

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 9 | Issue 5

2026

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Balancing Act: Regulating Digital Media to Preserve Free Speech

SREEJONI BARUAH*

ABSTRACT

The exponential expansion of digital media has levelled the playing field in terms of access to information and communication around the world. Nevertheless, concerns such as hate speech, misinformation and privacy violations have been magnified by this growth, leading to demands for regulation. This article examines the intricate balance that democratic societies must maintain between regulating digital media and protecting the fundamental right to free expression. In light of the intricacies of the modern digital ecology, it calls for well-rounded frameworks that protect the right to free speech. Through practical suggestions, it stresses the significance of safeguarding free expression in the face of changing regulatory environments, and it brings to light the difficulty of limiting damaging content without resorting to censorship or overreach. A rights-based approach is emphasised through a critical analysis of the role of technology corporations, civil society and lawmakers in establishing regulatory procedures.

Keywords: *Right to internet, freedom of speech and expression, fundamental right, social media, regulatory framework*

I. INTRODUCTION

Social media now extends into almost every part of our lives and has assumed an unimaginable significance in everyday life. Despite its many drawbacks and negative effects, it is an incredible instrument for fostering connection, collaboration and unity among individuals across geographic boundaries, and it has become an essential means of communication through which people express themselves freely and share ideas and information. In recent years there has been a noticeable global movement of individuals calling for justice, equality and change, for holding the powerful to account and for respect for human rights, and the internet and social media have been crucial to it. The regulation of digital media within the framework of free speech and expression is therefore a complicated matter that requires a balance to be struck between a number of conflicting interests.¹

* Author is an Advocate at Gauhati High Court, Guwahati, Assam, India.

¹ Neshapriyan M, *Social Media and Freedom of Speech and Expression*, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-426-social-media-and-freedom-of-speech-and-expression.html>.

Freedom of speech, however, is not unrestricted. Article 19(2) of the Constitution permits the State to impose reasonable restrictions on the right in the interests of the following:²

- the sovereignty and integrity of India;
- the security of the State;
- friendly relations with foreign States;
- public order;
- decency or morality;
- contempt of court;
- defamation; and
- incitement to an offence.

Regulating digital media while upholding the right to free speech, and juggling the competing interests involved, is difficult. In many countries digital media content is governed by laws and regulations that are frequently modelled on the legal frameworks that already exist for traditional media. The following legal provisions and considerations are important:

- **Constitutional protections:** The freedom of speech is safeguarded by the constitutions of many nations. Generally speaking, these provisions permit restrictions on speech only under specific conditions, such as the protection of individual rights, public order or national security.
- **Laws against hate speech:** Hate speech is speech that incites hatred or violence against people or groups because of their race, religion or ethnicity, and some nations have laws against it. There can, however, be significant regional differences in how hate speech is defined and applied.
- **Defamation laws:** These laws shield people and organisations from defamatory remarks that damage their reputation. Digital media content, such as posts on social media and articles published online, is subject to them.
- **Intellectual property laws:** These laws safeguard the rights of content creators and owners. By controlling the use of copyrighted content, trademarks and other forms of intellectual property, they apply to digital media as well.
- **Accountability and transparency:** Regulations on digital media may also emphasise accountability and transparency. They may, for example, require platforms to disclose how they moderate content.

² INDIA CONST. art. 19(2).

II. FREEDOM OF SPEECH IN THE INDIAN CONSTITUTION

The first fundamental freedom that the Indian Constitution guarantees to all its citizens is the right to freedom of speech and expression under Article 19(1)(a). The right is not absolute: it is subject to the limitations listed in Article 19(2). It has nonetheless served as the wellspring of numerous other rights that fall within its scope and that the Supreme Court has upheld in a number of decisions over the years, including the right to information, the freedom of the press and the freedom of opinion.

The democratic ideal enshrined in the Preamble to the Constitution is intrinsically linked to the freedom of opinion. The digital age has enabled a wealth of information reflecting the viewpoints, opinions, creative expression and ideas of people worldwide to circulate more quickly and widely.

