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Reserved on : 29.07.2025
Pronounced on : 24.09.2025

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF SEPTEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.7405 OF 2025 (GM - RES)

BETWEEN:

X CORP.
A COMPANY INCORPORATED UNDER
THE LAWS OF THE UNITED STATES OF AMERICA
HAVING ITS HEADQUARTERS AT:
865, FM 1209, BUILDING 2,
BASTROP, TEXAS - 78602, USA

HAVING ITS PHYSICAL CONTACT
ADDRESS IN INDIA AT:
8TH FLOOR, THE ESTATE,
121 DICKENSON ROAD,
BENGALURU – 560 042.

REPRESENTED BY ITS
AUTHORIZED SIGNATORY,
MR. ZAUR GAJIEV, OF LEGAL AGE.

... PETITIONER

(BY SRI K.G.RAGHAVAN, SR.ADVOCATE A/W
SRI MANU P.KULKARNI, ADVOCATE)

AND:

1 . UNION OF INDIA
REPRESENTED BY SECRETARY,
MINISTRY OF LAW AND JUSTICE
4TH FLOOR, A-WING,
SHASTRI BHAWAN
NEW DELHI – 110 001.

2 . MINISTRY OF ELECTRONICS AND
INFORMATION TECHNOLOGY
REPRESENTED BY ITS SECRETARY
ELECTRONICS NIKETAN,
6, CGO COMPLEX, LODHI ROAD
NEW DELHI – 110 003.

3 . MINISTRY OF HOME AFFAIRS
REPRESENTED BY ITS SECRETARY,
NORTH BLOCK,
NEW DELHI – 110 001.

4 . MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
REPRESENTED BY ITS SECRETARY,
NORTH BLOCK,
NEW DELHI – 110 001.

5 . MINISTRY OF DEFENCE
REPRESENTED BY ITS SECRETARY,
ROOM NO.305 - 'B' WING,
SENA BHAWAN,
NEW DELHI – 110 011.

6 . MINISTRY OF RAILWAYS
REPRESENTED BY ITS SECRETARY,
256-A, RAISINA ROAD,
RAJPATH AREA,
CENTRAL SECRETARIAT,

NEW DELHI – 110 001.

7. MINISTRY OF HEAVY INDUSTRIES
REPRESENTED BY ITS SECRETARY
UDYOG BHAWAN, RAFI MARG,
NEW DELHI – 110 011.

8. MINISTRY OF RURAL DEVELOPMENT
REPRESENTED BY ITS SECRETARY
(DEPARTMENT OF RURAL DEVELOPMENT)
KRISHI BHAVAN, DR.RAJENDRA PRASAD ROAD
NEW DELHI – 110 001.

... RESPONDENTS

(BY SRI TUSHAR MEHTA, SOLICITOR GENERAL OF INDIA A/W
SRI KANU AGRAWAL, SRI GAURANG BHUSHAN
SRI AMAN MEHTA, ADVOCATES;
SRI K.ARVIND KAMATH, ADDL.SOLICITOR
GENERAL OF INDIA A/W.
SRI M.N.KUMAR, CGSPC FOR THE RESPONDENTS
DR.ADITYA SONDHI, SR.ADVOCATE A/W
SRI APAR GUPTA, DR.MALAVIKA PRASAD,
MS.SPOORTHI COTHA, SRI A.S.VISHWAJITH AND
SRI NAIBEDYA DASH, ADVOCATES FOR THE
INTERVENING APPLICANTS)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT DECLARING THAT SECTION 79(3)(b) OF THE INFORMATION TECHNOLOGY ACT, 2000 (IT ACT) DOES NOT CONFER AUTHORITY TO ISSUE INFORMATION BLOCKING ORDERS UNDER THE IT ACT, AND FURTHER DECLARE THAT INFORMATION BLOCKING ORDERS CAN ONLY BE ISSUED UNDER SECTION 69A OF THE IT ACT READ WITH

THE INFORMATION TECHNOLOGY (PROCEDURE AND SAFEGUARDS FOR BLOCKING FOR ACCESS OF INFORMATION BY PUBLIC) RULES, 2009 (BLOCKING RULES) AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 29.07.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

PROLOGUE:

In the ever-evolving landscape of technology and communication, the law is constantly tested against new frontiers of information exchange. What once began with postal riders and the printing press, has through centuries of innovation, culminated in the boundless digital world of today. At the heart of this transformation lies the tension, as old as the governance itself. The balance between liberty and regulation, between freedom to speak and authority to restrain, is what this Court is called upon to answer in its sharpest form.

The present petition does not merely pit a Corporation against the State, it raises questions that go to the very heart of our Constitutional democracy in this digital age. The internet, once a novelty, the great amplifier of voices, has become an echo chamber of discord, as misinformation, incitement and instability has found unbridled passage. The law, therefore, must walk a delicate tight rope. The liberty and restraint must go hand in hand between innovation and regulation, stance the present writ petition.

The petitioner/X Corp, erstwhile twitter, is at the doors of this Court seeking –

(a) a declaration that Section 79(3)(b) of the Information Technology Act, 2000 ('IT Act' for short) does not confer authority to issue information blocking orders under the IT Act and further declaration that information blocking orders can only be issued under Section 69A of the IT Act read with rules framed thereunder.

(b) a declaration that Rule 3(1)(d) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 is ultra vires the IT Act or unconstitutional. In the alternative it also seeks a prayer to read down Rule 3(1)(d) by declaring that Rule 3(1)(d) does not independently authorize the respondents to issue information blocking orders.

(c) a declaration that censorship portal ((Sahyog Portal) is ultra vires the IT Act and thereby unconstitutional.

All other incidental prayers are sought for quashment of following notifications:

i. Respondent No. 2 - Ministry of Electronics and Information Technology's Office Memorandum dated 31.10.2023 bearing No. 1(4)/2020-CLES-1. (Annexure-C)

ii. Respondent No. 3 - Ministry of Home Affairs' notification dated 13.03.2024 bearing F. No. 22003/21/2019-I4C. (Annexure-D)

iii. Respondent No. 5 - Ministry of Defence's notification dated 24.10.2024 bearing F. No. A/34514/MI-10. (Annexure-E)

iv. Respondent No. 6 - Ministry of Railways' notification dated 24.12.2024 bearing F. No. 2024/PR/13/63. (Annexure-F)

v. Respondent No. 4 - Ministry of Finance's notification dated 06.01.2025 bearing F. No. N-24015/3/2024-Computer Cell. (Annexure-G)

vi. Respondent No. 7 - Ministry of Heavy Industries' office order dated 09.11.2023 bearing No. 11-B-12025/28/ 2014-IT CELL. (Annexure-G1)

vii. Respondent No. 8 - Ministry of Rural Development's draft notification dated 05.03.2025. (Annexure-G2)

viii. any actions taken pursuant thereto."

2. *Sans* details, facts in brief, germane are as follows:

2.1. **The petitioner, X Corp, formerly known to the world as Twitter, now reconstituted under a new appellation, is a social media Company based out of United States of America having headquarters in Texas.** Twitter was founded in 2006 and becomes a popular platform for microblogging and real time information sharing. In April, 2022 twitter was acquired, by a another Company and re-christened as **'X Corp'**. It is claimed to be having a physical contact address in India, at Bengaluru. It is before the Court seeking the afore-noted/quoted prayers.

2.2. On 09-06-2000 the Indian Parliament enacts the Information Technology Act, 2000 ('IT Act' for short). In terms of Section 79 of the said Act, certain network service providers had exemption, a safe harbour from liability for third party content. In 2009, the Parliament enacts Information Technology (Amendment) Act, 2008 ('IT Amendment Act, 2008' for short), which added Section 69A to the original enactment of 2000, and substituted Section 79 to the current version to expand the exemption, a safe harbour from liability. The claim is that the current version of

Section 79 also does not empower the State to issue blocking orders. Section 69, according to the averment in the petition, was the sole mechanism for the Government of India to issue information blocking order, under Section 69A through a designated officer.

2.3. The provisions of IT Act and blocking orders issued to the intermediary become the subject matter of a challenge before the Apex Court in the case of **SHREYA SINGHAL v. UNION OF INDIA**[1]. The Apex Court, in terms of the aforesaid judgment, held Section 66A to be unconstitutional and Section 69A to be constitutional and Section 79 was read down.

2.4. After to the judgment of the Apex Court, there was a change in the Rules. **New Rules were promulgated by the Union of India viz., the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules, 2021' for short).** The contention is that Rule 3(1)(d) is substantially different from the Information Technology (Intermediaries Guidelines) Rules, 2011 ('IT Rules,

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[1] (2015)5 SCC 1

2011' for short), which was interpreted in **SHREYA SINGHAL** *supra* and Rule 3(1)(d) is beyond what is envisaged under Article 19(2) of the Constitution of India. Certain notifications are also called in question by which those Authorities have issued take down orders, on the score that the content on platform is unlawful. It is therefore, the contention that Rule 3(1)(d) of the I.T.Rules, 2021, which is now invoked to pass plethora of orders goes beyond the scope permissible under Article 19(2) of the Constitution of India and Section 69A or even 79 of the Act.

2.5. Relying on Rule 3(1)(d), the following orders are passed:

"x. Relying on Rule 3(1)(d), the impugned notifications authorise:

a. The Ministry of Defense to issue takedown notices "to intermediaries in relation to any information which is prohibited under any law for the time being in force";

b. The Ministry of Railways to issue takedown notices "to the intermediaries in relation to any information which is prohibited under any law for the time being in force pertaining to the Ministry of Railways and its attached offices";

c. The Ministry of Finance to issue takedown orders to intermediaries under Section 79(3)(b) and Rule 3(1)(d);

d. Police officers in West Bengal to issue "content takedown orders" to intermediaries for any "unlawful Content/Information" - "we are pleased to submit the attached list of authorized officers designated for issuing content takedown orders under Section 79(3)(b) of the

Information Technology Act, 2000"; - the "following officers are notified as Authorised officers, to issue content take down orders";

e. Police officers in Goa to issue "take down notice to appropriate intermediary, if any online content on social media platform violates the law or any act" - designating numerous officers "for issuing take down notice to appropriate intermediary, if any online content on social media platform violates the law or any act, under section 79(3)(b) of the Information Technology Act, 2000";

f. Police officers in Delhi to issue "take down notice" to intermediaries for any "unlawful" information;

g. Police officers in Punjab to issue takedown orders to intermediaries to "disable access to material" for any "unlawful content and information";

h. Police officers in Bihar to issue "take down notice to appropriate intermediary, if any online content on social media platform violates the law or any act";

i. Police officers in Haryana to issue "take down notice" to intermediaries for any "unlawful" information;

j. Police officers in Karnataka to issue orders for "removal of Unlawful Content" and "disabling/taking down of content" and "to issue notice to an intermediary to disable access / take down of any unlawful material";

k. Police officers in Kerala to issue "take down notice to the appropriate intermediary if any online content violates the acts /law administered by the appropriate government" and "to issue notice to an intermediary to disable access/take down of any unlawful material";

l. Police officers in Nagaland to issue "take down notice to the appropriate intermediary if any online content violates the acts/law administered by the appropriate government" and "to issue notice to an intermediary to disable access/take down of any unlawful material";

m. Police officers in Odisha to issue "takedown notice to the appropriate intermediary if any online content violates the

law or any act";

n. Police officers in Jaipur to issue takedown orders to intermediaries for any "unlawful act which is prohibited under any law for the time being in force";

o. Police officers in Sikkim to issue "notice to the intermediary to take down unlawful content on electronic media";

p. Police officers in Tamil Nadu "to issue take down notices to the intermediaries under Section 79(3)(b) of the Information Technology Act, 2000";

q. Police officers in Tripura to issue "takedown notice to the intermediaries" or any "unlawful content/information";

r. Police officers in Manipur to issue takedown orders to intermediaries for any "unlawful content/ information/activities";

s. Police officers in Ladakh to issue "takedown/ removal notice to the concerned intermediaries" and "to regulate the activities of the intermediaries";

t. Police officers in Assam to issue takedown orders to intermediaries "for the purpose of Section 79(3)(b)";

u. Police officers in Jharkhand to issue takedown orders to intermediaries for any "unlawful" information;

v. Police officers in Jammu and Kashmir to issue takedown orders to intermediaries for any "unlawful content/ information/ activities" under Section 79(3)(b) and Rule 3(1)(d);

w. Police officers in Meghalaya to issue "takedown notice to the appropriate intermediary if any online content violates the law or any act";

x. Police officers in Mizoram to "notify intermediaries to remove or disable access to unlawful content hosted on their systems";

y. Police officers in Andhra Pradesh to "issue take-down notices" to intermediaries for any "unlawful content" and

"for taking down objectionable/ unlawful content available online";

z. Police officers in Maharashtra to issue takedown notices to intermediaries for "the removal or disabling of access" to any "unlawful" information;

aa. Police officers in Andaman and Nicobar to "issue notice to an intermediary to disable access / takedown of any unlawful materials", to issue "unlawful content / information takedown notice to the intermediaries", and "[i]f the intermediary fails to do so in an expeditious manner, it shall lose its exemption from liability and the appropriate government or its agency may proceed with penal provisions";

bb. Police officers in Telangana to issue takedown orders to intermediaries "directing them to remove or disable access" to any "unlawful" information;

cc. Police officers in Chhattisgarh to issue takedown notices to intermediaries for any "unlawful" information "which is prohibited under any law for the time being in force";

dd. Police officers in Puducherry to issue "content Take down orders" to intermediaries under Section 79(3)(b) and Rule 3(1)(d);

ee. Police officers in Himachal Pradesh to issue orders to intermediaries "for removing unlawful material";

ff. Police officers in Gujarat to "issue content take down orders to intermediaries" for "any information which is prohibited under any law for the time being in force";

gg. Police officers in Arunachal Pradesh to issue takedown orders to intermediaries under Section 79(3)(b) and Rule 3(1)(d);

hh. The Ministry of Health and Family Welfare to issue takedown notices under Section 79(3)(b) and Rule 3(1)(d);

ii. The Ministry of Rural Development to issue takedown notices "to intermediaries in relation to any information

which is prohibited under any law for the time being in force pertaining to this Department";

jj. The Ministry of Heavy Industries "to issue takedown notice to the appropriate intermediary, if any online content violate the act / law administered by this Ministry". The Ministry of Heavy Industries issued this notification pursuant to MeitY's Memorandum and that "a sample template provided by MeitY is enclosed" attaching the Template Blocking Order discussed in paragraphs 5 and 58 of this Writ Petition – i.e., MeitY's "[MODEL FORMAT FOR TAKEDOWN NOTICE TO INTERMEDIARIES]." MeitY designed this template and instructed all Central and State agencies to use it to send information blocking orders for any "unlawful information.

xi. Rule 3(1)(d) goes well beyond what is permissible under Article 19(2). It empowers countless executive officers to censor information on grounds that are not enumerated in Article 19(2).

xii. Consequently, Rule 3(1)(d) is unconstitutional."

The afore-noted take down notices are, what has driven the petitioner to this Court, seeking the afore-quoted prayers.

3. Heard Sri K.G. Raghavan, learned senior counsel appearing for the petitioner, Sri Tushar Mehta, learned Solicitor General of India appearing for the respondents, Sri K Arvind Kamath, learned Additional Solicitor General of India and Dr. Aditya Sondhi, learned Senior Counsel appearing for the intervening applicants.

SUBMISSIONS - THESIS:

PETITIONER'S:

4.1. The learned senior counsel Sri K.G. Raghavan appearing for the petitioner would vehemently contend that the entire issue is squarely covered by the judgment of the Apex Court in the case of **SHREYA SINGHAL** *supra*. There need not be further deliberation on the issue, as the Apex Court clearly covers all the alleged acts of the Union of India, in communicating take down orders or curtailing the right to free speech. He would contend that Section 79(3)(b) of the IT Act was never envisaged as an empowering provision, but it was always an exemption provision. An exemption provision cannot empower information blocking of unlawful act, as found in Section 79(3)(b) and it must be read as referring only to those 3 circumstances found in Section 79(3)(b) – (i) a court order; (ii) an order under Section 69A or (iii) an order under a statute that specifically empowers information blocking, the 2009 blocking Rules.

4.2. The learned senior counsel would submit that there is no dispute that the Government can communicate with the intermediary that, some online content in its view may be unlawful,

but that does not authorize any one of the thousands of authorized Executive Officers or Police Officers in every State/Union territory to direct the intermediary to block information from public access, failing which it would lose the safe harbour. He would contend that it would be an incorrect and unconstitutional reading of Section 79, that has led to severe censorship of lawful information, news, journalism and discussion of matters of public interest by the Indian public. Section 79 was enacted 25 years ago and Section 79(3)(b) comes into effect 16 years ago. Section 79(3)(b) now has given a cue to several officers to direct blocking of content from public access on the platform of the intermediary, like the petitioner.

4.3. He would submit that identical challenge was projected before the High Court of Bombay in the case of **KUNAL KAMRA v. UNION OF INDIA**[2]**,** where two Judges of the Bombay High Court differ and the third Judge accepts, the fact check unit of the Central Government, as beyond the scope of Article 19(2).

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[2] 2024 SCC OnLine Bom 3025

4.4. The learned senior counsel submits that the action of the State is beyond what is permissible under Article 19(2) of the Constitution of India and, therefore, it becomes arbitrary, as obtaining under Article 14 of the Constitution of India. It is his submission that right to free speech is undoubtedly a right of the platform and the platform is not responsible for any of the content that is placed before it, as it is only an intermediary. The content creators are third parties; they upload it on the platform and the medium through which it is circulated is the platform. Therefore, it is his submission that it is ununderstandable as to how the Union of India, is wanting to create a stumbling block to the intermediary. A take down order by all and sundry, is a straight breach, of Article 14 of the Constitution of India, as the decision of it being an unlawful act or unlawful information is not according to law, but according to, the whim and fancy of a nodal officer created under several notifications impugned in the petition.

4.5. Therefore, according to the Nodal officer, if the information that is uploaded in the platform is unlawful, it has to be taken down, failing which the effect would be that the petitioner

would lose the safe harbour. If it loses the safe harbour, it would become open to prosecution. Therefore, the interpretation of Section 3(1)(d), which runs counter to the IT Act, has given right to illegal actions through the Nodal officer. The learned senior counsel would vehemently contend that, Rule 3(1)(d) is therefore, unconstitutional and has to be struck down as such, as it runs foul of the findings of the Apex Court in the case of **SHREYA SINGHAL** and the judgment of the Division Bench of Bombay High Court in **KUNAL KAMRA** *supra*. He would seek the prayers that are sought to be granted.

IMPLEADING APPLICANTS/INTERVENERS:

5.1. Certain impleading applicants or intervening applicants have filed certain applications. Though those applications were not formally allowed, they were permitted to make their submissions, as their submissions were that they wanted to assist the petitioner.

5.2. Learned senior counsel Dr. Aditya Sondhi appearing for the applicants has contended that the right of the content creator was taken away by the stroke of a pen. It is their fundamental right

to freedom of speech, as envisaged under Article 19 of the Constitution. If not the platforms freedom of speech, it is the content creator freedom of speech that is now threatened, by the Nodal officer. There is no parameter as to which information is lawful. There are no parameters under which they would function and direct take down orders. Therefore, it becomes unconstitutional, as it falls foul of Article 19 of the Constitution of India. He would also support the prayers that are sought by the petitioner.

THE SOLICITOR GENERAL OF INDIA:

ANTI-THESIS:

6.1. Contrariwise, the learned Solicitor General of India Sri Tushar Mehta would refute every one of the submissions of the learned senior counsel for the petitioner, and the learned senior counsel for the intervening applicants. He would submit that today the internet scenario is completely different. At the time when the judgment in **SHREYA SINGHAL** was rendered by the Apex Court, the Indian network subscriber base was 25.159 crores or 25 crores,

to put straight. Since 2015, the internet subscriber base has grown exponentially. It is now at a staggering 98 crores. Therefore, what was 25 crores in 2014, is 98 crores today. The wireless data usage per subscriber, has reached 20.6 GB. He would, therefore, submit the scenario in which, the judgment in the case of **SHREYA SINGHAL** was rendered and the scenario in which the present issue stands, is entirely different, *qua* the internet subscriber base in the *lis,* apart from all other aspects to be taken note of.

6.2. The learned Solicitor General would contend that Article 19(2) was not in the form that it is seen today. It underwent an amendment, by way of first amendment to the Constitution of India, in terms of a judgment rendered by the Apex Court in the case of **ROMESH THAPPAR v. STATE OF MADRAS**[3]. The provincial parliament or the constituent assembly, which was in place till the Union Parliament, came about, had elaborate deliberations of great men of the time, which are all found in the constituent assembly debates. It was then decided to insert the words "in the interest of" and elaborating the words "public order".

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[3] AIR 1950 SC 124

In the interest of public order, free speech can be curtailed. This was brought under the ambit of reasonable restrictions. He would take this Court through a plethora of judgments of, 5 Judge or 7 Judge benches of the Apex Court interpreting Article 19(2) of the Constitution, post its amendment, to contend that they were all considering what would be the purport of interest *qua* the public order or maintenance of public order.

6.3. He would submit that the judgment in the case of **SHREYA SINGHAL** was rendered following the judgment of American Supreme Court, in the case of **RENO v. AMERICAN CIVIL LIBERTIES UNION**[4]. He would contend that the judgment in the case of **RENO** *supra* itself, is refused to be followed in the subsequent judgment, by the American Supreme Court. He would contend that the free speech doctrine, which the petitioner projects, is not accepted even in the United States of America, or in many other democracies of the world. The entire globe is grappling with the menace of the posts on social media, that every now and then, crop up on every issue. He would contend that the petitioner, an

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[4] 521 US 844 (1997)

intermediary, has a safe harbour under Section 79. The other provisions of Section 79 i.e., 79(3) would clearly indicate, if they do not take down the contents that are unlawful, they would lose the safe harbour. Therefore, it is a choice, if they want to continue to get the benefit of safe harbour, they better well take down, the unlawful content.

6.4. He would contend that, the petitioner is an American Company who does not have a registered office in India and does not operate in India. The American Company, cannot come before the constitutional Court of this country, and contend that it has a right as envisaged under Article 19 of the Constitution. Article 19 is citizen centric. It is not available to a foreign entity. Therefore, no breach of Article 19 can be projected before this Court by a foreign entity. Knowing that full well, the petitioner has set up intervening applicants to project that their fundamental right is put to jeopardy.

6.5. He would further contend that the law that is followed by the Apex Court in the case of **SHREYA SINGHAL**, as submitted, is an American scenario interpreting American jurisprudence. The

Constitution Benches of the Apex Court right from 1950 have clearly held that the country, or the countries jurisprudence, should not be dependent upon American jurisprudence; the two are entirely different. Merely because India has borrowed fundamental rights, from the bill of rights of the American Constitution, it does not mean that India is governed by what American Courts would lay down. He would take this Court through plethora of judgments of the Apex Court to buttress his submission, that the Apex Court itself has opined, that the American concepts should not be imported to be relied on by Indian Courts.

6.6. Insofar as Nodal officers directing take down orders are concerned, the learned Solicitor General would defend every order contending that they are Nodal officers appointed under the statute and a duty is cast on them under the statute to act. Therefore, none of the take down orders can be held to be illegal, if they would touch any unlawful information or unlawful act. What is unlawful is already defined under the statute. It cannot be at the whim and fancy of the Nodal Officers but only upon already determined law by way of Statutes that taking down orders are passed, which could be

defaming the Nation showing the Nation in a poor state and propensity to create unrest or any content which would bring down the integrity of the Nation. He would contend, who is the person who is seeking justice at the doors of this Court; it is an American Company. An Indian Company cannot go and knock at the American Supreme Court, asking for free speech contrary to their laws. Rule of law must prevail over the rights of citizens, as even freedom of speech, is reasonably restricted.

7.1. Joining issue, as a rejoinder, the learned senior counsel for the petitioner would contend that, may be the freedom under Article 19 of the Constitution is not available to a foreign Company, as he would accept that it is citizen centric. But, would contend that Article 14 would pervade through every action of the State. If Article 14 pervades through every action of the State, such actions of the State must be in conformity, with the tenets of Article 14, meaning which that, it should not be arbitrary. The action now challenged is, on the face of it arbitrary, as the taking down orders are done at the whim and fancy of officers.

7.2. The learned senior counsel would submit that whether American jurisprudence has developed after **RENO** or **RENO** is not followed later, is of no consequence. The Apex Court, in the case of **SHREYA SINGHAL,** has considered all that. What is binding is the judgment of the Apex Court in the case of **SHREYA SINGHAL** and not what the American Supreme Court holds in **RENO** or its aftermath. The learned senior counsel would further add that Section 69A, which is affirmed by the Apex Court, is a complete code by self. It has detailed procedure as to how a blocking order should be passed. The procedure is envisaged under the 2009 Rules. Those Rules are still in subsistence, as they are blocking orders.

7.3. The blocking is permitted under the Blocking Rules. Section 79 therefore, must be read along with Section 69A, as Section 69A is affirmed in the case of **SHREYA SINGHAL** and Section 79 was directed to be read with Section 69A. It was saved from declaring unconstitutional. He would therefore, contend that following the judgment of **SHREYA SINGHAL** and **KUNAL KAMRA,** this Court has to strike down Rule 3(1)(d), which arrogates to itself

a power that is not envisaged under the Act, as it is settled principle of law that the Rules cannot traverse beyond the Act.

8.1. The learned senior counsel Dr. Aditya Sondhi appearing for the intervening applicants would, by way of rejoinder submissions, support the contentions of the learned senior counsel Sri K.G. Raghavan, but would contend that Article 19 if not available to the petitioner, it is undoubtedly available to the intervening applicants, as they are engaging in protected speech under Article 19(1)(a) and have the freedom to practice any profession under Article 19(1)(g) of the Constitution of India. The only permissible ground to restrict protected freedom of speech is under Article 19(2) of the Constitution and such restrictions must be laid down by law and ought to be proportionate.

8.2. The learned senior counsel would contend, the circumvention of Section 69A and the use of Section 79 of the IT Act to issue take down requests to the intermediary is, on the face of it, contrary to the judgment in the case of **SHREYA SINGHAL,** as Section 69A has procedural safeguards, but Section 79 has no

procedural safe guard. Therefore, it falls foul of Article 14 of the Constitution of India, as without procedural safeguard, it becomes an arbitrary action.

9. Having bestowed my anxious consideration upon the submissions made by the respective learned senior counsel and have perused the material on record. In furtherance whereof, the following issues emerge for an answer:

(i) Whether the march of human civilization – from the days of *yore* to the present *digital age* – has ever witnessed information and communication in an unregulated state; or whether regulation has been its constant companion across epochs?

(ii) Whether the regimes of regulation that prevailed in earlier times continue to subsist, both in the local context of our polity and in the global order of nations?

(iii) Whether the right to free speech, as enshrined under Article 19(1)(a) of the Constitution of India, is an unbridled entitlement, or whether it stands hedged by the canopy of reasonable restrictions as embodied in Article 19(2)?

(iv) Whether the jurisprudential edifice of the United States of America can be transplanted, without reservation or adaptation, into the soil of Indian constitutional thought?

(v) Whether there has been a discernible shift in American judicial philosophy in the aftermath of

the celebrated decision in RENO v. ACLU, and if so, to what effect upon comparative jurisprudence?

(vi) What were the Rules that fell for consideration before this Court in SHREYA SINGHAL v. UNION OF INDIA, and whether, in the contemporary context the Rules now occupying the field are materially distinct, thus demanding a fresh interpretative lens?

(vii) Whether the present challenge to the Rules, or their constitutionality, is vitiated by alleged vagueness, or whether the Rules withstand the test of clarity and definiteness in law?

(viii) Whether the fundamental rights guaranteed under Part-III of the Constitution are to be regarded as essentially citizen-centric, or whether they extend in their sweep to all persons?

(ix) Whether the Sahyog Portal, envisaged under the Information Technology Act is ultra vires the parent enactment, or whether it stands as a legitimate instrument in aid of statutory purpose?

(x) In the contemporary digital milieu, where algorithms increasingly shape the flow of information, its autonomy eclipse the guiding hand of human agency - myth or reality?

(xi) Whether the menace of social media needs to be curbed and regulated?

CONSIDERATION - SYNTHESIS:

The questions raised in this petition, cannot be considered in isolation. They lie at a confluence of history, technology and constitutionalism. Therefore, to appreciate the foundation of the submissions – free speech in this digital epoch, it is imperative to cast a backward glance at the genenis, journey of information and communication.

ISSUE NO.1:

(i) Whether the march of human civilization – from the days of *yore* to the present *digital age* – has ever witnessed information and communication in an unregulated state; or whether regulation has been its constant companion across epochs?

THE HISTORICAL DEVELOPMENT OF INFORMATION AND COMMUNICATION:

10.1. **The controversy before this Court finds its roots in the eternal triad of information, communication and creation and in the modern era, the platform that gives breath to the creator's voice – the intermediary. To truly grasp its**

essence, one must voyage back, through the grand tapestry of history, tracing the arc of humanity's endeavour to connect, to converse and to convey thought. From the whisper of voices in antiquity to the pulsating networks of internet, communication has been the beating heart of civilization varying and improving from time to time.

FROM MESSENGERS TO THE POSTAL AGE:

10.2. The earliest chronicles of organized communication takes us to the 6th Century BC, when the Persian Empire of Cyrus with its mounted couriers and roadside post houses wove together distant lands through relays of speed and endurance. Rome, in its march from city to the State of Empire constructed an intricate web of military and administrative exchanges, binding together the farthest frontiers in its dominion. Commerce in the middle ages with its caravans and trading fleets demanded correspondence that leapt across borders, planting the seeds of international trade. This long march of progress culminated in postal reforms of 1874 and 1875 whereupon the General Postal Union, subsequently renamed as the Universal Postal Union, was born, erecting for the first time

an international framework – a global covenant of correspondence. This is on the international arena.

10.3. India too, traced her own tale. The roots of the postal system here, reached back to 1764 to 1766, yet communication had flourished in her soil from the Mauryan age itself, through countless centuries of innovation. In the dawn of civilization, it was the spoken word that reigned supreme – knowledge flowing not from ink, but from memory, tradition and discourse. The invention of printing press in the 15th century shattered this dominion, scattering words across continents, as print began to travel farther than voice had ever dared.

THE AGE OF TELEGRAPH, RADIO AND TELEVISION:

10.4. The 19th century heralded the telegraph, shrinking distances, compressing time. The 20th century added radio and television. Thus, began the era of newspapers which were being printed almost daily starting from the 1700s, where people were able to track every day events due to daily distribution of newspapers. This led to electronic telegraph system developed in

the early 1800s. The telegraph enabled people to send their messages using Morse code. At the time when telegraph was picking up to become indispensable, telephone comes to be invented by Alexander Graham Bell in 19th Century and making long distance voice conversation possible, a revolutionary step in communication. From the telephone, began invention of radio and television, which made the dissemination of information faster than the previous modes of communication.

THE LANGUAGE OF CODE AND LIGHT:

10.5. It is not that digital communication was not available before the internet. The printing telegraph was a method of digital communication which required a pair of wires. Morse telegraph was the most reliable of the telegraph system, as the Morse code allowed an operator to press a key to send a signal over the telegraph wires. This goes on upto 1901, when codes were changed and messages were allowed to be typed out in advance and transmitted through machine significantly, faster than an operator could type. When things stood thus, people were getting acquainted to the development of technology from the ancient days towards

modern days internet, technology comes to the fore. A semaphore system was brought in place. The system was a method of visual signaling, usually by means of flags or lights.

THE BIRTH OF THE INTERNET:

10.6. Then arose a creation, unlike any before: The ARPANET. Conceived in the crucible of military research by the United States Department of Defence, it was a network designed not to fall even if fracture. Based upon this network progress happens, linking of Universities and Laboratories in the 1970's and the 1980's. As a result of which, nurturing of brotherhood of scientists sharing knowledge across the invisible threads of innovation. From this cradle emerged the TCP/IP protocol crafted by Vinton Cerf and Robert Kahn which emerged as a true "network of networks" and with it began the digital age. Soon after, history records that a single marketer sending the first unsolicited message across ARPANET, inaugurated what we now know as digital marketing – the prelude to an era where information would cascade boundlessly across the globe.

10.7. On the 1st day of January, 1983, a quiet yet a monumental transformation took place. ARPANET embraced wholly the TCP/IP protocol, an Act that has since been immortalized as the official birth of the modern internet. With that moment, the myriad pulses of information found a common rhythm and mankind stepped into a new epoch, the dawn of global digital communication.

THE COMING OF DOMAINS:

10.8. Yet the internet, though alive, did not have a language of its own, a means to make its vastness comprehensible to the human mind. Between 1983 to 1985, this language took its form in the Domain Name System (DNS). Thus were born the first familiar sign spots: .com, org. and .edu making the usage of internet more user friendly. These suffixes made the addresses intelligible to ordinary users. In the annals of history, the very first to bear such name was symbolics.com, a public domain. As these domains flourished, ARPANET once a proud pioneer, slowly dimmed and was at last de-commissioned, passing its torch to the modern internet.

THE WORLD WIDE WEB – WWW:

10.9. While the foundations were being laid, another dream stirred the heart of visionaries, the World Wide Web, bound by delicate threads of hyperlinks. In the year 1991, the world wide web was released to public, enabling people to share and access documents and websites through a standardized system. A browser by name Mosaic browser comes to be introduced as the first web browser in United States of America. Just a handful of years later, Google emerged in the year 1998. Wikipedia emerges in 2001, a boundless library, authored by hands of many. Yet even then, the social media, as we know now, remained unborn waiting for its own hour to arrive.

THE RISE OF FACEBOOK:

10.10. In 2004, out of the dormitories of Harvard, emerged Facebook, a social network, conceived for students, but distinct for the world. If Wikipedia, had democratized knowledge, Facebook democratized connection.

THE REVOLUTION OF YOUTUBE:

10.11. A year later, in 2005 came another marvel – YouTube, the great amphi-theater of the digital age. For the first age, the moving image once confined to cinema halls and television sets, became a shared experience across borders, cultures, languages.

THE AGE OF APPS - WHATSAPP, INSTAGRAM AD SNAPCHAT:

10.12. The swift ascent of Facebook and YouTube paved the way to newer modes of expression. Between 2008 and 2011 WhatsApp, Instagram and Snapchat emerged, the platforms for instant messaging, visual story telling and fleeting moments. Even then, the devices in our hands had not yet reached their modern brilliance. The true smart phone revolution was still afoot, but with every leap forward, came the inevitable counterpart: **THE HAND OF LAW.** Just as Kings and Parliaments of the old regulated the messenger, the post, the press, so too did Governments. The boundless power of the communication since ages, has never been beyond governance. The communication has always been the

harbinger of freedom, and the subject of order. It has been regulated from the days of yore to the present day.

INTERNET IN INDIA:

EDUCATIONAL RESEARCH NETWORK – ERNET:

10.13. In the global narrative, the dawn of the internet in India can be rightly traced to the year 1986. The seed was sown through ERNET, a visionary collaboration between the Department of Electronics of the Government of India and the United Nations Development Programme. The ERNET gave rise to the internet, which was brought to India by the Videsh Sanchar Nigam Limited, VSNL which brought internet in India. Since then, the usage of internet, taking cue from the technological developments in India, has evolved. Since those early days, the trajectory of growth has mirrored the march of technological advancement across the globe. Today, in a nation of 140 crores, no fewer than 97 crores stand as subscribers to the internet. Only a slender fraction remains untouched, comprise largely of children and those yet to come of

age. Thus, the sweep of the internet which has encircled the globe has weaved itself into the fabric of daily life.

10.14. The rise of this medium, heralded by speed of light carrying information, ideas and commerce across continents has not been without the steadying hand of regulation from time to time, the State has felt compelled to step in, to guide to safeguard and balance the forces unleashed by its digital revolution. It is therefore, apposite to examine whether the tide of information and communication, in any nation, particularly of the United States of America has left the flow unchecked or whether it, too was subject to the rigours of law. **In the light of the preceding analysis, what would unmistakably emerge is, every nation has grappled in its own way with the challenges posed by this new medium and each State has thought it fit to erect a regulatory framework befitting its circumstances. I, therefore, answer the issue holding that development of information and communication, from time to time, nation to nation, have always been regulated through regulatory frameworks.**

ISSUE NO.2:

(ii) Whether the regimes of regulation that prevailed in earlier times continue to subsist, both in the local context of our polity and in the global order of nations?

REGULATORY REGIME IN UNITED STATES OF AMERICA:

11.1. The story of communication in the United States begins not with the internet, but with a humble post – postal services introduced in 1792. It was regulated by the **Postal Service Act of 1792,** which laid the first foundation of regulated communication in the young republic that was born on 1775. This became necessary, as between 1755 to 1775, Benjamin Franklin was overseeing the colonial postal services and in 1775 after the American independence, the courier services were introduced in the newly formed 13 Colonies of United States of America. In 1787, the US Constitution gave Congress, the power to create official post offices and post roads. What began with letters soon advanced to Telegraph and in 1866, the **Telegraph Act** was enacted to address inefficiencies and monopolistic practices of the dominance of western union. The Act, thus, was brought into foster competition

and drive away monopoly. **This is the second regime of regulation**.

11.2. As the communication advanced, so too did the framework of law. Therefore, to control the communication or the mode of communication through telegraph and telephone, the **Mann-Elkins Act, 1910** was brought into force. This was the amendment to **Interstate Commerce Act, 1887**, to regulate transport and communication including telegraph, telephone and cable companies sending messages from one State to another. The Communication Act was brought into effect in the United States of America in 1934 called the **Communications Act, 1934** establishing a Federal Communications Commission, an independent United States agency responsible for the regulation of interstate and foreign communication by radio, television, wire and now satellite. This was an umbrella, under which **Radio Act, 1912** and 1927 were also included under the Act. Therefore, **the Communications Act, 1934** regulated, what was communicated to interstates and foreign countries by radio, television, wire or satellite, which clearly indicates that any mode of communication or

spread of information was never left unregulated in the United States of America.

11.3. By the 1970s, the march of regulation turned towards the citizen's right to privacy. **The Privacy Act of 1974** placed limits on federal agencies ensuring that personal data could not be collected without consent, save for narrow exceptions, such as, census and statistical purposes. For the first time now, United States formally recognized individual's right to privacy as against the State. A decade later, comes in a **Cable Communications Policy Act, 1984.** The Act established a national policy for regulation of cable communication, televisions by federal States or local authorities.

11.4. The watershed moment came in 1996, when President Bill Clinton signed into law, the Telecommunications Act, the most sweeping overhaul of communication since 1934. The Act was conceived in an era of rapid technological innovation, its purpose was to loosen restrictions, foster competition and connect classrooms to the internet. Yet with few freedoms, came new

anxieties. The spread of obscene and indecent content online. With this comes the **Communications Decency Act**, criminalizing display of offensive material to minors while shielding online intermediaries from liability for third party content. Its fate, however, was tested in **RENO** where, the Supreme Court struck down portions of the Communications Decency Act, as being violative of its first amendment.

11.5. Then comes the Uniting and Strengthening America by Providing Appropriate Tools to Intercept Terrorism Act, **2001** (**USA PATRIOT Act)**, which instilled surveillance and was applicable to any mode of communication. The core purpose was to deter terrorism, expand law enforcement investigatory abilities. In 2006, Internet Freedom and Non-discrimination Act comes in, by amending the age-old Sherman Act, 1890 and the Clayton Act, of 1914. In 2010, an FCC open internet order to regulate broad band and ISP services comes in, which is replaced by FCC Open Internet Order 2015 and is further replaced by subsequent orders.

11.6. In 2023, the United States brings in **Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN-IT) Act** to eliminate abusive and rampant misuse of interactive Technologies. The Act brings in, a federal frame work in prevention of online sexual exploitation of children. The United States later regulates Broadband and ISPs, by notifying an Open Internet Order of 2024, which sought to control exploitation by immobilizing technological deepfakes on websites and networks. The Open Internet Order ceased to exist on account of a judgment rendered by the American Court. Later, what is in place in 2025, is the **Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks, 2025** (**TAKE IT DOWN Act)**, encompassing under its canopy, all social media networks or Apps like Facebook, Instagram and the petitioner/X Corp, as they are all public facing online platforms.

11.7. The purport of 'TAKE IT DOWN Act' is plain to shield dignity and to prevent exploitation in the digital public square and to criminalize non-consensual intimate imagery and seeking to govern the ungoverned expanse of cyberspace, as law and morality

could not be exiled. **Thus, from the Postal Services Act of 1792 to the TAKE IT DOWN Act, of 2025, the history of the United States demonstrates that no mode of communication, whether post, telegraph, telephone, radio, television, cable or internet – has ever been left wholly unregulated**.

11.8. Other nations, particularly, within the European Union have similarly erected their own regime to confront misinformation and malicious online content, yet, **I have dwelt at length upon the American experience for the petitioner before this Court is a Corporation incorporated in the United States, which now seeks to take refuge under the banner of unbridled freedom, the record however, reveals a different story – that even in its home land the spread of information has never been free from the tempering hand of law and notwithstanding the same, it is wanting to cry foul of the regulatory regime in this country.**

THE INDIAN SCENARIO – REGULATORY REGIMES:

11.9. India, it must be said, was never a laggard in the field of regulation. At every stage, in the march of communication, whether through print, radio, telegraph till the digital media, the State has kept a watchful eye, ensuring that spread of information was never left to a free for all. For clarity, I deem it appropriate to divide this narrative category-wise:

HISTORY OF THE REGULATIONS GOVERNING PRINT MEDIA:

- 1799 - Censorship of Press Act, 1799.
- 1823 - Licensing Regulations, 1823.
- 1835 - Press Act or Metcalfe Act, 1835
- 1857 - Licensing Act, 1857.
- 1867 - The Press and Registration of Books (PRB) Act, 1867
- 1878 - Vernacular Press Act,1878
- 1908 - Newspaper (Incitement to Offence) Act, 1908
- 1910 - Indian Press Act, 1910
- 1931 - Indian Press (Emergency Powers) Act, 1931
- 1956 - Registration of Newspapers (Central) Rules, 1956

CURRENT ACTS AND REGULATIONS GOVERNING PRINT MEDIA:

- Press and Registration of Periodicals (PRP) Act, 2023
- Press Council of India Act, 1978
- Central Media Accreditation Guidelines, 2022

In the broadcasting communication, the following were the regulatory regimes:

HISTORY OF THE RADIO AND THE REGULATORY FRAMEWORK:

- 1930 - Indian Broadcasting System – Established by the Government
- 1936 – Renamed as All India Radio (AIR)
- 1937 - Central News Organization(CNO)
- 1990 - Prasar Bharati Act, 1990.

Terrestrial radio services can be divided into two main categories, namely, AM Radio and FM Radio.

In the communication sector, they are specifically regulated by several enactments from time to time. They are –

REGULATORY FRAMEWORK OF THE COMMUNICATIONS SECTOR:

- The Indian Telegraph Act, 1885 (The Telegraph Act)
- The Indian Wireless Telegraphy Act, 1933 (The Wireless Act)
- National Telecom Policy 1994
- The Telecom Regulatory Authority of India (TRAI) Act 1997 (the TRAI Act).
- New Telecom Policy, 1999
- National Telecom Policy, 2012
- National Digital Communications Policy 2018 (the NDCP 2018)
- Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016.

With the growth of television, media, OTT etc. the regulatory regime is as follows:

REGULATORY FRAMEWORK:

- The Cinematograph Act, 1952.
- Cable Television Network Rules, 1994 (Programme Code, Advertising Code)
- Cable Television Networks Act, 1995 (Cable TV Act)
- Guidelines for Uplinking and Downlinking of Satellite Television Channels in India, 2022
- Draft Broadcasting Services (Regulations) Bill, 2023.

The present case does not turn upon these particular enactments, yet they have been recited to illustrate a larger truth; that in India, as elsewhere, the flow of information has never been left unregulated. From the press of the colonial era, to the digital platforms today, there has always existed a framework of law to temper liberty with responsibility, freedom with accountability. I thus, answer the second issue, holding that regulatory regimes subsisted, are subsisting both locally and globally. **There is no nation that has left flow of information, wholly unregulated**.

ISSUE NO.3:

(iii) Whether the right to free speech, as enshrined under Article 19(1)(a) of the Constitution of India, is an unbridled entitlement, or whether it stands hedged by the canopy of reasonable restrictions as embodied in Article 19(2)?

ARTICLE 19 – CONSTITUTION OF INDIA:

12.1. **We are a nation governed under the majesty of Constitution of India, and within its framework lie the guarantees that secure liberty to the citizen, yet those guarantees are not absolute, they are accompanied by the tempering hand of reasonable restriction**. The foremost of these liberties are housed in Article 19. Article 19 of the Constitution of India reads as follows: -

> "**19. Protection of certain rights regarding freedom of speech, etc**.—(1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;
> (*b*) to assemble peaceably and without arms;
> (*c*) to form associations or unions or co-operative societies;
> (*d*) to move freely throughout the territory of India;
> (*e*) to reside and settle in any part of the territory of India; and

(*f*) * * *

(*g*) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (*d*) and (*e*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Thus, Article 19 has 6 distinct protections. Article 19(1)(a) guarantees freedom of speech and expression. The other articles guarantee different freedoms, they are not germane for the issue in the *lis*. Article 19(2) imposes a limitation upon all the 6 freedoms, even to the fulcrum of the present *lis*, the freedom of speech and expression. It becomes necessary to notice that Article 19(2) was not always cast in the language we know today. At the dawn of republic, on 26th November 1949, when the Constitution was adopted and on 26th January 1950, when it came into force, the provision stood in this form.

