cycles where normative content and ideological conviction are sacrificed for survival in political office.

The democratic edifice of India's Constitution has faced serious existential threats by autocratic legalism,<sup>141</sup> where carefully crafted legislative and executive processes dismantle core constitutional foundations.<sup>142</sup> The judiciary, the last sentinels of the constitutional ethos, has been subjected to incessant onslaughts, which have had the potential of destabilising the very independence that informs Rule of Law governance through a system of checks and balances. During the COVID-19 pandemic, the expansion of bureaucratic power leading to the normalisation of state and non-state violence and the consequent marginalisation of political accountability through étatisation was abundantly demonstrated.<sup>143</sup>

The ever-deepening fault lines of mistrust between the formal governance mechanisms and the fourth branch institutions like the media were clearly illustrated during the Supreme Court's pandemic-time hearings about the migrant labour crisis allegedly caused by the sudden announcement of a nationwide lockdown. Arguing that those migrants were fleeing the capital due to 'fake news', Solicitor General of India Tushar Mehta requested the Supreme Court to pass an order to 'prevent fake and inaccurate reporting, whether intended or not, either by electronic, print or social media which will cause panic in the society'.<sup>144</sup> Although the court did not oblige, it observed: 'We do not intend to interfere with the free discussion about the pandemic, but direct the media to refer to and publish the official version about the developments'.<sup>145</sup> It is submitted that in situations where institutions like the media, which are meant to demand

<sup>141</sup>Kim Lane Schepelle, 'Autocratic Legalism' (2019) 85(2) University of Chicago Law Review 545.

<sup>142</sup>Madhav Khosla, 'The Possibility of Modern India' (2021) Global Intellectual History <<https://doi.org/10.1080/23801883.2021.1962582>> accessed 19 February 2023. Khosla in this paper also points out how the rise of an unregulated non-legal force often resulting in extra-legal violence has been on the rise since the ascent of the Modi Government in 2014.

<sup>143</sup>Amit Prakash, 'Shadow of the Pandemic and the Beleaguered Liberal-Democratic Script in India' (2021) 20(2) India Review 104.

<sup>144</sup>*Alakh Alok Srivastava v Union of India* W.P. (Civil) No. 468/2020.

<sup>145</sup>*Ibid.*

accountability from the government, are directed to adhere to the official accounts of events, autocratic legalism takes over and results in the death of dissent in a democracy.<sup>146</sup>

The problem in India is not that the Constitution does not guarantee free speech but that it is easy to silence free speech because of a combination of specific laws,<sup>147</sup> an inefficient justice system, and a lack of jurisprudential consistency. India's legal system is infamous for being clogged and overwhelmed, leading to lengthy and expensive delays; it can discourage even the innocent from fighting for their right to free speech. The government's grip on the judiciary and the consequent appointments to various committees post-retirement serve as obstacles to the functioning of a genuinely independent judiciary.<sup>148</sup> Further, despite the stance taken by courts for protecting creative expression, there has been a lowered sense of tolerance in Indian society. Measures such as boycotts, social media propaganda and threats, and negative publicity, have become standard tools in increasing pressure on content creators and restricting free speech. If religious extremism grows, it will drag India's democracy down. It challenges the secular constitutional order on which the Indian Republic was founded. It is essential to protect and promote dissenting voices, uphold the rule of law, and ensure the independence of democratic institutions, but this would require a commitment from the government, civil society, media, and citizens to work towards strengthening the democratic process and safeguarding the fundamental rights and liberties of all individuals. The meaning and scope of freedom of speech and expression in India will continue to be tested as the country faces new challenges and technology evolves. The government needs to recognise the importance of protecting the right to free speech and expression, even if the views expressed may be unpopular or critical of the government. Without these protections, the democratic process is at risk of becoming distorted, and the health of the democracy is compromised.

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<sup>146</sup>Shameek Sen and Shouvik Kumar Guha, 'The Struggles of the Indian Constitution in the Face of Autocratic Legalism: Constitutionalism at Crossroads?' (2022) 50(3) Federal Law Review 275.

<sup>147</sup>Several sections in the Indian Penal Code are widely used and abused to ban works of art, films, and books. See Human Rights Watch, 'Stifling Dissent: The Criminalization of Peaceful Expression in India' (24 May 2016) <[www.hrw.org/report/2016/05/25/stifling-dissent/criminalization-peaceful-expression-india](http://www.hrw.org/report/2016/05/25/stifling-dissent/criminalization-peaceful-expression-india)> accessed 20 February 2023.

<sup>148</sup>Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 Law & Ethics of Human Rights 49.