In India in particular, this has made it easier for constructive criticism of the government and its policies to circulate, as well as political campaigns, especially during elections. Although the advantages are considerable, commentators have observed that such criticism has at times been viewed negatively, particularly by those in positions of authority, and branded “anti-national”.³

A. Freedom of speech and expression and the internet

As Neshapriyan observes, social media and the internet have become essential tools of communication through which people express themselves freely and share ideas and information. In recent years there has been a noticeable increase in the global movement of people who support justice, equality and change, holding the powerful to account and respect for human rights. Social media and the internet have frequently been crucial to these movements, because they enable people to connect, share information instantly and build a sense of community.

In August 2020 Rahul Gandhi engaged in a political battle on Twitter, tweeting that the “BJP & RSS control Facebook & WhatsApp in India” and that “[t]hey spread fake news and hatred through it and use it to influence the electorate”. The BJP countered with the allegation that Facebook employees were on record abusing Prime Minister Narendra Modi and senior Cabinet ministers. Shashi Tharoor, then chair of the Parliamentary Standing Committee on Information Technology, summoned Facebook over these reports and over the measures it proposed to take against hate speech in India.⁴

³ Nikara Liesha Fernandez, *Freedom of Speech and Expression in the Digital Era*, IPLEADERS (June 6, 2021), <https://blog.ipleaders.in/freedom-speech-expression-digital-era/#Conclusion>.

⁴ Rajesh Vellakkat, *Regulating Digital Media Platforms & Free Speech Rights*, FOX MANDAL (Sept. 4, 2020), <https://www.foxmandal.in/Insights/regulating-digital-media-platforms-free-speech-rights/>.

All of this highlights the power and the responsibility that social media platforms carry. One has to agree with the concern these leaders expressed that digital platforms are being abused and have become a stage for wrongs such as copyright infringement, defamation, hate speech, violence, pornography, terrorism and anti-national activities. Controlling these harmful and unlawful activities is essential to maintaining law and order, promoting peace and preserving the principles of the Constitution. From this angle it makes sense to examine the legal framework that governs the operation of these digital platforms.⁵

The United Nations Human Rights Committee has also sought to give practical effect to the freedom of opinion and expression in a media environment transformed by mobile and internet communication. Describing the new media as a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media, the Committee stated that States should take all necessary steps to foster the independence of these new media and to ensure access to them. Freedom of speech and expression through the internet and social media is likewise protected by Article 19 of the Universal Declaration of Human Rights and Article 19(2) of the International Covenant on Civil and Political Rights, which extends to expression “through any other media of his choice”.⁶ The Indian Constitution and the international instruments thus recognise the right to freedom of speech and expression as a fundamental one, whatever the means by which it is exercised, and access to the internet and social media has come to be treated as integral to its exercise.

B. Recent judgments

i. *Anuradha Bhasin v. Union of India*

In *Anuradha Bhasin v. Union of India*,⁷ the Supreme Court laid down the following propositions.

Freedom of speech and expression. The freedom of speech and expression under Article 19(1)(a), and the freedom to practise any profession or carry on any trade, business or occupation under Article 19(1)(g), exercised over the medium of the internet, enjoy constitutional protection. Any restriction on these fundamental rights must conform to the mandate of Articles 19(2) and 19(6), including the test of proportionality.

⁵ Vellakkat, *supra* note 4.

⁶ Hum. Rts. Comm., General Comment No. 34: Article 19: Freedoms of Opinion and Expression, ¶ 15, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171; *see also* Neshapriyan M, *supra* note 1.

⁷ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637, ¶ 152(b)–(e) (India). The 2017 Suspension Rules were made under section 7 of the Indian Telegraph Act, 1885; they have since been superseded by the Telecommunications (Temporary Suspension of Services) Rules, 2024, notified on 22 November 2024 under section 20 of the Telecommunications Act, No. 44 of 2023, INDIA CODE (2023).

Suspension orders. An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. Suspension may be used for a temporary duration only.

Principle of proportionality. Any order under the Suspension Rules that suspends internet access must adhere to the principle of proportionality and must not extend beyond the necessary duration.

Judicial review. Any order under the Suspension Rules that suspends internet access is subject to judicial review on the parameters set out in the judgment.