ORIGINAL (PRE-AMENDMENT) TEXT:

"(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which

> offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

In contrast, the current text, as amended by the Constitution (First Amendment) Act, 1951 reads as follows:

POST-AMENDMENT TEXT:

> "(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

The transformation is evident, from a narrow catalogue of exceptions the scope was broadened to include **sovereignty and integrity, friendly relations with foreign states, public order and incitement to offence, while also framing the power of the State within the doctrine of reasonable restriction.**

PRELUDE TO THE FIRST AMENDMENT:

12.2. The shift was not incidental. It was born of judicial interpretation, in the first 15 months of the Constitution's working. The Statement of Objects and Reasons appended to the Constitution (First Amendment) Bill, 1951 records this context:

"**STATEMENT OF OBJECTS AND REASONS**

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. The citizen's right to practise any profession or to carry on any occupation, trade or business conferred by article 19(1)(g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of general public". While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to article 19(6). Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

The main objects of this Bill are, accordingly to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. the opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may arise.

It is laid down in article 46 as a directive principle of State policy that the State should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, it is

> proposed that article 15(3) should be suitably amplified. Certain amendments in respect of articles dealing with the convening and proroguing of the sessions of Parliament have been found necessary and are also incorporated in this Bill. So also a few minor amendments in respect of articles 341, 342, 372 and 376."
>
> (Emphasis supplied)

Thus, the statement makes it clear that the amendment was propelled by the judgments of the Apex Court. I, therefore, deem it appropriate to notice the judicial backdrop to the aforesaid amendment. The immediate catalyst lay in two constitution bench judgments of the Apex Court in the cases of **ROMESH THAPPAR** *supra* and **BRIJ BHUSHAN v. STATE OF DELHI**[5]. In the decision of **ROMESH THAPPAR** *supra* the Apex Court holds as follows:

> **"12. We are therefore of the opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.** It follows that Section 9(1-A) which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under clause (2), and is therefore void and unconstitutional."
>
> (Emphasis supplied)

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[5] 1950 SCR 605

12.3. In the backdrop of the judgments, on 12th May 1951, Former Prime Minister Pandit Jawaharlal Nehru moved the First Amendment Bill in the Parliament seeking to amend Article 19(2) of the Constitution of India and thereby harmonize liberty, with order. The constituent assembly debates of the day is germane to be noticed.

"**THE DEBATES OVER THE FIRST AMENDMENT SOUGHT IN THE CONSTITUENT ASSEMBLY:**

> "The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom."

98. Originally, Art. 19(1)(a) guaranteed the fundamental right to speech and expression subject to exceptions set out in Art. 19(2), which originally read 19(2) as under:

> "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

99. **The Constitution (First Amendment) Bill sought to introduce three new exceptions in 19(2), covering public order, incitement to an offence and friendly relations with foreign states; it also sought to remove the qualifiers relating to undermining the security of the state or tending to its overthrow.** The amending clause in

the Bill as originally introduced in Parliament read as follows (words in boldface indicate the major changes sought to be made):

> "3. Amendment of article 19 and validation of certain laws. –
>
> (1) In article 19 of the Constitution – (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to have been originally enacted in the following form, namely: –
>
> "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, contempt of court, defamation or incitement to an offence."

100. It may be noted that since the first elections under the new Constitution were not held until the winter of 1951, it was the Provisional Parliament which debated the First Amendment Bill in May–June 1951. Thus, it was the very same body, sitting as the Constituent Assembly, which had written the Constitution. Shri Nehru, opens the debate as under:

> "The Prime Minister and Minister of External Affairs (Shri Jawaharlal Nehru): We have come up here, naturally because after the experience of a year and a half or so; we have learned much. We have found out some, if I may say so, errors in drafting or in possible interpretations to be put on what we had drafted. That is but natural. And the House will also remember that when this matter of the Constitution was being considered in the Constituent Assembly, a clause or an article was proposed, that within a space of five years any changes in the Constitution should be relatively easy, that the normal procedure laid down need not be followed, but an easy procedure should be followed. Why? Because it was thought—and if I may say so, rightly thought—that after a little while many little things may come to our notice which did not come up in the course of the debate, and we could rectify them after that experience, with relative ease,

so that after this preliminary experience, the final shape may be more final and there would be no necessity for extensive amendments. However, that particular clause unfortunately—if I may say so with due respect—was dropped out. Nevertheless, so far as this House is concerned, it can proceed in the manner provided by the Constitution to amend it, if this House so chooses."

101. Dr. Ambedkar, also expressed his views as under:

"Dr. Ambedkar:

Detention laws are something quite different. That is in a nutshell (Shri Kamath: What a poor nut!) the case for amending article 19 of the Constitution. It is next important to consider why the Supreme Court and the various State High Courts have come to this conclusion. Why is it that they say that Parliament has no right to make a law in the interests of public order or in the interests of preventing incitement to offences? That is a very important question and it is a question about which I am personally considerably disturbed. For this purpose I must refer briefly to the rules of construction which have been adopted by the Supreme Court as well as by the various State High Courts, but before I go to that I would like to refer very briefly to the rules of construction which have been adopted by the Supreme Court of the United States—and I think it is very relevant because the House will remember that if there is any Constitution in the world of a country of any importance which contains Fundamental Rights it is the Constitution of the United States and those of us who were entrusted with the task of framing our own Constitution had incessantly to refer to the Constitution of the United States in framing our own Fundamental Rights. There are many Members, I know who are familiar with the Constitution of the United States. How does the Constitution of the United States read? I think hon. Members will realize that apparently there is one difference between the Constitution of India and the Constitution of the United States so far as the Fundamental Right are concerned. The Fundamental Rights in the Constitution of the United States are stated in an absolute form the Constitution does not lay down any limitation on the Fundamental Rights set out in the Constitution. Our Constitution, on the

other hand not only lays down the Fundamental Rights but it also enumerates the limitations on the Fundamental Rights and yet what is the result? It is an important question to consider.

The result is this that the Fundamental Rights in the United States although in the text of the Constitution they appear as absolute so far as judicial interpretations are concerned they are riddled with the limitations of one sort or another. Nobody can in the United States claim that his Fundamental Rights are absolute and that the Congress has no power to limit them or to regulate them. In our country I find that we are in the midst of a paradox: we have Fundamental Rights, we have limitations imposed upon them and yet the Supreme Court and the High Court say — You shall not have any further limitations upon the Fundamental Rights.

Now comes the question: how does this result come to be? And here I come to the canons of interpretation which have been adopted in the United States and by the Supreme Court and High Courts in our country. As hon. Members who are familiar with the growth of the Constitution of the United States will know, although the Constitution of the United States is a bundle of bare bones, the United States Supreme Court has clothed it with flesh and muscle so that it has got the firmness of body and agility which a human being requires. How has this happened? This has happened because the U.S. Supreme court, although it was the first court in the world which was called upon to reconcile the Fundamental Rights of the citizen with the interests of the State, after a great deal of pioneering work came upon two fixed principles of the constitution. One is that every State possesses what is called in the United States —police power a doctrine which means that the State has a right to protect itself whether the Constitution gives such a right expressly or not. The —police power is an inherent thing just as our Courts have inherent powers, in certain circumstances to do justice. It is as a result of this doctrine of —police power that the United States Supreme Court has been able to evolve certain limitations upon the Fundamental Rights of the United States citizens. The second doctrine which the United States Supreme Court developed and which it applied for purposes of interpreting the Constitution is known as the doctrine of —implied powers. According to the decisions of the Supreme Court if any particular authority

has been given a certain power then it must be presumed that it has got other powers to fulfill that power and if those powers are not given expressly then the Supreme Court of the United States is prepared to presume that they are implied in the Constitution. Now, what is the attitude which the Supreme Court has taken in this country in interpreting our Constitution? The Supreme Court has said that they will not recognize the doctrine of the —police power which is prevalent in the United States.

I do not wish to take the time of the House in reading the judgments of the Supreme Court but those who are interested in it may find this matter dealt with in the case known as Chiranjit Lal Chowdhuri versus the Union of India otherwise known as the Sholapur Mills case. You find the judgment of Mr. Justice Mukherjea expressly rejecting this doctrine which in text of the judgment has occured on page 15. They say they will not apply this doctrine. The reason why the Judges of the Supreme Court do not propose to adopt the doctrine of —police power is this, so far as I am able to understand. That the Constitution has enumerated specially the heads in clause (2) under which Parliament can lay restriction on the Fundamental Right as to the freedom of speech and expression, and that as Parliament has expressly laid down the heads under which these limitations should exist, they them- selves now will not add to any of the heads which are mentioned in clause (2). That is in sum and substance the construction that you will find in the case of Thapar's judgment which was delivered by Mr. Justice Patanjali Sastri. He has said that they will not enlarge it and therefore as the Constitution itself does not authorizes Parliament to make a law for purposes of public order according to them. Parliament has no capacity to do it and they will not invest Parliament with any such authority. In the case of the Press Emergency Laws also they have said the same thing—that in clause (2) there is no head permitting Parliament to make any limitations in the interests of preventing incitement to an offence. Since section 4 of the Press (Emergency Powers) Act provides for punishment for incitement to the commitment of any offence, Parliament has no authority to do it. That is the general line of argument which the Supreme Court Judges have adopted in interpreting the Constitution. With regard to the

doctrine of implied powers they have also more or less taken the same view personally myself I take the view that there is ample scope for recognizing the doctrine of implied powers and I think our Directive Principles are nothing else than a series of provisions which contain implicitly in them the doctrine of implied powers. I find that these Directive Principles are made a matter of fun both by judges and by lawyers appearing before them. Article 37 of the Directive Principles has been made a butt of ridicule. Article 37 says that these Directives are not justifiable, that no one would be entitled to file a suit against the Government for the purpose of what we call specific performance. I admit that is so. But I respectfully submit that that is not the way of disposing of the Directive Principles?

The Directive Principles are nothing but obligations imposed by the Constitution upon the various Governments in this country—that they shall do certain things although, it says that if they fail to do them no one will have the right to call for specific performance. But the fact that there are obligations of the Government, I think, stands unimpeached. My submission in this that if these are the obligations of the State how can the State discharge these obligations unless it undertakes legislation to give effect to them? And if the Statement of obligations necessitates the imposition and enactment of laws it is obvious that all these fundamental principles of Directive Policy imply that the State with regard to the matters mentioned in these Directive Principles has the implied power to make a law. Therefore my contention is this that so far as the doctrine of implied powers is concerned there is ample authority in the Constitution itself to permit Parliament to make legislation, although it will not be specifically covered by the provisions contained in the Part on Fundamental Rights.

Dr. S.P. Mookerjee (West Bengal): Even though they may become inconsistent with the provisions of the Constitution?

Dr.Ambedkar : That is a different matter. Shri Kamath : That is a vital matter.

Dr. Ambedkar: What I am saying is this that the various provisos attached to the various fundamental articles need

not be interpreted as though they were matters of strait-jacket as if nothing else is permissible.

Shri Kamath: You yourself made it

Dr. Ambedkar: The point that I was trying to make to the House is that on account of the declaration by the Supreme Court that this Parliament has no capacity to make a law in certain heads the question before the House is this can we allow the situation to remain as it is, as created by the judgments or we must endow Parliament with the authority to make a law? At this stage I do want to make a distinction and I do so for the special reason that Dr. Mookerjee came and said that we were taking away the freedom which people enjoyed. I think it is necessary to make a distinction between the capacity to make a law and the enactment of a particular law. All these matters as to whether a particular law encroaches upon the freedom of the people is a matter which can be discussed wheel the law is being made. Today we are not dealing with the capacity of Parliament to make a law."

102. At this stage, the Bill was referred to the Select Committee consisting of Prof. K. T. Shah, Sardar Hukam Singh, Pandit Hirday Nath Kunzru, Dr.Syama Prasad Mookerjee, Shri Naziruddin Ahmad, Shri C. Rajagopalachari, Shri L. Krishnaswami Bharati, Shri Awadheshwar Prasad Sinha, Shri T. R. Deogirikar, Dr. B. R. Ambedkar, Shri V. S. Sarwate, Shri Mohanlal Gautam, Shri R. K. Sidhva, Shri Khanduhhai K. Desai, Shri K. Hanumanthaiya, Shri Raj Bahadur, Shrimati G. Durgabai, Shri ManilalChaturbhai Shah, Shri Dev KantaBarooah, Shri Satya Narayan Sinha and the Mover with instructions to report on Monday the 21st May, 1951. The Select Committee produced its report on the 25th of May. The Select Committee further noted as under:

"Clause a -Our discussions centred mainly round the proposed clause (2) of article 19. After considering several alternative forms, we have come to the conclusion that the only substantial change required in the draft clause is the insertion of the word "reasonable" before the word "restrictions". This will bring clause (2) into line with clauses (3) to (6), all of which refer to laws imposing "reasonable restrictions". Certain consequential drafting changes have been made in the clause."

103. As amended by the Select Committee, section 3 of the Amended Bill read as under:

> "3. Amendment of article 19 and validation of certain laws. – (1) In article 19 of the Constitution – (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to always to have been enacted in the following form, namely:
>
> - "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the right conferred by the said sub clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, including, in particular, any existing or other law relating to, contempt of court, defamation or incitement to an offence."

104. Shri Nehru continued to stress the importance of approaching the Constitution in a "dynamic" spirit. He noted as under:

> "A Constitution must be respected if there is to be any stability in the land. A Constitution must not be made the plaything of some fickle thought or fickle fortune – that is true. At the same time we have in India a strange habit of making gods of various things, adding them to our innumerable pantheon and having given them our theoretical worship doing exactly the reverse. If we want to kill a thing we deify it. That is the habit of this country largely. So, if you wish to kill this Constitution make it sacred and sacrosanct – certainly. But if you want it to be a dead thing, not a growing thing, a static, unwieldy, unchanging thing, then by all means do so, realising that that is the best way of stabbing it in the front and in the back."

105. Importantly, the Home Minister at the time, Shri Rajagopalachari, stated something which resonates with the debate today – especially on the issue of "incitement to an offence". He notes as under:

> "Shri Rajagopalachari:

My desire to intervene was not very strong, but in view of the particular connection which my function in the Government has with the criticisms that have been offered, I consider it incumbent on me to intervene, though I value the time of the House at this stage far too greatly to do it with pleasure.

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Now, what is this right that we are discussing? This right that we are discussing is a natural right the right of freedom of expression and speech. It is a natural right. No one can claim that a natural right is like a right given in a clause of a lease or an insurance policy to be enforced like Shylock's pound of flesh. According to the letter of the law, a natural right should he subject to natural restrictions. Therefore, the proper way of approaching the question is whether the amendments that we propose do away with any natural and proper restrictions, whether the proposals that we make only refer to such unnatural things and abuses that everybody must agree to prevent. Was it the intention of any hon. Member who was party to the Constitution was it the intention of any freedom of speech should allow anybody to act adversely by sneaking or writing, to the security of the State or to friendly relations with foreign States or to public order or decency or morality or that the law of contempt of court should be abolished or that the law of defamation should be abolished or that incitement to offence should become part of the charter of freedom of speech? It is a perversion of logic to say that is natural right which has been acknowledged in the constitution as binding should be so interpreted by reason of its specific insertion in the constitution. As if it were a legal document by which a man can claim his pound of flesh under it whatever the injurious consequences.

xxxx

Then the question is what are the objectionable points. Now, I shall deal only with the incitement to offence clause to which great objection has been taken. What is the clause relating to incitement to offence? Hon. Members agree that violence should be kept out. But do hon. Members want that other forms of crime should be encouraged or allowed to be encouraged? If Parliament gravely sits down to pass a law that people should not sell wheat or gram at above a certain price, if hon. Members make a law that people should not commit theft, if hon. Members make a law in any other matter which does not involve violence, is it to be conceived that the freedom of speech granted by the Constitution

should go to the extent of encouraging or inciting people to commit those very crimes which we have defined after deliberation and put into the statute book? It is not between great and small that we should distinguish what we should distinguish is between crime or no crime. If Legislatures have decided that certain things are bad for society that they should be punished, then I say that freedom of speech should not cover incitements to committing those very things that have been forbidden. The ordinary way would be that it a prosecution is to be launched in any matter, trifling things may be ignored. Probably Government have, to ignore various things, trivial or big. But the question is what should the law and Constitution be? We cannot be contradictory in bur attitudes though we may be contradictory in our arguments for the time being. Our attitudes must be consistent. Do we want certain things to be crime or do we want them to be not crimes? If they are not bad do not make the law of crime cover such things. But once you make up your mind that they are important and a certain thing should be treated as a crime and punished, then there is no sense in allowing people to use their freedom of speech for the purpose of incitement to that crime. Then the question is raised—it works that way in the minds of lawyers—that there is the law of abetment.

That is, you can proceed it the man abets a crime and you need not curb his freedom of speech. I want to know whether courts would hold that ah abetment which is only an exercise of the right of freedom of speech would be admitted as a crime once this article stands here. It is absolutely necessary and hon. Members may consult any lawyer of any eminence. If it is necessary to pass a law that certain acts are to be punished, as offences in order to govern we country, then: incitement to such crimes should not be encouraged. An incitement to offence is not necessarily an abetment. An abetment has to be directed to a particular offence and it should be proved in a particular manner, but surely we do not want people to say on the one hand, there should be no black-marketing and on the other hand say, people should be allowed to write and freely circulate statements and expressions saying: we honour men who break this law and we want you to break the law so that the law itself may be changed. We do not want that kind of contrary attitude with regard to crime. Let us pass laws with reference to crime with all the care that we can. But having passed that law once, let us not stultify ourselves by saying that freedom of expression must be any

> man may circulate stuff inciting people to break that law and reduce it to nullity. Take the very popular measure with regard to prohibition of drink. Suppose we make laws that drink should be prohibited. May we at the same time allow the people to write: —It is a noble thing to break this law. Carry bottles in your trouser pockets. Try to smuggle wherever you can?‖ If we really mean governance, we should uphold the law of crime that we put into the statute book. We cannot allow the freedom of the Press to run counter to the law of crime. A restriction in this respect is necessary. Therefore with respect to any offence so far as it is admitted as an offence by any Legislature, we must guard that law properly. If you pass this law, it does not make incitement to offence as such a crime. What this clause allows is for Legislatures and Parliament to pass laws which would take notice of such incitements to offence in a suitable manner. It does not mean that every incitement to crime becomes a crime by itself, apart from abetment. This clause only permits Legislatures to take notice and take due measures to prevent such incitement to offence and that is the reason behind this clause and not any intention to curb the freedom of speech. 'Freedom of speech' put most briefly is a thing to be used and not to be abused. Of every natural right there can be use as well as abuse and Governments and Parliaments and Legislatures have to prevent abuse and it is not interference with that freedom if we prevent that abuse."

106. The clause-by-clause discussion of the Bill was to take place on June 1, 1951. The debate on the Art. 19(2) exceptions in clause 3 of the Bill was brief, and covered familiar ground – it was passed by a majority of 228 to 19.

107. There was an interesting exchange at this stage between Shri Shyama Prasad Mookerjee on the one hand and Shri Ambedkar and Shri Rajagopalachari on the question of "incitement to an offence". In his earlier intervention on the Bill Rajagopalachari had suggested that the scope of this clause should go beyond crimes of violence – for instance theft or black-marketing: once an act was criminalised, one should also criminalise its encouragement or incitement.

108. Shri Ambedkar extended the point and argued that if "violence" to apply only to physical violence, such a narrow reading, would make it impossible to pass a law, e.g. punishing

calls for social boycotts of Scheduled Castes. Shri Ambedkar and the debates on this point are as under:

> "**Dr. Ambedkar:**
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> I know some people have got a bee in their bonnet. On all these three counts I submit that all these amendments are quite unnecessary.
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> xxxx
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> I will now deal with the question of confining "incitement" to violence and I want my friends, Dr.Syama Prasad Mookerjee and also Pandit Kunzru to pay some attention to what I am saying—and I will take some very particular cases. First of all, I would like to know whether they are in a position to give a precise definition of the meaning of the word "violence". What is "violence"? Is it to be confined merely to physical violence?
> Dr. S. P. Mookerjee: Violent words are excluded.
>
> Dr. Ambedkar: I am not talking of violent words. Have they been able to give us any precise definition which would enable the legislature and the court to know that this is violence and this is not violence? I cannot find any.
>
> Shri Kamath: Put it as "as defined by law".
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> Dr. Ambedkar: It is only postponing the trouble. Some day when we make the law we shall have to give the definition of "violence". I come now to specific instances. Supposing, for instance, there is trouble—I am giving some concrete cases –which have happened—and there is trouble between the Scheduled Castes and caste Hindus in a particular village and the caste Hindus conspire together to proclaim a social boycott on the Scheduled Castes, preventing them from obtaining any kind of supplies, preventing them from going into the -fields, preventing them from going in the jungles to collect fuel, then I want to know from Dr.Syama Prasad Mookerjee and Pandit Kunzru whether they want this, as an offence, to be regarded by the State as such or not.
>
> Dr. Ambedkar: I shall give another illustration which was recently reported in Bombay. In a place near Thana there was trouble going on between caste Hindus and the 'Scheduled Castes over the taking of water from a particular well. With the help of the police the Scheduled Castes there were able to secure their right to take water from that well

along with the caste Hindus. The caste Hindus did not like the matter. They wanted the well to be exclusively used by them. Two days ago there was a report in the Bombay Press wherein it was stated that some caste Hindus incited some of their men to drop into it some kind of poisonous weeds. The result was that the whole water was poisoned and some of the Scheduled Caste people who drank the water suffered from the effect of the poison. I want to ask both of them whether they would limit their definition of incitement to violence, or whether they would extend it to cover where one community does something' in order harm and injure another community.

Dr. S. P. Mookerjee: In such a case you and I will go there to prevent it.

Dr. Ambedkar: You and I cannot go everywhere. You will be engaged in fighting the elections and I may be doing something else and we will have no time to go to the rescue of those people. It is no use taking the responsibility on our shoulders. It is much better that the law provides for it. Then, with regard to particular laws, I and my colleagues on the Treasury Benches have been shouting time and over again that in this Bill what we are doing is to merely confer capacity on Parliament to make laws for certain purposes. We are not enacting particular laws. We are, not even protecting the laws as they exist today. But somehow Members who are determined to oppose, Members who are determined to take the opposite view -if they will forgive me —out of pure obstinacy are not able to make this distinction between capacity to legislate and making a particular law.

Dr. S. P. Mookerjee: The obstinacy is yours not to understand."

109. Finally, on 18.6.1951, the Constitution [First Amendment] Act, 1951 was brought in, amending Article 19[2] of the Constitution of India."

(Emphasis supplied)

12.4. **The debates were broadly on the concept that the Constitution must be dynamic and adaptable. Amendments**

are necessary to correct drafting gaps which were exposed by the judicial interpretations. Free speech is a natural right, but no right is absolute. Incitement to crimes, not just violent crimes, must be restricted. Given the take, on the aforesaid debate, comes the afore-quoted amendment. The final outcome of the amendment was, that Article 19(2) was amended to allow, reasonable restrictions on speech, in the interest of security of the State; friendly relations with foreign states; public order; decency or morality; contempt of Court; defamation; and incitement to an offence. Thus comes the thread of reasonable restriction woven into the Article 19(2). This marked the first major constitutional clash between individual liberty versus state.

12.5. The entire fulcrum of the submissions of the learned senior counsel for the petitioner is based upon free speech doctrine, as interpreted by **SHREYA SINGHAL** *supra*, which the learned senior counsel submits **that it is his sheet anchor**. In that light, it becomes necessary to notice the judicial thought, **Pre-SHREYA**

SINGHAL and **Post-SHREYA SINGHAL** *qua* Article 19(2) – Doctrine of free speech.

JUDICIAL THOUGHT: PRE-SHREYA SINGHAL:

12.6. The amended Article 19(2) with the words "in the interests of Public Order" fell for interpretation before the Apex Court in the case of **STATE OF MADRAS v. V.G. ROW**[6] wherein it is held as follows:

"…. …. ….

> **20. It was not disputed that the restrictions in question were imposed "in the interests of public order". But, are they "reasonable" restrictions within the meaning of Article 19(4)?** Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. **If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters**

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[6] (1952) 1 SCC 410

that the courts in the new set-up are out to seek clashes with the legislatures in the country.

21. The learned Judges of the High Court unanimously held that the restrictions under Section 15(2)(*b*) were not reasonable on the ground of (*1*) the inadequacy of the publication of the notification, (*2*) the omission to fix a time-limit for the Government sending the papers to the Advisory Board or for the latter to make its report, no safeguards being provided against the Government enforcing the penalties in the meantime, and (*3*) the denial to the aggrieved person of the right to appear either in person or by pleader before the Advisory Board to make good his representation. In addition to these grounds one of the learned Judges (Satyanarayana Rao, J.) held that the impugned Act offended against Article 14 of the Constitution in that there was no reasonable basis for the differentiation in treatment between the two classes of unlawful associations mentioned in Sections 15(2)(*a*) and (*b*). The other learned Judges did not, however, agree with this view. Viswanatha Sastri, J. further held that the provisions for forfeiture of property contained in the impugned Act were void as they had no reasonable relation to the maintenance of public order. The other two Judges expressed no opinion on this point. While agreeing with the conclusion of the learned Judges that Section 15(2)(*b*) is unconstitutional and void, we are of opinion that the decision can be rested on a broader and more fundamental ground.

22. This Court had occasion in *Khare case* [*N.B. Khare* v. *State of Delhi*, 1950 SCR 519 : 1950 SCC 522] to define the scope of the judicial review under clause (5) of Article 19 where the phrase "imposing reasonable restrictions on the exercise of the right" also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised.

> **23.** It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. **The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable**."
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> (Emphasis supplied)

The Apex Court holds that the word "in the interests of Public Order" would undoubtedly give room to suitably tailored reasonable restrictions to meet the demands of time.

12.7. Again, the Apex Court considering the very insertion in the case of **RAMJI LAL MODI v. STATE OF U.P.**[7], has held as follows:

> "…. …. ….

[7] 1957 SCC OnLine SC 77

9. Learned counsel then shifted his ground and formulated his objection in a slightly different way. Insults to the religion or the religious beliefs of a class of citizens of India, may, says learned counsel, lead to public disorders in some cases, but in many cases they may not do so and, therefore, a law which imposes restrictions on the citizens' freedom of speech and expression by simply making insult to religion an offence will cover both varieties of insults i.e. those which may lead to public disorders as well as those which may not. **The law insofar as it covers the first variety may be said to have been enacted in the interests of public order within the meaning of clause (2) of Article 19, but insofar as it covers the remaining variety will not fall within that clause. The argument then concludes that so long as the possibility of the law being applied for purposes not sanctioned by the Constitution cannot be ruled out, the entire law should be held to be unconstitutional and void. We are unable, in view of the language used in the impugned section, to accede to this argument. In the first place clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression "in the interests of public order", which is much wider than "for maintenance of" public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order. In the next place Section 295-A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.** Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. **The calculated**

> **tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of clause (2) of Article 19 as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by Article 19(1)(*a*). Having regard to the ingredients of the offence created by the impugned section, there cannot, in our opinion, be any possibility of this law being applied for purposes not sanctioned by the Constitution. In other words, the language employed in the section is not wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental right guaranteed by Article 19(1)(*a*) and consequently the question of severability does not arise and the decisions relied upon by learned counsel for the petitioner have no application to this case.**
>
> **10.** For the reasons stated above, the impugned section falls well within the protection of clause (2) Article 19 and this application must, therefore, be dismissed."

(Emphasis supplied)

The Apex Court interprets in the interest of public order. Holds it to be wide. It does mean, only the acts that directly cause disorder, but those, with a tendency to cause disorder. So, even if in some cases, an insult does not lead to disorder, the law is valid, if the act, can disrupt, the public order. The Court holds that Section 295A is constitutional and it squarely falls within the scope of reasonable restriction, on free speech, in the interest of public order.

12.8. The Apex Court again, in the case of **VIRENDRA v. STATE OF PUNJAB**[8]**,** interprets the words 'in the interest of' thus:

"…. …. ….

> **10.** The test of reasonableness has been laid down by this Court in *State of Madras* v. *V.G. Row* [(1952) 1 SCC 410 : (1952) SCR 597, 607] in the following words:
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> > "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."
>
> This dictum has been adopted and applied by this Court in several subsequent cases. The surrounding circumstances in which the impugned law came to be enacted, the underlying purpose of the enactment and the extent and the urgency of the evil sought to be remedied have already been adverted to. It cannot be overlooked that the Press is a mighty institution wielding enormous powers which are expected to be exercised for the protection and the good of the people but which, may conceivably be abused and exercised for anti-social purposes by exciting the passions and prejudices of a section of the people against another section and thereby disturbing the public order and tranquillity or in support of a policy which may be of a subversive character. The powerful influence of the newspapers, for good or evil, on the minds of the readers, the wide sweep of their reach, the modern facilities for their swift circulation to territories, distant and near, must all enter into the judicial verdict and the reasonableness of the restrictions imposed upon the Press has to be tested against this background. It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its

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[8] **1957 SCC OnLine SC 56**

> correspondents relating to or concerning what may be the burning topic of the day. **Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public. Therefore, the crucial question must always be: Are the restrictions imposed on the exercise of the rights under Articles 19(1)(*a*) and 19(1)(*g*) reasonable in view of all the surrounding circumstances? In other words, are the restrictions reasonably necessary in the interest of public order under Article 19(2) or in the interest of the general public under Article 19(6)?"**
>
> (Emphasis supplied)

The Apex Court holds that the words "in the interest of" are words of great amplitude and much wider than the words "for the maintenance of" used in Article 19(2) of the Constitution.

12.9. This culminated in a judgment rendered by the Apex Court in the case of **SUPERINTENDENT, CENTRAL PRISON v. DR. RAM MANOHA LOHIA**[9] wherein the Apex Court considers the width and amplitude of Article 19(2) in the following paragraphs:

"…. …. ….

[9] **1960 SCC Online SC 43**

9. We shall now proceed to consider the constitutional validity of this section. The material portions of the relevant provisions of the Constitution may now be read:

> "19. (1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;
>
> ***
>
> (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

clause (2) of Article 19 was amended by the Constitution (First Amendment) Act, 1951. By this amendment several new grounds of restrictions upon the freedom of speech have been introduced, such as friendly relations with foreign States, public order and incitement to an offence. It is self-evident and common place that freedom of speech is one of the bulwarks of a democratic form of Government. It is equally obvious that freedom of speech can only thrive in an orderly society clause (2) of Article 19, therefore, does not affect the operation of any existing law or prevent the State from making any law insofar as such law imposes reasonable restrictions on the exercise of the right of freedom of speech in the interest of public order, among others. To sustain the existing law or a new law made by the State under clause (2) of Article 19, so far as it is relevant to the present enquiry, two conditions should be complied with viz. (*i*) the restrictions imposed must be reasonable; and (*ii*) they should be in the interests of public order. Before we consider the scope of the words of limitation, "reasonable restrictions" and "in the interests of", it is necessary to ascertain the true meaning of the expression "public order" in the said clause. The expression "public order" has a very wide connotation. Order is the basic need in any organised society. It implies the orderly state of

society or community in which citizens can peacefully pursue their normal activities of life. In the words of an eminent Judge of the Supreme Court of America "the essential rights are subject to the elementary need for order without which the guarantee of those rights would be a mockery". The expression has not been defined in the Constitution, but it occurs in List II of its Seventh Schedule and is also inserted by the Constitution (First Amendment) Act, 1951 in clause (2) of Article 19. The sense in which it is used in Article 19 can only be appreciated by ascertaining how the Article was construed before it was inserted therein and what was the defect to remedy which the Parliament inserted the same by the said amendment. The impact of clause (2) of Article 19 on Article 19(1)(*a*) before the said amendment was subject to judicial scrutiny by this Court in *Romesh Thappar* v. *State of Madras* [(1950) SCR 594, 600, 601, 602] . There the Government of Madras, in exercise of their powers under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949, purported to issue an order whereby they imposed a ban upon the entry and circulation of the journal called the "Cross Roads" in that State. The petitioner therein contended that the said order contravened his fundamental right to freedom of speech and expression. At the time when that order was issued the expression "public order" was not in Article 19(2) of the Constitution; but the words "the security of the State" were there. In considering whether the impugned Act was made in the interests of security of the State, Patanjali Sastri, J., as he then was, after citing the observation of Stephen in his *Criminal Law of England*, states:

> "Though all these offences thus involve disturbances of public tranquillity and are in theory offences against public order, the difference between them being only a difference of degree, yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by the Indian Penal Code. Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Article 19(1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their

> prevention the sole justification for legislative abridgement of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression …."

The learned Judge continued to state:

> "The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."

The learned Judge proceeded further to state:

> "We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order."

This decision establishes two propositions viz. (*i*) maintenance of public order is equated with maintenance of public tranquillity; and (*ii*) the offences against public order are divided into two categories viz. (*a*) major offences affecting the security of the State, and (*b*) minor offences involving breach of purely local significance. This Court in *Brij Bhushan* v. *State of Delhi* [(1950) SCR 605] followed the earlier decision in the context of Section 7(1)(*c*) of the East Punjab Public Safety Act, 1949. Fazl Ali, J., in his dissenting judgment gave the expression "public order" a wider meaning than that given by the majority view. The learned Judge observed at p. 612 thus:

> "When we approach the matter in this way, we find that while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by, or affects, a small group of persons, 'public unsafety' (or insecurity of the State), will usually be connected with

> serious internal disorders and such disturbances of public tranquillity as jeopardize the security of the State."

This observation also indicates that "public order" is equated with public peace and safety. Presumably in an attempt to get over the effect of these two decisions, the expression "public order" was inserted in Article 19(2) of the Constitution by the Constitution (First Amendment) Act, 1951, with a view to bring in offences involving breach of purely local significance within the scope of permissible restrictions under clause (2) of Article 19. After the said amendment, this Court explained the scope of *RomeshThapper's case* [(1950) SCR 594, 600, 601, 602] in *State of Bihar* v. *Shailabala Devi* [(1952) 2 SCC 22 : (1952) SCR 654] . That case was concerned with the constitutional validity of Section 4(1)(*a*) of the Indian Press (Emergency Powers) Act, 1931. It deals with the words or signs or visible representations which incite to or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence. Mahajan, J., as he then was, observed at p. 660:

> "The deduction that a person would be free to incite to murder or other cognizable offence through the press with impunity drawn from our decision in *Romesh Thapper case* could easily have been avoided as it was avoided by Shearer, J., who in very emphatic terms said as follows:
>
> 'I have read and re-read the judgments of the Supreme Court, and I can find nothing in them myself which bear directly on the point at issue, and leads me to think that, in their opinion, a restriction of this kind is no longer permissible.'"

The validity of that section came up for consideration after the Constitution (First Amendment) Act, 1951, which was expressly made retrospective, and therefore the said section clearly fell within the ambit of the words "in the interest of public order". That apart the observations of Mahajan, J., as he then was, indicate that even without the amendment that section would have been good inasmuch as it aimed to prevent incitement to murder.

10. The words "public order" were also understood in America and England as offences against public safety or public

peace. The Supreme Court of America observed in *Cantewell* v. *Connecticut* [(1940) 310 US 296, 308] thus:

> "The offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot … When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious."

The American decisions sanctioned a variety of restrictions on the freedom of speech in the interests of public order. They cover the entire gamut of restrictions that can be imposed under different heads in Article 19(2) of our Constitution. The following summary of some of the cases of the Supreme Court of America given in a well-known book on Constitutional law illustrates the range of categories of cases covering that expression. "In the interests of public order, the State may prohibit and punish the causing of 'loud and raucous noise' in streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of the public streets for the purpose of exercising freedom of speech; provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere 'public inconvenience, annoyance or unrest'". In England also Acts like Public Order Act, 1936, Theatres Act, 1843 were passed : the former making it an offence to use threatening, abusive or insulting words or behaviour in any public place or at any public meeting with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be caused, and the latter was enacted to authorise the Lord Chamberlain to prohibit any stage play whenever he thought its public performance would militate against good manners, decorum and the preservation of the public peace. The reason underlying all the decisions is that if the freedom of speech was not restricted in the manner the relevant Acts did, public safety and tranquillity in the State would be affected.

11. But in India under Article 19(2) this wide concept of "public order" is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. "Public order" is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that "public order" is synonymous with public peace, safety and tranquillity.

… … …

18. The foregoing discussion yields the following results : (*1*) "Public order" is synonymous with public safety and tranquillity : it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (*2*) there must be proximate and reasonable nexus between the speech and the public order; (*3*) Section 3, as it now stands, does not establish in most of the cases comprehended by it any such nexus; (*4*) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (*5*) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest."

(Emphasis supplied)

The Apex Court draws a delicate, yet decisive line between the security of the State and public order. It holds that the quiet rhythm of daily life, the calm of streets and markets, the harmony of neighbourhoods is nothing more and nothing less than the safety and tranquillity of the ordinary citizen. A breach of public order is not a revolution, but a riot, not a civil war, but a communal flare-up, not the downfall of Governments but, the shattering of the even tempo of the community life. Thus, in the constitutional vision, public order is not a sword to silent dissent, but a shield to preserve the peace. The Apex Court thus observed that, **the law distinguishes between the cry of the rebellion and the murmur of the critic, between the dangerous incitement and the unpopular opinion. It held that there must be proximity and reasonable nexus between speech and public order.** In the teeth of the afore-quoted judgments of the constitution benches of the Apex Court, interpreting Article 19(2), the freedom of speech and expression, being hedged with reasonable restrictions of several hues and forms, it becomes necessary to notice the sheet anchor of the learned senior counsel for the petitioner – the judgment in the case of **SHREYA SINGHAL**.

SHREYA SINGHAL:

12.10. Section 66A, 69A and 70 of the IT Act became the fulcrum of challenge before the Apex Court in the case of **SHREYA SINGHAL**. The Apex Court considered elaborate submissions made by respective parties. The challenge before the Apex Court and the contentions so advanced insofar as they are germane are as follows:

> "1. Section 66-A of the Information Technology Act, 2000 (the said Act) is unconstitutional because it violates the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.
>
> 2. (a) "Freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved." [See *Sakal Papers (P) Ltd. v. Union of India,* (1962) 3 SCR 842 at 866.]
>
> (b) "Freedom of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." [See *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788: (1973) 2 SCR 757 at 829.]
>
> (c) "Very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations...." [See *RomeshThappar v. State of Madras*, 1950 SCR 594 at 602.]

(d) "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the a unconstitutional and void. Constitution cannot be ruled out, it must be held to be wholly an enactment, which is capable of being applied to cases where no such danger would arise, cannot be held to be constitutional and valid to any extent." [see *RomeshThappar v. State of Madras*, 1950 SCR 594 at 603.]

(e) "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express." [See *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788: (1973) 2 SCR 757 at 829.]

3. "There is nothing in clause (2) of Article 19 which permits the State, to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19." [See *Sakal Papers (P) Ltd. v. Union of India,* (1962) 3 SCR 842 at 862.]

4. Restrictions which can be imposed on freedom of expression can be only on the heads specified in Article 19(2) and none other. Restrictions cannot be imposed on the ground of "interest of general public" contemplated by Article 19(6). [See *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at 868.]

5. Section 66-A penalises speech and expression on the ground that it causes annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will. These grounds are outside the purview of Article

19(2). Hence the said section is unconstitutional. [See *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal,* (1995) 2 SCC 161 at 226-27.1

6. Section 66-A also suffers from the vice of vagueness because expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm. [See *State of M.P. v. Baldeo Prasad,* (1961) 1 SCR 970 at 979; *HarakchandRatanchandBanthia v. Union of India*, (1969) 2 SCC 166 at 183, para 21; *K.A. Abbas v. Union of India*, (1970) 2 SCC 780 at 799, paras 45-46; *Burstyn v. Wilson*, 96 L Ed g 1098 at 1120-22; *Ministry of I&B. Govt. of India v. Cricket Assn. of Bengal*. (1995) 2 SCC 161 at 199-200.]

7. In that context enforcement of the said section is an insidious form of censorship which is not authorised by the Constitution. [See *Hector v. Attorney General of Antigua & Barbuda,* (1990) 2 All ER 103.]

8. There are numerous instances about the arbitrary and frequent invocation of the said section which highlight the legal infirmity arising from uncertainty and vagueness *which is inherent in the said section.*

(emphasis added)

9. The said section has a chilling effect on freedom of speech and expression and is thus violative of Article 19(1)(a). [See *R. Rajagopal v. State of T.N*., (1994) 6 SCC 632 at 647; *S. Khushboo v. Kanniammal,* (2010) 5 SCC 600 at 620.]

10. Freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said view has significance in a country like ours. [See *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 229.]

11. It is not correct to suggest that Section 66-A was necessitated to deal with the medium of the internet. Offences under the Penal Code (IPC) would be attracted even for actions over the internet. In particular, Sections 124-A, 153-A, 153-B,

292, 293, 295-A, 505, 505(2) IPC, it is submitted, suffice to cover the situations which are being used by the Union of India as illustrations to justify the existence of Section 66-A on the statute. The aforesaid IPC offences take into consideration any or every medium of expression. As long as written words are within its ambit, merely because they are written on a public medium on the internet would not take such actions beyond their purview, especially in view of Section 65-B of the Evidence Act, 1872.

12. Furthermore, assuming without admitting that Section 66-A was necessitated to deal with the medium of the internet, the standards for restricting the same would still have to conform to Article 19(2). The standards for every medium cannot be drastically different as that would be violative of Article 14. There is no intelligible differentia between an expression on the internet and that on a newspaper or a magazine, for the purposes of Article 19(1)(a) read with Article 19(2).

13. English cases cited by the respondents are based on Articles 10(1) and 10(2) of the European Convention on Human Rights 1950 (ECHR). The heads of restriction in Article 10(2) of ECHR are wider than those prescribed under Article 19(2) of our Constitution.

14. Furthermore, the question of reasonableness of the restrictions arises when restrictions imposed are on heads specified in Article 19(2). If restrictions imposed are outside the prescribed heads they are per se unconstitutional and alleged reasonableness of restrictions cannot cure the fundamental constitutional infirmity.

15. Constitutionality of a statute is to be adjudged on its terms and not by reference to the manner in which it is enforced. "The constitutional validity of a provision has to be determined on construing it reasonably. If it passes the test of reasonableness, the possibility of powers conferred being improperly used, is no ground for pronouncing it as invalid, and conversely if the same properly interpreted and tested in the light of the requirements set out in Part III of the Constitution, does not pass the test, it cannot be pronounced valid merely because it is being administered in the manner which might not

conflict with the constitutional requirements." [See *Kantilal Babulal & Bros. v. H.C. Patel.* (1968) 1 SCR 735 at 749: Collector of Customs v. NathellaSampathu Chetty, AIR 1962 SC 316 at 331. 332.] "A bad law is not defensible on the ground that it will be iudiciously administered." [See *Knuller Ltd. v. DPP,* (1972) 2 All ER 898 at 906(b).] 14

16. The crux of the matter is: can the exercise of the invaluable b fundamental right of freedom of expression be subject to or be dependent upon the subjective satisfaction of a non-judicial authority and that too in respect of vague and varying notions about "grossly offensive", as "menacing character" and causes "annoyance", inconvenience, insult and injury.

17. The impugned heads of restrictions are inextricably linked with other provisions of the said section and are not severable. Hence, the entire Section 66-A is unconstitutional. [See R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 at 950-51.]

II. Mr Shyam Divan, Senior Advocate, Ms Mishi Choudhary, Mr Prasanth Sugathan, Mr Biju K. Nair, Ms ShagunBelwal, Mr Arjun J., Advocates for the petitioner, Mouthshut.com (India) Pvt. Ltd. in Writ Petition (C) No. 217 of 2013

A. Introduction

1. These written submissions filed on behalf of the writ petitioners are concise and pointed. Rather than setting out elaborate arguments, the petitioners have chosen to project the thrust of their case in this note to supplement the oral submissions at the Bar.

B. Relevant facts and relief

2. The first petitioner is a private limited company which operates Mouthshut.com, a social networking, user review website. The website provides a platform for consumers to express their opinion on goods and services, facilitating the flow of information and exchange of views with respect to products and services available in the marketplace. Since its founding in

2000, the popularity of this website has grown and an estimated 80 lakh users visit the website every month. Mouthshut.com is a pioneer in this field, predating other review websites and is the subject of academic studies that recognise the immense importance and value of the service it renders. Illustratively, (1) Philip Kotler, *Marketing Management* (2009), extract at Annexure 1; (2) Cateora, Philip et al, International Marketing (2008), extract at Annexure 2.

3. The second petitioner is an Indian citizen and a shareholder of the first petitioner. He is the founder of the first petitioner and its CEO. While at the time of the first petitioner's incorporation, its entire shareholding was held by the second petitioner, it is now held equally amongst the six brothers of the Farooqui family.

4. The manner Mouthshut.com works is best understood with reference to the site's screenshots. Some of the essential features of this website are: (a) Any reader may visit the website and read its content; (b) To post a comment, the user is required to first register by providing an email address, user name and by creating a password. The user may also log in through Facebook or Google accounts (which have an established pre-registration protocol); (c) Businesses may respond to reviews and rebut claims and they have the option of paying a nominal fee to create an authorised account; (d) When problems are satisfactorily addressed on the Mouthshut.com platform, a "stamp" appears next to the grievance indicating resolution of the issue. Mouthshut.com does not provide any content of its own. It provides a platform that hosts content posted by users. Having regard to the nature of this website, users share their experiences with respect to goods and services in diverse categories such as appliances, automobiles, builders and developers, health and fitness industry, movies, music, restaurants, travel, etc.

5. The petitioners constantly receive threatening calls from police officials across various States in India requiring the petitioners to block comments/content. The petitioners also regularly receive notices under Sections 91 and 160 of the Code of Criminal Procedure, 1973. This is apart from a flood of legal notices from private parties threatening the petitioners with defamation and civil suits instituted in different parts of the

country. On several occasions, fabricated orders of courts have been served on the petitioners.

6. The petitioners have thus far resisted the threats since taking down every negative comment in response to every complaint would erode the value and integrity of the website. Consumers visit the website before choosing a product or service because they expect to review genuine experiences of previous users, good or bad. Were the petitioners to yield to every complaint, Mouthshut.com would lose its utility and appeal.

7. As an intermediary, the first petitioner enjoys immunity from liability in terms of Section 79 of the Information Technology Act, 2000 (the IT Act). The continuous barrage of threats and legal actions faced by the petitioners demonstrate that the intended "safe harbour" provided by the legislature simply does not work. The attenuation of Section 79 is due to the Information Technology (Intermediaries Guidelines) Rules, 2011 (the impugned Rules). The impugned Rules conflict with Section 79 and create an unworkable gframework for intermediaries that desire to retain immunity.

8. The petition challenges the IT (Intermediaries Guidelines) Rules, 2011 inasmuch as they are *ultra vires* the IT Act and Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India.

C. Importance of intermediaries and necessity for immunity

9. The expression "intermediary" is defined in Section 2(1)(w) of the IT Act. The relationship between users who access the internet, persons posting content on a website and intermediaries is illustrated in a diagram at *p. 17 of IA No. 4 of 2014.* The first petitioner is an intermediary since it receives, stores and transmits electronic records on behalf of persons posting reviews a and also because it is a web-hosting service provider. The distinction between hosting and posting, internet hosting service providers and web hosting service providers is drawn out at *Annexure 3.*

10. Online intermediaries provide significant economic benefits and this is why across the world major economies provide a safe harbour regime to limit liability for online intermediaries when there is unlawful behaviour by intermediary users. Online intermediaries organise information by making it accessible and understandable to users. Intermediaries enhance economic activity, reduce costs and enable market entry for small and medium enterprises, thereby inducing competition, which eventually leads to lower consumer prices and more economic activity. The role of intermediaries and c the economic benefits are explained at pp. *68-75 of IA No. 4 of 2014*.

11. Online intermediaries do not have direct control of information that is exchanged on their platforms. Legal regimes across the world prescribe exemptions from liability for intermediaries and these safe harbour provisions are regarded as a necessary regulatory foundation for intermediaries to operate.

12. In the wake of representations by the information technology industry following the arrest in 2004 of Avnish Bajaj, the CEO of Baazee.com, an auction portal, Parliament with effect from 27-10-2009 substituted Chapter XII of the IT Act comprising Section 79. This new safe harbour protection to intermediaries was introduced to protect intermediaries from burdensome liability that would crush innovation, throttle Indian competiveness and e prevent entrepreneurs from deploying new services that would encourage the growth and penetration of the internet in India.

D. Important features of Section 79

13. Section 79 in Chapter XII of the IT Act comprises a self-contained regime with respect to intermediary liability.

14. The object of Section 79 is to exempt an intermediary from liability arising from "third-party information". An intermediary is exempt from all liability (civil and criminal) for any third-party information, data or Communication link made available or hosted by him. The purpose of this wide exemption from liability is to protect intermediaries from harassment or liability arising merely out of their activities as an intermediary.

15. The opening words of Section 79 are a widely worded non obstante clause which overrides "anything contained in any law for the time being in force" (Section 81 gives overriding effect to the Act in relation to inconsistent provisions contained in any other law.) The clear intent of Parliament is to insulate intermediaries as a class from civil as well as criminal liability.

16. The exemption from liability granted by Section 79(1) is subject to the provisions of sub-sections (2) and (3) of Section 79,

17. Section 79(2)(e) provides that in order to ensure exemption from liability under Section 79(1) the intermediary *"observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf*". The mandate of this provision empowers the Central Government to frame statutory guidelines for a specific objective, that is, to ensure observance by an intermediary of his duties under the IT Act. This is clearly brought out by the underlined expressions, particularly the words "*in this behalf*".

18. The duties of an intermediary under the IT Act include (i) the duty to preserve and retain information as set out in Section 67-C; (ii) the duty to extend all facilities and technical assistance with respect to interception on monitoring or decryption of any information as envisaged in Section 69; (iii) the duty to obey government directions to block public access to any information under Section 69-A; (iv) the duty to provide technical assistance and extend all facilities to a government agency to enable online access or to secure or provide online access to computer resources in terms of Section 69-B; (v) the duty to provide information to and obey directions from the Indian Computer Emergency Response Team under Section 70-B; (vi) the duty to not disclose personal information as envisaged under Section 72-A; and (vii) the duty to take down any information, data or communication link, etc.sed to commit an unlawful act as envisaged under Section 79(3)(b).

19. Section 79(3)(b) envisages a "*takedown*" provision where, inter alia, the exemption from liability enjoyed by the intermediary under Section 79(1) is lost "*on being notified by the appropriate Government or its agency that any information,*

data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act" and the intermediary fails to expeditiously remove or disable access.

E. The IT (Intermediaries Guidelines) Rules, 2011

20. Rule 3 of the impugned Rules enumerates various requirements that an intermediary must observe while discharging his duties. These requirements constitute due diligence and are summarised below:

(a) Rule 3(1) requires the intermediary to publish rules and regulations, adopt a privacy policy, provide a user agreement for access to the intermediary's computer resource.

(b) Rule 3(2) requires that the rules and regulations, terms and conditions or user agreement inform the user not to host, display, upload, modify, publish, transmit, update or share "information" enumerated in sub-clauses (a)-(i) of Rule 3(2).

(c) Rule 3(3) proscribes the intermediary from knowingly hosting or publishing information or initiating transmission in respect of the information specified in sub-clauses (a)-(i) of Rule 3(2).

(d) Rule 3(4) requires the intermediary to take down information within 36 hours of receiving a written intimation from an "affected person" that such information contravenes sub-clauses (a)-(i) of Rule 3(2).

(e) Rule 3(4) requires the intermediary to preserve such contravening information for 90 days for the purpose of investigation.

(f) Rule 3(5) requires the intermediary to inform its users that in the event of non-compliance with rules and regulations, user agreement or privacy policy, the intermediary would have a right to immediately terminate the access or usage rights of the users to the computer resource of the intermediary and remove non-compliant information.

(g) Rule 3(6) requires the intermediary to strictly follow the provisions of the IT Act "*or any other law for the time being in force*".

(h) Rule 3(7) requires the intermediary to provide information or assistance to government agencies.

(i) Rule 3(8) requires the intermediary to take all reasonable measures to secure its computer resource.

(j) Rule 3(9) requires the intermediary to report cyber security incidents and share information with the Indian Computer Emergency Response Team.

(k) Rule 3(10) proscribes the intermediary from knowingly deploying or installing or modifying the technical configuration of a computer resource to circumvent any law;

(l) Rule 3(11) requires the intermediary to publish on its website the name of the Grievance Officer as well as contact details and mechanism to redress complaints within one month from the date of the receipt of e the complaint.

21. The petitioners' main problem is with Rule 3(4). Rule 3(4), *inter alia*, provides that upon receiving in writing or through email signed with electronic signature from any affected person, any information as mentioned in Rule 3(2), the intermediary shall act within 36 hours to disable such information that is in contravention of Rule 3(2). Further, the intermediary is required to "*work with user or owner of such information"* before disabling the information.

F. Why the impugned Rules are ultra vires

22. The principal points which according to the petitioners render the impugned Rules *ultra vires*are set out in the section. However, before elaborating these points the petitioners seek to highlight their real grievance.

23. As an intermediary, the first petitioner provides a platform and enables users to connect and exchange views through the platform. Mouthshut.com is not providing the content which is supplied by users. The first petitioner has a

lean operation in terms of human resources and the website is programmed in a manner by which users can exchange views and business can respond to consumers with ease, without any specific human intervention on the part of the Mouthshut.com team.

24. Being an intermediary, the first petitioner is anxious to retain the exemption from liability conferred under Section 79(1) of the IT Act. The petitioners cannot afford to be dragged across the country in response to summons, court cases, etc. that relate to content uploaded by third parties. The petitioners have no objection to taking down the material in response to orders passed by a duly authorised government agency or a court. Indeed, the petitioners submit that on a correct interpretation of the relevant provisions, the IT Act envisages full protection and immunity to intermediaries provided that the intermediary extends cooperation to government agencies and facilitates implementation of duly authorised orders

25. The problem is that the impugned Rules, specifically Rule 3(4), require the intermediary to (i) respond to any "affected person" making a written complaint; (ii) contact and work with the user or owner of the information who has posted the information on the first petitioner's website; (iii) make a determination or judgment as to whether the information complained about contravenes Rule 3(2); and (iv) take down such information. At a practical level, the first petitioner is compelled to set up an adjudicatory machinery or in default take down each and every piece of information complained about. While taking down information within 36 hours is the surest manner of retaining immunity, this would completely compromise the value of the website since users expect genuine product and service reviews, both positive and negative. The petitioners have no difficulty in complying with "takedown" orders passed by a court or government agency, but to cast the burden of adjudicating complaints on the intermediary as part of its duty to retain exemption from liability under Section 79(1) is onerous and unreasonable.

26. Adjudicating on whether or not there is contravention of a particular provision of law, is the quintessential sovereign function to be discharged by the State or its organs. This function cannot be delegated to private parties such as

intermediaries. Rule 3(4) of the impugned Rules, by requiring the intermediary to assume the role of a Judge, in place of some State agency, amounts to a wrongful abdication of a fundamental State duty.

27. The petitioners submit that the impugned Rules are *ultra vires* the IT Act as well as the Constitution of India for the following reasons which are set out in point form:

(a) The power of the Central Government to frame statutory guidelines with respect to intermediaries is circumscribed by the limits contained in Section 79(2)(c). The purpose of the guidelines is to ensure that an intermediary observes due diligence while discharging his duties under the IT Act. This is evident from the expression "*in this behalf*". The statutory duties of an intermediary are set out in Sections 67-C, 69, 69-A, 69-B, 70-B, 72-A and 79(3)(b). The "due diligence" guidelines in Rule 3(2) have nothing to do with observance of the statutory duties under the abovementioned sections. Rule 3(2) travels beyond the narrow limit defined with respect to guidelines under Section 79(2)(c).

b) Section 79(3)(b) contemplates a situation where an intermediary "*on being notified*" by the appropriate Government or its agency must "take down" the offending material. Rule 3(4) directly conflicts with the scheme in the section because (i) it requires the intermediary to respond to any "affected person", not just the appropriate government or its agency; (ii) it requires the intermediary to work with the user or owner of such information; (iii) it requires the intermediary to adjudicate or determine whether there is contravention of Rule 3(2). None of these roles and requirements is envisaged in Section 79 and, indeed, the Rules directly conflict with the parent statute in this regard.

(c) The purpose of the non obstante clause in Section 79 is clearly to give overriding effect and grant exemption from liability to intermediaries. Rule 3(6) of the impugned Rules by requiring the intermediary to "*strictly follow the provisions... or any other laws for the time being in force*" brings about a direct conflict with the

non obstante clause. Requiring compliance with all other laws in force as a condition of "due diligence", reintroduces by a back door the very laws that the legislature deemed appropriate to override in the context of intermediary liability.

(d) The impugned Rules introduce a censorship regime. The object of Section 79 is to confer immunity on intermediaries, not to introduce censorship by private edict. At a practical level, an intermediary, in its anxiety to retain immunity, will almost always take down material the moment it receives a written intimation from any affected person. This is quite apart from taking down material in response to directions from police departments. The guidelines under the impugned Rules leave an intermediary with a Hobson's choice where it wants to retain protection finder the safe harbour provision.

(e) The statutory machinery for disabling access to content on a website is through two possible channels, apart from a court order. The statutory channels are under Section 79(3)(b) and Section 69-A. The takedown regime triggered by any unspecified private individual (affected person) is beyond the statute and amounts to creating a third mechanism which is not envisaged by the Act.

(f) The power of government to impose reasonable restrictions with respect to speech is circumscribed by Article 19(2) of the Constitution of India. By seeking to control speech and expression that is "grossly harmful", "harassing", "blasphemous", "invasive of another's privacy". "hateful", "racially, ethnically objectionable", "disparaging", "otherwise unlawful in any manner whatsoever", "harm minor in any way", "violates any law for the time being in force", etc. the impugned Rules travel beyond Article 19(2) with respect to the aforesaid undefined expressions.

(g) The expressions in the previous sub-paragraph are vague. When this, vagueness is coupled with a requirement on the part of an intermediary to ensure

non-contravention in terms of Rule 3(4), or else lose exemption from liability, the statutory scheme is liable to be struck down as unconstitutional under Article 14 on the grounds of vagueness and arbitrariness.

(h) The impugned Rules do not make any provision for restoring content that has been taken down. The intermediary, in order to retain immunity, is not only required to take down material within 36 hours, but is also prevented from putting back information. This is because unlike Sections 52(1)(b) and (c) of the Copyright Act, 1957 which permits restoration access to the material complained about, there is no corresponding provision in the impugned Rules. The impugned Rules are unconstitutionally over broad because they compel permanent removal of material without determination by a government agency or court.

(i) The second petitioner is a citizen of India and is entitled to invoke Article 19(1)(a) Article 19(1)(a) embraces commercial speech (*Tata Press Ltd. v. MTNL*, (1995 SCC 139, paras 24 and 25). The first petitioner's website encourages and enables the exchange of information with respect to a product or service and also enables the manufacturer or service provider to address consumer issues on the platform. This lifts the quality of goods and standard of services in society. The right to rebut or respond is protected under Article 19(1)(a) (*LIC v. Manubhai D. Shah*, (1992) 3 SCC 637, paras 8, 9 and 12). Moreover, where a person's business is intricately connected with speech as in the case of the importer of books, any illegal restriction not only impinges upon Article 19(1)(g) but also amounts to an infraction of Article 19(1)(a) (*Gajanan VisheshwarBirjur v. Union of India*, (1994) 5 SCC 7-9). The impugned Rules, in their operation, through an over broad, "affected person" triggered takedown mechanism restrict commercial speech and are violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India.

(j) The first petitioner's servers are all located in India. Unless the intermediary safe harbour provision is meaningfully interpreted as suggested by the petitioners,

it will compel an Indian enterprise to relocate geographically to a more intermediary friendly jurisdiction.

G. Miscellaneous material

28. In the course of the oral arguments, the petitioners explained the nature of takedown provisions in other jurisdictions with reference to a report analysing the impugned Rules prepared by SFLC.in.

H. Reply to respondent's note on Section 79

29. In reply to Para 3, the subordinate legislation has to be within the contours permitted by the Constitution and cannot in any way be justified because the clauses are similar to the terms of service of private intermediaries. Terms of service of intermediaries are, at best, terms of a contractual relationship between a service provider and a user. Such terms cannot be equated to statutory rules notified by the Government. The tests for validity of a contract and a statute are different.

30. In reply to Para 8, the impugned Rules are unique to India and cannot be said to be similar to provisions followed all over the world. E.g. in USA a under Section 230 of the Communications Decency Act, 1996, no provider or user of interactive computer service shall be treated as a publisher or speaker information content provider. gives an intermediary complete immunity from liability arising out of user generated content. The safe harbour protection given to intermediaries in b USA is provided in detail at *Annexure 4*. Other jurisdictions like Finland and Canada follow a takedown and put-back regime and notice-and-notice regime respectively, wherein the content creator is given an opportunity of being heard Additional information about the practice in these jurisdictions is provided at *Annexure 5.*

31. Contrary to the respondent's account of legislative history (enumerated in Paras 10-40), the enactment of Section 230 was not the culmination of protracted legislative and judicial debates surrounding the imposition of strict liability on intermediaries with respect to copyright infringing content. In

fact, Congress' intention behind enacting Section 230 was discussed extensively in a 4th Circuit Court of Appeals judgment in *Zeran v. AOL* [139 F 3d 327 (1997)], where the Court observed that the section had evidently been enacted to maintain the robust nature of internet communications and to keep Government interference in the medium to a minimum. A true copy of the judgment of the 4th Circuit Court of Appeals in *Zerat v. AOL*, [139 F 3d 327 (1997)] is provided at Annexure 6."

The Apex Court, on the aforesaid contentions, renders its findings as follows:

"This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(*a*) of the Constitution of India. The immediate cause for concern in these petitions is Section 66-A of the Information Technology Act of 2000. This section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27-10-2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this section, it is set out hereinbelow:

"**66-A.** ***Punishment for sending offensive messages through communication service, etc.***—Any person who sends, by means of a computer resource or a communication device—

(*a*) any information that is grossly offensive or has menacing character; or

(*b*) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(*c*) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience

or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.—For the purposes of this section, terms '**electronic mail**' and '**electronic mail message**' means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

2. A related challenge is also made to Section 69-A introduced by the same amendment which reads as follows:

"**69-A.** ***Power to issue directions for blocking for public access of any information through any computer resource***.—(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in Para 3 that:

> "**3.** A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Penal Code, the Indian Evidence Act and the Code of Criminal Procedure to prevent such crimes."

4. The petitioners contend that the very basis of Section 66-A—that it has given rise to new forms of crimes—is incorrect, and that Sections 66-B to 67-C and various sections of the Penal Code, 1860 (which will be referred to hereinafter) are good enough to deal with all these crimes.

5. The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66-A. According to them, first and foremost Section 66-A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66-A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(*a*). In addition, the said section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the

internet. The petitioners also contend that their rights under Articles 14 and 21 are breached inasmuch as there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

6. In reply, Mr Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66-A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66-A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

… … …

13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(*a*). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the

sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(*a*). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(*a*) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make *no law* which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(*a*) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early US Supreme Court judgments, continues even today. In *Chaplinsky* v. *New Hampshire* [86 L Ed 1031 : 315 US 568 (1942)] , Murphy, J. who delivered the opinion of the Court put it thus : (L Ed p. 1035)

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood

> that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut* [310 US 296: 60 S Ct 900: 84 L Ed 1213 : 128 ALR 1352 (1940)] , US pp. 309, 310 : S Ct p. 906."

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(*a*), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American judgments have great persuasive value on the content of

freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to subserving the general public interest that there is the world of a difference. This is perhaps why in *Kameshwar Prasad* v. *State of Bihar* [1962 Supp (3) SCR 369 : AIR 1962 SC 1166] , this Court held : (SCR p. 378 : AIR pp. 1169-70, para 8)

> "As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading 'Congress shall make no law … abridging the freedom of speech …' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications, etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Article 19(1)(*a*) or (*b*) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision."

19. But when it comes to understanding the impact and content of freedom of speech, in *Indian Express Newspapers (Bombay)(P) Ltd.* v. *Union of India* [(1985) 1 SCC 641: 1985 SCC (Tax) 121: (1985) 2 SCR 287], Venkataramiah, J. stated: (SCC p. 671, para 44: SCR pp. 324F-325A)

> "While examining the constitutionality of a law which is alleged to contravene Article 19(1)(*a*) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(*a*) and of Article 19(1)(*g*) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19(1)(*a*) and Article 19(1)(*g*) of the Constitution are to be

> read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made."

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a)

21. Section 66-A has been challenged on the ground that it casts the net very wide—"all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(*v*) of the Information Technology Act, 2000 defines "information" as follows:

> "**2. *Definitions***.—(1) In this Act, unless the context otherwise requires—
>
> (*v*) '**information**' includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66-A. Information of all kinds is roped in—such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know—the marketplace of ideas—which the internet provides to persons of all kinds is what attracts Section 66-A. That the information sent has to be annoying, inconvenient, grossly offensive, etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc. The petitioners are right in saying that Section 66-A in creating an

offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A.

22. In this regard, the observations of Jackson, J. in *American Communications Assn.* v. *Douds* [94 L Ed 925 : 339 US 382 (1950)] are apposite : (L Ed p. 967)

> "… Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

B. Article 19(2)

23. One challenge to Section 66-A made by the petitioners' counsel is that the offence created by the said section has no proximate relation with any of the eight subject-matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

24. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In *Sakal Papers (P) Ltd.* v. *Union of India* [(1962) 3 SCR 842 : AIR 1962 SC 305] , this Court said : (SCR p. 863 : AIR pp. 313-14, para 37)

> "It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech

> can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

25. Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In *Supt., Central Prison* v. *Ram Manohar Lohia* [*Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002] , this Court laid down : (SCR pp. 834-36 : AIR pp. 639-40, paras 12-14)

> "… We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom; and between an Act that directly maintained public order and that indirectly brought about the same result. *The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act*.
>
> … The restriction made 'in the interests of public order' must also have reasonable relation to the object to be achieved i.e. the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction

> within the meaning of the said clause. … The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.
>
> … There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order."
>
> (emphasis supplied)

Reasonable restrictions

26. This Court has laid down what "reasonable restrictions" means in several cases. In *Chintaman Rao* v. *State of M.P.* [*Chintaman Rao* v. *State of M.P.*, 1950 SCC 695 : 1950 SCR 759 : AIR 1951 SC 118] this Court said : (SCR p. 763 : AIR p. 119, para 7)

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

27. In *State of Madras* v. *V.G. Row* [*State of Madras* v. *V.G. Row*, (1952) 1 SCC 410 : 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966] , this Court said : (SCR pp. 606-07 : AIR pp. 199-200, para 15)

> "This Court had occasion in *Khare case* [*N.B. Khare* v. *State of Delhi*, 1950 SCR 519 : 1950 SCC 522 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550] to define

the scope of the judicial review under clause (5) of Article 19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

28. Similarly, in *Mohd. Faruk* v. *State of M.P.* [(1969) 1 SCC 853 : (1970) 1 SCR 156] , this Court said : (SCC p. 857, para 10 : SCR p. 161 E-G)

"… The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a

> business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

29. In *N.B. Khare* v. *State of Delhi* [*N.B. Khare* v. *State of Delhi*, 1950 SCR 519 : 1950 SCC 522 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550] , a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said : (SCR p. 524 : AIR p. 214, para 4)

> "… While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years' externment or ten years' externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the Court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted."

30. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

"(*i*) The reach of print media is restricted to one State or at the most one country while internet has no boundaries and its reach is global;

(*ii*) The recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(*iii*) In case of televisions serials (except live shows) and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

(*iv*) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted/televised/viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

(*v*) By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

(*vi*) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

(*vii*) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(*viii*) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper and/or will have to go to a theatre to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(*ix*) In case of other mediums, it is impossible to maintain anonymity as a result of which speech/idea/opinions/films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(*x*) In case of other mediums like newspapers, television or films, the approach is always institutionalised approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV channel will have its own institutionalised policies in-house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19(1)(*a*).

(*xi*) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constraints. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constraints have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click."

31. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved—that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. **Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a section creating a new offence, such as Section 69-A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above**.

32. In fact, this aspect was considered in *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal* [(1995) 2 SCC 161] in para 37, where the following question was posed : (SCC p. 208)

> "*37*. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

This question was answered in para 78 thus : (SCC pp. 226-27)

> "*78*. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent

monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(*a*) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. *If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial*. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by

> denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media."
>
> (emphasis supplied)

Public order

33. In Article 19(2)(as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9(1)(*a*) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus, in *RomeshThappar* v. *State of Madras* [*RomeshThappar* v. *State of Madras*, 1950 SCR 594 : 1950 SCC 436 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514] , this Court held that an order made under Section 9(1)(*a*) of the Madras Maintenance of Public Order Act (23 of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

34. Similarly, in *Brij Bhushan* v. *State of Delhi* [1950 SCR 605 : 1950 SCC 449 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525] , an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

35. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

36. In *Supt., Central Prison* v. *Ram Manohar Lohia* [*Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821: AIR 1960 SC 633: 1960 Cri LJ 1002], this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in *Ram Manohar Lohia* v. *State of Bihar* [*Ram Manohar Lohia* v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] , where this Court held : (SCR p. 746 D-E : AIR pp. 758-59, para 52)

> "It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."

37. In *Arun Ghosh* v. *State of W.B.* [(1970) 1 SCC 98 : 1970 SCC (Cri) 67 : (1970) 3 SCR 288] , *Ram Manohar Lohia case* [*Ram Manohar Lohia* v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] was referred to with approval in the following terms : (SCC pp. 99-100, para 3 : SCR pp. 290-91)

> "… In *Ram Manohar Lohia case* [*Ram Manohar Lohia* v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance

amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardised because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. *He may annoy them and also the management but he does not cause disturbance of public order*. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in *Pushkar Mukherjee* v. *State of W.B.* [(1969) 1 SCC 10] drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of

> peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In *Ram Manohar Lohia case* [*Ram Manohar Lohia* v. *State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."
>
> (emphasis supplied)

38. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question : does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66-A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66-A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this section is concerned. (Save and except where under sub-clause (*c*) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The section makes no distinction between mass dissemination and dissemination to one person. Further, the section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent—there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an

immediate threat to public safety or tranquillity. On all these counts, it is clear that the section has no proximate relationship to public order whatsoever. The example of a guest at a hotel "annoying" girls is telling—this Court has held that mere "annoyance" need not cause disturbance of public order. Under Section 66-A, the offence is complete by sending a message for the purpose of causing annoyance, either "persistently" or otherwise without in any manner impacting public order.

Clear and present danger — Tendency to affect

39. It will be remembered that Holmes, J. in *Schenck* v. *United States* [63 L Ed 470 : 249 US 47 (1919)] , enunciated the clear and present danger test as follows : (L Ed pp. 473-74)

> "… The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove & Range Co.* [221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911)] , US p. 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

40. This was further refined in *Abrams* v. *United States* [250 US 616 : 63 L Ed 1173 (1919)] , this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the US Supreme Court, the test has been understood to mean to be "clear and present danger". The test of "clear and present danger" has been used by the US Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see *Terminiello* v. *Chicago* [93 L Ed 1131 : 337 US 1 (1949)] , L Ed at pp. 1134-35, *Brandenburg* v. *Ohio* [23 L Ed 2d 430 : 395 US 444 (1969)] , L Ed 2d at pp. 434-35 & 436, *Virginia* v. *Black* [155 L Ed 2d 535 : 538 US 343 (2003)] , L Ed 2d at pp. 551, 552 and 553 [In its present form the clear and present danger test has been reformulated to say that:"The constitutional guarantees of free

speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat"."'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.""The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[See *Virginia* v. *Black*, 155 L Ed 2d 535 : 538 US 343 (2003) and *Watts* v. *United States*, 22 L Ed 2d 664 at p. 667 : 394 US 705 (1969)]] .

41. We have echoes of it in our law as well—*S. Rangarajan* v. *P. Jagjivan Ram* [(1989) 2 SCC 574] , SCC at para 45 : (SCC pp. 595-96)

> "*45*. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. *Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered*. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a power keg'."
>
> (emphasis supplied)

42. This Court has used the expression "tendency" to a particular act. Thus, in *State of Bihar* v. *Shailabala Devi* [(1952) 2 SCC 22 : 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cri LJ 1373] , an early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (SCR at pp. 662-63). The test laid down in the said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader (SCR at pp. 664-65).

43. In *Ramji Lal Modi* v. *State of U.P.* [1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006] , SCR at p. 867, this Court upheld Section 295-A of the Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in *Kedar Nath Singh* v. *State of Bihar* [1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103] , Section 124-A of the Penal Code, 1860 was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or *creating feelings of enmity* in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(*a*). Again, in *Ramesh YeshwantPrabhoo* v. *Prabhakar Kashinath Kunte* [(1996) 1 SCC 130] , Section 123(3-A) of the Representation of the People Act was upheld only if the enmity or hatred that was spoken about in the section would tend to create immediate public disorder and not otherwise.

44. Viewed at, either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66-A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

… … …

62. Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be wilfully done. *It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished*. It is only on

these limited grounds that the said Ordinance was considered not to be impermissibly vague.

63. In *Reno* v. *American Civil Liberties Union* [*Reno* v. *American Civil Liberties Union*, 521 US 844: 138 L Ed 2d 874 (1997)], two provisions of the Communications Decency Act, 1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons—that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66-A. Section 223(*d*), which was adjudged unconstitutional, is set out hereinbelow : (US p. 860)

> "**223. (*d*)** Whoever—
>
> (1) in interstate or foreign communications knowingly—
>
> (*A*) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (*B*) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by para (1) with the intent that it be used for such activity,
>
> shall be fined under Title 18, or imprisoned not more than two years, or both."

Interestingly, the District Court Judge writing of the internet said:

> "[I]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most

> participatory marketplace of mass speech that this country—and indeed the world—as yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication : individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and anti-federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen." *American Civil Liberties Union* v. *Reno* [929 F Supp 824 (3d Cir 1996)] , F Supp at p. 881. (at p. 425)

64. The Supreme Court held that the impugned statute lacked the precision that the First Amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

65. Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. *It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad*. It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

… … …

72. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in Section 66-A are completely open-ended and undefined.

… … …

78. Incidentally, none of the expressions used in Section 66-A are defined. Even "criminal intimidation" is not defined—and the definition clause of the Information Technology Act,

Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

… … …

90. That the content of the right under Article 19(1)(*a*) remains the same whatever the means of communication including internet communication is clearly established by *Reno case* [*Reno* v. *American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997)] and by *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal* [(1995) 2 SCC 161] , SCC at para 78 already referred to. It is thus clear that not only are the expressions used in Section 66-A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, *Kedar Nath Singh* v. *State of Bihar* [1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103] , SCR at pp. 808-09. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first *Ram Manohar Lohia case* [*Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002] , namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the section takes in the innocent as well as the guilty, bona fide and mala fide advice and whether the person be a legal adviser, a friend or a well-wisher of the person instigated, he cannot escape the tentacles of the section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

91. In *Kameshwar Prasad* v. *State of Bihar* [1962 Supp (3) SCR 369 : AIR 1962 SC 1166] , Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The

Rule states, "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

92. The aforesaid Rule was challenged under Articles 19(1)(*a*) and (*b*) of the Constitution. The Court followed the law laid down in *Ram Manohar Lohia case* [*Supt., Central Prison* v. *Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002] and accepted the challenge. It first held that demonstrations are a form of speech and then held : (*Kameshwar Prasad case* [1962 Supp (3) SCR 369 : AIR 1962 SC 1166] , SCR p. 374 : AIR p. 1168, para 5)

> "… The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Articles 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent State is that the rule is framed 'in the interest of public order'. A demonstration may be defined as 'an expression of one's feelings by outward signs'. A demonstration such as is prohibited by, the rule may be of the most innocent type—peaceful orderly such as the mere wearing of a badge by a government servant or even by a silent assembly say outside office hours—demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of the type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type—innocent as well as otherwise—and in consequence its validity cannot be upheld."

93. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held : (*Kameshwar Prasad case* [1962 Supp (3) SCR 369 : AIR 1962 SC 1166] , SCR p. 384 : AIR p. 1172, para 17)

> "… The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result."

94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Possibility of an Act being abused is not a ground to test its validity

95. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66-A is capable of being abused by the persons who administer it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66-A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In *Collector of Customs* v. *NathellaSampathu Chetty* [(1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364] , this Court observed : (SCR pp. 825-26 : AIR p. 332, para 33)

> "… This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:
>
> 'If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably'
>
> and treating this as a ground for holding the statute invalid Viscount Simonds observed in *Belfast Corpn.* v. *O.D. Cars*

Ltd. [1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL)] , AC at pp. 520-21:

> '… it appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. … If it is not so exercised [i.e. if the powers are abused], it is open to challenge, and there is no need for express provision for its challenge in the statute.'
>
> The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements."

96. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66-A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66-A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66-A must be judged on its own merits without any reference to how well it may be administered.

… … …

114. It will be noticed that Section 69-A unlike Section 66-A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the

subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

115. The Rules further provide for a hearing before the Committee set up—which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69-A.

116. Merely because certain additional safeguards such as those found in Sections 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011

117. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfil the conditions of the section. Section 79 states:

> **"79. *Exemption from liability of intermediary in certain cases*.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.**
>
> **(2) The provisions of sub-section (1) shall apply if—**
>
> **(*a*) the function of the intermediary is limited to providing access to a communication system over**

which information made available by third parties is transmitted or temporarily stored or hosted; or

(*b*) the intermediary does not—
(*i*) initiate the transmission,
(*ii*) select the receiver of the transmission, and
(*iii*) select or modify the information contained in the transmission;
(*c*) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(*a*) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(*b*) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression 'third party information' means any information dealt with by an intermediary in his capacity as an intermediary."

118. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rules 3(2) and 3(4) are important, they are set out hereinbelow:

"3. *Due diligence to be observed by intermediary*.—The intermediary shall observe following due diligence while discharging his duties, namely—

***

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that—

(*a*) belongs to another person and to which the user does not have any right to;
(*b*) is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;
(*c*) harm minors in any way;
(*d*) infringes any patent, trademark, copyright or other proprietary rights;
(*e*) violates any law for the time being in force;
(*f*) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;
(*g*) impersonate another person;
(*h*) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;
(*i*) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

***

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the

intermediary shall preserve such information and associated records for at least ninety days for investigation purposes."

119. The learned counsel for the petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69-A. Also, for the very reasons that Section 66-A is bad, the petitioners assailed sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2).

120. One of the petitioners' counsel also assailed Section 79(3)(*b*) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2).

121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(*b*) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(*b*).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(*b*). **The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.**

124. In conclusion, we may summarise what has been held by us above:

124.1. Section 66-A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(*a*) and not saved under Article 19(2).

124.2. Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 are constitutionally valid.

124.3. Section 79 is valid subject to Section 79(3)(*b*) being read down to mean that an intermediary

> **upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.**
>
> **124.4. Section 118(*d*) of the Kerala Police Act is struck down being violative of Article 19(1)(*a*) and not saved by Article 19(2).**
>
> **125. All the writ petitions are disposed in the above terms."**
>
> (Emphasis supplied)

The Apex Court, while elaborately interpreting the Intermediary Rules, 2011 strikes down Section 66A of the Act to be violative of Article 19(1)(a) and not saved under Article 19(2). The Apex Court holds Section 69A and the Blocking Rules, 2009 to be constitutionally valid. It reads down Section 79 to mean, that an intermediary upon receiving actual knowledge from a Court order, or being notified by the appropriate Government, would remove the material under the Intermediary Rules, 2011. The action was said to be valid, subject to Rule 3(4) being read down in the same manner as indicated *qua* Section 79.

12.11. It now becomes necessary to notice the change in judicial thought post **SHREYA SINGHAL**, where the Apex Court considering the cases of these intermediaries holds differently.

POST - SHREYA SINGHAL:

12.12. The Apex Court in the case of **AJIT MOHAN v. LEGISLATIVE ASSEMBLY, NCT OF DELHI**[10], has held as follows:

> **"*Prolegomenon***
>
> **1. The technological age has produced digital platforms — not like the railway platforms where trains were regulated on arrival and departure. These digital platforms can be imminently uncontrollable at times and carry their own challenges. One form of digital platforms are the intermediaries that claim to be providing a platform for exchange of ideas without any contribution of their own. It is their say that they are not responsible for all that transpires on their platform; though on complaints being made, they do remove offensive content based on their internal guidelines. The power and potentiality of these intermediaries is vast, running across borders. These are multinational corporations with large wealth and influence at their command. By the very reason of the platform they provide, their influence extends over populations across borders. Facebook is one such corporation.**
>
> **2. A testament to the wide-ranging services which Facebook offers is the fact that it has about 2.85 billion monthly active users as of March 2021. This is over one-third of the total population of this planet. In the national context, Facebook is the most popular social media**

[10] **(2022) 3 SCC 529**

platform in India with about 270 million registered users. Such vast powers must necessarily come with responsibility. Entities like Facebook have to remain accountable to those who entrust them with such power. While Facebook has played a crucial role in enabling free speech by providing a voice to the voiceless and a means to escape State censorship, we cannot lose sight of the fact that it has simultaneously become a platform for disruptive messages, voices, and ideologies. The successful functioning of a liberal democracy can only be ensured when citizens are able to make informed decisions. Such decisions have to be made keeping in mind a plurality of perspectives and ideas.

3. The information explosion in the digital age is capable of creating new challenges that are insidiously modulating the debate on issues where opinions can be vastly divided. Thus, while social media, on the one hand, is enhancing equal and open dialogue between citizens and policy makers; on the other hand, it has become a tool in the hands of various interest groups who have recognised its disruptive potential. This results in a paradoxical outcome where extremist views are peddled into the mainstream, thereby spreading misinformation. Established independent democracies are seeing the effect of such ripples across the globe and are concerned. Election and voting processes, the very foundation of a democratic government, stand threatened by social media manipulation. This has given rise to significant debates about the increasing concentration of power in platforms like Facebook, more so as they are said to employ business models that are privacy-intrusive and attention soliciting. The effect on a stable society can be cataclysmic with citizens being "polarised and paralysed" by such "debates", dividing the society vertically. Less informed individuals might have a tendency to not verify information sourced from friends, or to treat information received from populist leaders as the gospel truth.

4. It is interesting to note that the *Oxford Dictionary* in 2016 chose "Post-Truth" as the word of the year. The adjective has been defined as "*relating to or denoting circumstances in which objective facts are less influential in shaping public*

opinion than appeals to emotion and personal belief." This expression has a period relevance when it came to be recognised contextually with divided debates about the 2016 US Presidential Elections and Brexit — two important events with effects beyond their territorial limits. The obfuscation of facts, abandonment of evidentiary standards in reasoning, and outright lying in the public sphere left many aghast. A lot of blame was sought to be placed at the door of social media, it being a source of this evolving contemporary phenomenon where objective truth is becoming a commodity with diminishing value. George Orwell, in his 1943 essay titled "Looking Back on the Spanish War" had expressed "… *the very concept of objective truth is fading out of the world. After all, the chances are that those lies, or at any rate similar lies will pass into history*" the words have proved to be prophetic.

5. In the conspectus of the aforesaid, it is difficult to accept the simplistic approach adopted by Facebook — that it is merely a platform posting third-party information and has no role in generating, controlling or modulating that information. The endeavour to hide behind such simplistic models have been found to be unacceptable by the UK Parliament. The House of Commons Digital, Culture, Media and Sport Select Committee in its 2018 Report had opined that this would amount to shirking of their responsibilities with respect to content regulation on their site.

6. Serious questions have been raised about whether there is a faulty architecture of such intermediary platforms and whether the kind of free, liberal debate which they sought to encourage has itself become a casualty, defeating the very objective of providing that platform. It is too late in the day for companies like Facebook to deny that they use algorithms (which are sequences of instructions) with some human intervention to personalise content and news to target users. The algorithms select the content based on several factors including social connections, location, and past online activity of the user. These algorithms are often far from objective with biases capable of getting replicated and reinforced. The role played by Facebook is, thus, more active and not as innocuous as is often presented when dealing with third-party content.

7. In fact, in the proceedings before us, it is their contention that there are times when they are at the receiving end of both groups alleging bias towards the other but then this is a sequitur to their ability to decide which content to amplify, suggest, and elevate. Internationally, Facebook has had to recognise its role in failing to prevent division and incitement of offline violence in the context of the stated ethnic cleansing in Myanmar where a crescendo of misinformation and posts, somehow missed by Facebook employees, helped fuel the violence. The platform similarly apologised for its lack of serious response to evident signs of abuse of the platform in Sri Lanka, which again is stated to have stoked widespread violence in 2018 in the country and had to acknowledge its need to be regulated though the exact method is still unclear and a prerogative of law-making authority.

8. There have been endeavours in light of the aforesaid by countries like Australia, US, the UK, and the EU for ways to regulate platforms such as Facebook in an efficient manner but their efforts are still at a nascent stage as studies are undertaken to understand the dynamism of the platform and its disruptive potential. A recent example has been Australia's effort to formulate a legislation that would require Facebook to pay publishers for using their news stories. The law was seen as a tool to regulate the platform's unchecked influence over political discourse, society, and democracy. In response, Facebook blocked all news on its platform across the country with the result that there was some relaxation but ultimately a via media was found. The US has also seen heated debates arising from the 2016 Presidential Elections with allegations of supposed interference by Russia allegedly facilitated by platforms like Facebook. Last year, the EU formulated legislative proposals, namely, the Digital Services Act and Digital Markets Act, setting out rules for platforms to follow.

9. We have penned down a detailed introduction to appreciate the gravity of what was debated before us in the context of Facebook's hands-off approach, who have urged that they cannot be compelled to participate in proceedings of Sub-Committees formed by Parliament or the Legislative Assemblies. The immense power that platforms like Facebook wield has

> stirred a debate not only in our country but across the world. The endeavour has been to draw a line between tackling hate speech and fake news on the one hand and suppressing legitimate speech which may make those in power uncomfortable, on the other. This delicate balance has thus far only been maintained by the intermediaries by being value-neutral. The significance of this is all the more in a democracy which itself rests on certain core values. This unprecedented degree of influence necessitates safeguards and caution in consonance with democratic values. Platforms and intermediaries must subserve the principal objective as a valuable tool for public good upholding democratic values.
>
> **10. The sheer population of our country makes it an important destination for Facebook. We are possibly more diverse than the whole of Europe in local culture, food, clothing, language, religion, traditions and yet have a history of what has now commonly been called "unity in diversity". This cannot be disrupted at any cost or under any professed freedom by a giant like Facebook claiming ignorance or lack of any pivotal role."**
>
> (Emphasis supplied)

12.13. The Apex Court recently encountered this menace and had to indicate the role of intermediaries in the case of **JUST RIGHTS FOR CHILDREN ALLIANCE v. S.HARISH**[11]. Therein the Apex Court observes as follows:

> "…. …. ….
>
> **254. The role of "intermediaries" as defined under Section 2(w) of the IT Act in checking the proliferation of child pornography is significant. Section 79 of the IT Act, 2000 which relates to due diligence that is to be observed by an intermediary, provides an exemption from liability**

[11] **2024 SCC OnLine SC 2611**

to such intermediaries in certain cases if they are in compliance with the due-diligence requirements prescribed under the said provision, more particularly sub-section (3)(b), this is known as the "safe harbour" protection or provision. "Safe Harbour" protection means that an intermediary will not be held liable for any third-party information, data, or communication link made available or hosted by him. As per sub-section (2), in order to avail such protection, the intermediary foremost must not in any manner be involved in either initiating the transmission, or the receipt or the modification of the third-party data or information in question, and further is required to observe due diligence while discharging his duties under the IT Act and to also observe such other guidelines as the Central Government may prescribe in his behalf. Subsection (3)(b) of the above-mentioned provision stipulates that if an intermediary receives actual knowledge or is notified by the appropriate government or its agency that any information, data, or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit an unlawful act, the intermediary must expeditiously remove or disable access to that material on that resource without compromising the evidence in any manner. It further states that the protection under Section 79 lapses and does not apply if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act, or if upon receiving "actual knowledge", or if the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act. The relevant provision reads as under:—

> "***79. Exemption from liability of intermediary in certain cases.—***

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) *the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or*

(b) *the intermediary does not—*

(i) *initiate the transmission;*

(ii) *select the receiver of the transmission; and*

(iii) *select or modify the information contained in the transmission;*

(c) *the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

(Emphasis supplied)

12.14. In a criminal case concerning **RANVEER GAUTAM ALLAHABADIA v. UNION OF INDIA**[12], the Apex Court suggested to Government of India to draft a regulatory proposal effective enough to ensure reasonable restrictions on free speech within the meaning of Article 19(2) of the Constitution of India. The Apex Court, in the said case, has held as follows:

"1. Learned Attorney General for India and learned Solicitor General of India are present in Court. They submit that in order to prevent the broadcasting or airing of the programmes, which are offensive to well-known moral standards of our society, some regulatory measures may be required. We have suggested learned Solicitor General of India to deliberate upon and draft such regulatory proposal which may not encroach upon the Fundamental Right of free speech and expression but, at the same time, which is effective enough to ensure the reasonable restrictions within the meaning of Article 19(2) of the Constitution. The draft regulatory measures, in this regard, can then be brought in public domain to invite suggestions from all the stakeholders before taking any legislative or judicial measures in this regard. For this purpose, we are inclined to extend the scope of these proceedings.

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[12] 2025 SCC OnLine SC 699

2. Learned Solicitor General representing the States of Assam and Maharashtra as also the Union of India points out that despite a specific condition imposed on the petitioner while protecting his arrest on 18.02.2025, he has not joined the investigation in the case registered at Guwahati, Assam.

3. Learned counsel for the petitioner, on the other hand, states that a Whatsapp message was sent to the Investigating Officer requesting him for a date and time to appear but no response was received.

4. Be that as it may, learned counsel for the State of Assam will instruct the Investigating Officer to fix date and time to enable the petitioner to join the investigation.

5. The petitioner has also moved I.A. No. 55507/2025 seeking the following reliefs:

> (i) Pass an order modifying condition (v) of the interim order dated 18.02.2025 passed by this Hon'ble Court to allow and enable the petitioner to continue to create and air online content on YouTube and other digital platforms.
>
> (ii) Pass an order modifying condition (iv) of the interim order dated 18.02.2025 to enable the Petitioner to travel abroad, with prior intimation to the concerned Investigating Officer, Mumbai, Maharashtra.
>
> (iii) Pass any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

6. As of now, we have heard learned counsel for the petitioner as well as learned Solicitor General of India with reference to prayer (i), which pertains to vacation/modification of Clause (v) of the order dated 18.02.2025 in terms whereof the petitioner and his associates were restrained from airing any show on Youtube or any other audio/video visual mode of communication till further orders.