It follows that, under the Indian Constitution and the international instruments, the right to freedom of speech and expression is protected whatever the medium one chooses to use. The Supreme Court in *Anuradha Bhasin* expressly declined, however, to decide whether access to the internet is itself a fundamental right, because no counsel had argued the point.⁸ The Kerala High Court has gone further and held that the right to access the internet forms part of the right to education as well as the right to privacy under Article 21.⁹

ii. *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*

In *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*,¹⁰ the Supreme Court held that the freedom of speech and expression includes commercial speech and advertisements, which may be restricted only on the grounds in Article 19(2). Although advertising is a business transaction, the Court reasoned, it nevertheless disseminates information about the product advertised; that information benefits the general public, and the free flow of commercial information is essential in a democracy.

In *Sakal Papers (P) Ltd. v. Union of India*, the Supreme Court struck down the Newspaper (Price and Page) Act, 1956 and the Daily Newspapers (Price and Page) Order, 1960 made under it, which fixed the maximum number of pages a newspaper could publish according to the price it charged. The Court held that they violated Article 19(1)(a) and were not saved as reasonable restrictions under Article 19(2), and it rejected the Government's argument that the scheme would help small newspapers to grow.¹¹

⁸ *Anuradha Bhasin*, (2020) 3 SCC 637, ¶ 28.

⁹ *Faheema Shirin R.K. v. State of Kerala*, AIR 2020 Ker 35 (India).

¹⁰ *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139 (India).

¹¹ *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305 (India).

iii. *Shreya Singhal v. Union of India*

The right to free speech and expression in the digital age was the central issue in *Shreya Singhal v. Union of India*,¹² in which section 66A of the Information Technology Act, 2000 was struck down as unconstitutional. Section 66A punished any person who sent, by means of a computer resource or a communication device, “any information that is grossly offensive or has menacing character”, or any information which he knew to be false but sent persistently “for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will”.

The Court held the provision unconstitutional on substantive grounds: its terms were broad and undefined and took into the net “a very large amount of protected and innocent speech”. Expressions such as “annoyance” and “inconvenience” could not be brought within Article 19(2), which permits restrictions only on graver grounds. Because the section reached internet communication in general, the Court found that its restrictions had a “chilling effect” on the right to free speech and expression and were unreasonable.¹³

III. SELF-REGULATION VS. GOVERNMENT INTERVENTION

“Self-regulation encourages creativity and makes content creators more responsive to its viewers. It’s worked well for broadcast media, and there’s no reason for it not to do so for curated video content.”¹⁴

Compared with traditional media platforms, OTT platforms offer distinctive content. Titles such as *Lust Stories* and *Karenjit Kaur: The Untold Story of Sunny Leone* carry explicit content and narratives about social, political, religious and sexual inhibitions, of a kind that would ordinarily be classed as “inappropriate and sensitive content” and subjected to censorship. Producers working in the conventional mode do not take up such narratives, or do not satisfy the CBFC’s standard of “appropriate content” without changes and edits. The only reason such films and shows are released on OTT platforms rather than through mainstream channels is the absence of a regulatory framework censoring content on these platforms. OTT platforms give content creators the freedom to explore new genres and to tell stories in ways that mainstream media channels frequently restrict. With no separate regulation or guidelines overseeing video content

¹² *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India).

¹³ *Shreya Singhal*, (2015) 5 SCC 1, ¶¶ 83, 90; see also Fernandez, *supra* note 3.

¹⁴ Neeru Mittal & Vanita Khanna, *Regulation of Content on Over-the-Top Video Platforms vis-a-vis Freedom of Speech and Expression*, 7 ROSTRUM’S L. REV. (2023), <https://www.rostrumlegal.com/regulation-of-content-on-over-the-top-video-platforms-vis-a-vis-freedom-of-speech-and-expression/>.

on OTT platforms such as Netflix, Prime Video and ALT Balaji, self-regulation was the only workable immediate means of controlling controversial content streamed across the country.¹⁵

Self-regulation refers to the responsibilities and duties that media administrators have freely and consciously chosen to lay down and carry out themselves. Such guidelines are more in the nature of goals, rules or ideals than of strict, mandatory standards. Sound self-regulatory guidelines allow quick adaptation to rapid technological change across the world and, when properly framed in collaboration with the government, are preferable to mandatory regulation imposed by the legislature. The general benefits of self-regulation include reduced cost, greater flexibility, greater efficacy and stronger incentives for compliance.¹⁶

A well-structured programme of self-regulation is especially suitable given the diverse range of content available on OTT platforms. It is interesting to note that, after a Supreme Court intervention in public interest litigation, OTT platforms were given the opportunity to frame a self-regulation code, but the players concerned showed little interest in it. Before the 2021 Rules, the government had done no more than allocate the subject (OTT content platforms) to the Ministry of Information and Broadcasting, by an amendment of 9 November 2020 to the Government of India (Allocation of Business) Rules, 1961.¹⁷

IV. NEED FOR REGULATION

The freedom to hold opinions and to receive and impart information is essential to guaranteeing the availability of fundamental human rights in a democratic society.

But, as Article 10(2) of the European Convention on Human Rights provides, the exercise of these freedoms “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.¹⁸

A film’s release in a theatre or on satellite television requires certification from the Central Board of Film Certification (CBFC), and such content is governed by the Cinematograph Act, 1952, the Cable Television Networks (Regulation) Act, 1995 and the Cable Television Networks

¹⁵ Mittal & Khanna, *supra* note 14.

¹⁶ Mittal & Khanna, *supra* note 14.

¹⁷ Mittal & Khanna, *supra* note 14.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 221; *see also* Mittal & Khanna, *supra* note 14.

Rules, 1994. There were, however, no clear guidelines governing content on over-the-top (OTT) platforms.¹⁹

In recent years OTT platforms have grown rapidly and captured the market. According to a PwC report cited by Mittal and Khanna, OTT subscribers more than doubled between August 2019 and August 2020, and screen time increased by 300 per cent. Netflix, which had 167 million subscribers at the end of 2019, saw global subscriptions surge to almost 183 million in April 2020 and to nearly 193 million by July 2020, while Disney+ reached 60.5 million in early August 2020.²⁰

It has rightly been said that size always calls for scrutiny. Technological innovation on the internet has raised legitimate concerns and questions about the rights and safety of users, and it was high time for the government to address them through appropriate legislation. The 2021 Rules, which placed OTT platforms under the Ministry of Information and Broadcasting, changed the position of platforms that had until then escaped every form of regulation.²¹

These rules must, as Mittal and Khanna argue, be applied with care so that they do not expose or impair the autonomy of users and citizens. Regulation should protect the environment that has supported the internet's development while keeping it open and free, so as to preserve its capacity to promote innovation and economic growth.

“National jurisdiction can be a solution to ensure sovereignty in the global environment that OTT possesses. Any form of regulation cannot progress or be implemented without adequately resolving issues of jurisdiction. The issue of jurisdiction can be tackled to an extent by mandating the OTT platforms/companies to have a registered office or at least one formal office in the country in which it operates and/or provides its services.”²²

In India most content is self-regulated or unregulated, which gives media companies complete control over what appears on their platforms. The problem lies not in the freedom offered as such but in its abuse by users. Anything can be posted without the person posting it realising that it might hurt someone else's feelings or what problems it might cause. In January 2023 there were approximately 4.8 billion social media users worldwide, and about 467 million in India.²³ These platforms are where fake news, including content generated by AI tools, is shared

¹⁹ Mittal & Khanna, *supra* note 14.

²⁰ Mittal & Khanna, *supra* note 14.

²¹ Mittal & Khanna, *supra* note 14.

²² Mittal & Khanna, *supra* note 14.

²³ Simon Kemp, *Digital 2023: Global Overview Report*, DATAREPORTAL (Jan. 26, 2023), <https://datareportal.com/reports/digital-2023-global-overview-report>; Simon Kemp, *Digital 2023: India*, DATAREPORTAL (Feb. 13, 2023), <https://datareportal.com/reports/digital-2023-india>.

and posted. Public outrage at inflammatory content can give rise to riots and disrupt public order. Several videos posted during the 2020 Delhi riots went viral; the posts appeared to be directed at a particular section of society, had a communal character, and were offensive enough to ignite a riot and shatter social harmony. Internal Facebook research, as reported in October 2021, found that inflammatory content on its platform in India had risen by 300 per cent in the months after December 2019, before the riots of February 2020.²⁴ The Chairman of the Peace and Harmony Committee of the Delhi Legislative Assembly told a press conference in August 2020 that the Committee had found Facebook “prima facie guilty of a role in the violence”, saying that the platform continued to host “incriminating material” despite complaints from users.²⁵ The Supreme Court later upheld the Committee’s power to summon Facebook’s India head, but held that law and order and the police lay outside the Assembly’s domain and disapproved of the Chairman’s statements at that press conference.²⁶ Incidents of this kind have become more frequent because no suitable regulatory body exists to control what is posted online, and the platforms’ internal bodies often function ineffectively. The government should, in future, establish regulatory bodies to prevent similar incidents.