7. Subject to the petitioner's furnishing an undertaking to the effect that his digital podcast named 'The Ranveer Show' will

> maintain the desired standards of decency and morality so that viewers of any age group can watch it, and subject to further condition that no programme on the 'The Ranveer Show' shall be telecasted which has direct or indirect bearing on the merits of the cases which are *sub-judice*, the petitioner is permitted to resume 'The Ranveer Show". The directions contained in Clause (v) of order dated 18.02.2025 are modified primarily keeping in view the fact that livelihood of around 280 employees statedly engaged by the petitioner for his 'The Ranveer Show' is likely to be affected.
>
> **8.** As regard to prayer (ii), namely, to allow him to travel abroad to record his podcast with guests based in foreign countries and for other work commitments, such a prayer shall be considered after the petitioner joins the investigation."

(Emphasis supplied)

12.15. The Apex Court while dealing with issues of intersection of free speech and criminal liability throughout its judicial thought, observes that while speech must be protected as the corner stone of liberty, its unchecked proliferation in the digital age, may necessitate, measured regulatory interventions to preserve, order, decency and integrity of democratic life. It is therefore while dealing with the case of **RANVEER** *supra*, the Apex Court thought it appropriate to invite the Government of India to formulate a regulatory framework capable of imposing effective and meaningful checks on the freedom of expression, within the boundaries of Article 19(2) of the Constitution of India. Thus, the

larger benches of the Apex Court, pre-**SHREYA SINGHAL** recognised the right of reasonable restrictions upon free speech and expression. Post-**SHREYA SINGHAL**, the benches of larger strength or even equal strength have thought it fit to curb the developing menace. **Therefore, I answer the issue holding that free speech, as obtaining under Article 19(1)(a) cannot be unbridled, uncanalized and a free fall, it is hedged, regulated and restricted by reasonable restrictions as found in Article 19(2).**

ISSUE NO.4:

(iv) Whether the jurisprudential edifice of the United States of America can be transplanted, without reservation or adaptation, into the soil of Indian constitutional thought?

13.1. The judgment of the Apex Court in the case of **SHREYA SINGHAL** was broadly based upon the judgment of the American Supreme Court in the case of **RENO** *supra, albeit, inter alia*. It, therefore, becomes necessary to notice the judgments rendered by the benches of larger strength, as to whether American

Jurisprudence or doctrines can be transplanted to Indian Jurisprudence.

13.2. Beginning with the Constitution Bench judgment in the case of **BABULAL PARATE v. STATE OF MAHARASHTRA**[13], wherein the Apex Court observes as follows:

"…. …. ….

> **23.** The argument that the test of determining criminality in advance is unreasonable, is apparently founded upon the doctrine adumbrated in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] that previous restraints on the exercise of fundamental rights are permissible only if there be a clear and present danger. **It seems to us, however, that the American doctrine cannot be imported under our Constitution because the fundamental rights guaranteed under Article 19(1) of the Constitution are not absolute rights but, as pointed out in *State of Madras* v. *V.G. Row* [(1952) 1 SCC 410 : 1952 SCR 597] are subject to the restrictions placed in the subsequent clauses of Article 19. There is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of our Constitution**. The Fourteenth Amendment to the U.S. Constitution provides, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ….".
>
> **24. The framework of our Constitution is different from that of the Constitution of the United States. Then again, the Supreme Court of the United States has held that the privileges and immunities conferred by the Constitution are subject to social control by resort to the**

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[13] (1961) 3 SCR 423 : 1961 SCC OnLine SC 48

doctrine of police power. It is in the light of this background that the test laid down in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] has to be understood.

25. The language of Section 144 is somewhat different. The test laid down in the section is not merely "likelihood" or "tendency". The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.

26. Apart from this it is worthy of note that in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] the Supreme Court was concerned with the right of freedom of speech and it observed:

> "It well may be that the prohibition of law abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose…. We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.… The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force…. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

27. Whatever may be the position in the United States it seems to us clear that anticipatory action of the kind permissible under Section 144 is not impermissible under clauses (2) and (3) of Article 19. Both in clause (2) (as amended in 1951) and in clause (3), power is given to the legislature to make laws placing reasonable restrictions on the exercise of the rights conferred by these clauses in the interest, among other things, of public order. Public order has to be maintained in

> **advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. We must, therefore, reject the contention.**
>
> **28.** It is no doubt true that since the duty to maintain law and order is cast upon the Magistrate, he must perform that duty and not shirk it by prohibiting or restricting the normal activities of the citizen. But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order. In such circumstances that could be the only mode of discharging the duty. We, therefore, reject the contention that Section 144 substitutes suppression of lawful activity or right for the duty of public authorities to maintain order."
>
> (Emphasis supplied)

The Apex Court holds that American doctrine cannot be imported under our Constitution, because the fundamental rights guaranteed under Article 19(1) are not absolute rights, but as pointed by the Apex Court in the case of **STATE OF MADRAS v. V.G.ROW** *supra,* they are subject to restrictions placed in the subsequent clauses of Article 19. There is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of the Constitution. Therefore, the Constitution Bench holds that framework of our Constitution is different from that of the Constitution of the United States of America. The privileges and immunity conferred in the

United States are entirely different from such conferment under the Constitution of India.

13.3. Again, the 7 Judge Bench of the Apex Court in the case of **MADHU LIMAYE v. SUB-DIVISIONAL MAGISTRATE MONGHYR**[14] has held as follows:

"…. …. ….

> 16. We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. "Public order" no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means, what the French designate order publique, defined as an absence of insurrection, riot turbulence, or crimes of violence. The expression "public order" includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression "order publique" explained above but not acts which disturb only the serenity of others.
>
> **17. The English and American precedents and legislation are not of such help. The Public Order Act, 1936 was passed because in 1936 different political organisations marched in uniforms causing riots. In America the First Amendment freedoms have no such qualifications as in India and the rulings are apt to be misapplied to our Constitution.**"

(Emphasis supplied)

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[14] (1970) 3 SCC 746

The 7 Judge Bench holds that English and American precedents and legislation are not of such help. In America, the first amendment freedoms have no such qualifications as in India and the rulings are apt to be misapplied to our Constitution.

13.4. The Constitution Bench of the Apex Court, again in the case of **RAMLILA MAIDAN INCIDENT, IN RE.**[15] has held as follows:

> "…. …. ….
>
> **2.** It appears justified here to mention the First Amendment to the United States (US) Constitution, a bell-wether in the pursuit of expanding the horizon of civil liberties. This Amendment provides for the freedom of speech of press in the American Bill of Rights. This Amendment added new dimensions to this right to freedom and purportedly, without any limitations. The expressions used in wording the First Amendment have a wide magnitude and are capable of liberal construction. It reads as under:
>
> > "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> The effect of use of these expressions, in particular, was that the freedom of speech of press was considered absolute and free from any restrictions whatsoever.
>
> **3.** Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each

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[15] (2012) 5 SCC 1

case on the touchstone of the rule of "clear and present danger" [**Ed.** : The "clear and present danger" test was laid down by Holmes, J. in *Schenck* v. *United States*, 63 L Ed 470 : 249 US 47 (1919) for deciding whether a restriction on free speech was constitutionally valid.] . However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of "balancing of interests". The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Frankfurter, J. often applied the abovementioned balancing formula and concluded that "while the court has emphasised the importance of 'free speech', it has recognised that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations." [**Ed.** : See in this regard observations of Frankfurter, J. in *Niemotko* v. *Maryland*, 95 L Ed 267, at 276 : 340 US 268, at 282 (1951).]

4. The "balancing of interests" approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structure of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the "clear and present danger" and "preferred position" doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position. (*Freedom of Speech: The Supreme Court and Judicial Review*, by Martin Shapiro, 1966.)

5. Even in the United States there is a recurring debate in modern First Amendment jurisprudence as to whether First Amendment rights are "absolute" in the sense that the Government may not abridge them at all or whether the First Amendment requires the "balancing

of competing interests" in the sense that free speech values and the Government's competing justification must be isolated and weighted in each case. Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time.

6. In *Schenck* v. *United States* [63 L Ed 470 : 249 US 47 (1919)] the Court held : (L Ed pp. 473-74)

> "… the character of every act depends upon the circumstances in which it is done. … The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. … The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."
> [*Constitution of India* (2nd Edn.), Vol. 1 by Dr L.M. Singhvi.]

7. In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(*a*). It also provides the right to assemble peacefully and without arms to every citizen of the country under Article 19(1)(*b*). However, these rights are not free from any restrictions and are not absolute in their terms and application. Articles 19(2) and 19(3), respectively, control the freedoms available to a citizen. Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause. Similarly, Article 19(3) enables the State to

make any law imposing reasonable restrictions on the exercise of the right conferred, again in the interest of the factors stated therein.

8. In face of this constitutional mandate, the American doctrine adumbrated in *Schenck case* [63 L Ed 470 : 249 US 47 (1919)] cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the abovenoticed restrictions. Thus, the position under our Constitution is different.

9. In *Constitutional Law of India* by H.M. Seervai (4th Edn.), Vol. 1, the author has noticed that the provisions of the two Constitutions as to freedom of speech and expression are essentially different. The difference being accentuated by the provisions of the Indian Constitution for preventive detention which have no counterpart in the US Constitution. Reasonable restriction contemplated under the Indian Constitution brings the matter in the domain of the court as the question of reasonableness is a question primarily for the court to decide. (*Babulal Parate* v. *State of Maharashtra* [AIR 1961 SC 884: (1961) 2 Cri LJ 16: (1961) 3 SCR 423])

10. The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. For instance, the right to freedom of speech and expression is not violated by a law which requires that the name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper.

11. Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note that the freedom of speech is the bulwark of a democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving

> **succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press."**
>
> (Emphasis supplied)

The Constitution Bench, again holds that, in the face of the Constitutional mandate, the American doctrine in **SCHENCK** v. **UNITED STATES, 249 U.S. 47 (1919)** case cannot be imported and applied to our Constitution. The Apex Court holds that there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the U.S. laws. American doctrines, apart from the precedents, have also been declined to be followed by the Apex Court from time to time.

13.5. In the case of **JOSEPH KURUVILLA VELLUKUNNEL v. THE RESERVE BANK OF INDIA**[16], the Apex Court has held as follows:

> "…. …. ….
>
> 50. Mr Nambiar, however, joined issue on the use of the American precedents on the ground that banking in America is by grace of legislature, and is either a franchise or a privilege,

[16] AIR 1962 SC 1371

which has no place in our Constitution. He added that the carrying on of business is not one of the provisions of the American Bill of Rights, nor a fundamental right, as we understand it, though by judicial construction the individual right has been brought within the Fourteenth Amendment. **He, therefore, contended that American cases and American laws should not be used. In our opinion, no useful purpose will be served by trying to establish the similarities or discrepancies between the American Constitution and banking laws, on the one hand, and our Constitution and our banking laws, on the other, and we do not wish to rest our decision on the American and Japanese analogies.**

75. The aid of American concepts, laws and precedents in the interpretation of our laws is not always without its dangers and they have therefore to be relied upon with some caution if not with hesitation because of the difference in the nature of those laws and of the institutions to which they apply. Mr Nambiyar relied upon these different concepts and submitted that in U.S.A. the right to carry on business is not a fundamental right but is a "franchise", though, it has by legal interpretation, been brought within the fourteenth amendment and the doctrine of "franchise" has no place in the Indian Constitution: C.S.S. Motor Service v. State of Madras [ILR (1953) Mad. 304] approved in Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707, 718]. Similarly the right to form a corporation is in U.S.A. a "franchise" or a "privilege" which can be withdrawn. To apply the analogy of Banks in U.S.A. to those in India or the mode of exercise by and extent of the powers of a Controller of Currency or some similar authority will more likely than not lead to erroneous conclusions.

(Emphasis supplied)

13.6. The Apex Court in the case of **M.C. MEHTA v. UNION OF INDIA**[17]**,** has held as follows:

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[17] (1987) 1 SCC 395

"29. We were, during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the courts in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence. That we in no way consider ourselves bound by American exposition of constitutional law is well demonstrated by the fact that in *R.D. Shetty* [(1979) 3 SCC 489 : AIR 1979 SC 1628 : (1979) 3 SCR 1014] this Court preferred the minority opinion of Douglas, J. in *Jackson* v. *Metropolitan Edison Company* [42 L Ed (2d) 477] as against the majority opinion of Rehnquist, J. And again in *Air India* v. *NergeshMeerza* [(1981) 4 SCC 335 : 1981 SCC (L&S) 599 : (1982) 1 SCR 438] this Court whilst preferring the minority view in *General Electric Company* v. *Martha V. Gilbert* [50 L Ed (2d) 343] said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different."

(Emphasis supplied)

13.7. In the case of **AUTOMOBILE TRANSPORT (RAJASTHAN) LIMITED v. STATE OF RAJASTHAN**[18] the Apex Court holds as follows:

"…. …. ….

> **8.** So far we have set out the factual and legal background against which the problem before us has to be solved. We must now say a few words regarding the historical background. **It is necessary to do this, because extensive references have been made to Australian and American decisions, Australian decisions with regard to the interpretation of Section 92 of the Australian Constitution and American decisions with regard to the Commerce clause of the American Constitution. This Court pointed out in the *Atiabari Tea Co. case* [(1961) 1 SCR 809] that it would not be always safe to rely upon the American or Australian decisions in interpreting the provisions of our Constitution. Valuable as those decisions might be in showing how the problem of freedom of trade, commerce and intercourse was dealt with in other federal constitutions, the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution-makers tried to solve according to the genius of the Indian people whom the Constitution-makers represented in the Constituent Assembly.** The first thing to be noticed in this connection is that the Constitution-makers were not writing on a clean slate. They had the Government of India Act, 1935 and they also had the administrative set up which that Act envisaged. India then consisted of various administrative units known as Provinces, each with its own administrative set up. There were differences of language, religion etc. Some of the Provinces were

[18] **(1963) 1 SCR 491:1962 SCC OnLine SC 21**

economically more developed than the others. Even inside the same Province, there were under developed, developed and highly developed areas from the point of view of industries, communications etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facets. Two questions, however, stood out; one question was how to achieve a federal, economic and fiscal integration, so that economic policies affecting the interests of India as a whole could be carried out without putting an ever-increasing strain on the unity of India, particularly in the context of a developing economy. The second question was how to foster the development of areas which were under-developed without creating too many preferential or discriminative barriers. Besides the Provinces, there were the Indian States also known as Indian India. After India attained political freedom in 1947 and before the Constitution was adopted, the process of merger and integration of the Indian States with the rest of the country had been accomplished so that when the Constitution was first passed the territory of India consisted of Part A States, which broadly stated, represented the Provinces in British India, and Part B States which were made up of Indian States. There were trade barriers raised by the Indian States in the exercise of their legislative powers and the Constitution-makers had to make provisions with regard to those trade barriers as well. The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the constitutions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Article 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself. One of the grievances made on behalf of the intervening States before us was that the majority view in the *Atiabari Tea Co. case* [(1961) 1 SCR 809] did not give sufficient importance to the power of the States under the Indian Constitution to raise revenue by taxes under the legislative heads entrusted to them, in interpreting the series of articles relating to trade, commerce and intercourse in Part XIII of the Constitution. It has been often stated that freedom of inter-State trade and commerce in a federation has been a baffling problem to constitutional experts in Australia, in America and in other federal

constitutions. In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations which may be broadly stated thus : first, in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether; and third, there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India. As we shall presently show, all these three considerations have played their part in the series of articles which we have to consider in Part XIII of the Constitution. Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III (Fundamental Rights), Part XII (Finance, Property etc. containing Articles 276 and 286) and their inter-relation to Part XIII in the context of a federal or quasi-federal Constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation."

(Emphasis supplied)

13.8. The Apex Court in the case of **STATE OF BIHAR v. UNION OF INDIA**[19], has held as follows:

"…. …. ….

13. Our attention was drawn to some provisions of the American Constitution and of the Constitution Act of Australia and several decisions bearing on the interpretation of provisions which are somewhat similar to Article 131. But as the similarity is only limited, we do not propose to examine either the provisions referred to or the decisions to which our attention was drawn. **In interpreting our Constitution we must not be guided by decisions which do not bear upon provisions identical with those in our Constitution**."

(Emphasis supplied)

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[19] (1970) 1 SCC 67

13.9. In the case of **ASHOKA KUMAR THAKUR v. UNION OF INDIA**[20], the Apex Court has laid down as follows:

"…. ….. ….

188. At the outset, it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. Reference may be made to *BhikajiNarainDhakras* v. *State of M.P.* [AIR 1955 SC 781: (1955) 2 SCR 589] and *A.S. Krishna* v. *State of Madras* [AIR 1957 SC 297: 1957 SCR 399] **wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India**. While considering the scope and applicability of Article 19(1)(*g*) in *Kameshwar Prasad* v. *State of Bihar* [AIR 1962 SC 1166: 1962 Supp (3) SCR 369] it was observed: (AIR p. 1169, para 8)

> "*8*. As regards these decisions of the American courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading 'Congress shall make no law … abridging the freedom of speech …' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly."

189. In *Kesavananda Bharati case* [(1973) 4 SCC 225 : 1973 Supp SCR 1] also, **while considering the extent and scope of the power of amendment under Article 368 of the Constitution of India, the Constitution of the United States of America** was extensively referred to and Ray, J., held : (SCC p. 615, para 1108)

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[20] (2008) 6 SCC 1

> **"*1108*. The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution."**

190. It may also be noticed that there are structural differences in the Constitution of India and the Constitution of the United States of America. Reference may be made to the Fourteenth Amendment to the US Constitution. Some of the relevant portions thereof are as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Whereas in India, Articles 14 and 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. **Moreover, in our Constitution there is a specific provision under the directive principles of State policy in Part IV of the Constitution requiring the State to strive for justice'social, economic and political—and to minimise the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38)**. Earlier, there was a view that Articles 16(4) and 15(5) are exceptions to Articles 16(1) and 15(1) respectively. This view was held in *GM, Southern Railway* v. *Rangachari* [AIR 1962 SC 36 : (1962) 2 SCR 586] and *M.R. Balaji* v. *State of Mysore* [AIR 1963 SC 649 : 1963 Supp (1) SCR 439] .

… … …

209. The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in *Saurabh Chaudri* v. *Union of India* [(2003) 11 SCC 146] . Speaking for the Bench, V.N. Khare, C.J., said : (SCC p. 164, para 36)

> "*36*. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.""

13.10. In the case of **PATHUMMA v. STATE OF KERALA**[21] the Apex Court holds as follows:

"…. …. ….

23. We have deliberately not referred to the American cases because the conditions in our country are quite different and this Court need not rely on the American Constitution for the purpose of examining the seven freedoms contained in Article 19 because the social conditions and the habits of our people are different. In

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[21] (1978) 2 SCC 1

> **this connection, in the case of *Jagmohan Singh* v. *State of U.P.*** [(1973) 1 SCC 20, 27: 1973 SCC (Cri) 169] this Court observed as follows: (SCC p. 27)
>
> > "So far as we are concerned in this country, we do not have, in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply 'the due process' clause.""
>
> (Emphasis supplied)

The Apex Court, in the afore-quoted judgments has spoken with clarity that American Constitutional doctrines cannot simply be grafted on to the Indian Constitution. For the two rest profoundly on different foundations. The fundamental freedoms enshrined in Article 19(1) are not cast in the mould of absolutes. They are liberties delicately balanced with larger interest of the Society.

13.11. **In India, the Architects of our Constitutions wove the balance into the text itself. The 7 Judge Bench in the case of MADHU LIMAYE observes that English and American precedents provide but, scant guidance, in the Indian Constitutional landscape. To transplant its rulings untampered by contextual safeguards of Indian law, would therefore be to misapply them – to force a foreign mould**

upon a distinctly Indian design. The Constitution bench later reaffirms that in the face of Indian Constitutional mandate, American doctrine finds no room for importation or application within our jurisprudence. The Court underscored the striking distinctions in the very language of the two Constitutions.

13.12. The learned Solicitor General for the Union of India has submitted that on the aforesaid score, the Union is contemplating to seek a review of **SHREYA SINGHAL**, be that as it may. This Court is only asked to answer the importation of American doctrine into the Indian jurisprudence, in the light of the law as enunciated by the Apex Court, post **SHREYA SINGHAL**, following Constitution bench judgment in pre-**SHREYA SINGHAL**. I hold that the American Doctrines cannot be transplanted in interpreting Articles of the Indian Constitution. I deem it appropriate to add, that it must not be construed that this Court is interpreting **SHREYA SINGHAL**, while it is not, this Court is only answering the issue on the submissions made by the learned Solicitor General with regard

to importation of American Doctrine on the strength of the judgments rendered by 5 or 7 Judges of the Apex Court.

13.13. **From a careful reading of the judicial pronouncements of the Apex Court, whether emanating from benches of 2 Judges or from collective wisdom of 7, a single unwavering chord resounds that the wholesale importation of American doctrines, particularly in the realm of free speech, cannot be the touchstone for interpreting the provisions of the Indian Constitution**. The issue is answered accordingly.

ISSUE NO.5:

(v) Whether there has been a discernible shift in American judicial philosophy in the aftermath of the celebrated decision in RENO v. ACLU, and if so, to what effect upon comparative jurisprudence?

14. In the light of the enunciation in **RENO** being made applicable to the judgment of the Apex Court in the case of **SHREYA SINGHAL** and it being made the fulcrum of the

submissions of the petitioner, it becomes necessary to notice, the judicial thought in **RENO** and its aftermath.

14.1. The Supreme Court of United States in **RENO v. AMERICAN CIVIL LIBERTIES UNION** *supra* holds as follows:

> **"The Internet has experienced "extraordinary growth." The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.**
>
> *** *** ***
>
> **Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."**
>
> Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as

containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images." **Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available."**

*** *** ***

The first, 47 U. S. C. § 223(a) (1994 ed., Supp. II), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

> "(a) Whoever—
>
> "(1) in interstate or foreign communications—
>
> . . . . .
>
> "(B) by means of a telecommunications device knowingly—
>
> "(i) makes, creates, or solicits, and
>
> "(ii) initiates the transmission of,
>
> "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
>
> . . . . .
>
> "(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

> The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:
>
> "(d) Whoever—
>
> "(1) in interstate or foreign communications knowingly—
>
> "(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

The breadth of these prohibitions is qualified by two affirmative defenses. See § 223(e)(5).26 One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. § 223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. § 223(e)(5)(B).

*** *** ***

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 557 (1975), we observed that "[e]ach medium of

expression . . . may present its own problems." Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1969); *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978). In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, see, e. g., *Red Lion*, 395 U. S., at 399–400; the scarcity of available frequencies at its inception, see, e. g., *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 637–638 (1994); and its "invasive" nature, see *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 128 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. **Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden.** Users seldom encounter content 'by accident.' " 929 F. Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that " 'odds are slim' that a user would come across a sexually explicit sight by accident." Ibid

*** *** ***

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, e. g., *Gentile v. State Bar of Nev.*, 501 U. S. 1030, 1048–1051 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. **The severity of criminal sanctions may well cause speakers to remain silent**

> **rather than communicate even arguably unlawful words, ideas, and images. See, *e. g., Dombrowski v. Pfister*, 380 U. S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U. S. 727 (1996)."**
>
> (Emphasis supplied)

In its seminal decision in **RENO**, the United States Supreme Court was confronted for the first time, the question of how the first amendment, would apply to the emerging realm of cyberspace. The Court observes that unlike radio and television, whose voices resound in every home, the internet was not so intrusive nor so unrelenting in its reach, one had to seek it out to open its portals, much like, one might turn the pages of a book or unfold the sheets of a newspaper. On the said reasoning, the Court observed that **internet was not the pervasively invasive domain of broadcasting. So it concluded that internet could not be cast as a singularly pernicious force**.

14.2. **Yet, time has its way of reshaping realities. What was once an infant technology grew with extraordinary**

velocity into a vast and omnipresent sphere of human interaction. The internet once regarded as a distant cousin of printing press became an inseparable fabric of everyday life. In such circumstances, and in the face of this exponential growth, the Amercan Supreme Court was compelled, in subsequent cases, to revisit the assertions laid down in **RENO**, and to reconsider how freedom of speech might be preserved, amidst the immense and ever-expanding reach of the digital age. The judicial thought thus changed in the subsequent cases.

14.3. The American Supreme Court in the case of **MOODY, ATTORNEY GENERAL OF FLORIDA v. NETCHOICE, LLC, DBA NETCHOICE**[22], holds as follows:

> **"Not even thirty years ago, this Court felt the need to explain to the opinion-reading public that the "Internet is an international network of interconnected computers."** ***Reno v. American Civil Liberties Union*****, 521 U. S. 844, 849 (1997). Things have changed since then. At the time, only 40 million people used the internet. See id., at 850. Today, Facebook and YouTube alone have over two billion users each. See App. in No. 22–555, p. 67a. And the public likely no longer needs this Court to define the internet.**

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[22] 603 U.S.____(2024)

These years have brought a dizzying transformation in how people communicate, and with it a raft of public policy issues. Social-media platforms, as well as other websites, have gone from unheard-of to inescapable. They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments. The novel services they offer make our lives better, and make them worse—create unparalleled opportunities and unprecedented dangers. The questions of whether, when, and how to regulate online entities, and in particular the social-media giants, are understandably on the front-burner of many legislatures and agencies. And those government actors will generally be better positioned than courts to respond to the emerging challenges social-media entities pose.

But courts still have a necessary role in protecting those entities' rights of speech, as courts have historically protected traditional media's rights. To the extent that social-media platforms create expressive products, they receive the First Amendment's protection. And although these cases are here in a preliminary posture, the current record suggests that some platforms, in at least some functions, are indeed engaged in expression. In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression. And while much about social media is new, the essence of that project is something this Court has seen before. Traditional publishers and editors also select and shape other parties' expression into their own curated speech products. And we have repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world. In the latter, as in the former, government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the First Amendment.

Today, we consider whether two state laws regulating social-media platforms and other websites facially violate the First Amendment. **The laws, from Florida and Texas,**

restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. In addition, though far less addressed in this Court, the laws require a platform to provide an individualized explanation to a user if it removes or alters her posts. NetChoice, an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications. The cases come to us at an early stage, on review of preliminary injunctions. The Court of Appeals for the Eleventh Circuit upheld such an injunction, finding that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit reversed a similar injunction, primarily reasoning that the Texas law does not regulate any speech and so does not implicate the First Amendment.

*** *** ***

In doing so, the lower courts must address these cases at the right level of specificity. The question is not whether an entire category of corporations (like social media companies) or a particular entity (like Facebook) is generally engaged in expression. Nor is it enough to say that a given activity (say, content moderation) for a particular service (the News Feed, for example) seems roughly analogous to a more familiar example from our precedent. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 386 (1969) (positing that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them"). Even when evaluating a broad facial challenge, courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities *actually function* before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit. See Brief for Knight First Amendment Institute at Columbia University as *Amicus Curiae* 11–12. Thus, further factual development may be necessary before either of today's challenges can be fully and fairly addressed.

*** *** ***

For example, the majority paints an attractive, though simplistic, picture of what Facebook's News Feed and YouTube's homepage do behind the scenes. Taking NetChoice at its word, the majority says that the platforms' use of algorithms to enforce their community standards is *per se* expressive. But the platforms have refused to disclose how these algorithms were created and how they actually work. And the majority fails to give any serious consideration to key arguments pressed by the States. **Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old "public square"—should be viewed as common carriers. See *Biden v. Knight First Amendment Institute at Columbia University*, 593 U. S. ___, ___ (2021) (Thomas, J., concurring) (slip op., at 6). Whether or not the Court ultimately accepts that argument, it deserves serious treatment.**

Instead of seriously engaging with this and other arguments, the majority rests on NetChoice's dubious assertion that there is no constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of *Tornillo* and what Facebook and YouTube do today.

Maybe that is right—but maybe it is not. Before mechanically accepting this analogy, perhaps we should take a closer look.

Let's start with size. Currently, Facebook and YouTube each produced—on a daily basis—more than four petabytes (4,000,000,000,000,000 bytes) of data.54 By my calculation, that is roughly 1.3 billion times as many bytes as there are in an issue of the New York Times.

No human being could possibly review even a tiny fraction of this gigantic outpouring of speech, and it is therefore hard to see how any shared message could be discerned. And even if someone could view all this data and find such a message, how likely is it that the addition of a small amount of discordant speech would change the overall message?

Now consider how newspapers and social-media platforms edit content. Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors assigned articles to particular reporters, and copyeditors went over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other. And the vast bulk of the "curation" and "content moderation" carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts *post hoc* and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. And when AI algorithms make a decision, "even the researchers and programmers creating them don't really understand why the models they have built make the decisions they make." Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?

Other questions abound. Maybe we should think about the enormous power exercised by platforms like Facebook and YouTube as a result of "network effects." Cf. *Ohio v. American Express Co*., 585 U. S. 529 (2018). And maybe we should think about the unique ways in which social-media platforms influence public thought. To be sure, I do not suggest that we should decide at this time whether the Florida and Texas laws are constitutional as applied to Facebook's News Feed or YouTube's homepage. My argument is just the opposite. Such questions should be resolved in the context of an as-applied challenge. But no as-applied question is before us, and we do not have all the facts that we need to tackle the extraneous matters reached by the majority.

Instead, when confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects.

> **Premature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments.""**

(Emphasis supplied)

The Supreme Court of the United States once again found itself at the crossroads of law and technology, as it confronted challenges to certain censorship measures, enacted by individual states. **In resolving the conundrum the Court could not help, but revisit its earlier pronouncement in RENO – once the lodestar of internet jurisprudence**.

14.4. The American Supreme Court, again in the case of **TIKTOK INC. v. MERRICK B. GARLAND**[23], has held as follows:

> "Petitioners' proposed alternatives ignore the "latitude" we afford the Government to design regulatory solutions to address content-neutral interests. *Turner II*, 520 U. S., at 213. **"So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."** *Ward*, 491 U. S., at 800; see ibid. (regulation valid despite availability of less restrictive "alternative regulatory methods"); *Albertini*, 472 U. S., at 689; *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 299 (1984); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 815–816 (1984). For the reasons we have explained, the challenged provisions are "not substantially broader than necessary" to address the Government's data collection concerns. *Ward*, 491 U. S., at 800.

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[23] 604 U.S._____(2025)

> Nor did the Government ignore less restrictive approaches already proven effective. Contrast *McCullen v. Coakley*, 573 U. S. 464, 490–494 (2014) (state law burdened substantially more speech than necessary where State had not considered less restrictive measures successfully adopted by other jurisdictions). **The validity of the challenged provisions does not turn on whether we agree with the Government's conclusion that its chosen regulatory path is best or "most appropriate." *Albertini*, 472 U. S., at 689. "We cannot displace [the Government's] judgment respecting contentneutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner II*, 520 U. S., at 224. Those requirements are met here.**"
>
> (Emphasis supplied)

The Court noted, with grave concern, that digital intermediaries, the great platforms of the age, cloak in secrecy and vary algorithms that dictate what billions see here and read. The Court reflected upon artificial intelligence and described it to be a creation without reins, a force evolving at a pace beyond the reach of human control and fraught with profound implications for liberty itself. The Court ignores **RENO**.

14.5. The American Supreme Court, again in the case of **FREE SPEECH COALITION INC. v. PAXTON, ATTORNEY GENERAL OF TEXAS**[24], has held as follows:

> **"This Court has applied these principles to regulations of internet-based speech on two prior occasions, both at the dawn of the internet age. First, in *Reno v. American Civil Liberties Union*, 521 U. S. 844 (1997), we addressed the constitutionality of the Communications Decency Act of 1996 (CDA), 110 Stat. 133.** The CDA criminalized using the internet to knowingly transmit "obscene or indecent messages" to a minor, or to knowingly send or display "patently offensive messages in a manner that is available to" a minor. 521 U. S., at 859–860. It provided an affirmative defense to "those who restrict access to covered material by requiring certain designated forms of age proof." Id., at 860–861.
>
> We held that the CDA violated the First Amendment because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive." Id., at 874. The CDA's age-verification defense was illusory because, in many cases, "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." Id., at 876.4 And, even as to minors, the CDA swept far beyond obscenity. Fairly read, the terms "'indecent'" and "'patently offensive'" encompassed "large amounts of nonpornographic material with serious educational or other value." Id., at 877. The Act was thus a "content-based restriction" of protected speech that could not survive strict scrutiny. Id., at 879.
>
> **After *Reno*, Congress passed the Children's Online Privacy Protection Act of 1998 (COPA), 112 Stat. 2681–728, which we addressed in *Ashcroft v. American Civil Liberties Union*, 542 U. S. 656 (2004) (*Ashcroft II*). COPA criminalized posting "content that is 'harmful to**

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[24] 606 US _____ (2025)

minors'" online for "'commercial purposes.'" Id., at 661 (quoting 47 U. S. C. §231(a)(1)). The Act defined such content as material that is obscene under the *Miller* test, as adjusted to minors. 542 U. S., at 661–662 (citing §231(e)(6)). It also provided "an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on their Web site," such as requiring the use of a credit card or a digital certificate that verifies age. Id., at 662 (citing §231(c)(1)). Soon after COPA's passage, a District Court preliminarily enjoined its enforcement, holding that the Act likely violated the First Amendment. Id., at 663.

This Court held that the injunction was not an abuse of discretion. Id., at 664–665. The parties agreed that COPA was subject to strict scrutiny. So too did this Court, which briefly noted that this was so because COPA "'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.'" Id., at 665 (quoting *Reno*, 521 U. S., at 874). We then focused our analysis on whether the Government had shown that it was likely to satisfy its burden under strict scrutiny. 542 U. S., at 666–670. We held that it had not, because the Government had not ruled out that it could protect children just as well through the less restrictive means of encouraging parents to install blocking and filtering software on their computers. Ibid. We also noted that age verification was "only an affirmative defense," meaning that even speakers adopting an approved verification method might be forced to "risk the perils of trial." Id., at 670–671; accord, id., at 674 (Stevens, J., concurring). And, we leaned heavily on the abuse-of-discretion standard, observing that "substantial factual disputes remain[ed] in the case," and that "the factual record does not reflect current technological reality" because it was "over five years" old. Id., at 671 (majority opinion).

For the past two decades, *Ashcroft II* has been our last word on the government's power to protect children from sexually explicit content online. During this period, the "technology of the Internet" has continued to "evolv[e] at a rapid pace." *Ibid*. With the rise of the smartphone and instant streaming, many adolescents can now access vast libraries of video content—both benign and obscene—at almost any time and place, with an ease

that would have been unimaginable at the time of *Reno* and *Ashcroft II.*

*** *** ***

Petitioners read *Reno* and *Ashcroft II* to establish a comprehensive framework to govern all future attempts to restrict children's access to online pornography. As we have just explained, that view cannot be squared with those cases, which addressed only outright bans on material that was obscene to minors but not to adults. **Petitioners also fail to appreciate the context in which those cases were decided. This Court decided both cases when the internet was "still more of a prototype than a finished product"—*Reno* in 1997 and *Ashcroft II* in 2004, with factual findings made in 1999. A. Kennedy, The Rough Guide to the Internet 493 (8th ed. 2002) (Kennedy). We were mindful that "judicial answers" to "the totally new problems" presented by new technology are necessarily "truncated," and that in such circumstances "we ought not to anticipate" questions beyond those immediately presented. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944); accord, *TikTok Inc. v. Garland*, 604 U. S. ___, ___–___ (2025) (*per curiam*) (slip op., at 1–2). We did not purport to decide more than the specific circumstances of the cases that were before us.**

The Court in *Reno* was quite concerned about the unique threat that the CDA posed to the development of the then nascent internet. *Reno* was this Court's first decision about the internet. In describing the background of the case, we "felt the need to explain . . . that the 'Internet is an international network of interconnected computers,'" *NetChoice*, 603 U. S., at 713–714 (quoting *Reno*, 521 U. S., at 849), and we marveled that the internet had grown to 40 million users worldwide, id., at 850. In resolving the case, the Court was keenly aware that the "wholly unprecedented" "breadth of the CDA's coverage" "threaten[ed] to torch a large segment" of this emerging medium of communication. Id., at 877, 882. In these uncharted waters, the Court was cautious not to definitively establish when regulations on internet pornography triggered strict scrutiny.

Similarly, *Ashcroft II* was a self-consciously narrow and factbound decision. There, the Court reviewed a preliminary injunction based on a record that was "over five years" old, all while the "technology of the Internet" continued to "evolv[e] at a rapid pace." 542 U. S., at 671. As a result, we emphasized the abuse-of-discretion standard and made clear that we did not mean to rule definitively on COPA's constitutionality. Id., at 673. Moreover, we could not have meant to offer a comprehensive discussion on the appropriate standard of scrutiny for laws protecting children from sexual content online, given that the appropriate standard was not even a contested issue in the case.

In the quarter century since the factual record closed in Ashcroft II, the internet has expanded exponentially. In 1999, only two out of five American households had home internet access. Dept. of Commerce, Census Bureau, Home Computers and Internet Use in the United States: Aug. 2000, p. 2 (2001). Nearly all those households used a desk top computer or laptop to connect to the internet, and most used a dial-up connection. Dept. of Commerce, Economics and Statistics Admin., A Nation Online: Entering the Broadband Age 1, 5 (2004). Connecting through dial-up came with significant limitations: Dial-up is much slower than a modern broadband connection, and because dial-up relied on the home's phone line, many households could not use the internet and make or receive phone calls at the same time. See *Inline Connection Corp. v. AOL Time Warner Inc.*, 302 F. Supp. 2d 307, 311 (Del. 2004). And, "video-on-demand" was largely just a notion that figures like "Bill Gates and Al Gore rhapsodize[d] about"; "most Netizens would [have] be[en] happy with a system fast enough to view static photos without waiting an age." Kennedy 493–494.

In contrast, in 2024, 95 percent of American teens had access to a smartphone, allowing many to access the internet at almost any time and place. M. Faverio & O. Sidoti, Pew Research Center, Teens, Social Media and Technology 2024, p. 19. Ninety-three percent of teens reported using the internet several times per day, and watching videos is among their most common activities online. Id., at 4–5, 20. The content easily accessible to adolescents online includes massive libraries of pornographic videos. For instance, in 2019, Pornhub, one of the

> websites involved in this case, published 1.36 million hours—or over 150 years—of new content. App. 177. Many of these readily accessible videos portray men raping and physically assaulting women—a far cry from the still images that made up the bulk of online pornography in the 1990s. See N. Kristof, The Children of Pornhub, N. Y. Times, Dec. 6, 2020, p. SR4. **The Court in *Reno* and *Ashcroft II* could not have conceived of these developments, much less conclusively resolve how States could address them.**
>
> **Of course, *Reno* and *Ashcroft II* do not cease to be precedential simply because technology has changed so dramatically. See *NetChoice*, 603 U. S., at 733–734. "But respect for past judgments also means respecting their limits." *Brown v. Davenport*, 596 U. S. 118, 141 (2022). It is misleading in the extreme to assume that *Reno* and *Ashcroft II* spoke to the circumstances of this case simply because they both dealt with "the internet" as it existed in the 1990s.** The appropriate standard of scrutiny to apply in this case is a difficult question that no prior decision of this Court has squarely addressed. For the reasons we have explained, we hold today that H. B. 1181 triggers only intermediate scrutiny."
>
> (Emphasis supplied)

The Courts in the United States, now began to recognize intrinsic differences in media technologies. Broadcasting's inherent limitations justified a more regulatory approach. The functional realities of modern internet diverge sharply from the assumptions in **RENO**. The effect is that **RENO** is refused to be followed, even by the American Supreme Court. The American Supreme Court, in fact, holds that **RENO** is now vintage. It was rendered when the growth of internet was abysmally low and today the growth of internet is

unimaginably high. Likewise, every jurisdiction of the world has controlled and regulated, the growth of media, with particular reference to social media.

EUROPEAN UNION - ON REGULATING FREE SPEECH:

14.6. The European Court of Human Rights, in the case of **DELFI AS v. ESTONIA**[25], has held as follows:

> **"31.** The Supreme Court held as follows.
>
> "10. The Chamber finds that the allegations set out in the appeal do not serve as a basis for reversing the judgment of the Court of Appeal. The conclusion reached in the Court of Appeal's judgment is correct, but the legal reasoning of the judgment must be amended and supplemented on the basis of Article 692 § 2 of the Code of Civil Procedure.
>
> 11. The parties do not dispute the following circumstances:
>
> (a) on 24 January 2006 the defendant's Internet portal 'Delfi' published an article entitled 'SLK Destroyed Planned Ice Road';
>
> (b) the defendant provided visitors to the Internet portal with the opportunity to comment on articles;
>
> (c) of the comments published avaldatud on the aforementioned article, twenty contain content which is derogatory towards the plaintiff;
>
> (d) the defendant removed the derogatory comments after the plaintiff's letter of 9 March 2006.

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[25] Application No. 64569/09 decided on 16.06.2015

> 12. The legal dispute between the parties relates to whether the defendant as an entrepreneur is the publisher within the meaning of the Obligations Act, whether what was published (the content of comments) is unlawful, and whether the defendant is liable for the publication of comments with unlawful content.
>
> 13. The Chamber agrees with the conclusion of the Court of Appeal that the defendant does not fall within the circumstances precluding liability as specified in section 10 of the ISSA [Information Society Services Act].

According to section 2(6) of the Technical Regulations and Standards Act, an information society service is a service specified in section 2(1) of the ISSA. According to this provision, 'information society services' are services provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location, and such services involve the processing, storage or transmission of data by electronic means intended for the digital processing and storage of data. Hence, important conditions for the provision of information society services are that the services are provided without the physical presence of the parties, the data are transmitted by electronic means, and the service is provided for a fee on the basis of a request by the user of the service.

Sections 8 to 11 of the ISSA establish the liability of providers of different information society services. Section 10 of the ISSA states that where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of any facts or circumstances indicating any illegal activity or information; (b) the provider, upon having knowledge or becoming aware of the aforementioned facts, acts expeditiously to remove or to disable access to the information. Hence, the provision in question is applied in the event that the service provided consists in storing data on [the service provider's] server and enabling users to have access to these data. Subject to the conditions specified in section 10 of the ISSA, the provider of such a service is exempted from liability

for the content of information stored by it, because the provider of the service merely fulfils the role of an intermediary within the meaning of the provision referred to, and does not initiate or modify the information.

Since the Information Society Services Act is based on Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), the principles and objectives of that Directive must also be taken into account in the interpretation of the provisions of the Act in question. Articles 12 to 15 of the Directive, which form the basis for sections 8 to 11 of the ISSA, are complemented by Recital 42 of the preamble to the Directive, according to which the exemptions from liability established in Articles 12 to 15 cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. Hence, the providers of so-called 'content services' who have control over the content of the information stored cannot rely on the exemptions specified in Articles 12 to 15 of the Directive.

The Chamber shares the opinion of the Court of Appeal that the activities of the defendant in publishing the comments are not merely of a technical, automatic and passive nature. The objective of the defendant is not merely the provision of an intermediary service. The defendant has integrated the comments section into its news portal, inviting visitors to the website to complement the news with their own judgments *[hinnangud]* and opinions (comments). **In the comments section, the defendant actively calls for comments on the news items appearing on the portal. The number of visits to the defendant's portal depends on the number of comments; the revenue earned from advertisements published on the portal, in turn, depends on the [number of visits]. Thus, the defendant has an economic interest**

in the posting of comments. The fact that the defendant is not the author of the comments does not mean that the defendant has no control over the comments section. The defendant sets out the rules for the comments section and makes changes to it (removes a comment) if those rules are breached. By contrast, a user of the defendant's service cannot change or delete a comment he or she has posted. He or she can only report an inappropriate comment. Thus, the defendant can determine which of the comments added will be published and which will not be published. The fact that the defendant does not make use of this possibility does not lead to the conclusion that the publishing of comments is not under the defendant's control. The Chamber agrees with the opinion of the Court of Appeal that the defendant, which governs the information stored in the comments section, provides a content service, for which reason the circumstances precluding liability, as specified in section 10 of the ISSA, do not apply in the present case.……

*** *** ***

127. The Court considers that, in substance, the applicant company argues that the domestic courts erred in applying the general provisions of the Obligations Act to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Like the Chamber, the Grand Chamber reiterates in this context that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among others, Centro Europa 7 S.r.l. and Di Stefano, cited above, § 140, and Rekvényi v. Hungary [GC], no. 25390/94, § 35, ECHR 1999-III). **The Court also reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field.** Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see Gorzelik and Others v. Poland [GC], no. 44158/98, § 67, ECHR 2004-I). Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.127. The Court considers that, in

substance, the applicant company argues that the domestic courts erred in applying the general provisions of the Obligations Act to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Like the Chamber, the Grand Chamber reiterates in this context that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among others, Centro Europa 7 S.r.l. and Di Stefano, cited above, § 140, and Rekvényi v. Hungary [GC], no. 25390/94, § 35, ECHR 1999-III). The Court also reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see Gorzelik and Others v. Poland [GC], no. 44158/98, § 67, ECHR 2004-I). Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

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159. Lastly, the Court observes that the applicant company has argued (see paragraph 78 above) that the Court should have due regard to the notice-and-take-down system that it had introduced. If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. **However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (see paragraph 136 above), the Court considers, as stated above (see paragraph 153), that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties."**

(Emphasis supplied)

14.7. In **MAGYAR TARTALOMSZOLGÁLTATÓK EGYESÜLETE AND INDEX.HU ZRT v. HUNGARY**[26], it has held as follows:

"…. …. ….

37. The applicants furthermore contended that imposing strict liability on online publications for all third-party contents would amount to a duty imposed on websites to prevent the posting, for any period of time, of any user-generated content that might be defamatory. Such a duty would place an undue burden on many protagonists of the Internet scene and produce significant censoring, or even complete elimination, of user comments to steer clear of legal trouble – whereas those comments tend to enrich and democratise online debates.

38. It was noteworthy that the law of the European Union and some national jurisdictions contained less restrictive rules for the protection of rights of others and to manage liability of hosting service providers. Indeed, the application of the "notice and take down" rule was the adequate way of enforcing the protection of reputation of others.

39. The stance of the Hungarian authorities had resulted in disproportionate restriction on the applicants' freedom of expression in that they had had to face a successful civil action against them, even though they had removed the disputed contents at once after they had learnt, from the court action, that the company concerned had perceived them as injurious.

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[26]Application No. 22947/13, European Court of Human Rights, decided on 02/05/2016

The legal procedure, along with the fees payable, must be seen as having a chilling effect.

40. To conclude, the applicants maintained that the simple application of the traditional rules of editorial responsibility, namely strict liability, was not the answer to the new challenges of the digital era. Imposing strict liability on online publications for all third-party content would have serious adverse repercussions for the freedom of expression and the democratic openness in the age of Internet.

*** *** ***

68. The Court has already had occasion to lay down the relevant principles which must guide its assessment in the area of balancing the protection of freedom of expression as enshrined in Article 10 and the protection of the reputation of those against whom allegations were made, a right which, as an aspect of private life, is protected by Article 8 of the Convention. It identified a number of relevant criteria, out of which the particularly pertinent in the present case, to which the Court will revert below, are: contribution to a debate of public interest, the subject of the report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the gravity of the penalty imposed on the journalists or publishers (see *Couderc and Hachette Filipacchi Associés v. France* [GC], cited above, § 93; *Von Hannover v. (no. 2)*, cited above, §§ 108 to 113, ECHR 2012; and *Axel Springer AG,* cited above, §§ 90-95, 7 February 2012). At this juncture the Court would add that the outcome of such a balancing performed by the domestic courts will be acceptable in so far as those courts applied the appropriate criteria and, moreover, weighed the relative importance of each criterion with due respect paid to the particular circumstances of the case.

69. In the case of *Delfi AS*, the Grand Chamber identified the following specific aspects of freedom of expression in terms of protagonists playing an intermediary role on the Internet, as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's

liability, and the consequences of the domestic proceedings for the applicant company (see *Delfi AS,* cited above, §§ 142-43).

70. These latter criteria were established so as to assess the liability of large Internet news portals for not having removed from their websites, without delay after publication, comments that amounted to hate speech and incitement to violence. However, for the Court, they are also relevant for the assessment of the proportionality of the interference in the present case, free of the pivotal element of hate speech. It is therefore convenient to examine the balancing, if any, performed by the domestic courts and the extent to which the relevant criteria (see *Von Hannover (no. 2)*, cited above, §§ 108 to 113) were applied in that process, with regard to the specific aspects dictated by the applicants' respective positions (see *Delfi AS,* cited above, §§ 142-43).

*** *** ***

77. Without losing sight of the effects of defamation on the Internet, especially given the ease, scope and speed of the dissemination of information (see *Delfi AS,* cited above,§ 147), the Court also considers that regard must be had to the specificities of the style of communication on certain Internet portals. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions.

(iii) Liability of the authors of the comments

78. As regards the establishment, in the civil proceedings, of the commentators' identities, the Court notes that the domestic authorities did not at all address its feasibility or the lack of it. The Constitutional Court restricted its analysis to stating that the injured party was unlikely to receive any compensation without the liability of the operator of the Internet portal.

At this juncture, the Court notes that there is no appearance that the domestic courts enquired into the

conditions of commenting as such or into the system of registration enabling readers to make comments on the applicants' websites.

79. The national courts were satisfied that it was the applicants that bore a certain level of liability for the comments, since they had "disseminated" defamatory statements (see paragraph 42 above), however without embarking on a proportionality analysis of the liability of the actual authors of the comments and that of the applicants. **For the Court, the conduct of the applicants providing platform for third-parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature (see *Delfi AS,* cited above*,* §§ 112-13). Even accepting the domestic courts' qualification of the applicants' conduct as "disseminating" defamatory statements, the applicant's liability is difficult to reconcile with the existing case-law according to which "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so"** (see *Jersild*, cited above, § 35; *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III; and, mutatis mutandis, *Verlagsgruppe News GmbH v. Austria*, no. 76918/01, § 31, 14 December 2006, *Print Zeitungsverlag GmbH* v. Austria, no. 26547/07, § 39, 10 October 2013; and *Delfi AS*, cited above, § 135).

(iv) Measures taken by the applicants and the conduct of the injured party

80. The Court observes that although the applicants immediately removed the comments in question from their websites upon notification of the initiation of civil proceedings (see paragraphs 15 above), the *Kúria* found them liable on the basis of the Civil Code, since by enabling readers to make comments on those websites and in connection to the impugned article, they had assumed objective liability for any injurious or unlawful comments made by those readers. As the Budapest Court of Appeal held, the circumstances of removing the comments were not a matter relevant for the assessment of

objective liability but one for the assessment of any compensation (see paragraph 20 above).

81. The Court observes that the applicants took certain general measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their General terms and conditions stipulating that the writers of comments – rather than the applicants – were accountable for the comments. The posting of comments injurious to the rights of third parties were prohibited. Furthermore, according to the Rules of moderation of the second applicant, "unlawful comments" were also prohibited. The second applicant set up a team of moderators performing partial follow-up moderation of comments posted on its portal. In addition, both applicants had a notice-and-take-down system in place, whereby anybody could indicate unlawful comments to the service provider so that they be removed. The moderators and the service providers could remove comments deemed unlawful at their discretion (see paragraphs 7-10 above)."

(Emphasis supplied)

14.8. In the case of **SANCHEZ v. FRANCE**[27], it is held as follows:

"…. …. ….

140. Lastly, as to the question of the point in time from which the producer is deemed to have had knowledge of the unlawful remarks, the Court notes that section 93-3 of Law no. 82-652 of 29 July 1982 indeed remains silent (see paragraph 37 above), leaving the matter to be decided by the relevant domestic courts on a case-by-case basis. Moreover, at the material time, the domestic law did not require any prior representation by a victim vis-à-vis the producer, unlike the rule

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[27] Application No. 45581/15, European Court of Human Rights, decided on 15/05/2023

then applying to "hosts" such as Facebook (see paragraph 45 above). The Court would again point out that it is not its task to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field (see paragraph 128 above). The lack of a system of prior notification to the producer cannot therefore in itself raise a difficulty in terms of the lawfulness of the interference, regardless of any difference in relation to the regime that may be applicable to hosts (see paragraph 45 above). **The Court would, moreover, reiterate that in cases where third-party user comments take the form of hate speech, the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on the relevant Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties (see Delfi AS, cited above, § 159). Even though the applicant's situation cannot be compared to that of an Internet news portal (see paragraph 180 below), the Court sees no reason to hold otherwise in the present case.** A situation entailing the judicial interpretation of principles contained in statute law will not in itself necessarily fall foul of the requirement that the law be framed in sufficiently precise terms, as the role of adjudication vested in the courts serves precisely to dissipate such interpretational doubts as remain (see paragraphs 126 et seq. above).

*** *** ***

158. The Internet has become one of the principal means by which individuals exercise their right to freedom of expression. It provides essential tools for participation in activities and discussions concerning political issues and issues of general interest (see Vladimir Kharitonov v. Russia, no. 10795/14, § 33, 23 June 2020, and Melike v. Turkey, no. 35786/19, § 44, 15 June 2021).

159. The possibility for user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression (see Delfi AS, cited above, § 110; Times Newspapers Ltd v. the United Kingdom (nos. 1

and 2), nos. 3002/03 and 23676/03, § 27, ECHR 2009; and Ahmet Yıldırım v. Turkey, no. 3111/10, § 48, ECHR 2012). Given the important role played by the Internet in enhancing the public's access to news and in generally facilitating the dissemination of information (see Delfi AS, cited above, § 133), the function of bloggers and popular users of social media may be assimilated to that of a "public watchdog" in so far as the protection afforded by Article 10 is concerned (see Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 168, 8 November 2016).

160. As the Court has previously observed, the Internet has fostered the "emergence of citizen journalism", as political content ignored by the traditional media is often disseminated via websites to a large number of users, who are then able to view, share and comment upon the information (see Cengiz and Others v. Turkey, nos. 48226/10 and 14027/11, § 52, ECHR 2015 (extracts)). Generally speaking, the use of new technologies, especially in the political field, is now commonplace, whether it be the Internet or a mobile application "put in place by [a political party] for voters to impart their political opinions", "but also to convey a political message"; in other words, a mobile application may become a tool "allowing [voters] to exercise their right to freedom of expression" (see Magyar Kétfarkú Kutya Párt, cited above, §§ 88-89).

161. However, the benefits of this information tool, an electronic network serving billions of users worldwide (see Editorial Board of Pravoye Delo and Shtekel v. Ukraine, no. 33014/05, § 63, ECHR 2011 (extracts)), carry a certain number of risks: the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information, and the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see Bonnet, cited above, § 43; Société éditrice de Mediapart and Others v. France, nos. 281/15 and 34445/15, § 88, 14 January 2021; M.L. and W.W. v. Germany, nos. 60798/10 and 65599/10, § 91, 28 June 2018; Cicad v. Switzerland, no.

17676/09, § 59, 7 June 2016; and Editorial Board of Pravoye Delo and Shtekel, cited above, § 63).

162. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain available online for lengthy periods (see Savva Terentyev v. Russia, no. 10692/09, § 79, 28 August 2018, and Savcı Çengel v. Turkey (dec.), no. 30697/19, § 35, 18 May 2021). Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. While the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it has also found that the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights (see Delfi AS, cited above, § 110)."

(Emphasis supplied)

14.9. In the case of **EDITORIAL BOARD OF PRAVOYE DELO AND SHTEKEL v. UKRAINE**[28], it is held as follows:

"…. …. ….

63. It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. **The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms,**

[28] **Application No. 33014/05, European Court of Human Rights, decided on 05/05/2011**

> **particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ.** The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned."
>
> (Emphasis supplied)

In a singular voice, the American Supreme Court found it necessary to distance itself from **RENO**. Therefore, it loses its steam as a binding compass and is treated as a vintage decision, a pronouncement rendered in an era when internets' reach, was abysmally modest. In today's age, when the internet has grown to proportions unimaginably vast, the American Supreme Court holds that the reasoning of **RENO** no longer holds sway. **This evolution is not unique to the United States. The Courts in the European Union have thought it fit to follow suit. Across the world, every jurisdiction has sought through law, regulation and policy to temper the growth of media technologies with particular vigilance directed at the pervasive influence of social media. Thus, there is a paradigm shift in the thought process, in the aftermath of RENO. Therefore, the judgment in RENO or any judgment foundationed on RENO is to be**

restricted as one rendered when the internet was not all pervasive. The issue is thus answered.

ISSUE NO.6:

(vi) What were the Rules that fell for consideration before this Court in SHREYA SINGHAL V. UNION OF INDIA, and whether, in the contemporary context the Rules now occupying the field are materially distinct, thus demanding a fresh interpretative lens?

15. To consider the said issue, it is germane to notice the regulatory regime, subsisting at the time when the Apex Court considered the issue in **SHREYA SINGHAL.**

THE REGULATORY REGIME THEN:

15.1. When internet in India between 1990 and 2000 grew up to 5 million, though representing minimal share of the population, the Government of India as other Governments in the globe, began regulating the usage of internet or regulating usage of information and technology. It is, therefore, the Indian Parliament brings in

Information Technology Act, 2000, an Act to provide legal recognition for transactions carried out by means of electronic data interchange. The preamble of the Act reads as follows:

> **"An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as —"electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, 1980: Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.**
>
> WHEREAS the General Assembly of the United Nations by resolution A/RES/51/162, dated the 30th January, 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law;
>
> AND whereas the said resolution recommends inter alia, that all States give favourable consideration to the said Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information;
>
> **AND whereas it is considered necessary to give effect to the said resolution and to promote efficient delivery of Government services by means of reliable electronic records."**

(Emphasis supplied)

The aforesaid objects and reasons, gave rise to the **Information Technology Act, 2000.** Certain provisions of the Act fell for

consideration in the case of **SHREYA SINGHAL.** They read as follows:

> **"2. Definitions**.—(1) In this Act, unless the context otherwise requires,—
>
> *** *** ***
>
> **(*w*) "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces and cyber cafes;**
>
> *** *** ***
>
> **66-A. *Punishment for sending offensive messages through communication service, etc*.—Any person who sends, by means of a computer resource or a communication device,—**
>
> (*a*) any information that is grossly offensive or has menacing character; or
>
> (*b*) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or
>
> (*c*) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,
>
> shall be punishable with imprisonment for a term which may extend to three years and with fine.
>
> *Explanation*.—For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or

communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

*** *** ***

69-A. Power to issue directions for blocking for public access of any information through any computer resource.—(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

*** *** ***

79. Exemption from liability of intermediary in certain cases.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for

any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(*a*) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(*b*) the intermediary does not—

(*i*) initiate the transmission,

(*ii*) select the receiver of the transmission, and

(*iii*) select or modify the information contained in the transmission;

(*c*) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(*a*) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(*b*) upon receiving actual knowledge, or on being notified162 by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

*** *** ***

87. Power of Central Government to make rules.—(1) The Central Government may, by notification in the Official

Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

…… ……. ….

(*z*) the procedure and safeguards for blocking for access by the public under sub-section (2) of Section 69-A;

……. ……. ……

(*zg*) the guidelines to be observed by the intermediaries under sub-section (2) of Section 79;

……. ……. ……

(3) Every notification made by the Central Government under sub-section (1) of Section 70-A and every rule made by it] shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule."

(Emphasis supplied)

Need then arose to bring in an amendment to regulate alternative methods of communication. Therefore, a Bill comes to be tabled before the Parliament –Information Technology (Amendment) Bill 2006, which led to the **Information Technology (Amendment)**

Act, 2008. Certain Rules were promulgated along with, and post amendment. One of the Rules notified in the year 2009 was, **the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009**. Since digital platforms were mushrooming and were spoken to as intermediaries, the Government brings in **Information Technology (Intermediaries Guidelines) Rules, 2011**.

15.2. The Rules that fell for consideration before the Apex Court in **SHREYA SINGHAL,** *inter alia,* are as follows**:**

> **"Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009**
>
> In exercise of the powers conferred by clause (*z*) of sub-section (2) of Section 87, read with sub-section (2) of Section 69-A of the Information Technology Act, 2000 (21 of 2000), the Central Government hereby makes the following rules, namely:
>
> **1. Short title and commencement**.—(1) These rules may be called the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.
>
> (2) They shall come into force on the date of their publication in the Official Gazette.
>
> **2. Definitions**.—In these rules, unless the context otherwise requires,—

(*a*) "Act" means the Information Technology Act, 2000 (21 of 2000);

(*b*) "computer resource" means computer resource as defined in clause (*k*) of sub-section (1) of Section 2 of the Act;

(*c*) **"designated officer" means an officer designated as Designated Officer under Rule 3**;

(*d*) "Form" means a form appended to these rules;

(*e*) "intermediary" means an intermediary as defined in clause (*w*) of sub-section (1) of Section 2 of the Act;

(*f*) **"nodal officer" means the nodal officer designated as such under Rule 4**;

(*g*) **"organisation" means—**

(*i*) Ministries or Departments of the Government of India;

(ii) **State Governments and Union Territories;**

(*iii*) any agency of the Central Government, as may be notified in the Official Gazette, by the Central Government;

(*h*) "request" means the request for blocking of assess by the public any information generated, transmitted, received, stored or hosted in any computer resource;

(*i*) "review committee" means the Review Committee constituted under Rule 419-A of Indian Telegraph Rules, 1951.

3. Designated Officer.—**The Central Government shall designate by notification in Official Gazette, an officer of the Central Government not below the rank of a Joint Secretary, as the "Designated Officer", for the purpose of issuing direction for blocking for access by the**

public any information generated, transmitted, received, stored or hosted in any computer resource under sub-section (2) of Section 69-A of the Act.

4. Nodal officer of organisation.—**Every organisation for the purpose of these rules, shall designate one of its officer as the Nodal Officer and shall intimate the same to the Central Government in the Department of Information Technology under the Ministry of Communications and Information Technology, Government of India and also publish the name of the said Nodal Officer on their website.**

5. Direction by Designated Officer.—**The Designated Officer may, on receipt of any request from the Nodal Officer of an organisation or a competent court, by order direct any Agency of the Government or intermediary to block for access by the public any information or part thereof generated, transmitted, received, stored or hosted in any computer resource for any of the reasons specified in sub-section (1) of Section 69-A of the Act.**

6. Forwarding of request by organisation.—**(1) Any person may send their complaint to the Nodal Officer of the concerned organisation for blocking of access by the public any information generated, transmitted, received, stored or hosted in any computer resource**:

Provided that any request, other than the one from the Nodal Officer of the organisation, shall be sent with the approval of the Chief Secretary of the concerned State or Union territory to the Designated Officer:

Provided further that in case a Union territory has no Chief Secretary, then, such request may be approved by the Adviser to the Administrator of that Union territory.

(2) The organisation shall examine the complaint received under sub-rule (1) to satisfy themselves about the need for taking of action in relation to the reasons enumerated in sub-section (1) of Section 69-A of the Act and after being satisfied, it shall send the request

through its Nodal Officer to the Designated Officer in the format specified in the Form appended to these rules.

(3) The Designated Officer shall not entertain any complaint or request for blocking of information directly from any person.

(4) The request shall be in writing on the letter head of the respective organisation, complete in all respects and may be sent either by mail or by fax or by e-mail signed with electronic signature of the Nodal Officer:

Provided that in case the request in sent by fax or by e-mail which is not signed with electronic signature, the Nodal Officer shall provide a signed copy of the request so as to reach the Designated Officer within a period of three days of receipt of the request by such fax or e-mail.

(5) On receipt, each request shall be assigned a number along with the date and time of its receipt by the Designated Officer and he shall acknowledge the receipt thereof to the Nodal Officer within a period of twenty-four hours of its receipt.

7. Committee for examination of request.—**The request along with the printed sample content of the alleged offending information or part thereof shall be examined by a committee consisting of the Designated Officer as its chairperson and representatives, not below the rank of Joint Secretary in Ministries of Law and Justice, Home Affairs, Information and Broadcasting and the Indian Computer Emergency Response Team appointed under sub-section (1) of Section 70-B of the Act.**

8. Examination of request.—**(1) On receipt of request under Rule 6, the Designated Officer shall make all reasonable efforts to identify the person or intermediary who has hosted the information or part thereof as well as the computer resource on which such information or pert thereof is being hosted and where he is able to identify such person or intermediary and the computer resource hosting the information or part**

thereof which have been requested to be blocked for public access, he shall issue a notice by way of letters or fax or e-mail signed with electronic signatures to such person or intermediary in control of such computer resource to appear and submit their reply and clarifications, if any, before the committee referred to in Rule 7, at a specified date and time, which shall not be less than forty-eight hours from the time of receipt of such notice by such person or intermediary.

(2) In case of non-appearance of such person or intermediary, who has been served with the notice under sub-rule (1), before the committee on such specified date and time, the committee shall give specific recommendation in writing with respect to the request received from the Nodal Officer, based on the information available with the committee.

(3) In case, such a person or intermediary, who has been served with the notice under sub-rule (1), is a foreign entity or body corporate as identified by the Designated Officer, notice shall be sent by way of letters of fax or e-mail signed with electronic signatures to such foreign entity or body corporate and any such foreign entity or body corporate shall respond to such a notice within the time specified therein, failing which the committee shall give specific recommendation in writing with respect to the request received from the Nodal Officer, based on the information available with the committee.

(4) The committee referred to in Rule 7 shall examine the request and printed sample information and consider whether the request is covered within the scope of sub-section (1) of Section 69-A of the Act and that it is justifiable to block such information or part thereof and shall give specific recommendation in writing with respect to the request received from the Nodal Officer.

(5) The Designated Officer shall submit the recommendation of the committee, in respect of the request for blocking of information along with the details sent by the Nodal Officer, to the Secretary in the Department of Information

Technology under the Ministry of Communications and Information Technology, Government of India (Hereinafter referred to as the "Secretary, Department of Information Technology").

(6) The Designated Officer, on approval of the request by the Secretary, Department of Information Technology, shall direct any agency of the Government or the intermediary to block the offending information generated, transmitted, received, stored or hosted in their computer resource for public access within the time limit specified in the direction:

Provided that in case the request of the Nodal Officer is not approved by the Secretary, Department of Information Technology, the Designated Officer shall convey the same to such Nodal Officer.

9. Blocking of Information in cases of emergency.— **(1) Notwithstanding anything contained in Rules 7 and 8, the Designated Officer, in any case of emergency nature, for which no delay is acceptable, shall examine the request and printed sample information and consider whether the request is within the scope of sub-section (1) of Section 69-A of the Act and it is necessary or expedient and justifiable to block such information or part thereof and submit the request with specific recommendations in writing to Secretary, Department of Information Technology.**

(2) In a case of emergency nature, the Secretary, Department of Information Technology may, if he is satisfied that it is necessary or expedient and justifiable for blocking for public access of any information or part thereof through any computer resource and after recording reasons in writing, as an interim measure issue such directions as he may consider necessary to such identified or identifiable persons or intermediary in control of such computer resource hosting such information or part thereof without giving him an opportunity of hearing.

(3) The Designated Officer, at the earliest but not later than forty-eight hours of issue of direction under

sub-rule (2), shall bring the request before the committee referred to in Rule 7 for its consideration and recommendation.

(4) On receipt of recommendations of Committee, Secretary, Department of Information Technology, shall pass the final order as regard to approval of such request and in case the request for blocking is not approved by the Secretary, Department of Information Technology in his final order, the interim direction issued under sub-rule (2) shall be revoked and the person or intermediary in control of such information shall be accordingly directed to unblock the information for public access.

10. Process of order of court for blocking of information.—**In case of an order from a competent court in India for blocking of any information or part thereof generated, transmitted, received, stored or hosted in a computer resource, the Designated Officer shall, immediately on receipt of certified copy of the court order, submit it to the Secretary, Department of Information Technology and initiate action as directed by the court.**

11. Expeditious disposal of request.—The request received from the Nodal Officer shall be decided expeditiously which in no case shall be more than seven working days from the date of receipt of the request.

12. Action for non-compliance of direction by intermediary.—In case the intermediary fails to comply with the direction issued to him under Rule 9, the Designated Officer shall, with the prior approval of the Secretary, Department of Information Technology, initiate appropriate action as may be required to comply with the provisions of sub-section (3) of Section 69-A of the Act.

13. Intermediary to designate one person to receive and handle directions.—(1) Every intermediary shall designate at least one person to receive and handle the directions for blocking of access by the public any information generated, transmitted, received, stored or hosted in any computer resource under these rules.

(2) The designated person of the intermediary shall acknowledge receipt of the directions to the Designated Officer within two hours on receipt of the direction through acknowledgement letter or fax or e-mail signed with electronic signature.

14. Meeting of Review Committee.—**The Review Committee shall meet at least once in two months and record its findings whether the directions issued under these rules are in accordance with the provisions of sub-section (1) of Section 69-A of the Act and if is of the opinion that the directions are not in accordance with the provisions referred to above, it may set aside the directions and issue order for unblocking of said information generated, transmitted, received, stored or hosted in a computer resource for public access.**

15. Maintenance of records by Designated Officer.— The Designated Officer shall maintain complete record of the request received and action taken thereof, in electronic database and also in register of the cases of blocking for public access of the information generated, transmitted, received, stored or hosted in a computer resource.

16. Requests and complaints to be confidential.— **Strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.**"

(Emphasis supplied)

The other set of Rules are the IT Rules, 2011. The Rules that the Apex Court considers are as follows:

"1. Short title and commencement.—(1) These rules may be called the **Information Technology (Intermediaries Guidelines) Rules, 2011**.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions.—(1) In these rules, unless the context otherwise requires,—

(*a*) "Act" means the Information Technology Act, 2000 (21 of 2000);

….. ….. …..

(*h*) "Information" means information as defined in clause (*v*) of sub-section (1) of Section 2 of the Act;

(*i*) "Intermediary" means an intermediary as defined in clause (*w*) of sub-section (1) of Section 2 of the Act;

(*j*) "User" means any person who access or avail any computer resource of intermediary for the purpose of hosting, publishing, sharing, transacting, displaying or uploading information or views and includes other persons jointly participating in using the computer resource of an intermediary.

(2) All other words and expressions used and not defined in these rules but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Due diligence to be observed by intermediary.— The intermediary shall observe following due diligence while discharging his duties, namely:—

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person.

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that—

(*a*) belongs to another person and to which the user does not have any right to;

(*b*) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(*c*) harm minors in any way;

(*d*) infringes any patent, trademark, copyright or other proprietary rights;

(*e*) violates any law for the time being in force;

(*f*) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(*g*) impersonate another person;

(*h*) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(*i*) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

Provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule (2)—

(*a*) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;

(*b*) removal of access to any information, data or communication link by an intermediary after such information,

data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

(5) The intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage lights of the users to the computer resource of Intermediary and remove non-compliant information.

(6) The intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.

(7) When required by lawful order, the intermediary shall provide information or any such assistance to Government Agencies who are lawfully authorised for investigative, protective, cyber security activity. The information or any such assistance shall be provided for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force, on a request in writing stating clearly the purpose of seeking such information or any such assistance.

(8) The intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology

(Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011.

(9) The intermediary shall report cyber security incidents and also share cyber security incidents related information with the Indian Computer Emergency Response Team.

(10) The intermediary shall not knowingly deploy or install or modify the technical configuration of computer resource or become party to any such act which may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:

Provided that the intermediary may develop, produce, distribute or employ technological means for the sole purpose of performing the acts of securing the computer resource and information contained therein.

(11) The intermediary shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users or any victim who suffers as a result of access or usage of computer resource by any person in violation of Rule 3 can notify their complaints against such access or usage of computer resource of the intermediary or other matters pertaining to the computer resources made available by it. The Grievance Officer shall redress the complaints within one month from the date of receipt of complaint."

(Emphasis supplied)

15.3. On interpretation, the Apex Court in **SHREYA SINGHAL** holds as follows:

124. In conclusion, we may summarise what has been held by us above:

124.1. Section 66-A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(*a*) and not saved under Article 19(2).

124.2. Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 are constitutionally valid.

124.3. Section 79 is valid subject to Section 79(3)(*b*) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

124.4. Section 118(*d*) of the Kerala Police Act is struck down being violative of Article 19(1)(*a*) and not saved by Article 19(2).

125. All the writ petitions are disposed in the above terms."

(Emphasis supplied)

What fell for interpretation to draw up the aforesaid order in **SHREYA SINGHAL** is found in paragraph 118 to 123 of the said judgment noted *supra*. Therefore, the Apex Court interpreted Sections 66A, 69A and 79 of the IT Act, the Blocking Rules, 2009 and the IT Rules, 2011. Sections 69A and 79 of the IT Act and the Blocking Rules, 2009, which were held to be constitutionally valid, under the challenge to the constitutional validity, they remain the same even today. What is changed is, the IT Rules, 2011, it is

superseded by a new set of Rules called the IT Rules, 2021. Therefore, the Apex Court interprets a statute i.e., the IT Rules, 2011, which no longer is in subsistence.

15.4. The entire fulcrum of the subject *lis* revolves round the Act and the new Rules – the IT Rules, 2021. Therefore, there is change in the Rules. It becomes germane to notice certain provisions of the IT Rules, 2021.

> **"2. Definitions**.—(1) In these rules, unless the context otherwise requires—
>
> ….. ….. …..
>
> (*c*) 'Act' means the Information Technology Act, 2000 (21 of 2000);
>
> ….. ….. …..
>
> (*f*) 'communication link' means a connection between a hypertext or graphical element, and one or more items in the same or different electronic document wherein upon clicking on a hyperlinked item, the user is automatically transferred to the other end of the hyperlink which can be another electronic record or another website or application or graphical element;
>
> **(*g*) 'content' means the electronic record defined in clause (*t*) of Section 2 of the Act;**
>
> (*h*) 'content descriptor' means the issues and concerns which are relevant to the classification of any online curated content, including discrimination, depiction of illegal or harmful substances, imitable behaviour, nudity, language, sex, violence, fear, threat, horror and other such concerns as specified in the Schedule annexed to the rules;

(*i*) 'digital media' means digitized content that can be transmitted over the internet or computer networks and includes content received, stored, transmitted, edited or processed by—

(*i*) an intermediary; or

(*ii*) a publisher of news and current affairs content or a publisher of online curated content;

….. ….. …..

(*l*) 'Ministry' means, for the purpose of Part II of these rules unless specified otherwise, the Ministry of Electronics and Information Technology, Government of India, and for the purpose of Part III of these rules, the Ministry of Information and Broadcasting, Government of India;

….. ….. …..

(*r*) 'person' means a person as defined in sub-section (31) of Section 2 of the Income tax Act, 1961 (43 of 1961);

(*s*) 'publisher' means a publisher of news and current affairs content or a publisher of online curated content;

….. ….. …..

(*v*) 'significant social media intermediary' means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government;

(*w*) 'social media intermediary' means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;

(*x*) 'user' means any person who accesses or avails any computer resource of an intermediary or a publisher for the purpose of hosting, publishing, sharing, transacting, viewing, displaying, downloading or uploading information and includes other persons jointly participating in using such computer resource and addressee and originator;

(*y*) 'user account' means the account registration of a user with an intermediary or publisher and includes profiles, accounts, pages, handles and other similar presences by means of which a user is able to access the services offered by the intermediary or publisher.

(2) Words and expressions used and not defined in these rules but defined in the Act and rules made thereunder shall have the same meaning as assigned to them in the Act and the said rules, as the case may be.

PART II

DUE DILIGENCE BY INTERMEDIARIES AND GRIEVANCE REDRESSAL MECHANISM

3. (1) *Due diligence by an intermediary*: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely—

(*a*) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;

(*b*) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts by itself, and to cause the users of its computer resource to not host display, upload, modify, publish, transmit, store, update or share any information that,—

(*i*) belongs to another person and to which the user does not have any right;

(*ii*) is obscene, pornographic, paedophilic, invasive of another's privacy including bodily privacy, insulting or harassing on the basis of gender, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or an online game that causes user harm, or promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence;

(*iii*) is harmful to child;

(*iv*) infringes any patent, trademark, copyright or other proprietary rights;

(*v*) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify;

(*vi*) impersonates another person;

(*vii*) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognizable offence, or prevents investigation of any offence, or is insulting other nation;

(*viii*) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;

(*ix*) is in the nature of an online game that is not verified as a permissible online game;

(*x*) is in the nature of advertisement or surrogate advertisement or promotion of an online game that is not a permissible online game, or of any

online gaming intermediary offering such an online game;

(*xi*) violates any law for the time being in force.

Explanation.—In this clause, "user harm" and "harm" mean any effect which is detrimental to a user or child, as the case may be;

(*c*) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;

(*d*) **an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (*b*) of sub-section (3) of Section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force:**

Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:

Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as

possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:

Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (*b*) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (*a*) or (*b*) of sub-section (2) of Section 79 of the Act;

(*e*) the temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, involving no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource shall not amount to hosting, storing or publishing any information referred to under clause (*d*);

(*f*) the intermediary shall periodically, and at least once in a year, inform its users in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be:

Provided that an online gaming intermediary who enables the users to access any permissible online real money game shall inform its users of such change as soon as possible, but not later than twenty-four hours after the change is effected;

(*g*) where upon receiving actual knowledge under clause (*d*), on a voluntary basis on violation of clause (*b*), or on the basis of grievances received under sub-rule (2), any information has been removed or access to which has been disabled, the intermediary shall, without vitiating the evidence in any manner, preserve such information and associated records for one hundred and eighty days for investigation purposes, or for such longer period

as may be required by the court or by Government agencies who are lawfully authorised;

(*h*) where an intermediary collects information from a user for registration on the computer resource, it shall retain his information for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be;

(*i*) the intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011;

(*j*) the intermediary shall, as soon as possible, but not later than seventy two hours and in case of an online gaming intermediary who enables the users to access any permissible online real money game not later than twenty-four hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency which is lawfully authorised for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents:

Provided that any such order shall be in writing stating clearly the purpose of seeking information or assistance, as the case may be;

(*k*) the intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:

Provided that the intermediary may develop, produce, distribute or employ technological means for the purpose of performing the acts of securing the computer resource and information contained therein;

(*l*) the intermediary shall report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013;

(*m*) the intermediary shall take all reasonable measures to ensure accessibility of its services to users along with reasonable expectation of due diligence, privacy and transparency;

(*n*) the intermediary shall respect all the rights accorded to the citizens under the Constitution, including in the Articles 14, 19 and 21.

….. ….. …..

4. Additional due diligence to be observed by significant social media intermediary and online gaming intermediary.—(1) In addition to the due diligence observed under Rule 3, a significant social media intermediary, within three months from the date of notification of the threshold under clause (*v*) of sub-rule (1) of Rule 2, and an online gaming intermediary that enables the users to access any permissible online real money game, shall observe the following additional due diligence while discharging its duties, namely—

(*a*) appoint a Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and rules made thereunder and shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and rules made thereunder:

Provided that no liability under the Act or rules made thereunder may be imposed on such significant social media intermediary or such online gaming intermediary without being given an opportunity of being heard.

Explanation.—For the purposes of this clause "Chief Compliance Officer" means a key managerial personnel or such other senior employee of a significant social media intermediary or an online gaming intermediary, as the case may be,] who is resident in India;

(*b*) appoint a nodal contact person for 24x7 coordination with law enforcement agencies and officers to ensure compliance to their orders or requisitions made in accordance with the provisions of law or rules made thereunder.

Explanation.—In this clause, "nodal contact person" means the employee of—

(*i*) a significant social media intermediary, other than its Chief Compliance Officer; or

(*ii*) an online gaming intermediary, who is resident in India;

(*c*) appoint a Resident Grievance Officer, who shall, subject to clause (*b*), be responsible for the functions referred to in sub-rule (2) of Rule 3.

Explanation.—For the purposes of this clause, "Resident Grievance Officer" means the employee of a significant social media intermediary or an online gaming intermediary, as the case may be, who is resident in India;

(*d*) publish periodic compliance report every month mentioning the details of complaints received and action taken thereon, and, in respect of a significant social media intermediary, the number of specific communication links or parts of information that the intermediary has removed or disabled access to in pursuance of any proactive monitoring conducted by using automated tools or any other relevant information as may be specified;

(2) A significant social media intermediary providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource as may be required by a judicial order passed by a court of competent jurisdiction or an order passed under Section 69 by the Competent Authority as per the

Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, which shall be supported with a copy of such information in electronic form:

Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years:

Provided further that no order shall be passed in cases where other less intrusive means are effective in identifying the originator of the information:

Provided also that in complying with an order for identification of the first originator, no significant social media intermediary shall be required to disclose the contents of any electronic message, any other information related to the first originator, or any information related to its other users:

Provided also that where the first originator of any information on the computer resource of an intermediary is located outside the territory of India, the first originator of that information within the territory of India shall be deemed to be the first originator of the information for the purpose of this clause.

(3) A significant social media intermediary that provides any service with respect to an information or transmits that information on behalf of another person on its computer resource—

(*a*) for direct financial benefit in a manner that increases its visibility or prominence, or targets the receiver of that information; or

(*b*) to which it owns a copyright, or has an exclusive license, or in relation with which it has entered into any contract that directly or indirectly restricts the publication or transmission of that information through any means other than those provided through the computer resource of such social media intermediary, shall make that

information clearly identifiable to its users as being advertised, marketed, sponsored, owned, or exclusively controlled, as the case may be, or shall make it identifiable as such in an appropriate manner.

(4) A significant social media intermediary shall endeavour to deploy technology-based measures, including automated tools or other mechanisms to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary under clause (*d*) of sub-rule (1) of Rule 3, and shall display a notice to any user attempting to access such information stating that such information has been identified by the intermediary under the categories referred to in this sub-rule:

Provided that the measures taken by the intermediary under this sub-rule shall be proportionate having regard to the interests of free speech and expression, privacy of users on the computer resource of such intermediary, including interests protected through the appropriate use of technical measures:

Provided further that such intermediary shall implement mechanisms for appropriate human oversight of measures deployed under this sub-rule, including a periodic review of any automated tools deployed by such intermediary:

Provided also that the review of automated tools under this sub-rule shall evaluate the automated tools having regard to the accuracy and fairness of such tools, the propensity of bias and discrimination in such tools and the impact on privacy and security of such tools.

(5) A significant social media intermediary and an online gaming intermediary who enables the users to access any permissible online real money game shall have a physical contact address in India published on its website, mobile based application or both, as the case may be, for the purposes of receiving the communication addressed to it.

(6) A significant social media intermediary and an online gaming intermediary who enables the users to access any

permissible online real money game shall implement an appropriate mechanism for the receipt of complaints under sub-rule (2) of Rule 3 and grievances in relation to the violation of provisions under this rule, which shall enable the complainant to track the status of such complaint or grievance by providing a unique ticket number for every complaint or grievance received by such intermediary:

Provided that such intermediary shall, to the extent reasonable, provide such complainant with reasons for any action taken or not taken by such intermediary in pursuance of the complaint or grievance received by it.

(7) A significant social media intermediary and an online gaming intermediary who enables the users to access any permissible online real money game shall enable users who register for their services from India, or use their services in India, to voluntarily verify their accounts by using any appropriate mechanism, including the active Indian mobile number of such users, and where any user voluntarily verifies their account, such user shall be provided with a demonstrable and visible mark of verification, which shall be visible to all users of the service:

Provided that the information received for the purpose of verification under this sub-rule shall not be used for any other purpose, unless the user expressly consents to such use.

(8) Where a significant social media intermediary removes or disables access to any information, data or communication link, under clause (*b*) of sub-rule (1) of Rule 3 on its own accord, such intermediary shall,—

(*a*) ensure that prior to the time at which such intermediary removes or disables access, it has provided the user who has created, uploaded, shared, disseminated, or modified information, data or communication link using its services with a notification explaining the action being taken and the grounds or reasons for such action;

(*b*) ensure that the user who has created, uploaded, shared, disseminated, or modified information using its services is provided with an adequate and reasonable opportunity to dispute the action being taken by such intermediary and request for the reinstatement of access to such

information, data or communication link, which may be decided within a reasonable time;

(*c*) ensure that the Resident Grievance Officer of such intermediary maintains appropriate oversight over the mechanism for resolution of any disputes raised by the user under clause (*b*).

(9) The Ministry may call for such additional information from any significant social media intermediary as it may consider necessary for the purposes of this part.

….. ….. …..

7. Non-observance of Rules.—Where an intermediary fails to observe these rules, the provisions of sub-section (1) of Section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code."

(Emphasis supplied)

The IT Rules, 2021 noted hereinabove, brings in a sea change in the Rules that subsisted, now superseded i.e., IT Rules, 2011 in comparison to the Rules subsisting. The entire fulcrum of the *lis* revolves round the aforesaid Rules, as challenge is laid to the Constitutional validity of certain provisions of the IT Rules, 2021.

15.5. To notice the marked difference between the two, it is necessary to juxtapose the two. The two I mean, the Rule 3(4) of the IT Rules, 2011 that fell for interpretation in ***SHREYA SINGHAL***

and the present Rule 3(1)(d) of the IT Rules, 2021 promulgated post ***SHREYA SINGHAL.*** It is as follows:

COMPARATIVE TABLE - IT RULES, 2011 v. IT RULES, 2021

IT RULES, 2011	IT RULES, 2021
3. Due diligence to be observed by intermediary.—The intermediary shall observe following due diligence while discharging his duties, namely:— ….. ….. …. (4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.	3. **(1)** ***Due diligence by an intermediary*****:** An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely— ….. ….. ….. **(*d*) an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (*b*) of sub-section (3) of Section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of**

	court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force: **Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:** **Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:** **Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (*b*) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such**

	intermediary, shall not amount to a violation of the conditions of clauses (*a*) or (*b*) of sub-section (2) of Section 79 of the Act;"

(Emphasis supplied)

The afore-quoted Rules mandate due diligence by an intermediary. There are certain conditions imposed for compliance with the direction to remove the objectionable content on the platform. The reasons for directing such removal traces its origin to Article 19(2) of the Constitution of India. **Therefore, I answer the issue holding that the Rules that fell for consideration has undergone a change, a complete change, in comparison to the superseded Rules, which fell for consideration in SHREYA SINGHAL.**

ISSUE NO.7:

(vii) Whether the present challenge to the Rules, or their constitutionality, is vitiated by alleged vagueness, or

whether the Rules withstand the test of clarity and definiteness in law?

16.1. Yet another factor that is to be looked into is judgment in the case of **SHREYA SINGHAL** was interpreting the IT Rules, 2011. The IT Rules, 2011 are now superseded by IT Rules of 2021. Therefore, what fell for interpretation before the Apex Court in **SHREYA SINGHAL** *inter alia*, the said Rules today stood superseded. Therefore, the judgment or the effect of the judgment insofar as it concerns intermediary it is restrictable up to the amendment or the IT Rules, 2021. On and from 2021, the issue would stand governed by the IT Rules, 2021. It is, therefore, the petitioner has brought in a challenge to the Rules so made in the year 2021. Now I deem it appropriate to notice the challenge.

16.2. The petitioner seeks a declaration that Rule 3(1)(d) of the IT Rules, 2021 is ultra vires the IT Act or unconstitutional. In the alternative, the petitioner seeks to read down Rule 3(1)(d) by declaring that Rule 3(1)(d) would not independently authorize the Authorities to issue information blocking orders. This is the first

limb of challenge. The second limb of challenge is, seeking a declaration that Section 79(3)(b) of the IT Act does not confer authority to issue information blocking order and further declaration that information blocking order can be issued only under Section 69A of the IT Act. The declaration sought is that the Sahyog Portal which the petitioner terms it to be a censorship portal, is ultra vires the IT Act and unconstitutional. These are the main prayers sought in the petition. I deem it appropriate to answer each of them. To answer, it is necessary to re-quote only the relevant Rule/s of challenge.

> "3. (1) **Due diligence by an intermediary**: **An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary], shall observe the following due diligence while discharging its duties, namely:—**
>
> (a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;
>
> (b) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts 1 [by itself, and to cause the users of its computer resource to not host],

display, upload, modify, publish, transmit, store, update or share any information that,—

(i) belongs to another person and to which the user does not have any right;

(ii) is obscene, pornographic, paedophilic, invasive of another's privacy including bodily privacy, insulting or harassing on the basis of gender, racially or ethnically objectionable, relating or encouraging money laundering or gambling,2 [or an online game that causes user harm,] or promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence;

(iii) is harmful to child;

(iv) infringes any patent, trademark, copyright or other proprietary rights;

(v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify;

(vi) impersonates another person;

(vii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence, or prevents investigation of any offence, or is insulting other nation;

(viii) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;

(ix) is in the nature of an online game that is not verified as a permissible online game;

(x) is in the nature of advertisement or surrogate advertisement or promotion of an online game that is not a permissible online game, or of any online gaming intermediary offering such an online game;

(xi) violates any law for the time being in force;

Explanation.—In this clause, "user harm" and "harm" mean any effect which is detrimental to a user or child, as the case may be;

(c) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;

(d) an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force:

Provided that any notification made by the Appropriate Government or its agency in relation to

> **any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:**
>
> **Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:**
>
> **Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of section 79 of the Act;"**
>
> (Emphasis supplied)

The IT Rules, 2021 are promulgated in exercise of powers conferred under Section 87 of the IT Act and in supersession of the IT Rules, 2011. Therefore, the IT Rules, 2011 are no longer in existence. Rule 3 of the IT Rules, 2021 deals with due diligence to be performed by an intermediary. Several conditions of due diligence are noticed in sub-rules (a) to (d).

16.4. The bone of contention in the case at hand, is Rule 3(1)(d), which mandates that an intermediary on whose computer

resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order of the Court or on being notified by the appropriate Government or its agency under clause (b) of sub-section (3) of Section 79 of the IT Act shall not host, store or publish any "unlawful information" which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; and in relation to several incidental factors. Therefore, the intermediaries should not host, store or publish any unlawful information that would affect public order, decency or morality *inter alia*.