Obscenity and pornography have emerged as grave dangers that social media users must deal with. The government established the Censor Board to impose restrictions on Indian films in order to prevent obscenity, but such measures raise jurisdictional problems online. Because pornography is meant to arouse sexual desire, it offends morality and public decency. Identity-related threats include particular websites that monetise through targeted advertising, and in more severe cases scammers have been observed taking control of social media accounts in order to spread malware and attack further targets. Jurisdictional problems arise even with social media defamation, an offence under section 356 of the Bharatiya Nyaya Sanhita, 2023 (formerly section 499 of the Indian Penal Code, 1860).²⁷ The most common instances are fake accounts created with other people’s photographs and personal information.²⁸

²⁴ *Inflammatory Content on FB Was up 300% Before Delhi Riots, Says Internal Report*, THE NEWS MINUTE (Oct. 25, 2021), <https://www.thenewsminute.com/atom/inflammatory-content-fb-was-300-delhi-riots-says-internal-report-156878>.

²⁵ Taran Deol, *Delhi Assembly Panel Wants Facebook Named Co-Accused in Communal Riots, Hints at ‘Conspiracy’*, THEPRINT (Aug. 31, 2020), <https://theprint.in/india/governance/delhi-assembly-panel-wants-facebook-named-co-accused-in-communal-riots-hints-at-conspiracy/492793/>.

²⁶ *Ajit Mohan v. Legislative Assembly, National Capital Territory of Delhi*, AIR 2021 SC 3346, ¶¶ 182–83, 204–05 (India).

²⁷ The Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 356(1) (in force July 1, 2024; replacing Indian Penal Code, 1860, § 499).

²⁸ See generally Mohd Aqib Aslam, *Media and Obscenity*, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-7096-media-and-obscenity.html>.

V. EXISTING LEGAL FRAMEWORK

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, notified on 25 February 2021,²⁹ sparked considerable controversy and public outcry, and many considered that they violated the right to free speech and expression on several grounds. Through these Rules the government brought under its supervision OTT platforms that stream films and audio-visual programmes produced by online content providers, as well as platforms that publish news and current affairs content.³⁰

The government argued that the Rules were necessary because of a growing number of complaints about offensive and hurtful content on these platforms, such as scenes of violence, nudity and obscenity, indecent representation of women and child sexual abuse material, as well as content that offended people's religious feelings. Before the Rules there was no robust grievance redressal mechanism to deal with such complaints from the public.³¹

In a press release the government stated that the Rules did not seek to curtail freedom of speech or expression, since it recognised and respected that right, including the need for criticism of the government to keep democracy alive. Critics contend, however, that closer scrutiny of the Rules sits uneasily with that assurance. In an emergency, for example, rule 16 allows the Secretary of the Ministry of Information and Broadcasting to direct a publisher or an intermediary to block content as an interim measure without giving the person concerned an opportunity of hearing.³²

Critics also argue that the Rules do not make explicit the grounds on which such orders may be made or define the reasonable limits on what content is permissible on these platforms. In their view, this ambiguity leaves the speech of users at the discretion of the executive, so that speech

²⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E), Gazette of India, pt. II sec. 3(i) (Feb. 25, 2021) (India). The Rules have since been amended by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules of 2022 (G.S.R. 794(E), Oct. 28, 2022: Grievance Appellate Committees), 2023 (G.S.R. 275(E), Apr. 6, 2023: online gaming and a government fact check unit), 2025 (notified Oct. 22, 2025, in force Nov. 15, 2025: takedown intimations under rule 3(1)(d) only from senior officers, with monthly review) and 2026 (G.S.R. 120(E), Feb. 10, 2026, in force Feb. 20, 2026: synthetically generated information and shorter takedown timelines). Rules 9(1) and 9(3) (the Code of Ethics for digital publishers and its oversight mechanism) were stayed in *Agij Promotion of Nineteenonea Media Pvt. Ltd. v. Union of India*, Writ Petition (L) No. 14172 of 2021 (Bom. HC Aug. 14, 2021) (India), and the challenges to the Rules pending in several High Courts were transferred to the Delhi High Court by the Supreme Court on 22 March 2024. The fact check unit provision, rule 3(1)(b)(v) as inserted in 2023, was struck down in *Kunal Kamra v. Union of India*, Writ Petition (L) No. 9792 of 2023 (Bom. HC Sept. 26, 2024) (India); the Union of India's appeal is pending before the Supreme Court.