16.5. Rule 3(1)(d) of the IT Rules, 2021 refers to Section 79 of the IT Act. The prayer is seeking a declaration that Section 79(3)(b) of the IT Act does not confer power on the authority to issue blocking orders. Therefore, I deem it appropriate to re-notice Section 79 of the IT Act. Section 79 of the IT Act reads as follows:

> "**79. Exemption from liability of intermediary in certain cases.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the**

provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(*a*) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(*b*) the intermediary does not—

(*i*) initiate the transmission,
(*ii*) select the receiver of the transmission, and
(*iii*) select or modify the information contained in the transmission;

(*c*) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(*a*) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(*b*) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

> ***Explanation*.—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."**
>
> (Emphasis supplied)

Section 79 is a provision of safe harbour as intermediaries would not become liable for any action in certain cases. Section 79(1) begins with a non-obstante clause that notwithstanding anything contained in any law for the time being in force, but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data or communication link made available or hosted by him. Therefore, the intermediary can claim that whatever is hosted by third-party on its platform cannot be charged, upon the said intermediary. But, it is hedged by conditions, as Section 79(1) would indicate subject to the provisions of sub-sections (2) and (3). Sub-section (2) would apply on certain circumstances which need not be elaborated for the issue in the *lis*. Sub-section (3) is what forms the complete fulcrum. An intermediary upon receiving knowledge or being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource

controlled by the intermediary fails to remove or disable access to that material on that resource will lose safe harbour i.e., protection under Section 79(1).

16.6. The learned senior counsel for the petitioner and the impleading applicants have contended that the provision, is a catch 22 situation where they will have to obey the orders or lose the safe harbour. Therefore, the exemption is illusory. The challenge is in connection with the two provisions. The projection in support of the challenge is that IT Rules, 2021 are vague, unbridled, uncanalized and are susceptible to arbitrary exercise of power. On all these grounds the challenge is brought in. The Rules are completely different. Rule 3(4) of the IT Rules, 2011 which fell for consideration before Apex Court in the case of **SHREYA SINGHAL** is entirely different, in juxtaposition to the IT Rules, 2021. The submission that they are similar and the Apex Court has interpreted Rule 3(4) of the IT Rules, 2011 and, therefore, the interpretation should be paraphrased to IT Rules, 2021 is noted only to be rejected, on a twin score that, the Rules compared hereinabove are

completely distinct to each other, not similar. The IT Rules, 2011 have no existence today, as they are superseded.

16.7. The Apex Court in **SHREYA SINGHAL** has not interpreted the IT Rules, 2021 which ostensibly could not, as the Rules have come in 2021 whereas, **SHREYA SINGHAL** is rendered in 2015. The challenge now is that it is ultra vires the Act, and unconstitutional. The challenge to Rule 3(1)(d) of the IT Rules, 2021 is on the score that it is vague, gives unbridled power and does not have safeguards. Elaborating the said submission, the contention is, that the Rule that is under challenge i.e., Rule 3(1)(d) of the IT Rules, 2021 suffers from vagueness and such vagueness should lead to holding the said Rule unconstitutional. Therefore, I deem it appropriate to consider the ground projected to buttress the submission of unconstitutionality of the Rule - vagueness.

ON VAGUENESS:

16.8. Rule 3(1)(d) of the IT Rules, 2021 cannot be read in isolation as Rule 3(1)(d) itself refers to Section 79 of the IT Act.

Section 79 is the safe harbour provision hedged with conditions. Section 79 is not a free for all safe harbour. Any unlawful content on the platform if directed to be taken down and if not taken down, the safe harbour would be lost and Rule 3(1)(d) springs. The word used is 'unlawful' in Section 79 and Rule 3(1)(d) and it is qualified by the words 'under any law for the time being in force'. If the two are read in tandem, what would unmistakably emerge is that, non-compliance of Section 79(3) of the IT Act would lead to losing of safe harbour, and Rule 3(1)(d) kicks in to ensure that intermediaries comply with their obligations under Section 79. The soul of Section 79 is that, unlawful content or content declared as unlawful under any law for the time being in force or the laws in force, refers to already determined and clearly defined laws, as laws in force and under any law for the time being in force has profound meaning, being the existence and subsistence of the laws. Therefore, it is ununderstandable as to how it can be construed to be vague.

16.9. It becomes apposite to refer to the judgment of the Apex Court in the case of **A.K.ROY v. UNION OF INDIA**[29] has held as follows:

"…. …. ….

> **61.** In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application. But in considering the question whether the expressions aforesaid which are used in Section 3 of the Act are of that character, we must have regard to the consideration whether the concepts embodied in those expressions are at all capable of a precise definition. The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression. The British Parliament has defined the term 'terrorism' in Section 28 of the Act of 1973 to mean "the use of violence for political ends", which, by definition, includes "any use of violence for the purpose of putting the public or any section of the public in fear". The phrase 'political ends' is itself of an uncertain character and comprehends within its scope a variety of nebulous situations. Similarly, the definitions contained in Section 8(3) of the Jammu & Kashmir Act of 1978 themselves depend upon the meaning of concepts like "overawe the government". **The formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. We do not, of course, suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use of which people are sought to be deprived of their liberty. The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its**

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[29] (1982) 1 SCC 271

inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the strait-jacket of a definition. If it is permissible to the legislature to enact laws of preventive detention, a certain amount of minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide, or a court faced with the question as to whether certain acts fall within the mischief of the aforesaid expressions used in Section 3, will be able to find an acceptable answer either way. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.

62. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : (1978) 2 SCR 621 : AIR 1978 SC 597] . The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct

which may fall within the proscribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', or 'maintenance of harmony between different religious groups', or 'likely to cause disharmony or ... hatred or ill will', or 'annoyance to the public' [*see* Sections 124-A, 153-A(1)(*b*), 153-B(1)(*c*), and 268 of the Penal Code]. These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language.

63. We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of Section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in Section 3, which are fraught with grave consequences to personal liberty, if construed liberally."

(Emphasis supplied)

The Apex Court holds that impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition. It further holds that it cannot become a ground to challenge the validity of an Act.

16.10. In the case of **BENILAL v. STATE OF MAHARASHTRA**[30], the Apex Court holds as follows:

"…. …. ….

4. Shri G.L. Sanghi, learned Senior Counsel contends that a reading of these clauses do indicate that the Controller is a subordinate executive authority, who has been invested with judicial power to give permission to determine tenancy for ejectment on the ground of habitually in arrears. **The words 'habitually in arrears' should have been defined but it was not done. Its construction is varied on subjective decision of the court and can vary from court to court. Therefore, the word "habitually in arrears" being vague and indefinite, and exercise of the power having been entrusted to an officer not judicially trained to construe the provision of the Act, it would lead to unbridled exercise of power without guidelines, offending Article 14 of the Constitution. We find no force in the contention. It is well settled that the legislative scheme may employ words of generality conveying its policy and intention to achieve the object set out therein. Every word need not be defined. It may be a matter of judicial construction of such words or phrases. Mere fact that a particular word or phrase has not been defined is not a ground to declare the provisions of the Act itself or the order as unconstitutional**. **The word 'habitual' cannot be put in a straitjacket formula. It is a matter of judicial construction and always depends upon the given facts and circumstances in each case.** As to when an inference that a tenant is habitually in arrears disentitling him to the protection of the Order could be drawn is a question of fact in each case. But on that ground or circumstance itself, the provision of the Act cannot be declared to be ultra vires. Further contention that sub-clause (*i*) of clause 13(3) gives a discretion to the Rent Controller, to permit the defaulting tenant to deposit the arrears for a period of three months within a specified time, while clause 13(3)(*ii*) gives no discretion and that would render the latter clause arbitrary, is also without force. It is true that a right is

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[30] 1995 Supp (1) SCC 235

> given to the landlord to make an application under clause 13(3)(*i*) for permission to determine the tenancy when the tenant was in arrears for a period of three months in which event the discretion has been given to the Rent Controller to fix a time and direct the tenant to deposit the arrears and on its non-compliance the application stands rejected. The Rent Controller is empowered only if the default is for a period of three months and not after its expiry. But in the case covered under clause 13(3)(*ii*) if the Controller finds that the tenant is habitual defaulter in payment of the rent and kept the arrears exceeding three months without compliance thereof, on given facts and circumstances, the Controller may give permission for terminating the tenancy. If the finding is in the negative the petition entails dismissal. It is not a case of subjective satisfaction as sought to be contended for but an objective consideration of the proved facts and circumstances by the parties. The Controller needs to decide whether the tenant factually is a habitual defaulter in payment of the rent and on his recording a finding that the tenant habitually commits default in the payment of the rent, then permission would be granted to determine the tenancy. Thereafter, regular proceedings would be taken in a suit for eviction of the tenant in the civil court. Thus considered, we find that the words 'habitually in arrears' are not vague or indefinite. On the other hand, clause 13(3)(*i*) appears to give the guidance or indicia in that behalf to clause 13(3)(*ii*) of the Order."

(Emphasis supplied)

The Apex Court holds that it is well settled that the legislative scheme may employ words of generality conveying its policy and intention to achieve the objects set out therein. Every word need not be defined. It may be a matter of judicial construction of such words or phrases. This would not make the provision vague and vagueness to become a reason to hold it unconstitutional. **Public**

order, as found in Rule 3(1)(d) would encompass, all laws determined unlawful, **as public order has not sprung from air, but from Article 19(2) of the Constitution of India, and Constitution of India, is not a statute**. **It is the fountainhead of all statutes**. The words 'any information which is prohibited under any law for the time being in force' and used in Rule 3(1)(d) clearly depicts publication of any information despite a specific prohibition against such publication in any law. Therefore, it is ununderstandable as to how Rule 3(1)(d) fails to comply with the tenets of Article 14, to hold it to be arbitrary and obliterate it to be ultra vires the Act or unconstitutional. It is neither nebulous nor arbitrary.

16.11. The other submission in support of the challenge is to read down Rule 3(1)(d). Reading down of a provision would arise on certain parameters as held by the Apex Court in the case of **ARUP BHUYAN v. STATE OF ASSAM**[31]. The Apex Court, in the said case, holds as follows:

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[31] (2023) 8 SCC 745

> **"62.** Even otherwise as observed and held by this Court in *Subramanian Swamy* v. *Raju* [*Subramanian Swamy* v. *Raju*, (2014) 8 SCC 390 : (2014) 3 SCC (Cri) 482] **reading down the provision of a statute cannot be resorted to when the meaning of a provision is plain and unambiguous and the legislative intent is clear. This Court has thereafter laid down the fundamental principle of "reading down doctrine"** as under : (SCC p. 420, para 61)
>
> > "*61.* … **Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality.**"
>
> **At the cost of repetition, it is observed that reading down a particular statute even to save it from unconstitutionality is not permissible unless and until the constitutional validity of such provision is under challenge and the opportunity is given to the Union of India to defend a particular parliamentary statute."**
>
> (Emphasis supplied)

The Apex Court observes that reading down of a provision of a statute cannot be resorted to, when the meaning of the provision is plain and unambiguous and intention of the legislature is not nebulous. On the aforesaid principle, if the contention of the petitioner is noticed, there cannot be reading down for the asking, as the provision is plain and unambiguous. To iterate, blocking orders can be issued under Section 69A of the IT Act read with the

Blocking Rules, 2009. Rule 3(1)(d) provides information blocking within the scope of Section 79. Section 69A and Section 79 operate at two different and distinct circumstances. Section 79 is to be read with Rule 3(1)(d) and Section 69A separately, for the reason that Section 69A employs elaborate procedure for taking down or blocking. With the rigmarole of procedure being followed, the damage that an information should cause, would have caused by the elaborate procedure that is contemplated under Section 69A or the Blocking Rules of 2009.

16.12. What Section 79 of the IT Act and Rule 3(1)(d) of the IT Rules, 2021 mandates is only due diligence with conditions. It startles this Court that the petitioner does not want to undertake due diligence. The cascading effect of information hosted on the platform does not happen by itself. Submissions are made, as if the platform has nothing to do with the information. The platform has everything to do with the information. Tons and tons of information is on the platform and just one particular information springs up to become popular or unpopular is by the algorithms that the platform deploys. Algorithms are not in air; they are

controlled by the intermediary. Therefore, the element of control is always available with the platform. The platform cannot say that it will take its hands off, once the information is loaded on the platform. Therefore, there is nothing in the provision that can be said to be vague or unbridled, to be held it to be arbitrary, as there is nothing to be read down, where a nation is governed by rule of law. Rule of law should govern the nation of any activity of any person, as the person, company or personality cannot be above the rule of law. **Wherefore, I hold that the provision is neither ultra vires nor arbitrary and challenge to both stand repelled. The issue is answered accordingly.**

ISSUE NO.8:

(viii) Whether the fundamental rights guaranteed under Part-III of the Constitution are to be regarded as essentially citizen-centric, or whether they extend in their sweep to all persons?

17.1. The petitioner's submissions *qua* the challenge as quoted hereinabove is, drawing its strength from Article 19 of the

Constitution of India, *inter alia*. Therefore, it is necessary, to notice whether the fundamental rights as obtaining under Article 19 of the Constitution of India is available to an outsider, a person or a Company born beyond the shores of this nation. It is an admitted fact, that the petitioner/Company housed in United States of America is now wanting to invoke the jurisdiction of this Court under Article 226 of the Constitution of India claiming that it has a fundamental right under Article 19(1)(a) of free speech and expression. It therefore becomes necessary to notice Article 19. It reads as follows:

> "**19. Protection of certain rights regarding freedom of speech, etc**.—(1) **All citizens shall have the right**—
>
> (*a*) to freedom of speech and expression;
>
> (*b*) to assemble peaceably and without arms;
>
> (*c*) to form associations or unions [or co-operative societies];
>
> (*d*) to move freely throughout the territory of India;
>
> (*e*) to reside and settle in any part of the territory of India;
> [20][and]
>
> (*f*) [* * *]
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business.

[(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]

(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [24][the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in [sub-clauses (*d*) and (*e*)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]."

(Emphasis supplied)

A bare perusal of Article 19 is clearly indicative of the fact that those are the rights available to the citizens or rights guaranteed to the citizens of the country. Therefore, it is citizen centric and by no stretch of imagination, person centric.

17.2. The petitioner is not a Company incorporated under any of the laws of the nation nor has a face in the nation. It is a faceless Company, with not even a legally established office anywhere, in the nation. Article 19 of the Constitution undoubtedly gives its protective umbrella only to citizens. Fundamental rights obtaining under Article 19 are citizen centric and not person centric. The petitioner is not even a person, it is a Company. The petitioner being a Company, on the face of it, cannot contend that there is

violation of fundamental rights. It becomes apposite to refer to the judgment of the Apex Court and the High Court of Allahabad.

17.3. The Apex Court in the case of **INDO-CHINA STEAM NAVIGATION COMPANY LIMITED v. ADDITIONAL COLLECTION OF CUSTOMS, CALCUTTA**[32], has held as follows:

> "…. …. …..
>
> There is one more point which must be mentioned before we part with this appeal. Mr Choudhary attempted to argue that if mens rea was not regarded as an essential element of Section 52-A, the said section would be ultra vires Articles 14, 19 and 31(1) and as such, unconstitutional and invalid. We do not propose to consider the merits of this argument, because the appellant is not only a company, but also a foreign company, and as such, is not entitled to claim the benefits of Article 19. It is only citizens of India who have been guaranteed the right to freedom enshrined in the said article. If that is so, the plea under Article 31(1) as well as under Article 14 cannot be sustained for the simple reason that in supporting the said two pleas, inevitably the appellant has for fall back upon the fundamental right guranteed by Article 19(1)(f). The whole argument is that the appellant is deprived of its property by operation of the relevant provisions of the Act and these provisions are invalid. All that Article 31(1) provides is that no person shall be deprived of his property save by authority of law. As soon as this plea is raised, it is met by the obvious answer that the appellant has been deprived of its property by authority of the provisions of the Act and that would be the end of the plea under Article 31(1) unless the appellant is able to take the further step of challenging the validity of the act, and that necessarily imports Article 19(1)(f). Similarly, when a plea is raised under Article 14, we face the same position. It may be that if Section 52-A contravenes Article 19(1)(f), a citizen of

[32] **1964 SCC OnLine SC 42**

> India may contend that his vessel cannot be confiscated even if it has contravened Section 52-A, and in that sense, there would be inequality between the citizen and the foreigner, but that inequality is the necessary consequence of the basic fact that Article 19 is confined to citizens of India, and so, the plea that Article 14 is contravened also must take in Article 19 if it has to succeed. **The plain truth is that certain rights guaranteed to the citizens of India under Article 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners**. That being so, we see no substance in the argument that if Section 52-A is construed against the appellant, it would be invalid, and so, the appellant would be able to resist the confiscation of its vessel under Article 31(1). We ought to make it clear that we are expressing no opinion on the validity of Section 52-A under Article 19(1)(f). If the said question were to arise for our decision in any case, we would have to consider whether the provisions of Section 52-A are not justified by Article 19(5). That is a matter which is foreign to the enquiry in the present appeal."
>
> (Emphasis supplied)

17.4. A Division Bench of Allahabad High Court in a Judgment reported in the case of **POWER MEASUREMENT LIMITED v. UTTAR PRADESH POWER CORPORATION LIMITED**[33] has held as follows:

> "…. …. ….
>
> **14. As such Art. 19(1)(d) and (e) are unavailable to foreigners because those rights are conferred only on the citizens. Certainly, the machinery of Art. 14 cannot be invoked to obtain that fundamental right. Rights under Arts. 19(1)(d) and (e) are expressly, withheld to foreigners.**

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[33] 2003 SCC OnLine All 109

> **15. After giving anxious consideration to the facts of the case and the submissions made by the learned counsel for the parties, we are of the opinion that the foreigners also enjoy some fundamental right under the Constitution of this country but the same is confined to Art. 21 of the Constitution i.e. life and liberty and does not include the rights guaranteed under Art. 19 of the Constitution, which are available only to the citizens of this country. Fundamental rights, which are available to the citizens of this country, cannot be extended to non-citizen through Art. 14 of the Constitution.**
>
> **16.** In the present case, learned counsel for the petitioner claims violation of Art. 14 in the matter of awarding bid by the respondent-Corporation. In our view, violation of Art. 14 is to be examined under the back-drop of the facts that the petitioner has applied for tender in respect of supply, installation, testing and commissioning of O. 2S Accuracy Class Static Electronic Trivector Energy Meters but the Power Corporation after making enquiry and the preference of the domestic company over the foreign company, took a decision to grant tender to respondent No. 5. **In these circumstances, the petitioner cannot claim violation of Art. 14 independently but the same is to be read with Art. 19(1)(g) of the Constitution, which is confined to the citizens of the country alone."**
>
> (Emphasis supplied)

The Apex Court in the case of **INDO-CHINA STEAM NAVIGATION CO.LTD.,** *supra* while considering the submission with regard challenge to Section 52-A of the Sea Customs Act, 1878 for it to be violative of Articles 14, 19 and 31 of the Constitution has held that, it could not be challenged by an outsider. The challenge therein was with regard to Article 19(1)(f) coupled with Articles 14 and 31. The Court answers that in the grab of invoking Articles 14 and 31, what

is challenged is the purport of the Act *qua* Article 19. Therefore, the Court holds that Article 19 would not be available to any person who is not a citizen of this country. Same goes with the Division Bench judgment of Allahabad High Court, where at para-14 it is clearly held that Article 19(1)(d) and (e) are unavailable to foreigners, because these rights are conferred only on the citizens. Rights under Article 19 are withheld expressly to foreigners. The Division Bench also holds that, it is of the opinion that foreigners enjoy some fundamental rights of this country, but the same are confined to Article 21 of the Constitution of India, which deals with life and liberty and does not include the rights guaranteed under Article 19 of the Constitution.

17.5. On a coalesce of the judgments rendered by the Apex Court and that of Allahabad High Court, what would unmistakably emerge is, that Articles 14 and 21 of the Constitution would be available to every person and they are not restricted to the citizens of the country only. However, Article 19 is restricted only to citizens of this country and in the garb of projecting Articles 14 and 21, a foreigner cannot seek rights under Article 19. What the petitioner

projects is, that he has a right to challenge all that he has brought before this Court, under the umbrella of Article 14 of the Constitution of India. The challenge is repelled while answering issue No.7. Even otherwise, a foreign company, standing under the umbrella of Article 14, cannot raise a challenge which in effect would lead to interpretation of Article 19, or drawing support even from Article 19 of the Constitution. This is exactly what the petitioner is wanting to seek, project Article 14, take the rights that is unavailable only to citizens under Article 19(1)(a), notwithstanding the rigour of 19(2).

17.6. Ventilating statutory rights or grievances concerning the statute, seeking to challenge the statutes of the nation, on the foundation of Article 19, cannot be countenanced. A Company which is faceless in India, cannot on the basis of baseless allegations, come forward and challenge the laws of the nation. It is reciprocal, as it is unimaginable, that an entity which has no foothold in the United States, can challenge the laws of the United States in the Courts of the United States, except in certain circumstances. In the same manner, X Corp being faceless in the

nation, operating as an intermediary, cannot challenge any of the statutes of the nation under the umbrage of Article 19. Its presence is not there. It cannot raise a challenge to the statutes regulating social media. If it wants to operate in the nation, it has to abide by the laws, as simple as that.

17.7. Identical attempt was made before this Court in the case of **X CORP v. UNION OF INDIA**[34], which comes to be dismissed with imposition of costs of ₹50/- lakhs holding that Articles 19 and 21 are not available to X Corp. A coordinate Bench has held as follows:

"…. …. ….

> Petition has been structured *inter alia* on the provisions of Article 14 of the Constitution, as extensively construed by the Apex Court, **precedent by precedent. Paragraph 11, page 10 of petitioner's Rejoinder reads: "*Petitioner is canvassing rights under Articles 14, 19, 21 only to limited extent. Petitioner is mainly urging violation of statutory rights".* Even otherwise, it cannot claim protection of Article 19(1)(a) because it is not a citizen [Bishwananth Tea Company Ltd.(AIR 1981 SC 1368)], and Article 21 because it is not a natural person; it also cannot espouse the arguable cause of twitter account holders in the absence of enabling provision of law unlike trade unions espousing the cause of workmen under the provisions of**

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[34] Writ Petition No.13710 of 2022 decided on 30-06-2023

The Trade Unions Act, 1926 & The Industrial Disputes Act, 1947.

…. …. ….

The Petitioner-Company is not only threatened of losing its protection available u/s 79(1) but also penal action for violation of the mandatory provisions of the Act and the Website Blocking Rules.

In view of the above discussion, this court is of the considered view that petitioner has locus standi to tap the writ jurisdiction of this Court for the redressal of its arguable grievance.

…. …. ….

(c) The non-compliance with section 69A orders has the potential to make the tweet more viral and spread to other platforms as well. One can imagine the damage potential when such objectionable tweets are allowed to be disseminated despite interdiction. The damage potential is directly proportional to the delay brooked in the compliance of such orders. Petitioner has demonstrably adopted a tactical approach to delay compliance and that shows its intent to remain non-compliant to Indian law. No plausible explanation is offered for the delay in approaching the Constitutional Court, either. Petitioner has abruptly complied with section 69A orders, a bit before coming to court, though the 2nd respondent had issued *compliance requirement notice* way back on 2 February 2021 threatening: *"It needs to be mentioned that Section 69A(3) provides for specific penal consequences in case of non-compliance of the directions issued under section 69A of the Act."* The penalty prescribed u/s 69A(3) for the offence of non-compliance of the order is imprisonment for a term which may extend to seven years and/or fine. Even that did not deter the recalcitrant petitioner. The Central Government, in its discretion, did not choose to prosecute the petitioner for the offence in question. It hardly needs to be reiterated that the Constitutional Courts do not come to the aid of litigants whose hands are soiled or who are indolent.

…. …. ….

> **In the above circumstances, this Petition being devoid of merits, is liable to be dismissed with exemplary costs, and accordingly, it is. Petitioner is levied with an exemplary cost of Rs.50,00,000/- (Rupees Fifty Lakh) only, payable to the Karnataka State Legal Services Authority, Bengaluru, within 45 days, and delay if brooked attracts an additional levy of Rs.5,000/- (Rupees Fife Thousand) only, per day."**

(Emphasis supplied)

It is not that the coordinate Bench was, for the first time, holding that a Company is not a juristic person, which can agitate violation of fundamental rights.

17.8. Right from 1950, the Apex Court in the case of **CHARANJIT LAL CHOWDHURY v. UNION OF INDIA**[35], has held as follows:

"…. …. ….

> **12.** Thus anybody who complains of infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court for the enforcement of such rights and this Court has been given the power to make orders and issue directions or writs similar in nature to the prerogative writs of English law as might be considered appropriate in particular cases. **The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right**

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[35] 1950 SCC 833/1950 SCC OnLine SC 49

compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the Company except to the extent that it constitutes an infraction of his own rights as well. This follows logically from the rule of law that a corporation has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members. As the rights are different and inhere in different legal entities, it is not competent to one person to seek to enforce the rights of another except where the law permits him to do so. A well-known illustration of such exception is furnished by the procedure that is sanctioned in an application for a writ of habeas corpus. Not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment.

13. The application before us under Article 32 of the Constitution is on behalf of an individual shareholder of the Company. Article 32, as its provisions show, is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the legislature. To make out a case under this article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular legislature as not being covered by any of the items in the legislative lists, but that it affects or invades his fundamental rights guaranteed by the Constitution of which he could seek enforcement by an appropriate writ or order. The rights that could be enforced under Article 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights and approaches the Court for relief. This being the position, the proper subject of our investigation would be what rights, if any, of the petitioner as a shareholder of the Company have been violated by the impugned legislation.

A discussion of the fundamental rights of the Company as such would be outside the purview of our enquiry.

14. It is settled law that in order to redress a wrong done to the Company, the action should prima facie be brought by the Company itself. It cannot be said that this course is not possible in the circumstances of the present case. As the law is alleged to be unconstitutional, it is open to the old Directors of the company who have been ousted from their position by reason of the enactment to maintain that they are Directors still in the eye of the law, and on that footing the majority of shareholders can also assert the rights of the Company as such. None of them, however, have come forward to institute any proceeding on behalf of the Company. Neither in form nor in substance does the present application purport to be one made by the Company itself. Indeed, the Company is one of the respondents, and opposes the petition.

15. As regards the other point, it would appear from the language of Article 32 of the Constitution that the sole object of the article is the enforcement of fundamental rights guaranteed by the Constitution. A proceeding under this article cannot really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32; while the second purports to be framed for a relief by way of injunction consequent upon the first. As regards the third prayer, it has been contended by Mr Joshi, who appears for one of the respondents, that having regard to the nature of the case and the allegations made by the petitioner himself, the prayer for a writ of mandamus, in the form in which it has been made, is not tenable. What is argued is that a writ of mandamus can be prayed for, for enforcement of statutory duties or to compel a person holding a public office to do or forbear from doing something which is incumbent upon him to do or forbear from doing under the provisions of any law. Assuming that the respondents in the present case are public servants, it is said that the statutory duties which it is incumbent upon them to discharge are precisely the duties which are laid down in the impugned Act itself. There is no legal obligation on their part to abstain from exercising the powers conferred upon them by the

> impeached enactment which the Court can be called upon to enforce. There is really not much substance in this argument, for according to the petitioner the impugned Act is not valid at all and consequently the respondents cannot take their stand on this very Act to defeat the application for a writ in the nature of a mandamus. Any way, Article 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for."
>
> (Emphasis supplied)

The Apex Court holds that the shareholders of a Company cannot claim infringement of fundamental rights on behalf of a Company, unless their personal rights are affected.

17.9. The Apex Court, in the case of **TATA ENGINEERING AND LOCOMOTIVE COMPANY LIMITED v. STATE OF BIHAR**[36], holds as follows:

> "…. …. ….
>
> Mr. Palkhivala sought to draw a distinction between the right of a citizen to carry on trade or business which is contemplated by article 19*(g) from his right to form associations or unions contemplated by article 19*(c). He argued that article 19*(c) enables the citizens to choose their instruments or agents for carrying on the business which it is their fundamental right to carry on. If citizens decide to set up a corporation or a company as their agent for the purpose of carrying on trade or business, that is a right which is guaranteed to them under article 19 (1)(c). Basing himself on this distinction between the two rights guaranteed by article 19(1)(g) and (c) respectively, Mr.

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[36] 1964 SCC OnLine SC 111

Palkhivala somewhat ingeniously contended that we should not hesitate to lift the veil, because by looking at the substance of the matter, we would really be giving effect to the two fundamental rights guaranteed by article 10 (1). We are not impressed by this argument either. The fundamental right to form an association cannot in this manner be coupled with the fundamental right to carry on any trade or business. As has been held by this court in All India Bank Employees' Association v. National Industrial Tribunal*, the argument which is thus attractively presented before us overlooks the fact that article 19, as contrasted with certain other articles like articles 26, 29 and 30 guarantees rights to the citizens as such, and associations cannot lay claim to the fund fundamental! rights guaranteed by that article solely on the basis of their being an aggregation of citizens, that is to say, the right of the citizens composing the body. The respective rights guaranteed by article 19(1) cannot he combined as suggested by Mr. Palkhivala, but must be asserted each in its own way and within its own limits; the sweep of the several rights is no doubt wide, but the combination of any of those two rights would not justify a claim such as is made by Mr. Palkhivala in the present petitions. **As soon as citizens form a company, the right guaranteed to them by article 19(1)(c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens.** Therefore, we are satisfied that the argument based on the distinction between the two rights guaranteed by article 19(1)(c) and (g) and the effect of their combination cannot take the petitioners' case very far when they seek to invoke the doctrine that the veil of the corporation should be lifted. That is why we have come to the conclusion that the petitions filed by the petitioners are incompetent under article 32, even though in each of these

> petitions one or two of the shareholders of the petitioning companies or corporation have joined."
>
> (Emphasis supplied)

The Apex Court holds that once individuals form a Company, the rights of that Company cannot be equated with individual share holder's rights.

17.10. The Apex Court in the case of **INDIAN SOCIAL ACTION FORUM v. UNION OF INDIA**[37], holds as follows:

> "…. …. ….
>
> **18. We find force in the objection taken on behalf of the Union of India that the appellant organisation is not entitled to invoke Article 19. No member of the appellant organisation is arrayed as a party. Article 19 guarantees certain rights to "all citizens". The appellant, being an organisation, cannot be a citizen for the purpose of Article 19 of the Constitution. (See *State Trading Corpn. of India Ltd.* v. *CTO* [*State Trading Corpn. of India Ltd.* v. *CTO*, (1964) 4 SCR 99 : AIR 1963 SC 1811] ; *Bennett Coleman & Co.* v. *Union of India* [*Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788] ; *TELCO Ltd.* v. *State of Bihar* [*TELCO Ltd.* v. *State of Bihar*, (1964) 6 SCR 885 : AIR 1965 SC 40] and *Shree Sidhbali Steels Ltd.* v. *State of U.P.* [*Shree Sidhbali Steels Ltd.* v. *State of U.P.*, (2011) 3 SCC 193]) In the absence of any member of the association as a petitioner in the writ petition, the**

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[37] **(2021) 15 SCC 60**

> **appellant organisation cannot enforce the rights guaranteed under Article 19 of the Constitution."**
>
> (Emphasis supplied)

The Apex Court holds that Article 19 can be invoked only by citizens excluding organizations, unless individual members are parties.

17.11. A little earlier, the High Court of Delhi in the case of **STAR INDIA (P) LIMITED v. TELECOM REGULATORY AUTHORITY OF INDIA**[38], has held as follows:

> "…. …. ….
>
> **6.** On the other hand, the learned Counsel for the respondents have taken us through a catena of cases containing reflections on the legal position of whether a company can file a petition seeking enforcement of Fundamental Rights. **In *The State Trading Corporation of India* v. *The Commercial Tax Officer, Visakhapatnam*, AIR 1963 SC 1811 : 1964 (4) SCR 99 (STC case in short), the nine-Judge Bench of the Supreme Court clarified that the Constitution deliberately and advisedly makes a clear distinction between Fundamental Rights available to 'any person' and those guaranteed to 'all citizens'. Article 19 *inter alia* guarantees citizens of India (a) the freedom of speech and expression and (g) the right to carry on any occupation, trade or business. Their Lordships thereafter observed that the provisions of the Constitution of India in Part II relating to 'citizenship' are clearly inapplicable to juristic persons; and that neither the provisions of Constitution Part II nor of the Citizenship Act confer the right of citizenship on recognized citizens, any person**

[38] **2007 SCC OnLine Del 951**

other than a natural person; that they do not contemplate a corporation as a citizen. Their Lordships poignantly opined that Part-III of the Constitution, which proclaims Fundamental Rights, was very accurately drafted, delimiting rights like freedom of speech and expression, right to practice any profession, etc. as belonging to citizens only and the more general rights like the right to equality before the law, as belonging to all persons; that corporations may have nationality in accordance with the country of their incorporation but that does not necessarily confer citizenship on them.

7. This is also the view expressed in *Dharam Dutt* v. *Union of India*, (2004) 1 SCC 712. We are of the opinion that where companies approach the Court complaining of violation of Fundamental Rights the pleadings must, in the nature of basics, clearly spell out the manner in which individuals or natural persons are affected. In all the writ petitions before us this aspect has been glossed over, and in our considered opinion obviously for the reason that when the corporate veil is lifted the alleged infraction of these rights pertain to a negligible number of citizens. The gravamen of the assault is predicated on the infringement of the right to freedom of speech and expression. The Petitioner must disclose the manner in which Fundamental Rights of a citizen have been violated. It may be possible, in an exceptional case, that although the Petitioner is an incorporated entity, further compounded by the fact that it is not an Indian citizen, the views of reputed Indian journalists have been silenced. In such cases, the siege may eventually turn out to be successful. This does not detract from the necessity to carefully plead necessary details and circumstances showing that the plaintive cry is of an Indian citizen and not of a foreigner.

8. *Indo-China Steam Navigation Co. Ltd.* v. *Jasjit Singh, Additional Collector of Customs*, 1964 (6) SCR 594 was decided by a Constitution Bench comprising five members of the larger *STC case*. The facts were that a vessel had contravened the provisions of Section 52A of the Sea Customs Act when it entered the Calcutta Port. Learned Counsel for the Petitioner had sought to argue that if mens rea was not an essential

element of Section 52-A that provision would be *ultra vires* Articles 14, 19 and 31(1) and as such unconstitutional and invalid. **The Constitution Bench observed that the Appellant was "not only a company, but also a foreign company, and as such is not entitled to claim the benefits of Article 19. It is only citizens of India who have been guaranteed right to freedom enshrined in the said Article……The plain truth is that certain rights guaranteed to citizens of India under Article 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners". This very question thereafter arose before another Constitution Bench in *Tata Engineering and Locomotive Co. Ltd. (Telco)* v. *State of Bihar*, 1964 (6) SCR 885 and yet again was rejected. Following the STC case the Constitution Bench opined that the "Petitioners cannot be heard to say that their shareholders should be allowed to file the present petitions on the ground that, in substance, corporations and companies are nothing more than association of shareholders and members thereof. In our opinion, therefore, the argument that in the present petition we would be justified in lifting the veil cannot be sustained". Thereafter the decision of the Bench of eleven Judges in *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 reiterated the same legal position. It opined that a company registered under the Companies Act is a legal person, separate and distinct from its individual members. All its shareholders may not be entitled to move a petition for infringement of the rights of the company unless by the impugned action his right had also been infringed. On facts it was found that the Petitioner had challenged the alleged infringement of his own rights and hence he had the legal capacity to file and pursue the writ petition. The challenge concerned the commercial interests of the Petitioner as a shareholder and not for safeguarding his freedom of speech and expression.**

9. The Constitution Bench thereafter encountered this very legal nodus in *Benett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788. Their Lordships noted that neither in *Express Newspapers (P) Ltd.* v. *Union of India*, 1959 SCR 12 : AIR 1958

SC 578 nor in *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305 had any plea been raised about the maintainability of the writ petition. It bears highlighting that so far as Sakal was concerned it had only two shareholders who had joined the litigations as petitioners. Furthermore, the case projected by Sakal was that owing to its comparatively wide circulation, it was instrumental in playing a leading part in the dissemination of news and views and in moulding public opinion in matters of public interest. Sakal had also asseverated that it was not aligned with any political party and that the public referred to and replied upon the opinions articulated in it on controversial issues. We wish to emphasize that this role, which is quite distinct to simple entertainment, has always been considered so vital to nation building and social awareness that it has in almost all legal systems been accorded preeminence. Hence it has been viewed as a freedom and not a mere right. To put entertainment on parity with freedom of speech and expression seems to us to trivialize the function of the press and therefore to be logically and legally incongruent. After discussing the cases already mentioned by us above, Their Lordships spoke as follows:

> 22. In the *Bank Nationalization case* (supra) this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the *Bank Nationalization case* (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the *Bank Nationalization case* (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The *Bank Nationalization case* (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1)(a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech

> and expression of editors, Directors and shareholders are all exercised through their newspaper through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The *locus standi* of the shareholder petitioners is beyond challenge after the ruling of the Supreme Court in the *Bank Nationalization case* (supra). The presence of the company is on the same ruling not a bar to the grant of relief.

10. A couple of years thereafter, another Constitution Bench in the case *The State of Gujarat* v. *The Ambica Mills Ltd., Ahmedabad*, (1974) 4 SCC 656 recorded that in view of Telco, Cooper and Benett Coleman it had been settled "that a corporation is not a citizen for the purposes of Article 19 and has, therefore, no Fundamental Right under that Article". This conundrum has also been considered by H.M. Seervai in the treatise "Constitutional Law of India" IV Edn. where the learned author and distinguished Advocate had expressed the view that this state of the law is unsatisfactory. However, after culling out and expressing the view in paragraph 10.26 on page 708, the opinion has been expressed that a corporation seeking to enforce Fundamental Rights must fulfil two conditions—(a) the majority of its shareholders must be Indian citizens and (b) its management and control must in the hands of Indian citizens. This discussion discloses the undisputed view that foreigners and foreign corporations cannot enforce the Fundamental Rights enshrined in Part III of the Constitution.

11. We have already analysed the respective shareholding of the Petitioners, brushing aside the skein of holding companies, and the minuscule and infinitesimal number of shares in Indian hands. Mr. Shenoy has forcefully posited that the Indian Constitution, as explained in *Benett Coleman*, does not consider it essential that a 'class action' should be initiated in order to successfully withstand an assault on the Fundamental Right of a citizen; nay, even a single citizen has the inviolable right to enforce compliance and respect to his Fundamental Rights. In our opinion whilst there is no scope for applying a quantitative test a qualitative test is essential in such

matters. **As has specifically been observed in *Benett Coleman* the rights of a writer or Editor of freedom of speech and expression must be protected. But these rights cannot be confusedly and incorrectly enforced in favour of persons not falling in this category. A single shareholder may have sufficient *locus standi* to fight the cause of a company whose commercial interests are common to his, as had happened in the *Bank Nationalization cases.* The employment of the word 'citizen' should not be washed away or watered down. Bennet Coleman was not a foreign company. The right of speech and expression, being zenithal in nature, is a freedom incomparable to any other Fundamental Right. Whilst its amplitude ought not to be circumscribed, curtailed or restricted its immense impact on the population requires its availability only to citizens. EcoSOC in terms acknowledges and Advocates the wisdom in preserving all existing cultures and customs. If freedom of speech and expression is made available to foreign entities it would directly result in imposing their foreign cultural values on our society.** In fact they are already doing this unabashedly without any check or restraint through their so-called family-life and other so-called entertainment serials. They are displaying naked vulgarity starting with innocent kids to above 60 years old women. They are teaching bad manners, adultery, rapes, innovative methods of murders, illegitimacy and all sorts of indecencies and crimes to the Indian families which were hitherto foreign to Indian culture. They have hijacked and monopolized the media from 24 × 7 hours. They are unashamedly indulging in cultural sabotage from within the country and their role is like the role of Anti National people and Public Enemies and is akin to the role of terrorists but under the cover of media and in the name of freedom of speech and expression. We cannot comprehend a more belligerent use of these freedoms. The Respondents and their associates have apparently shut their eyes, may be for ulterior motives. The economic strength of Western countries has an irresistible effect on changing the mindset of developing nations and these societies tend to ape, copy, imitate and replicate the economically advanced nations. Courts should be loath to permit such an assault and invasion by indiscriminately extending freedom of speech and expression under Article 19(1)(a) to persons who are not Indian citizens. It would be

> relevant to recall that in CAB the Supreme Court had observed that—"what distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home." In that very case the Apex Court had noted the absence of any suggestion before it that acknowledgement of a foreign agency by the BCCI/CAB is violative of the provisions of Article 19(2) of the Constitution."
>
> (Emphasis supplied)

The High Court of Delhi holds that foreign Company cannot claim fundamental rights under Article 19, emphasizing that Companies must be founded under Indian laws with Indian citizens majority controlling management, to claim any such rights.

17.12. In the light of the law as laid down by the Apex Court and that of other High Courts what would unmistakably emerge is, that freedom under Article 19 cannot be claimed by a non-citizen. It can only by/for the citizen. Therefore, it is citizen centric. The other Articles that are pressed into service are Articles 14 and 21. The petitioner has the status of an intermediary as defined under the IT Act, 2000 and nothing beyond it. It is neither a citizen of the country nor a natural person who can be permitted to

sue on the protective umbrella of Article 19. It is for the individual citizens of the country, the right under Article 19 are provided. The petitioner, as observed hereinabove, is a mere artificial juristic entity. Therefore, the challenge to a Constitutional validity of a provision or a statute under the Indian law cannot be permitted, particularly under the garb of violation of right guaranteed under Article 19. more so, in the light of the fact that the pleading of the petitioner, at paragraph 22 of the petition, reads as follows:

> **"Petitioner is a company incorporated under the laws of the United States of America. It operates a platform called "X" for its users in India and is an "intermediary" under Section 2(1)(w) of the IT Act".**

The petitioner pleads that it is a Company incorporated under the laws of United States of America. It operates in India as an intermediary, as obtaining under Section 2(1)(w) of the IT Act.

17.13. The Writ Petition appends to it an affidavit, the signatory to the affidavit is a non-Indian citizen. All these are clear instances of the petitioner not having any right to question any law of this nation, particularly on the premise that it violates tenets of

Article 19 of the Constitution of India. Therefore, the plea projected before this Court, on the strength of Article 19 of the Constitution is, on the face of it, untenable. The issue is thus, answered.

ISSUE NO.9:

(ix) Whether the Sahyog Portal, envisaged under the Information Technology Act, is ultra vires the parent enactment, or whether it stands as a legitimate instrument in aid of statutory purpose?

18.1. To consider the said issue, it is germane to notice the genesis of the portal. Rule 3(1)(d) *supra* of the IT Rules, 2021 specifies issuance of a notification for the purpose of execution of orders under Section 79(3)(b) of the IT Act and that would be issued to the intermediary by an authorized agency, notified by the appropriate Government. The learned Solicitor has placed on record, the reason for establishment of a Portal, which according to him is a facilitation Portal, for the convenience of all stakeholders. Elaborate justification is made in the written submissions placed

before the Court by the learned Solicitor. I deem it appropriate to paraphrase the same.

"SAHYOG – A MERE FACILITATION PORTAL FOR CONVENIENCE OF

STAKEHOLDERS

308. **It is further submitted that Rule 3(1)(d) of the IT Intermediary Rules, 2021 clearly specifies that the notification for the purpose of section 79(3)(b) of the IT Act, 2000 r/w Rule 3(1)(d) IT Intermediary Rules, 2021 will be issued to the intermediary by the authorized agency notified by the Appropriate Government. As on 24.03.2025, 28 States, 5 UTs and 06 Central Government Ministries/ Departments have notified the authorized agencies/nodal officers and have been onboarded to Sahyog Portal. Only these notified agencies/nodal officers are authorized to issue notification to the intermediaries under section 79(3)(b) of the IT Act, 2000 r/w Rule 3(1)(d) IT Intermediary Rules, 2021. Any notifications received other than by the above authorized agencies/nodal officers or the court of the competent jurisdiction, can be rejected.**

309. It is submitted that I4C being a coordinating agency on matters of cybercrime routinely keeps interacting with the Law Enforcement Agencies (LEAs) of the States/UTs and extends assistance in matters of handling cybercrimes. During such interactions, the LEAs had highlighted the availability of large number of unlawful/harmful information and the difficulties faced by them in timely removal or disabling access to such information particularly those which do not fall under section 69A of the IT Act, 2000 and also with respect to data requests made u/s 94 BNSS (formerly Section 91 Cr.P.C).

310. It is submitted that the issues highlighted by LEAs while notifying intermediaries for removal or disabling access

to unlawful/harmful information are as follows:

a. **Lack of Reliable Contact Information:** Authorized officers often face significant difficulties in obtaining reliable and updated contact details of intermediaries. Contact information provided on intermediary websites/apps is most of the time non-functional. Much of the time goes into finding the Nodals' Contact details resulting in delayed communications. Many a time, the contact could not be found and established. The absence of accessible and verified contact channels impedes the issuance of notices for the removal of disabled access to unlawful information.

b. **Delay in removal or disabling access of Unlawful information and data requests:** There are frequent delays in the removal or disabling of access to unlawful or harmful information, even after formal requests have been made by authorised agencies. Such delays compromise the effectiveness of enforcement efforts, particularly in sensitive or urgent cases for example non-consensual intimate images are circulated on the internet to cause harm to the user as a result of revenge tactics, defamation etc. Similarly such delays are in r/o notices issued u/s 94 BNSS.

c. **Lack of domestic representation by intermediary:** A large number of intermediaries offering services within India are foreign-based entities with no physical presence, office, or designated representative within the country. This lack of domestic representation significantly hinders timely redressal of the grievances raised by the users who in turn approach the LEAs for action. In such cases or otherwise LEAs face problems in coordination and compliance with the issuance of notices for removal or disabling access of unlawful information and data requests.

D. **Complex Law Enforcement Online Request (LEOR) Portals:** The existing portals used by intermediaries for processing law enforcement requests are complex, non-

uniform, and difficult to navigate. Different intermediaries have different platforms. LEAs are required to operate across multiple platforms with varying requirements and user interfaces, leading to operational inefficiencies and confusion.

e. **Delayed or No Response from Intermediaries:** In many instances, intermediaries either delay their response or fail to respond altogether to official notices issued by LEAs. This lack of responsiveness not only disrupts investigations but also undermines the enforcement of lawful directions.

f. **Non-Compliance to the legally issued notices:** There are recurring cases where intermediaries do not comply with legally issued notices for the removal or disabling of access to unlawful or harmful content and data requests. Such non- compliance raises concerns over accountability and adherence to Indian law.

g. **Inaction on User Grievances:** LEAs have also flagged the failure of intermediaries to take timely or adequate action on user grievances related to harmful or illegal content. This inaction compromises user protection and weakens public trust in digital platforms and users in turn approach the LEAs for action. Many times the immediate requirement of the users will be to remove unlawful content pertaining to them from the platforms or on the internet.

h. **Absence of Mechanism to track Non-Compliance**: Currently, there is no standardized or accessible mechanism through which LEAs can track timely non-compliance by intermediaries or escalate unresolved issues, resulting in a lack of oversight and follow-up.

i. **Pendency of Requests:** A significant number of legally issued notices remain pending without resolution or action from intermediaries. No communication is received/entertained from/by the intermediaries for non-compliance. This backlog obstructs the progress of

investigations and legal proceedings.

j. **Lack of Accountability for Delayed Responses:** Since, there is no common visibility of non-compliance on the part of different intermediaries, ensuring the accountability of the intermediaries becomes difficult. This leads to resorting to blame game.

k. **Lack of Transparency in Communications:** There is limited transparency in the communication process between LEAs and intermediaries. Often, there is no clear documentation of the timeline, status, or reason for delay/non-compliance, making it difficult to track interactions effectively.

311. It is submitted that the issues highlighted by intermediaries while dealing with notices issued by LEAs for removal or disabling access to unlawful/harmful information and data disclosure under various legal provisions, are as follows**:**

a. **Lack of Clarity on Authority of Issuing Agencies:** Intermediaries frequently receive notices from various agencies or officials whose legal authority to issue such directives is unclear. The absence of a standardized framework for recognizing the legitimacy of these directives creates uncertainty regarding compliance obligations. This ambiguity can lead to inconsistent enforcement, legal risks, and delays in actioning legitimate requests.

b. Insufficient Information in legally issued notices: Law enforcement Agencies (LEAs) often provide limited details when issuing notices. The lack of specificity in such notices makes it challenging for intermediaries to assess their validity and take appropriate action, potentially resulting in non-compliance or wrongful removal of lawful content. A more structured approach, including mandatory detailed justifications and supporting evidence, would improve compliance efficiency.

c. **Redundant Notices for the Same Content:** A further issue is the duplication of legally issued notices for the same issues. Intermediaries often receive multiple directives from different agencies or jurisdictions for the removal of identical unlawful/harmful information, creating operational inefficiencies and increasing compliance burdens. This redundancy not only leads to confusion but also consumes significant resources.

d. **Need of Structured and Transparent Mechanism:** There is a need for a more structured and transparent mechanism for taking lawful measures by LEAs, ensuring that notices are in standard format, well-documented, authorized, and accompanied by sufficient supporting information.

312. **It is submitted that to address the above cited challenges faced by both Law Enforcement Agencies (LEAs) and intermediaries, the LEAs had suggested for a centralized platform. In this connection, to facilitate the routing of notices under Section 79(3)(b) of Information Technology, 2000 r/w Rule 3(1)(d) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, I4C, MHA in collaboration with Ministry of Electronics and Information Technology (MeitY) and Department of Telecommunication (DoT) has developed a portal called SAHYOG. The word Sahyog implies co-operation and as meant is aimed at ensuring a seamless process and co-operation for routing the lawfully issued notices pertaining to cybercrimes/cyberspace b/w the authorized agencies, its nodal officers, and the intermediaries for the benefit of both the parties.**

313. **It is submitted that the said central portal seeks to facilitate the removal or disabling of access to any information, data, or communication link being used to commit an unlawful act. It will bring together all Authorized Agencies of the country and the intermediaries on one platform to ensure immediate action against unlawful online information.**

314. It is submitted that the 'Sahyog' Portal is operational since **October 2024** and significant progress has been made in on boarding IT intermediaries to the Sahyog portal. It is submitted that so far, **38 IT intermediaries** have been onboarded on the portal which includes social media intermediaries including the significant ones, Google, Microsoft, Amazon, Telegram, Apple, Sharechat, Snapchat, LinkedIn, YouTube, Dot In Registrars, Instant Messaging Service Providers such as Quora, Josh, PI Data Centers, Sify, Oracle India Private Limited, etc. Meta Inc. representing Facebook, Instagram and Whats App, is getting API based Integration with Sahyog to enable real-time action. The process of API Integration is in the advanced stage and likely by the first week of April, 2025 will be live. With this, Instagram Facebook & Whats App platforms will be onboarded on the Sahyog. Owing to the significant benefits of the portal and appreciating the fact that the requests routed through the portal are well within the legal framework, there has been a positive response from the intermediaries including significant intermediaries like Google, Meta, Microsoft etc., for onboarding on the SAHYOG. The onboarding of the intermediaries shall be ongoing process.

315. It is submitted that the LEAs of 28 States**, 5UTs and 06 Central Ministries/Department** namely the Ministry of Home Affairs, Ministry of Defence, Ministry of Finance (FIU&DGGI), Ministry of Information and Broadcasting, Ministry of Rural Development and Ministry of Heavy Industries have notified the nodal officers/authorized agency under Section 79(3)(b) of the IT Act, 2000 to issue notices for removal or disable access to any information, data, or communication link which is being used to commit an unlawful act available on Intermediary platforms. The UTs of Chandigarh, Lakshadweep & Dadra and Nagar Haveli and Daman and Diu are yet to notify the authorized agencies and their nodal officers. The process of creating login credentials for the authorized officers is under process."

(Emphasis added)

Having noticed the elaborate justification placed on record, this Court is satisfied that the Sahyog portal is not an instrument of censorship, but a facilitation mechanism intended to streamline communication between authorized agencies and intermediaries. The recitals of difficulties faced by both the law enforcement agencies and intermediaries ranging from lack of reliable contact information to duplication of notices, delays and absence of accountability – demonstrates, the pressing need for a centralized and standardized platform. Therefore, the justification is completely acceptable. The nomenclature “Sahyog’ means co-operation is itself indicative of the collaborative intent underlying its establishment. It serves as an administrative channel, a digital post office of sorts ensuring efficiency and traceability. Since power to issue binding blocking directions, as submitted by the learned Solicitor General, remains exclusively under Section 69A of the IT Act and the Blocking Rules of 2009. To describe Sahyog as a ‘censorship portal’ is, therefore, a mischaracterization that cannot be sustained. Therefore, it is only a portal under a single umbrella, for the purpose for which it is established and the purpose is narrated hereinabove. Wherefore, the Sahyog Portal does not suffer from

any vice of unconstitutionality. The submission is thus noted to be rejected and the issue is answered repelling the said contention.

NODAL OFFICERS:

19. The only contention now remains is concerning the Nodal Officer. Much is contended about Nodal Officers acting at their whim or fancy. The Nodal officers emanate from the Blocking Rules, 2009. Rule 2 of the said Rules deals with definitions. Rule 2(c) defines 'designated officer'. Rule 2(f) defines 'nodal officer' as obtaining under Rule 4. Rules 3 and 4 of the said Rules read as follows:

> "3. **Designated Officer**.-The Central Government shall designate by notification in Official Gazette, an officer of the Central Government not below the rank of a Joint Secretary, as the "Designated Officer", for the purpose of issuing direction for blocking for access by the public any information generated, transmitted, received, stored or hosted in any computer resource under sub-section (2) of section 69A of the Act.
>
> **4. Nodal officer of organisation.-Every organisation for the purpose of these rules, shall designate one of its officer as the Nodal Officer and shall intimate the same to the Central Government in the Department of Information Technology under the Ministry of Communications and Information Technology, Government of India and also publish the name of the said Nodal Officer on their website."**
>
> (Emphasis supplied)

The Ministry of Electronics and Information Technology, have by an office memorandum dated 31st October 2023, directed designation and notification of Nodal Officer to handle unlawful content/information/activities in cyberspace. The office memorandum reads as follows:

"**भारत सरकार**
Government of India
इलेक्ट्रॉनिकी और सूचना प्रौद्योगिकी मंत्रालय
Ministry of Electronics & Information Technology
इलेक्ट्रॉनिक्स निकेतन, 6, सी जी ओ कॉम्प्लेक्स, नई दिल्ली-110003
Electronics Niketan, 6, CGO Complex, New Delhi-110003
Website: www.meity.gov.in

संख्या दिनांक
No. 1(4)/2020-CLES-1 Date. October 31, 2023

Office Memorandum

Subject: Designate and notify nodal officer to handle Unlawful content / information / activities in Cyber Space, as per the provisions of the act / law administered by the Appropriate government

The content which is considered unlawful in the physical world is also unlawful in the online world. However, the way the Internet technologies work, disabling/ taking down of content can happen only at the country level/ global level. The contents cannot be blocked/removed at regional level. It is, therefore, necessary that a suitable and effective mechanism is developed for receiving and / or co-ordinating such requests for taking down in a way based on the subject matter dealt by each Ministry/ Department. The aim is to ensure effective and timely

removal of such unlawful content over the internet through appropriate government framework, as these are presently dealing with that domain and its related unlawful activities in the physical/ online world.

2. The "intermediary" has been defined under section 2(1) (w) of the IT Act and also includes Social media platforms, Websites, Mobile Apps, e-commerce websites, various online aggregators, Internet Service providers, webhosting platforms etc. The Information Technology Act, 2000 also provides for the definition of Appropriate government based on the VII schedule of the Constitution.

3. Section 79(3)(b) of the information Technology Act, 2000 ("IT Act") and the Information Technology (Intermediary guidelines and Digital Media Ethics Code) Rules, 2021" (hereinafter referred to as the "IT Rules, 2021) empowers "Appropriate Government or its authorized agency" to issue notice to an intermediary to disable access / takedown of any unlawful material residing in or connected to a computer resource, controlled by that intermediary. The provisions of Rule 3(1)(d) of the IT Rules, 2021 is reproduced below for your ready reference:

"*...an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force:*

Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:

Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:

Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of subsection (2) of section 79 of the Act;"

4. Therefore, it is imperative that the corresponding Nodal Ministries/ Departments, as an Appropriate Government for the law / act administered by them, may address the issue of online unlawful contents in an effective manner.

5. In this regard, each appropriate government may consider the following:

i. Designate and notify a Nodal Officer in the nodal Ministry/ Department and also in each state (if the subject matter is of the State Govts.) and such other designated official(s) for issuing takedown notice to the appropriate intermediary if any online content violates their act / law administered by them.

ii. Confirm the same to MeitY for overall co-ordination.

The existing record with reference to the above is attached herewith for further updation, if any, from your side.

6. For issuing notices to the appropriate Intermediary platform, hosting or controlling the said unlawful information (brought to your knowledge either through grievances, complaints or as suo-moto), a sample templates for content removal requests / takedown notice is placed in Annexure I. Since this is an evolving process, Meity will facilitate resolving

any technological/ feasibility issue or any other technical support as may be required to identify the right intermediary.

Encl: As above

Sd/-
(Dr. Sandip Chatterjee)
Group Coordinator (Cyber Law & Data Governance) & Scientist G
Tel.: 011-24363094
Email: gccyberlaw@meity.gov.in

To
1. All Central Ministries / Departments
2. The Chief Secretaries and DCPs of all States / Union Territories"

The office memorandum refers to Section 79(3)(b), which mandates that the intermediary on being notified by the appropriate Government or its agency; Rule 3(1)(d) refers to being notified by the appropriate Government or its agency under Section 79(3)(b). With these references, the office memorandum is notified directing designation of Nodal Officers. Four such illustrations of implementation by the Ministry of Railways, GST, the PMLA and the Ministry of Defence, are germane to be noticed. They are as follows:

"MINISTRY OF RAILWAYS
NOTIFICATION
New Delhi, the 24th December, 2024

G.S.R. 781(E). — In pursuance of clause (b) of sub-section (3) of section 79 of the Information Technology Act, 2000 (21 of 2000), read with clause (d) of sub-rule (1) of rule 3 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, the Central Government being the appropriate Government hereby notifies Executive Director (Information and Publicity), Railway Board, Ministry of Railways, for the purpose of issuing notice to the intermidiaries in relation to any information which is prohibited under any law for the time being in force pertaining to the Ministry of Railways and its attached offices.

[F. No. 2024/PR/13/63]
T. SRINIVAS, Jt. Secy"

…

"MINISTRY OF FINANCE
(Department of Revenue)
NOTIFICATION
New Delhi, the 6th January, 2025

S.O. 95(E).—In pursuance of clause (b) of sub-section (3) of section 79 of the Information Technology Act, 2000 (21 of 2000) read with clause (d) of sub-rule (1) of rule 3 of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, the Central Government hereby designates the Additional/ Joint Director (Intelligence) of Directorate General of GST Intelligence Headquarters (DGGI-Hq), Central Board of Indirect Taxes and Customs in Department of Revenue, Ministry of Finance, as the nodal officer for the purposes of the said rules in respect to section 14A(3) of Integrated Goods and Services Tax Act, 2017 (13 of 2017).

2. This Notification shall remain in force from the date of its publication in the Official Gazette.

[F. No. N-24015/3/2024-Computer Cell]
MUKESH SUNDRIYAL, Under Secy. (Computer Cell)"

…

"MINISTRY OF FINANCE
(Department of Revenue)
NOTIFICATION
New Delhi, the 3rd January, 2025

S.O. 32(E).—In pursuance of clause (b) of sub-section (3) of section 79 of the Information Technology Act, 2000 (21 of 2000) read with clause (d) of sub-rule (1) of rule 3 of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, the Central Government hereby designates the Director, Financial Intelligence Unit, India as the nodal officer for the purposes of the said rules in respect to section 13 of The Prevention of Money Laundering Act 2002.

2. This Notification shall remain in force from the date of its publication in the Official Gazette.

[F. No. N-24015/5/2024-Computer Cell]
MUKESH SUNDRIYAL, Under Secy. (Computer Cell)"

…

"MINISTRY OF DEFENCE
NOTIFICATION
New Delhi, the 24th October, 2024

S.R.O. 136(E).—In pursuance of clause (b) of sub-section (3) of section 79 of the Information Technology Act, 2000 (21 of 2000) read with clause (d) of sub-rule (1) of rule 3 of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, the Central Government hereby designates Additional Directorate Genenal of Strategic Communication (being an officer of the Central Government not below the rank of Deputy Secretary), in the Indian Army, as the nodal officer for the purpose of issuing notice to intermediaries in relation to any information which is prohibited under any law for the time being in force, pertaining to the Indian Army and its components.

[F. No. A/34514/MI-10]
MAJOR GENERAL G S CHOUDHRY, Jt. Secy."

Rule 4 directs that every organisation for the purpose of these Rules, shall designate one of its officers as the Nodal Officer and shall intimate the same to the Central Government in the Department of Information and Technology and also publish the name of the said Nodal Officer. This was a question that is raised in **SHREYA SINGHAL** which affirms Rule 4 of the Blocking Rules and appointment of the Nodal Officer. The designation, as observed, emanates from 3 statutes, all intertwined with one solitary purpose of handling unlawful content, information and activity in the cyberspace. Therefore, Nodal Officers, are not dropped from air, but emanate from Statutes. The blocking of information in case of emergency is found in Rule 9 of the said Rules. The Nodal Officers who are appointed under the Rules will hand out notices to the intermediary to take down unlawful information that is floated on the platform of the intermediary. Several such notices are now called in question in the case at hand. Therefore, it becomes necessary to refer to one of the notices issued to the Nodal Officer of the petitioner. It reads as follows:

"No.22003/47/2024-14C/161
Government of India
Ministry of Home Affairs

Indian cyber Crime Coordination Centre (14C)
(CIS Division)
5th Floor, NDCC-II Building,
Jain Singh Road, New Delhi.
Dated 21 July,2024

To
The Nodal Officer X
"Compliance-officer-in" Compliance-officer-in@twitter.com

Sub: Notice u/s 79(3)(b) of Information Technology Act, 2000 r/w 3(1)(d) of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

The NCTAU Unit of 14C, MHA has noticed that certain X handles are propagating inappropriate content. Through these posts, misleading statements are spreading among different groups which could lead to communal disharmony. The above acts are violative of provisions of Section 196 of Bharatiya Nyaya Sanhita BNS 2023. The identical URL is as under:-

https://x.com/kamaalrkhan/status/1814886949968097398?t=acmHVvdvXayjOcu-ySjSXw&s=08

2. As the Nodal Officer representing the Indian Cyber Crime Coordination Centre, an authorised agency of the Ministry of Home Affairs, I, Rahul Kant Sahu, issue this Notice under Section 79(3)(b) of the Information Technology act, 2000 read with Rule 3(1)(d) of the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. It is imperative that the abovementioned URLs may be disabled immediately, and in no circumstances later than 36 hours from receipt of this notice, without compromising any evidence.

3. Failure to comply with the removal of the aforementioned content may result in the loss of intermediary exemptions provided under Section 79 of the IT Act, 2000, and Rule 7 of the IT Rules, 2021 will come into effect.

Sd/- (Rahul Kant Sahu)
DGM (14C)”

(Emphasis added)

The notice is issued under Section 79(3)(b) of the Act and Rule 3(1)(d) of the 2021 Rules. It is indicative that the Ministry of Home Affairs has noticed X handles are propagating inappropriate contents and the said acts are violative of the provisions of Section 196 of BNS 2023. The URL is also quoted and URL is directed to be disabled immediately or not later than 36 hours without compromising any evidence. Identical notices are appended to the statement of objections of the respondents. They are concerning violation of either the provisions of the IT Act or the BNS, 2023. Therefore, they are all alleging violation of already established illegality, if committed.

20. **The BNS 2023 is a code of penal provisions. Those penal provisions are quoted in the notices that they are in violation. Therefore, the submission that according to the Nodal Officers mind, whatever becomes the violation, is the violation, is a statement that is contrary to the facts. The**

Nodal Officer has never indicated that according to him it is wrong, but according to law it is wrong. Therefore, the intermediary has no choice but to obey the take down orders issued from time to time by the Nodal Officers. If the document with the objections are seen, it shrouds with so much obscenity that is found in the platform. If illegality and unlawful information is floating on the platform and the Government of the day directs taking it down, it cannot be said to be illegal orders. They are orders in consonance with law. The Nodal Officers are endowed with the duty to protect integrity of every citizen and integrity of the nation. The petitioner is making a hue and cry about taking down orders issued in the India soil. The petitioner, as observed, belongs to American soil.

21. In the United States of America, the petitioner or any social media platform does not have a free for all. The congress of United States has notified ”TAKE IT DOWN Act 2025”. The TAKE IT DOWN Act amends Section 223 of the Communications Act, 1934, for the purpose of adding new criminal prohibitions related to the

publication of intimate images. The criminal prohibition under the TAKE IT DOWN Act consists of 7 separate offences. They read as follows:

(i) Publications involving "authentic" intimate visual depictions of adults;
(ii) Publications involving authentic visual depictions of minors (under 18);
(iii) Publications involving digital forgeries of adults;
(iv) Publications involving digital forgeries of minors;
(v) Threats involving authentic intimate depictions of adults or minors;
(vi) Threats involving digital forgeries of adults; and
(vii) Threats involving digital forgeries of minors.

The criminal liability under the TAKE IT DOWN Act is as follows:

> "For publication offenses concerning depictions of adults, the prosecution must prove several elements beyond a reasonable doubt. First, it must establish that the defendant knowingly published the material, meaning that the act of making the depiction accessible to others was done with awareness rather than accidentally. Second, the prosecution must demonstrate either that the defendant intended the publication to cause harm, whether psychological, reputational, or financial or that harm in fact occurred as a result of the publication.
>
> The Act also requires certain consent and privacy-related conditions to be satisfied. In the case of authentic depictions, the prosecution must show that the material was obtained under circumstances in which the defendant knew or reasonably should have known that the identifiable individual had a reasonable expectation of privacy. In the case of digital forgeries, it must be shown that the material was published without the identifiable individual's consent. Further, the material must not have been voluntarily exposed by the identifiable individual in a public or commercial setting, and the content must not be a matter of public concern, which is

interpreted in accordance with the principles of the First Amendment."

Notice and removal requirements under the TAKE IT DOWN Act is as follows:

- 'Covered platforms' are websites, online services, online applications, or mobile applications that serve the public and either primarily provide a forum for user-generated content or publish, curate, host, or make available non-consensual intimate visual depictions in the ordinary course of business.

- Internet service providers, email services and websites or apps that mainly display pre-selected, non-user-generated content, where user interaction (chat, comments, etc.) is merely incidental, are excluded from the ambit of 'covered platforms'.

- Covered platforms must establish a **clear, accessible process** to allow identifiable individuals (or their authorised representatives) to request removal of intimate visual depictions published without consent.

- A valid notice most be **in writing**, include **identification of the depiction** and enough information for the platform to locate it, and contain a **brief statement of good-faith belief** that the depiction was published without consent, with any information necessary to verify lack of consent, and must include the **signature and contact information** of the individual or authorized representative.

- **Obligations of the covered platform – Upon receiving such a notice, a covered platform must remove the intimate visual depiction "as soon as possible" but not later than 48 hours after receiving the notice. Within that time frame, the platform must also "make reasonable efforts to identify and remove and known identical copies of such depiction". A covered platform must provide a "plain language" explanation of its notice and removal process on its site.**

- **Safe Harbour Protections to covered platforms** – The Act provides that a covered platform shall not be liable for any claim based on its "good faith" disabling of access to, or removal of a depiction based on an "apparent" unlawful publication, even if the depiction turns out to be lawful.

- The Act authorizes the Federal Trade Commission (FTC) to enforce the notice-and-removal requirements, stating that a failure to reasonably comply with these obligations constitutes a violation of a rule defining an unfair or deceptive act or practice under the Federal Trade Commission Act. The Act extends the FTC's jurisdiction in this regard to non-profit organizations, which are not usually covered by the FTC Act."

Therefore, it is not as if the petitioner would not abide by the law as found in the TAKE IT DOWN Act of the United States in the United States, but is making a hue and cry about what is found in India, the notices of take it down in the statute. It is not that this Court is now wanting to draw parallel to the TAKE IT DOWN Act of the United States to the IT Act. The IT Act or its later avatar are all home grown. Therefore, what happens to TAKE IT DOWN Act in United States of America can have no bearing on the laws of the nation. **It is quoted only to remind the petitioner that it obeys every Act of the United States, and wants to disobey the law of the Indian soil.**

ISSUE NO.10:

(x) In the contemporary digital milieu, where algorithms increasingly shape the flow of information, its autonomy eclipse the guiding hand of human agency - myth or reality?

22.1. The learned senior counsel for the petitioner has vehemently contended that the platform has no human hand. It is only a platform where content creators create their content, post it on the platform. It is all machine driven or at best artificial intelligence driven. There is no human hand involved. Therefore, who the State is trying to regulate, cannot be a machine. The learned Solicitor General would vehemently refute this submission, in contending that, it is the algorithm, that the platform operates, through human intervention, which brings a post which is, for illustration at 300 posts down on a particular platform, to become the first post. It is his submission that algorithms are operated by human hands. Therefore, it becomes necessary to notice the intertwined concept of algorithms and the human hand.

22.2. Algorithms are often presented as neutral, mathematical systems that generate outcomes free from human bias. This is the myth, in reality, algorithms are conceived, designed and trained by human beings. Every line of the code is a part of the creation of the creator. The algorithms are not independent actors, they are extensions of human judgment encoded in a mathematical form. No algorithm exists in isolation. Its efficacy depends on the data it processes and that data is itself a product of human activity. **Today, algorithms are everywhere, they decide what news you see on social media; how maps guide you through traffic; what prices you pay on e-commerce sites; which job applications pass the first round of screening; it is in healthcare. Law enforcement agencies flag algorithms as suspicious, patterns of behaviour. Algorithms today have become instruments of power, they can amplify voices or silence them, open opportunities or close them, therefore, every algorithm reflects the human hand, it is a human imprint. The Engineer who writes the code, the policy maker who sets the**

goal, the Manager who decides to collect the data, are all human beings.

22.3. Therefore, the submission of the learned senior counsel that there is no human hand involved in the platform is noted only to be rejected. As observed, the algorithms decide what news you see on social media, it is therefore, when an unlawful content or a defamatory topic or the integrity of any nation is posted on the platform like the petitioner, the algorithms bring it to the top with a few likes on it, as the likes go up, the algorithm speed up, this is how the algorithm works. The petitioner cannot escape the hand of law, on a submission that the platform cannot be regulated, as it has no human intervention. Time has come that the legal systems must insist upon transparency, explainability and human responsibility, as, in the algorithm, the human hand is present in every stage, right from conception to enforcement, which passes through coding, training and development.

22.4. From the Constitutional stand point, such algorithms cannot be permitted to erode fundamental rights, under the guise

of technological neutrality. The law cannot abdicate its role merely because technology mediates the act. **In essence, the algorithms may be new order of the day, but the Constitutional demand is old. Power, whether human or digital, must remain accountable**.

ISSUE NO.11:

(xi) Whether the menace of social media needs to be curbed and regulated?

23. In the light of the preceding analysis, it becomes necessary to notice the menace generated by social media and the growing necessity to regulate it.

23.1. Scholars across the globe have repeatedly underscored this paradox. On the one hand, the social media is hailed as a harbinger of new information order; on the other, it is indicated as the fountain head of misinformation, disinformation and malice. To borrow from the article **The Menace of Fake News in the Rise in**

the Use of Social Media[39] the platform that once promised enlightenment has become the stage of falsehood. Excerpts from the article read as follows:

> "**Cause and Effect of Fake News**
>
> **The give-and-take relationship of information (which includes opinions, facts, humor, information etc.,) that has emerged on the internet is the biggest threat to regulating authorities. People are consuming data daily without any hesitation and this gives room to manipulation of data and information and its unwarranted reception to millions of people resulting in their unfair and unjustified actions. Fake news, also known as junk news, refers to the mal-information that is spread in a country through the informal exchange of words and traditional media in the form of edited videos, memes, unsubstantiated ads and web-based life which engenders bits of gossip (Sharma, 2020).** Spread of fake news and misleading information is a very serious issue as it causes and gives a platform to other crimes, such as:
>
> - Several cases of mob lynching were encountered based on the circulation of fake news of child kidnappers on WhatsApp and Facebook.
>
> - Many a times, hate speech was made against people by spreading wrong information against them and infuriating the community by same.
>
> - A sense of uneasiness and fear was initiated during the whole demonetization process in November, 2018, when the new currency notes were incorporated with chips that would track every move of the currency.

[39] **Misra, P., & Shukla, S. The Menace of Fake News in the Rise in the Use of Social Media**

> - Fake news of COVID-19 being just a hoax and is not a real disease, made people believe that there is no need for masks, quarantine, lockdown, social distancing and following government orders.
>
> - The fake news of taking the vaccine of COVID-19 is dangerous and could cause serious illness and even death.
>
> The spread of false news has thus been characterized as a social problem creating negative externalities by threatening the ability of the public to trust legitimate news outlets and the ability of traditional journalism to serve its role in preserving democratic institutions (Ton, p. 2).
>
> Reading the reports relating to fake news, it poses a few questions:
>
> - How come people believe anything that comes in the form of a short message, video or audio on their phones or web without any source backing the information received?
>
> - Why people do not seek to check the validity of the information received in this era of technology where it is very easy to validate or rectify any data?
>
> - Why people do not report these fake news and misleading information but instead forward it that makes the problem even bigger?"
>
> (Emphasis added)

23.2. Likewise, social media, opening new avenues for perpetrators to threaten and intimidate has also been subject of a study. Today no longer does someone need to physically stalk their prey to deliver a message; they can now threaten anyone,

anywhere with just one click of their cell phone. This is what is analyzed in the article – '**Prosecuting Threats in the Age of Social Media[40]'**. Relevant excerpts of the article which are necessary to be noticed, are as follows:

> "***Social media has opened new avenues for perpetrators to threaten and intimidate. No longer does someone need to physically stalk their prey to deliver a message; they can now threaten anyone, anywhere with just one click of their cell phone. And because the threatening communications are often prepared in private and can be delivered anonymously, they are not regulated by social norms that would harshly condemn such behavior. Thus, it should come as little surprise that threats are increasing every year and online threats are fueling that growth.*** *This Article considers the challenges facing prosecutors in charging and prosecuting online threats after the Supreme Court's decision in Elonis v. United States, 135 S. Ct. 2001 (2015). Social media has radically changed the way we communicate, removing both in-person human interaction and the meaning and intent such interaction conveys. In this Article, we argue that* ***applying the recklessness standard to today's online communications has the unjustified danger of punishing legitimate speech without increasing public safety.***
>
> **I. INTRODUCTION**
>
> Can you tell the difference between a joke and a threat? When do creative rap lyrics become a vehicle for intimidation? When does a Facebook post transform into a terrorist act? Every day millions of communications are sent via social media. Celebrated new forms of electronic communication have brought people together in new and profound ways. But there lurks a troubling side to this medium: social media has

[40] **Enrique A. Monagas & Carlos E. Monagas, Prosecuting Threats in the Age of Social Media, 36 N. Ill. U. L. Rev. 57 (2016)**

become a preferred conduit for threats and criminal intimidation. Regrettably, people are willing to say things online that they would never say in person, face-to-face. But simply reading an online comment or message board often does not provide sufficient context. "Is what I just read a threat or is the writer being sarcastic?" Jokes and offensive comments are commonplace and of ten spontaneous in this medium. Additionally, communications intended for just a few may inadvertently reach millions. A person's intent can well be lost in translation. In all events, joke or not, social media communications that are interpreted by recipients as threats do cause real harm. The fear that threats engender can have profound detrimental consequences for victims.

Regardless of the personal wishes of the declarant, these communications may in fact create actual victims.

*** ***

Online threats have real-world consequences. Policing threats, however, must be balanced with the First Amendment's right to free speech. Although the Supreme Court has recognized a "true threats" exception to the freedom of speech-permitting a state to ban "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"' whether a declarant must subjectively desire to threaten someone to be found outside First Amendment protection is a question the Court has yet to resolve. Yet, the answer to this question is critically important to state legislatures and local law enforcement agencies who must respond to the seeming explosion of online threats.

In 2015, it appeared that the Court was prepared to answer this intent question. In Elonis v. United States, the Court considered "**[w]hether, consistent with the First Amendment . .. conviction of threatening another per son requires proof of the defendant's subjective intent to threaten."' At issue was a defendant's federal conviction for online harassment under 18 U.S.C. § 875(c), which makes it a federal crime to "'transmit[] in**

interstate or foreign commerce any communication containing . .. any threat to injure the person of another." The defendant had been convicted under a "reasonable person" standard, which allowed for conviction if the evidence demonstrated that a reasonable person would regard the statement as threatening. Whether the defendant actually sought to threaten his victim was not relevant under this objective, general intent standard.

Instead of considering the First Amendment principles at play, however, the Court sidestepped the constitutional issues and decided the case on a statutory basis. Specifically, the Court held that in "interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate' wrongful conduct from 'otherwise innocent conduct." Here, mere negligence would not suffice." As such, a defendant needed to act with some higher level of culpable awareness to be convicted. Because the court below erred when it used a negligence standard, the conviction was reversed. Of consequence, however, the Supreme Court did not determine which level of culpability was necessary for conviction under the federal statute. Whether purposefulness or knowledge was required, or whether recklessness alone would suffice, was left for another day. Nor did the Court have reason to answer a threshold question Justice Ginsberg posed at oral argument:

> How does one prove what's in somebody else's mind? This case, the standard was would a reasonable person think that the words would put someone in fear, and reasonable people can make that judgment. But how would the government prove whether this threat in the mind of the threatener was genuine?

This paper considers the questions left open in Elonis. Part II of this paper provides an overview of social media and considers why it has become a fertile ground for threats and intimidation. Part III briefly traces the history and reasoning underpinning the various levels of criminal culpability. Part IV provides an analysis and roadmap to proving intent under the culpability levels set forth in Elonis. Part V considers how a prosecutor should balance public safety and free speech when charging social media threats. Finally, Part VI considers

recklessness culpability in the age of social media. Social media has radically changed the way we communicate, removing both in-person human interaction and the meaning and intent such interaction conveys. We argue that applying the recklessness standard to today's online communications has the unjustified danger of punishing legitimate speech without increasing our public safety.

II. SOCIAL MEDIA OVERVIEW

There is a new world order. And it seems to have passed people of a certain age right by. Online communication-or social media-has quickly become the preferred method to connect and communicate for many Americans, and especially for those under thirty. Indeed, living in the "real world" today requires constant access to computers or mobile devices just to keep up: your colleagues get their news from Facebook, relatives constantly post new photos on Instagram, children speak to their friends through videos on Snapchat, friends gossip on Twitter, and so on.

A. AN INTRODUCTION TO TODAY'S MOST USED SOCIAL MEDIA PLATFORMS

Facebook describes itself as a tool that gives "people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them." Presently, it is the dominating social media platform. Users are identifiable on Facebook and are able to disseminate their messages to the world broadly-or discretely to friends and strangers alike through private messages.

Instagram describes itself as a "way to share your life with friends through a series of pictures." Through the application software, users can take photos on their mobile devices, "then choose a filter to transform the image into a memory to keep around forever." For today's teenagers, Instagram is the most used social media outlet. Alarmingly, many articles have been written on the coded language of

Instagram and how it can be a tool to achieve or destroy social statuses and self-esteem among teens.

Twitter enables its users to send and read short 140-character messages called "tweets." Through these short declarations transmitted electronically to the entire world, Twitter aspires to "give everyone the power to create and share ideas and information instantly, without barriers. In practice, Twitter has been best used as a way to deliver news or sell products.

B. THREATS AND INTIMIDATION ARE COMMONPLACE ON SOCIAL MEDIA

On December 15, 2015, the Los Angeles Unified School District (LAUSD), the second largest school district in the nation, abruptly closed its doors in response to an electronic threat received over email. Coming on the heels of a terrorist attack in neighboring San Bernardino, some observers felt that LAUSD acted prudently. The anonymous threat, which was ultimately deemed a hoax by district officials, displaced 640,000 students and shut down 900 campuses, as well as 187 charter schools. In the end, the hoax achieved exactly what it set out to do-to stoke fear and generate massive disruption.

What happened in Los Angeles, regrettably, was not an isolated incident. Social media, and other electronic communication forms (e.g., emails, texts), has opened new avenues for perpetrators to threaten and intimidate. No longer does someone need to physically stalk their prey to deliver a message; they can now threaten anyone, anywhere with just one click of their cell phone. And because the threatening communications are often prepared in private and can be delivered anonymously, they are not regulated by social norms that would harshly condemn such behavior. Thus, it should come as little surprise that threats are increasing every year and online threats are fueling that growth.

A 2015 study conducted by the National School Safety and Security Services found that the act of calling in a bomb threat has become a thing of the past-37% of threats studied "were sent electronically, using

social media, email, text messaging and other online resources. Social media threats, alone, account for 231 threats (28%).” Cyberstalking is also on the rise, with perpetrators turning to social media to announce what harm they intend to do to their victims. Further, "apps like Yik Yak, After School and Whisper are creating special problems for investigators because [culprits] can post anonymously, making it harder to track down offenders." And when the Elonis decision is added to the calculus-which has made a federal prosecutor's job more difficult by requiring a higher level of culpability before a conviction can be attained-policing and successfully prosecuting online threats can be a difficult road to travel.

.....

C. RECKLESSNESS IN THE AGE OF SOCIAL MEDIA

In his Elonis concurrence, Justice Alito laments that "[a]ttorneys and judges need to know which mental state is required for conviction under 18 U.S.C. §875(c), an important criminal statute.... But the Court refuses to explain what type of intent was necessary." Undaunted, the Justice proceeds to answer the ultimate question left open. As an initial matter, he agrees with the majority that section 875(c) requires a higher mens rea culpability level than negligence. One step above negligence on the hierarchy of criminal culpability lies recklessness. For the Justice, recklessness is the appropriate mental state. "[W]hen Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed." Overreaching and imposing a "purposely" or "knowingly" standard would cross "over the line that separates interpretation from amendment." And besides, for the Justice, recklessness is sufficient: "Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway."

As for Elonis's First Amendment concerns, Justice Alito deftly dispatches with them. As an initial matter, the Justice rightly observes that "[t]rue threats inflict

great harm and have little if any social value." The argument that threatening language made without the intent to threaten may be either "therapeutic" or "artistic" completely fails to appreciate that "whether or not the person making a threat intends to cause harm, the damage is the same." On balance, for the Justice, "the fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection." Justice Alito then addresses the concern that a recklessness standard would chill speech by penalizing "statements that may be literally threatening but are plainly not meant to be taken seriously."Analogizing to the Court's libel jurisprudence, Justice Alito argues that the freedom of speech is amply protected when the law requires proof that threatening statements were made with reckless disregard as to their threatening nature.

Assuming *arguendo*, that Justice Alito's analysis is correct-that the statute compels a recklessness standard and that the First Amendment condones it-on a policy level, is recklessness appropriate? Does it actually remove dangerous people from the community and deter other criminal behavior? Does it take into consideration the unique nature of online communications? Or does it cast too broad of a net, ensnaring innocent behavior?

A person acts "recklessly" if he "disregards a substantial and unjustifiable risk that" his communication is threatening or that someone may be threatened by his words. Context matters under this standard. Unlike the reasonable person standard, which simply asks whether someone reasonable would consider the message threatening, the recklessness standard gets into the mind of the speaker and requires a prosecutor to demonstrate that the speaker was aware that his words could be viewed as threatening and that he, nonetheless, transmitted the communication in spite of it.

…….. …… …….

Or should the recipient bear the risk? **After all, social media allows for the distribution of communications to**

far wider audiences than the speaker can fairly anticipate. A private message can be shared, retweeted, snapped, and reposted within seconds and quickly spread virally, and all without the speaker's consent. A communication meant as a joke between two friends can become a deranged threat to kill children that a person thousands of miles away, in another country no less, finds credible. People's sense of what is threatening has yet to catch up with technology. They fail to appreciate their lack of context and do not have the sense to seek it out. Just because words can be misconstrued online does not mean that the default position should be that the speaker is punished for someone else's misinterpretation.

In the end, the recklessness standard in today's reality of constant un-filtered online communication would at best chill speech (if the speakers were even aware that sarcasm had been elevated to a federal offense); at worst, it would wrongly prosecute and convict citizens exercising their freedom of speech. More troubling, the standard would enable and embolden prosecutors to charge and prosecute innocent, if perhaps careless, speakers under the lesser culpability standard. On balance, the better rule to protect speech and public safety would be to require proof that the defendant purposely issued a threat or did so with the knowledge that his communication would be viewed as a threat. True credible threats of violence, like those at issue in Elonis, can be successfully prosecuted under the heightened culpability standards. Recklessness is unnecessary to deter criminal behavior or remove dangerous people from social media. Instead, it has the potential to sweep in innocent, but careless, speech. In so doing, the recklessness standard fails to elevate moral culpability above negligence. The accused is still being tried and convicted for "an unwarrantable act without a vicious will."

(Emphasis added)

23.3. Studies have emerged with regard to dangers of social media for human psyche, which would mean, that it does affect one psychologically. The most important aspect of this is, antisocial behaviour online and cyber bullying, which has been analysed in the article - **'The Dangers of Social Media for the Psyche'[41].** The relevant excerpts of the article reads as follows:

> "**Antisocial Behaviour Online and Cyberbullying**
>
> That the Internet can serve as a tool that can enhance wellbeing is accepted; likewise, obvious advances in communication are clearly enjoyed by many. However, problems related to social media continue to emerge and appear to both match the pace of technological advance, and reflect the dark side of human behaviour also. Posted material designed to be damaging and offensive to others can be varied, inventive and designed for maximum impact (as an example of subversive - likely pathological - online behaviour, the use of anonymity to troll memorial internet groups in order to deface online obituaries seems hard to beat).
>
> **Cyber-bullying,unwanted/inappropriate contact, the posting of inappropriate/distressing information and problems related to the concept of addiction have all been identified as online behaviours which can have a negative impact in the general population. Not surprisingly then, given that the majority of the above examples effect the psyche of users indirectly i.e., via the antisocial behaviour of other users, the guidance for positive online social networking which does exist, tends to have a narrow psychological focus, such as general safety tips for users.**

[41] David Brunskill, 'The Dangers of Social Media for the Psyche' in Annmarie Bennett (eds), *Media and Communications - Technologies, Policies and Challenges* (Nova Science Publishers New York 2014)

Whilst a full discussion of the emerging phenomenon of cyberbullying (i.e., the use of electronic devices to over-power others) is beyond the scope of the chapter, it represents a startlingly clear example of how social media can affect the psyche of those involved in profound ways. Worryingly, research considers cyberbullying to be on the rise and to 'afford several advantagesover traditional bullying']. It is also considered that the approach to cyberbullying necessitates additional interventions to those used for traditional bullying, and specific tactics to keep up with the unanticipated opportunities for social interactions, positive and negative, available through diverse media."

Study would reveal as follows:

"Negative Psychological Transformations

Although an awareness of the more overt/obvious effects of social media upon the psyche is obviously important (e.g., via the dysfunctional postings/antisocial online behaviour of others, and the potential for 'addiction'), the subtler psychological effects of the online experience should also be considered. The following is a selected description of the negative psychological transformations which are thought to occur.

Identity Shifts and Compartmentalization

……..

Congruence and Incongruence

Consciously or unconsciously, people conceal or misrepresent aspects of their self as often as they honestly reveal them.

This process (of revealing something while hiding something else) is known as compromise formation and has direct relevance to the use of social media, where the self-selection of representational material is inherent to the experience. By selecting/omitting the written, visual, and audio material to represent the self-online, social media provides an opportunity to project an ideal, or hoped for version of the self

(perhaps without the inhibiting influences which could ordinarily be expected to result from physical processes such as reality-checking and face to face feedback from others).

By selecting the best bits to represent the self in the creation of a social avatar, online image is therefore highly unlikely to match offline identity, and a psychologically significant "gap" is created (Figure 2), with an obvious potential to contribute to internal conflict, emotional distress, and a psychological erosion of the congruence necessary for psychological authenticity and well-being in the longer term.

Acting out

Cyberspace has been described as a psychological extension of the individual's intra-psychic world and a psychological space that can stimulate the processes of projection, acting out and transference. Case reports from different settings illustrate this observation further: In court, the use of a social avatar resulted in a pathologically increased need to save face. In psychoanalysis, presenting one version of the self in person and another via social media resulted in an accompanying (and unhelpful) expectation that the two would remain un-integrated in treatment. It is also intriguing to consider whether the application of psychodynamic thinking may also have the potential to spotlight the psychological make- up of those who use the Internet in deeply harmful ways towards others.

Could cyber bullying for example, be considered in terms of the size of the gap which exists in the perpetrator between offline identity and online image, and the projection of this conflict/inadequacy on to the victim.

Unhelpful Emotional States

As part of the social media experience, the social avatar (and the psychologically significant gap it represents) may be implicated in contributing to unhelpful emotional states within the individual user. For example, by inviting ongoing comparisons with the projected/inflated/exaggerated lifestyles of others, there is clearly a potential for an unhelpful sense of dissatisfaction to result in the social media user. Indeed, envy,

> jealousy and depression are all anecdotally reported with respect to the online and artificial process of comparison, including in the context of the coarse measures of implied popularity which are inherent to social media platforms (e.g., the numbers of advertised "friends", or "likes" in response to a user's postings).
>
> This has led some to observe that depression in the context of social media is a type of 'smiling depression', with roots in the gap between the externalities of online image and the emotional reality of the internal state. Evidence of social media affecting the psyche can also be demonstrated by inference, such as when the gap between online image and offline substance is exposed for what it is, with negative results such as 'difficult-to-take, psychologically violent, and very rude awakenings' and 'desperate attempts to save face having been reported.
>
> Whilst at first glance then, social media and the creation of a social avatar is an intoxicating opportunity offering significant freedoms (including the illusion of personal control), on further analysis, it appears to actually come with its own *psychological pressures*.
>
> For example, the narcissistic pressure to conform (everyone else's virtual identity is above average also), and that individuals run a risk of exhaustion secondary to putting their lives on constant display for fear of missing out (FOMO), itself related to the clear expectation of participation that accompanies the 'connected' status."

23.4. The social media networking sites are sometimes described as demons of modern age. An article named **'Dangers and Demons of Social Media Networks and Their Effects on**

Litigation in the Modern Age'[42], published on that issue would throw light on demonization of social media:

> "III. **Social Networking Sites-Demons of the Modern Age**
>
> ……. This portion of this Note will define social networking sites in general, describe their societal function as impression management tools, the lack of privacy rights and control held by those with social media accounts, and the demons that are created by a societal obsession of exposing it all on the Internet.
>
> A. **Facebook and Other Social Media Websites-The Everything Connection**
>
> Out of the 7.6 billion people inhabiting Earth, approximately 2 billion of them are monthly Facebook users. Half of the 2 billion monthly users access their Facebook accounts daily.51 Since its inception approximately thirteen years ago, Facebook announced in June 2017 that almost thirty percent of the world's population has joined Facebook to connect with their friends and family. Facebook, created by a budding Harvard student in 2004, was designed to share biographical information with other students. Within a day of creation, 1,200 students had joined the site. Within a month, half of the undergraduate population of the U.S. had created a Facebook profile. Today, anyone with an email address can create a profile and start connecting. While most of this Note centers around Facebook data, it is important to recognize that there are other platforms growing just as rapidly. Twitter, created in 2006, has exploded in usage, tracking approximately 1 billion tweets every three days. Instagram, created in 2010, reported that as of September 2017 it had over 800 million active users; 500 million of which use Instagram every day. Facebook and other social networking sites like Twitter and Instagram have been best defined as: "web-based services that allow individuals to (1) construct a public or semi-public profile

[42] Mylee McKinney, 'Dangers and Demons of Social Media Networks and Their Effects on Litigation in the Modern Age' (2019) 6 Savannah L Rev 85

within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."

This definition provides a very broad and general idea of what Facebook and other social media networking platforms are designed to do. They help you reconnect with old friends long forgotten, investigate the cute guy from work, and post photos from your travels and adventures, even if those adventures only take you as far as your local Target home furnishing section.

Understanding the ownership and privacy rights of social media ESI is counter-intuitive. When creating a Facebook account, users are unlikely to read the 14,000-word service agreement, which is a prerequisite for account creation. This is a legal contract between the user and Facebook. Who actually knows what they have signed up for?

Although the users' account may be set to "private" rather than "public," nothing you do on Facebook is private. Nothing, Despite a user's privacy settings, Facebook has the ability to use all information received. Facebook tracks advertisements you watch, keywords from your timelines, comments posted onto friends posts or timelines, and things you share. Facebook even monitors things users type, then delete, to monitor how Facebook users "self-censor". Facebook also has the ability to manage and manipulate account holder's photos, usernames, content, and information without any compensation to the user. However, given a user's privacy settings, Facebook will honor to not share information contrary to those settings. Similar arrangements are utilized through sites like Twitter and Linkedln. This impulsive click of "agreement" perpetuates a societal demon of ambivalence. Despite agreeing that technology is dehumanizing society, millennials remain glued to their smartphones and tablets. Despite the complete relinquishment of privacy and control of data and information put into the hands of social networking platforms, the population of Earth continues to sign up and provide terabytes of data to social networking sites each day.

B. **Impression Management**

Users of social media often display the person that they most desire to be on their profiles. While there are "About Me" sections that allow users to display age, gender, political affiliations, and sexual preferences, users highlight the information about themselves that they want others to see and believe. This impression management tool allows users to cultivate relationships with others and gain a sense of belonging. Human beings want to be accepted. We want to be liked. We want to be respected. Social media provides a perfect platform to find others to connect with and further the drive of users to be desired by others.

Social networking sites have been theorized to create what is referred to as an "extended chilling effect." The "chilling effect" is the idea that rights, such as free speech, are threatened by the possible negative result of exercising these rights. When applying this theory to social networking sites, it has been noted that users constrain their presence online due to "peer surveillance." Regardless if the threat of sanction is real or not, the fear of social disapproval creates this "chilling" effect in social network users. To avoid this social disapproval, social networking sites serve as a form of social self-preservation to project the self we most want the public to see.

As an impression management tool, social networking sites make the dissemination of information and connectivity with others so easy. Facebook, particularly, even prompts users to share "What's on your mind?" and reminds users of past activities to encourage posting. This connectivity desire is not unique to social media; it is a basic human element. All of the tweets, photos, and thoughts, however, regardless of a user's privacy settings, could make their way into a courtroom and to the eyes of a jury, creating a potentially dangerous result of an adverse jury verdict.

B. The Illusion of Privacy

The idea of privacy and social media accounts is also a little counter-intuitive. Social media users select with whom they want to share their thoughts, posts, and photos with through

"Friends" or "Followers". The question then becomes, do social media users have a right to privacy when it comes to their user data and the information that they post allowing a select group to view the information? Do social media users inherently have a right of privacy from users they are not connected with, and does this right to privacy protect them in litigation? While the Fourth Amendment only protects citizens from the government, could a comprehendible comparison be drawn between unreasonable searches and seizures and the forceful relinquishment of information (such as usernames and passwords) and data in a lawsuit?

Pretend that parties of a lawsuit do have some protection and expectation of privacy when it comes to discovery requests. In *Katz v. United States,* Justice Harlan proposed a simple test to determine whether an individual's Fourth Amendment rights had been violated: (1) whether the citizen have an actual expectation of privacy; and (2) whether the citizen's expectation of privacy reasonable. If either prong fails, the citizen has not suffered a violation to his or her Fourth Amendment right. The nature of social media accounts and the information that is shared seems to be a metaphorical surrendering of privacy by nature of the site. However, depending on which side of the discovery requests the client sits, it could be argued that while thoughts and feelings are shared with a large audience, the client did not intend to share them with the world, only the select few that the client has personally connected with on each site. It is certain that the litigant did not intend to share the post or photos with the defendant, or whomever is seeking the production of SNS material.

The *Katz* doctrine could serve as a guide for judges when examining discovery disputes between parties. In *Katz,* the Supreme Court found that the government violated Charles Katz's reasonable expectation of privacy when the FBI attached a microphone to the top of the telephone booth used by Katz. The microphone recorded the contents of Katz's conversations while he made calls inside the booth. Katz allegedly used this booth to relay illegal gambling bets from Los Angeles to Miami. Succeeding at the Court of Appeals, the government argued and prevailed on the theory that because there was no "physical invasion" into the telephone booth, Katz's constitutional rights had not been violated. Katz appealed, and the Supreme Court

granted review. At oral arguments, however, the government changed its tone. It unsuccessfully argued that because Katz was using a public telephone booth, he was not in a constitutionally-protected area.

The Supreme Court rejected this argument, finding that when a citizen closes the door behind him in a telephone booth, he has a reasonable expectation of privacy. The Supreme Court found in favor of Katz, setting a sweeping precedent that dramatically expanded a person's fundamental right to privacy.

Similar to *Katz* and the closing of the telephone booth door, social media users who selectively allow other members to access their information close the metaphorical door on the public viewing their intimate thoughts, posts, and photos. Courts that allow wholesale access to social networking accounts serve as a fundamental misunderstanding of social media sites. Rather than treating the sites like a file cabinet (or a telephone booth) that contains some relevant information and some irrelevant information, courts often interpret the nature of social networking sites as public material, and therefore wholly discoverable. The platform in which social media is communicated does not equate to a publicity waiver of a user's thoughts and posts. As one court put it,

Facebook, Myspace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. This is, in fact, their purpose, and they do not bill themselves as anything else. Thus, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential.

Based on this analysis, the defendant in *McMillen* was entitled access to that content, regardless of relevance. This ridiculous rationale allows a litigant to run rampant through the irrelevant, non-discoverable social networking profiles of other litigants. "Our rules have never allowed blanket access to a person's email account simply because those emails might have multiple recipients or otherwise are not 'confidential.

However, a person's privacy is irrelevant when it comes to traditional discovery. Just like Zuckerberg refused to share his hotel choice with Congress, a user's refusal to share their information with the general public should matter. If a user has no restrictions on her privacy settings, it is fair to assume that anything on the social network page is fair game for discovery. However, under the *Katz* doctrine, if a user's page is restricted, should not she have a more reasonable expectation to privacy?

Under the current Federal Rules of Civil Procedure, information is "fair game" for discovery requests as long as it is not privileged and is relevant. Civil litigants throw a myriad of objections at opposing counsel when it comes to the production of social media ESI in discovery, including relevancy and privilege. Attorneys who receive discovery requests for social media data will object that the request is unlikely to yield the discovery of admissible evidence, and that any data contained in the account is not relevant to the litigation at hand. However, the bar for relevancy sets a low threshold under Rule 26- documents are discoverable if they are "relevant to any party's claim or defense."The evidence in question can best be evaluated using the test established in *Hess v. Pittsburg Steel Foundry,*in which the Court ruled that the evidence in question need only to "appear relevant," and that the only way to determine if that evidence *might* be relevant is to proceed with discovery. However, just because something is *discoverable* does not make it automatically *admissible.* This distinction is important.

When it comes to privilege of social media data, litigants also face a tough row to hoe. Common law privileges, such as attorney-client privilege and marital privilege, are strictly examined under the Federal Rules of Civil Procedure. To support a privilege objection for social media ESI, litigants must meet a four-prong test:

1. First, the claimant must establish that he or she divulged the communication with confidence that they would not be disclosed.

2. Second, the claimant must show that the element of confidentiality is essential to fully and satisfactorily maintain the relationship between the parties.

3. Third, the claimant must establish that there is community agreement that the relationship must be sedulously fostered.

4. Fourth, the claimant must show that the injury potentially sustained to the relationship because of the disclosure outweighs the benefit of correctly disposing of the litigation.

At face value, this test debunks all theories and assertions that any social media posts and photos could be considered privileged, despite attempts to create this newfound privilege by some attorneys. Essentially, a claimant would have to prove that the information posted would have some degree of confidentiality. This claim contradicts the entire theory behind social media accounts: sharing personal information with large groups of people on the Internet.

How about a user's name and password? Are those credentials privileged? The *McMillen* court ruled that it was not. In a personal injury action, Plaintiff Bill McMillen sought to recover damages after being injured in a stock car race.McMillen received discovery requests for his Facebook login credentials but objected to the request on the grounds the information was confidential and privileged. After reviewing the public portions of McMillen's Facebook page, the attorney for Defendant Hummingbird Speedway filed a motion to compel McMillen's login credentials based on the belief that relevant evidence was contained in the private portions of McMillen's Facebook account.The motion was granted. The court ruled that litigants should be allowed to utilize "all rational means for ascertaining the truth" based on the idea that McMillen could not have had a reasonable expectation of privacy given the nature of social media accounts. The court makes no reference to the Fourth Amendment, but the theory behind *Katz* lingers.The court rejected the idea of creating specialized discovery privileges like McMillen requested.

Instead of ordering a discovery production, the *McMillen* court skips a step, and gives direct access to the electronic information. This method of "direct access" and further issues

> associated with this form of production will be assessed in Section III of this Note. Similar access was granted in the case of *Romano v. Steelcase, Inc.,* in which a New York trial court granted direct access to a plaintiff's Facebook and MySpace account.These cases should stand as a warning for litigants. In lieu of producing photos, a court could order the production of a client's login credentials for direct access to the data being requested."

(Emphasis added)

23.5. Threats to security and privacy of information has been the part of menaces. Phishing is a social engineering attack in which the attacker communicates that his victim by disguising as a trustworthy person or an organization to solicit their personal, financial or business information. On the youth of the Nation, social media has created havoc. A study of social media or a boon or curse for the youth in India, elucidated in the article titled **'Social Media: A Boon or Curse for the Youth in India'**[43], would reveal startling details reading:

> **"5.2 Social Media as a Curse (Bane) for Youth**
>
> No technology is completely flawless. It can be misused. That is why many benefits of social media have come to the fore, then at the same time its side effects and possible dangers have also increased. Today, as social media Aps are proving beneficial for the youth, its negative effects are also not less.

[43] Priyanka Kapoor, 'Social Media: A Boon or Curse for the Youth in India' (2020) 29(1) Contemporary Social Sciences

Youth sports and other physical activities are decreasing. They waste most of their time with social media. They are becoming self-centered and socializing is ending in them. He is losing his mind from studies and is having a bad effect on his educational progress and he is learning to misuse English grammar through social media. Physical and mental health of youth is also being affected. Due to these reasons, there is a feeling of depression in the youth and social media has increased the chances of cybercrime. Social media tools and applications are so engaging and interactive that youth are becoming addicts. According to research by the University of Chicago Booth Sway of Business, social network sites have now become more addictive than alcohol. Teens and youth are spending more and more time on social media. On an average, a teenager and a youth spend 4-5 hours on it every day. It is becoming an essential function of their routine. Such a mentality of users is happening. Where every day by opening the site again and again, to see which friends and friends have put pictures or messages or on their own messages, as many people are becoming hungry for likes and comments. Its addiction has increased so much that in many places Internet Addicted Clinics have also started.

No identity card/ID proof is required to open an account on the social network. Here anyone can open his account and use it. Many people are using this to create fake accounts. Today there are countless fake accounts of social media and these platforms are being used for spreading communal riots, spread of terrorist activities, cybercrime etc. A report by the Brookings Institute based in Washington, which was recently published, revealed that as of December 2014, about 4000 Twitter account holders are associated with the dangerous terrorist organization.

Social media as a curse (bane) for youth in India is evident from its following uses:

- **Social media is such a dangerous drug that it can easily distract and isolate the students from the real world. Youngsters are usually happy to stay active online for most of their time. In other words, social media leads to isolation among the youth. Media reduces the**

number of face-to-face interactions amongst the youths because they normally spend most of their time on these online social platforms.

- Most of the youth face the issues of security of data. **Hacking and Cyberbullying are the top most dangerous weapons for the youngsters that can cause huge harm to their mental health and well as personal details. In other words, social media leads to lack of privacy.**

- **Social media use has often resulted in high level of anxiety and stress among youth. Evidence is mounting that there is a link between social media and depression**. In several recent studies, teenage and young adult users who spend the most time on Instagram, Facebook and other platforms were shown to have a substantially (from 13 to 66 percent) higher rate of reported depression than those who spent the least time.

- **Exchange of all kinds of news and information including murder cases, crimes, pornography, rape cases, etc. on social media makes youth highly vulnerable section of society. Social media also exposes these teens to pornographic content being spread in some the social groups online.** This, in turn, leads to early pregnancies amongst young girls causing them to drop out of school.

- **Lack of focus on studies definitely results in bad results/ grades in examinations at various levels. Students' concentration is adversely affected by social networking sites.** Social net- working websites like Facebook have negative effects on students, and those who frequently use such websites are more likely to get lower marks in school/colleges/universities.

- **Too much engagement with social media among the youth hampers their health**

conditions. Headache, poor eyesight, bad eating habits, and lifestyle are all the disadvantages of social media for the youth. Evidence suggests that social media can impact detrimentally on children and young people's mental health. Research also demonstrates that increased social media use has a significant association with poor sleep quality in young people.

- It is also said that the **independence thinking of the youth is jeopardized with the excessive use of social media as a result of peer group pressure. Peer pressure may occur directly or indirectly.** Direct pressure involves peers explicitly asking you to do something. Indirect pressure happens when you witness others engaging in an activity and are motivated to do the same. Peer pressure can lead to alcohol abuse.
- The young generation is mostly found loafing around on the internet instead of spending their time in a productive task. In other words, **social media reduces productivity. Studies have shown that the unrestricted usage of social media is having a negative impact on workplace productivity, as employees spend more of their time on social media every day for personal work.**

- There is a very strong temptation in social media for the youth. It can become an addiction for the youth and begin to side-track them. **Social media addiction is a behavioral addiction that has been found to have negative impact on the youth. Social media exposes teens to more than drugs. The compound effects of peer pressure and unrealistic expectations of life facilitated through social media may cause an increase in teen mental health concerns.**

- **Social platforms also encourage the spread of wrong information which may be in the form of rumours. Such wrong information has**

> **debasing impact on youth. Falsehoods spread like wildfire on social media, getting quicker and longer-lasting pickup than the truth. Disinformation in times of a pandemic may have very devasting impact on youth. The point which is quite clear is that social media misinformation can overturn a democratic process. It is antithetical to human rights for which the UNO stands for."**
>
> (Emphasis added)

23.6. **If this be the general menaces, all social media menaces caused by social media to women has proliferated to a large extent. The United Nations General Assembly has stepped up or intensified efforts to eliminate all forms of violence against women and girls with particular reference to technology facilitated violence against them** and the Secretary General of the United Nations has tabled a report titled **'Intensification of efforts to eliminate all forms of violence against women and girls: technology-facilitated violence against women and girls'**[44]. The excerpts of the report reads as follows:

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[44] **Report of the United Nations Secretary General, 'Intensification of efforts to eliminate all forms of violence against women and girls: technology-facilitated violence against women and girls, presented at the United Nations General Assembly, A/79/500, dated October 8, 2024.**

United Nations General Assembly - Report of the Secretary General - Intensification of efforts to eliminate all forms of violence against women and girls: technology-facilitated violence against women and girls

"2. Rapid technological change continues to create new risks with regard to violence against women and girls. As examined in the previous report of the Secretary-General on the intensification of efforts to eliminate all forms of violence against women and girls (A/77/302), violence against women and girls is increasingly experienced across the online and offline continuum. Perpetrators are using a range of digital tools and platforms to inflict gender-based harm, abuse, hate speech, control, harassment and violence, while the proliferation of misogynistic content in online spaces, including the "manosphere" (ibid., para. 8), is increasingly permeating mainstream platforms, perpetuating harmful masculinities and discriminatory social norms that fuel violence against women and girls. **The recent growth in generative artificial intelligence (AI) is also having an impact on violence against women and girls by reinforcing and intensifying the misogynist norms that justify, excuse and normalize violence against women and girls and facilitating the proliferation of image-based abuse. There is evidence that such trends, in addition to having an impact on the perpetration of online violence, are linked to offline violence, including gender-related killings or femicides.**

3. **Like all forms of violence against women and girls, these forms of technology- facilitated violence against women and girls are rooted in gender inequality and discriminatory gender norms. While all women and girls are at risk, some groups are disproportionately affected, including women who are most visible online, such as women in public life, journalists, human rights defenders, politicians, feminist activists, young women who are more present online and those who challenge gender norms and patriarchal structures.** Women with limited access to quality digital technologies and connectivity, such as women in rural contexts, may also be at greater risk owing to limited digital literacy.

*** *** ***

II. Emerging issue: how technological change is creating new platforms for violence against women and girls

*** *** ***

7. **Although the newer patterns of technology-facilitated violence against women and girls, such as deep fake pornography, are unique, they are part of the continuum of multiple, recurring and interrelated forms of violence across online and offline spaces. As highlighted in the previous report of the Secretary-General, the unique features of digital spaces that create an enabling context for violence against women and girls include the scale, speed and ease of communication and anonymity, combined with automation, affordability and impunity. The recent growth of generative AI, through deep learning models, is exacerbating existing harms, including through more convincing false media that can be generated and disseminated automatically and at scale. A newly emerging threat is compositional deep fakes.** Despite efforts to improve gender balance, the technology sector remains a male-dominated industry. For instance, women make up just 29.2 per cent of the science, technology, engineering and mathematics workforce and only 30 per cent of the AI workforce. The absence of women, and their perspectives, in the technology sector affects the extent to which technologies are designed to be gender-responsive and inclusive of and safe for women. Furthermore, as AI is based on data that are often gender-biased, it risks replicating and exacerbating gender-based discrimination.

*** *** ***

A. Definitions of violence against women and girls in digital contexts are still evolving.

9. **The absence of agreed definitions and methodologies for measuring violence against women and girls in digital contexts, coupled with widespread underreporting, has hampered efforts to understand the true extent of the issue. As there is currently no internationally agreed definition of violence against**

women in digital contexts, in the previous report of the Secretary-General, "violence against women and girls in digital contexts" was used to describe a wide range of violence committed against women in digital spaces and/or using information and communications technologies. In the present report, the term "technology-facilitated violence against women and girls" has been utilized to align with the language recently used by the Statistical Commission at its fifty-fifth session, and in General Assembly resolution 77/193, entitled "Intensification of efforts to prevent and eliminate all forms of violence against women and girls: gender stereotypes and negative social norms". Technology - facilitated violence against women and girls is also known interchangeably as "information and communications technology-facilitated violence", "online violence", "tech-facilitated or related violence", "digital violence" or "cyberviolence".

*** *** ***

B. Data show that technology-facilitated violence against women and girls persists and continues to intensify the continuum of gender-based violence

*** *** ***

13. **Globally, data on the forms of violence, abuse and harassment experience indicate that misinformation and defamation are the most prevalent forms of online gender-based violence affecting women, with 67 per cent of women and girls who have experienced online violence encountering this tactic. Cyberharassment (66 per cent), hate speech (65 per cent), impersonation (63 per cent), hacking and stalking (63 per cent), astroturfing (58 per cent), image- and video-based abuse (57 per cent), doxing (55 per cent) and violent threats (52 per cent) are among the other most common forms.**

*** *** ***

C. Women in the public eye and marginalized women and girls continue to be most affected by technology-

facilitated violence against women and girls, with significant impacts

*** *** ***

18. **Women with high levels of public visibility, such as journalists, politicians and activists, continue to be at significant risk. A 2021 report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) found that 73 per cent of women journalists interviewed reported having experienced online violence, with journalists and politicians. Technology-facilitated violence against women and girls election periods leading to an intensification of violence towards both women is often directed towards women who challenge gender norms and patriarchal structures, for example, those who defend women's human rights. Threats of violence against family members of women in public life, including rape threats against their young children, are also a significant concern.**

19. **The harms caused by technology-facilitated violence against women and girls at the individual level can be physical, sexual, psychological, social, political or economic. Violence in the online space may transition offline in various ways, including coercive control, surveillance, stalking, physical violence or even death. At present, violence in online settings is not considered as serious as some other forms of violence or crime, despite the significant harms that may result.**

*** *** ***

E. The rapid growth of artificial intelligence has serious implications for violence against women and girls

22. **AI is intensifying violence against women and girls in numerous ways, both through the deliberate spread of targeted disinformation and through the automated, large-scale and often-unintended promulgation of misinformation. Content produced by generative AI can reinforce and intensify the misogynist norms that justify, excuse and normalize violence against women and girls and can enable and intensify the spread of gendered misinformation and disinformation, including**

more convincing fake news, hate speech, harassment and attacks that fuel such violence. The sheer volume of media created using ever more advanced generative AI is obscuring the distinction between genuine, good information and "fakeries". As a result, there are many legal, social, regulatory, technical and ethical challenges.

23. **Generative AI has also facilitated the proliferation of image-based abuse, deepfake pornographic videos and interactive deepfakes based on deceptive and non-consensual sexually explicit content. Deepfakes are perpetuating the harmful norms that continue to enable and justify violence against women and girls. Alarmingly, deepfakes are being used for image-based abuse and harassment, including by children in school settings. According to Sensity AI, between 90 and 95 per cent of all online deepfakes are non-consensual pornographic images, with around 90 per cent of those images depicting women. The rise of "sextortion" using deepfakes is also a growing concern, where non-consensual fabricated images are shared widely on pornographic sites to threaten or blackmail people, inflicting significant harm. Victims of deepfakes can suffer devastating consequences, including lasting psychological trauma, reputational damage, social isolation, financial harm and, in some cases, loss of life. This harm disproportionately affects women and girls.**

24. **Deepfakes can also be fabricated by synthesizing misinformation and disinformation across several media types that corroborate one another, facilitating coordinated gendered disinformation campaigns and sexist hate speech which reinforce deeply ingrained gender biases. Gendered disinformation undermines efforts to prevent violence against women and girls by reinforcing rigid stereotypes and harmful norms.**

25. As with other forms of online violence, the anonymity of perpetrators is a barrier to ensuring that victims of deepfakes have access to justice. **Inadequate laws and regulatory frameworks also uphold a culture of impunity for perpetrators. Remedies for victim-survivors are often**

limited and expensive and do not take into account the long-term impacts of abuse. While online hate speech is sometimes detected and censored by AI bots as part of platforms' safety features, these guardrails are often not up to standard. The adoption of coded language – such as epithets to refer to specific individuals – can help perpetrators escape detection, resulting in widespread impunity and ongoing amplification.

*** *** ***

G. Laws, policies and practices needed to respond to emerging trends

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32. **The implications of emerging trends, such as generative AI, also require a holistic approach and cooperation across the ecosystem of actors, in particular generative AI companies that are content generators. Content distributors, such as social media companies, also play a critical role. The due diligence principle continues to apply in the context of generative AI where States have the obligation to ensure that both State and non-State agents refrain from engaging in any act of discrimination or violence against women and girls, including due diligence obligations to prevent, investigate and punish acts of violence against women and girls committed by private companies, such as Internet intermediaries** (see A/HRC/38/47).

*** *** ***

36. **Actions by content distributors and content generators are also important, such as: developing robust methods of identifying generated media; openly sharing their terms of service, safeguards and approaches to monitoring use for inappropriate content; and responding swiftly to reports of harmful content and analysing the account generating or distributing the images. All responses should ensure that women and girls harmed by AI-generated content are not pushed out of the public sphere.**

> 37. **Content distributors can also play a role in interrupting pathways, particularly for young men, into online forums that are fuelling misogynistic views, by removing channels and content that promote misogyny or de-ranking such online forums in search engines. Policies that seek to counter hate speech and violent extremism should address incel content and forums. Risk assessment frameworks for detecting the activity of extremist groups as a threat to national security – both online and offline – should also explicitly refer to incels and gender-based violence, the continuum of online and offline harm and the use of technology to perpetuate harmful misogynistic ideology as risk factors.**"
>
> (Emphasis added)

23.7. The Impact and Policy Research Institute of the nation has been calling for ending online violence against women in India by an inclusive comprehensive and gender sensitive law and policy frame work particularly in the cyberspace arena, and has published an article titled **'Ending Online Violence Against Women in India: Calling for an Inclusive, Comprehensive, and Gender-Sensitive Law and Policy Framework'[45].** The article reads as follows:

> "**<u>Cyberviolence Against Women</u>**
>
> **Cyberviolence is a gendered phenomenon where continued sexism permeates the online space and reflects**

[45] Adv. Dr. Shalu Nigam, 'Ending Online Violence Against Women in India: Calling for an Inclusive, Comprehensive, and Gender-Sensitive Law and Policy Framework', published on 22/04/2024 by the Impact Policy and Research Institute (IMPRI)

a larger culture of discrimination that devalues women. Cyberviolence against women is defined as the online perpetration of gender-based harm and abuse through digital and technological means. Other terms used to describe online harms are cyber abuse, online victimization, cyber aggression, and technology-facilitated violence. On violence encompasses misogynistic speech and efforts to silence and discredit women online, including threats of offline violence. Women are subjected to hateful comments on social media for expressing their thoughts. Hostile cultures of sexism and misogyny in digital spaces are depriving women of the benefits of technology.

Cyber harassment also include trolling women for their opinions and views, gender-based hate speeches, image-based abuse, blackmailing, threats, fraud, sharing of deep fake images, revenge pornography to shame the victim, harassment, insults, obscene messages, bullying, blackmailing, rape threats, cyberstalking, revenge porn, sextortion, cyber pornography, cybersex trafficking, spreading of hate and misogyny, morphing images, publishing sexually explicit images, publicly humiliating women, negatively portraying them, reiterating conventional stereotypes to devalue women, defamation, moral policing, slut shaming, breach of the right to privacy, identity theft and economic violence, repression by the state and the non-state actors, and other forms of violence. Targeting women's bodies and sexuality to control and silence them is a form of abuse that is taking place in the virtual world. The weaponization and politicization of social media are further inciting online communal tension in an organized way to target particular sections of society. Some of these forms of violence magnified during the pandemic-induced lockdown across the world and inflicted serious damage.

Digital violence experienced by women forms a continuum of violence that is a manifestation of patriarchy and misogyny and an extension of a larger systemic and structural violence. Experiences of online violence are not separated from the cultural and social context. The boundaries between online and offline violence are often blurred in a deeply patriarchal society. On the one hand, the misogynist society lays much

emphasis on the purity and chastity of women; at the same time, the female body is objectified and commodified in media, entertainment, movies, television, and by market forces. A woman's body becomes a battlefield among the contesting ideologies, myths, and cultural practices. Frequently, women are abused online merely because of their presence in the digital space. Just as the visibility of a woman is not tolerated in the male-dominated public space, similarly, her active existence is threatened in the virtual space and seen as an act of transgression of patriarchal boundaries.

The Impact of Cyber violence on Women

Digital violence violates basic human rights guaranteed under national and international provisions, including the CEDAW. Scholars maintain that various forms of cyberviolence have a negative short- and long-term impact on an individual's psychological state, physical condition, cultural or social engagement including an individual's economic and social life. A victim of online harassment experiences shame, exclusion, and ostracization. **Continuous cyberviolence may create a system of fear and self-censorship by which male dominance is maintained and perpetuated. Survivors of cyber abuse may withdraw from online spaces due to fear, depression, anxiety, trauma, and self-harm. The cumulative effects of cyberviolence affect the health and wellbeing of women and girls and pose serious economic, social, and political harm. Digital violence can limit the online participation of women, thus increasing the gender divide and limiting women's voices. More specifically, in the patriarchal societies in South Asia, with increasing vulnerabilities and lesser available legal remedies, many women are facing higher risks of victimization.**

Legal Protection Across the Globe to Protect Women and Children from Cyberviolence

Cybercrime is different than an ordinary crime because here the perpetrator is hidden behind the screen when he commits an illegal act. Moreover, any stranger can act anonymously using a range of devices, including phones, laptops, and computers; therefore, identifying the perpetrator

may involve a huge challenge. The anonymity and distance in the digital world allow the perpetrators to easily violate ethical and legal norms. Also, the technology being opaque and remote, it poses a daunting challenge to crime prevention and law enforcement. Further, cybercrime is a transnational crime; therefore, territorial jurisdiction raises concerns. The relative ease of the use of the internet, accessibility, affordability, and reach across geographical boundaries have led to an increase in online crimes. The women are, therefore, facing newer and harsher forms of violence in the digital space.

In its recent report, the World Bank observed that only 30 percent of countries provide legal protection against cyber harassment, which implies that only 47 percent of women receive legal protection. Globally, 53 out of 190 economies have imposed criminal penalties for offences relating to cyber harassment, and 19 have specified a definite procedure to deal with such cases. The laws enacted by South Africa, Nigeria, and Uganda have elaborately define cyber harassment and provide protection against cyberbullying. Also, several European countries are addressing cybercrimes through general legal provisions while others are enacting new laws and adopting specific provisions, some of which are gender- neutral. In the USA, the law prohibits child pornography, sexual exploitation and abuse of children. Hence, it may be said that **limited efforts are made to specifically address online violence against women and children across the globe. While developing and expanding technology, no emphasis is laid on assessing its impacts on human lives or to protect the vulnerable from the harms it may cause.**

Existing Gaps in the Policies and Legislation

The analysis shows that the existing law and policy framework has failed to take into account the ground realities of the situation of women facing violence online. The paternalist approach followed by law-enforcement and law-making agencies focuses on morality and has failed to consider the concerns relating to the safety of women and children online. In fact, the recent socio-legal discourse which emerged after a viral video of women playing Holi inside the metro focuses on morality versus vulgarity while ignoring the online safety aspects and depicts

the insensitivity of society towards digital gender-based violence. Also, the emphasis on gender neutrality has negated the impacts of gender-based harms. Therefore, specific provisions are required to address the unique needs of women survivors and victims of online violence.

Another loophole exists in the narrow definition of a violation of privacy under the IT Act. It only encompasses the transmission, publication, or capture of an 'image of a private area of the body' when more ways to violate one's online privacy exist. Moreover, the law is centered around the concept of consent. While dealing with cybercrimes against women, the difficulty lies in proving whether victims consent to the publication of unwanted images. The Digital Personal Data Protection Act, 2023 is riddled with controversies. The risks emerged with the advent of deep fake and AI breaching personal data, regulations become vital to protect an individual's rights.

Further, the online platforms commodify the personal information of users by data mining. Research on the algorithms used by digital platforms reveals how racism and misogynist stereotypes are perpetuated. Yet, the law has not addressed this issue. The terms and conditions regarding how these companies operate are frequently opaque, and users often remain unaware of the ways their privacy is compromised. Legally, the mechanism of accountability for the state and non-state actors in cases of cybercrimes against women is not clear. Additionally, the surveillance by the state and non-state actors and similar crimes are not taken into consideration while making the law. For instance, a blatant violation of data security occurred when "Bulli Bai" and "Sulli Deals", fake online auctions, that took place where women from a particular community were targeted and attacked. Hence, **checks and balances are important to deal with the cases of online harassment. Besides, with increasing digitalization, many apps have emerged to protect women. Most of these are based on a paternalist approach rather than ensuring the online safety of users.**

> Furthermore, delay in getting justice, low conviction rates, lack of awareness of the legal procedure, absence of digital and legal literacy, difficulties in accessing justice, dwindling faith in the law, fear of engaging with the system, gender stereotypes in courtrooms, stigma, fear of defamation, and fear of retaliation all serve as barriers to responding to online violence against women. Several studies show that the police are not trained enough to comprehend and implement the nuances of technical laws. For instance, Section 66A of the IT Act has been stuck down in Shreya Singhal v Union of India. However, the police continued to book the cases under this provision. Training and sensitization remain a major challenge. Law-enforcement in the field of cybercrimes needs to be strengthened."
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> (Emphasis added)

23.8. The excerpts afore-quoted cast an unflinching light upon grim menace of social media and the proliferating spectre of online crimes against women, in particular such crimes, it must be underscored, do not ordinarily unfold through sending an e-mail, rather, they insidiously take share across sprawling platform of digital age – 'X' Instagram, Facebook and at times even on WhatsApp. **Primary among these, however, are the social media forums, whose immense reach and immediacy makes them fertile ground for both expression and exploitation. A *caveat***, it must not be understood or misunderstood that this Court seeks to advance the proposition that every cyber crime emanates from social media only. It is beyond cavil that many grievous

offences are indeed birthed in these digital spheres, not at the caprice of a few, but in a brazen defiance of laws duly enacted and binding for the time being in force. **When illegality goes unchecked through the arteries of social media, a pressing question confronts us; should such acts shall be permitted to fester until the danger metastasizes into a malady threatening the very fabric of society. Therefore, such acts must be reined in through timely and effective regulation.**

23.9. **The reality stands stark; social media has not been free from abuse. Like the two faces of a single coin, use and misuse revolve together. When the wheel of use turns, so too does the wheel of misuse. If misuse is unchecked will wreak untold havoc particularly upon women, who too often become its most vulnerable targets. A single post, once marred by derogatory commentary, may in its very utterance transgress the boundaries of law of the day and can such affronts be left unregulated? Surely not. Regulation is not a matter of choice, but a solemn necessity. Therefore, regulating the social media is a must. The State, therefore,**

carries the solemn obligation to align its regulatory frameworks to the aforesaid menace, ensuring that digital spaces do not become lawless territory where women's rights are trampled with impunity, *albeit, inter alia.*

23.10. Insofar as the present petition is concerned, the petitioner itself has published its transparency report for the month of August, 2025 it reads as follows:

"TRANSPARENCY REPORT - AUGUST 2025 - EXTRACTION OF TABLE

Issue Type	Total Number of Grievances[5]	Total Number of URLs Actioned[6]
Abuse / Harassment	429	64
Ban Evasion	307	307
Child Sexual Exploitation	31	0
Defamation	36	1
Hateful Conduct	245	17
Impersonation	21	2
IP-related Infringement[7]	28	1
Misinformation / Synthetic and Manipulated Media	0	0
Promoting Suicide or Self-Harm	10	0
Terrorism / Violent Extremism	0	0
Sensitive Adult Content	345	23
Privacy Infringement	41	10

The transparency report indicates that grievances have been projected to the platform. The grievances pending for the month concerning child sexual exploitation is 31 and action taken is zero. According to the transparency report, the citizens have projected the aforesaid grievances and the action taken by the petitioner is abysmally low. It now becomes all the more necessary to vindicate the stand of the learned Solicitor General that 'X' is in the habit of violating the law or not adhering to the law that is time being in force.

24.1. It is germane to notice the attitude of the petitioner, not on the soil of this nation, but several countries for the matter. It has shown no respect to take down the content, as and when they are directed to do so. For illustration, in 4 different countries where there are take down orders, they are challenged. They are as follows:

> "67. Further, the European Union's regulatory response has recently culminated in the Digital Services Act (DSA), effective 2024. The DSA retains the basic safe harbour for mere hosts but adds significant due diligence obligations, especially for "Very Large Online Platforms" (VLOPs). It is submitted that under the DSA, platforms above a certain size must proactively assess systemic risks on their services (such as the dissemination of illegal content, impacts on

fundamental rights, electoral manipulation, etc.) and put in place reasonable mitigation measures It explicitly allows courts or authorities to issue orders to remove illegal content and even expects quick compliance.

68. It is submitted that, for all the reasons set out above, the internet and social media represent a new paradigm of communication that intrinsically warrants a distinct and stricter regulatory framework under constitutional law. It is submitted that the technical architecture of online intermediaries – algorithms driving amplification, the viral spread of content, and the indefinite permanence and global reach of speech – differentiates them qualitatively from the printing press of yore or the broadcast stations of the 20th century.

69. It is because of these reasons that various other cases are as of now pending across jurisdictions:

CASE/PARTIES	JUDGEMENT/ORDER	COMMENT
X Corp v eSafety Commissioner October 4, 2024 Federal Court of Australia	Facts: eSafety Commissioner gave a notice to X requiring it to prepare a report about the extent to which it had complied with specified applicable basic online safety expectations. (as per section 56 of the OSA). The report provided was considered incomplete and inaccurate and hence the Commissioner gave a notice to X of and imposed penalty. X approached the Court.	X has filed an appeal against the order.

	Order: Court vide order dated 4th October 2024, held: - X Corp failed to show that it was not required to respond to reporting notice. - Failure of infringement notice to identify the place of the contraventions did not spell invalidity for the notice. - **X Corp failed on all its claims and proceedings were dismissed with costs.**	
Extraordinary Appeals 1.037.396 (Theme 987) and 1.057.258 (Theme 533) June 26, 2025 Supreme Federal Court, Brazil (STF)	Facts: On June 26th, 2025, the Brazilian Supreme Federal Court (STF) while analysing constitutionality of Article 19 of Marco Civil Da Internet (Brazilian civil law for internet), which conditioned platform liability on existence of a prior court order for removal of third party content, **concluded that in specific situations as incitement to violence, hate speech, serious disinformation, child pornography, terrorism, encouraging or assisting suicide, incitement to discrimination based on gender identity, sexuality, race, colour, crimes against women, human trafficking – platforms may be held civilly liable even without a prior court order.** -The ruling introduced a model of liability based on systemic failure i.e. absence of moderation mechanisms and response to user notifications.	(Access to court website is barred-copy of the order not available)

CASE/PARTIES	JUDGEMENT/ORDER	COMMENT
X v Brazil's Supreme Federal Court Supreme Federal Court, Brazil (STF)	Facts: - In August 2024, STF ordered X (then Twitter) to block certain accounts. - Despite multiple summons, the company X Corp did not comply with court orders, with X leadership stating that X operations would be discontinued in Brazil. - Court thereafter, froze bank accounts of X Corp and Starlink. Order: **On August 30, Justice Alexander De Moraes delivered the decision to suspend X platform in Brazil**.	In an update to the case, the Court concluded that on September 18, 2024, X complied with its orders requiring blocking of accounts. X also paid all the fines Amounting to appx. USD 5.6 million and was allowed to resume operations. *(Access to court* *Website barred)*
European Commission v X European Union	Facts: - Following Hamas attack in Israel in October 2023,EuropeanCommissionsent Xarequestfor information, under DSA (Digital Services Act) regarding alleged "*spreading of illegal content and disinformation, terrorist and violent content and hate speech*". Investigation findings of European Commission: - Preliminary findings indicated X was in breach of DSA in certain areas. - The Commission has intensified its investigations into X's content moderation practices by demanding X's internal documents related to platform's algorithms.	The European Commission has not concluded its investigations, as yet. Nevertheless, if found in breach X might have to pay significant penalties or may be temporarily suspended if it fails to comply with orders of the Commission.

24.2. The attitude is no different in the subject issue. Plethora of blocking orders have been called in question and an interim order of stay is sought. The application, which by its very tenor would imply that take down directives are disregarded. Yet, this is not the first occasion on which the present petitioner has sought to circumvent or challenge such mandates. The take down order quoted hereinabove brooks no ambiguity. Its source of authority is set forth. The violation alleged is clearly delineated the offending, the offending URL is annexed, the explicit command to remove is issued and still to this day compliance remains wanting.

24.3. During the proceedings of hearing of the subject petition, the learned Solicitor General had placed before this Court the troubling instance of social media account operating under the name of "Supreme Court of Karnataka", an account left to persist in the petitioner's platform until it was exposed during the proceedings. Within couple of minutes of such exposure it was deleted. **If such impersonation of a constitutional Court can be permitted to exist, it would**

underscore the truth that on the petitioner's platform anything can be done, for no vigilant, guards its gates. If it could be deleted in minutes after its exposure, it is ununderstandable as to how such things remain to stay even after certain take it down notices. **Therefore, a balance must be struck – a delicate equipoise between the sacred liberty of free expression and the corrosive menace of misuse. In the guise of free speech, menace cannot be allowed to fester and allowed to spread.** The petitioner, in every jurisdiction does not take down, but chooses to challenge those notices including the subject challenge, who in its very homeland, the United States of America, the Take it Down Act extends its reach with pervasive force and the petitioner would abide. **If the petitioner does abide to pervasive force of the TAKE IT DOWN Act in the United States of America, why then before this Court a plea is projected bordering on denial of compliance. Law cannot be honoured in one jurisdiction and flouted in another.**

SUMMARY OF FINDINGS:

(1) From orient to the occident, the march of civilization borne witness to the inescapable truth that information and communication, its spread or its speed has never been left unchecked and unregulated. It has always been subject to regulation.

(2) As and when technology developed right from the messengers to the postal age, till the age of Apps Whastapp, Instagram and Snapchat, all have been regulated by regulatory regimes subsisting then and subsisting today both globally and locally.

(3) Article 19(1)(a) of the Constitution of India, right to free speech and expression is hedged by restrictions under Article 19(2) and is always subject to those reasonable restrictions.

(4) The American jurisprudential edifice or American judicial thought cannot be transplanted into the soil of Indian Constitutional thought, is the clear law enunciated by the Apex Court right from 1950, till this day.

(5) The judicial thought process has undergone a complete change, in the realm of free speech, even in the United States of America, in the aftermath of the judgment in the case of RENO v. AMERICAN CIVIL LIBERTIES UNION.

(6) Article 19 of the Constitution of India, noble in its spirit and luminous in its promise, remains nevertheless a charter of rights confered upon citizens only. The petitioner who seeks sanctuary under its canopy, must be a citizen of the nation failing which the protective embrace of Article 19 cannot be invoked.

(7) The Sahyog Portal, far from being a constitutional anathema, is in truth an instrument of public good. Conceived under the authority of Section 79(3)(b) of the IT Act and Rule 3(1)(d) of the 2021 Rules, it stands as a beacon of cooperation between citizen and intermediary, a mechanism through which the State endeavours to combat the growing menace of cybercrime. To assail its validity is to misunderstand its purpose; hence, the challenge is without merit.

(8) The judgment in SHREYA SINGHAL, predicated inter alia upon the reasoning in RENO v. ACLU, cannot by

judicial alchemy be transposed to the present controversy. RENO itself has been diluted in subsequent pronouncements of the American Supreme Court, SHREYA SINGHAL spoke to the 2011 Rules, now consigned to history. The 2021 Rules, fresh in their conception and distinct in their design, demand their own interpretative frame, unsaddled by precedents that address a bygone regime.

(9) Social media, as the modern amphitheater of ideas, cannot be left in a state of anarchic freedom. Regulation of information in this domain is neither novel nor unique; the United States regulates it, every sovereign nation regulates it, and India's resolve to do likewise cannot, by any stretch of constitutional imagination, be branded unlawful. Unregulated speech, under the guise of liberty, becomes a licence for lawlessness. Regulated speech, by contrast, preserves both liberty and order, the twin pillars upon which any democracy must stand.

(10) No social media platform, in the modern-day agora, may even feign the semblance of exemption from the rigour and discipline of the laws of this land. None may presume to treat the Indian marketplace as a mere playground, where information may be disseminated in

defiance of statutes, or in disregard of legality, while adopting a posture of detachment.

(11) In the light of the observations made in the course of the order, the content on social media, needs to be regulated and its regulation is a must, more so, in the cases of offences against women in particular, failing which, the right to dignity of a citizen is railroaded.

(12) We are a society governed by laws; order is the architecture of our democracy. Every platform that seeks to operate within jurisdiction of our nation, which they do, must accept that liberty is yoked to responsibility, and that the privilege of access carries with it the solemn duty of accountability. To hold otherwise is to imperil both the rule of law and the fabric of social harmony.

(13) The petitioner's platform is subject to regulatory regime in the United States of America, its birthplace and foot-land under the TAKE IT DOWN Act, 2025. It chooses to follow the said Act, as it criminalizes the violation of orders of a take down, but the same petitioner refuses to follow in the shores of this nation of similar take down orders which are founded upon illegality, this is sans countenance.

EPILOGUE:

The law must walk a tight rope between perils of unregulated expression and dangers of unrestrained censorship. In that delicate balance, rests the health of Constitutional democracy. The questions raised here were not merely about statutory interpretation, but about the preservation of democratic discourse in the digital public square. The Constitution does not permit unfettered public speaking, in the garb of freedom of speech and expression. Though liberty cannot be eroded by the expedience of executive action, Constitution cannot be permitted to be corroded. **The Regulated - the petitioner and the like, is asking the Regulator – the Government of India, to be Regulated at the hands of this Court. This is *sans* countenance.**

25. For the aforesaid reasons, the petition lacking in merit stands ***rejected***.

In the light of the rejection of the subject petition, the application of the interveners, for the very reasons rendered in the course of the order, stands rejected.

This Court places its appreciation to the able assistance rendered by Miss. Sai Suvedhya R., and Miss. Samriddhi N. Shenoy, Law Clerk cum Research Assistants attached to this Court.

Sd/-
(M.NAGAPRASANNA)
JUDGE

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