³⁰ Fernandez, *supra* note 3; see also Shivani Singh, *OTT: Censorship vs Right to Freedom of Speech and Expression*, LEGAL DESIRE (July 9, 2021), <https://legaldesire.com/ott-censorship-vs-right-to-freedom-of-speech-and-expression/>.

³¹ Fernandez, *supra* note 3.

³² Fernandez, *supra* note 3; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, r. 16(2), *supra* note 29.

perceived as critical of the government could readily be labelled “hate speech” or “fake news”.³³

In a nation of more than 100 crore people, press freedom is crucial, particularly for criticism of the government and as a safeguard against totalitarianism. The Rules seek to “regulate” this freedom while claiming to protect the sensibilities and traditions of the people of India. By placing such broadly worded restrictions on so wide a range of categories, however, they have been criticised as a form of censorship that will chill the right to free speech and expression. OTT platforms and intermediaries need to be able to portray certain issues, because doing so raises awareness of realities and social evils that can be checked only by bringing them before the public.³⁴

A. Information Technology Act, 2000

1. Chapter XI of the Act prescribes penalties for computer-related offences under sections 65, 66, 66A, 66C, 66D, 66E, 66F, 67, 67A and 67B, which may also be committed through social media. These offences include tampering with computer source documents, computer-related offences under section 43, sending offensive messages through a communication service (section 66A, since struck down), identity theft, cheating by personation using a computer resource, violation of privacy, cyber terrorism, and publishing or transmitting in electronic form obscene material, material containing sexually explicit acts, and material depicting children in sexually explicit acts.³⁵
2. Under section 69, the Central Government or a State Government may order the interception, monitoring or decryption of any information through any computer resource in the interest of the sovereignty or integrity of India, the defence of India, the security of the State, friendly relations with foreign States or public order, for preventing incitement to the commission of any cognizable offence relating to these, or for the investigation of any offence.
3. Under section 69A, the Central Government may, for similar reasons, direct that any information be blocked from public access through any computer resource.

³³ Fernandez, *supra* note 3.

³⁴ Fernandez, *supra* note 3.

³⁵ The Information Technology Act, No. 21 of 2000, INDIA CODE (2000), §§ 65–67B. Section 66A was struck down in *Shreya Singhal*, (2015) 5 SCC 1, ¶ 119. *See also* Neshapriyan M, *supra* note 1.

4. Under section 69B, the Central Government may authorise any agency to monitor and collect traffic data or information through any computer resource for cyber security purposes.
5. Section 79 addresses the liability of intermediaries. Subject to its conditions, an intermediary is not liable for any third-party information, data or communication link made available or hosted by it.³⁶

VI. OTHER RELEVANT PROVISIONS

A. The Indian Telegraph Act, 1885

Section 5(2) of the Indian Telegraph Act, 1885 (the “Telegraph Act”), which empowers the Central and State Governments to order the interception of messages, is the relevant provision for surveillance. The Indian Telegraph Rules, 1951, framed under the Telegraph Act, were amended in 2007 to include rule 419A, under which interception orders could be issued only by the Union Home Secretary or, in the case of a State Government, the Secretary in charge of the Home Department.

In unavoidable circumstances, however, an order could be issued by an officer not below the rank of Joint Secretary to the Government of India who had been authorised by the Union or State Home Secretary. Rule 419A also sought to build in safeguards against unrestricted surveillance by law enforcement agencies.³⁷ Interception is now governed by section 20(2) of the Telecommunications Act, 2023, in force since 26 June 2024, and by the Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024, which superseded rules 419 and 419A.³⁸

B. Code of Criminal Procedure, 1973 (now the Bharatiya Nagarik Suraksha Sanhita, 2023)

Access to stored data has been obtained under section 91 of the Code of Criminal Procedure, 1973, which allowed a court or an officer in charge of a police station to require the production of any document or other thing needed for an investigation, inquiry, trial or other proceeding under the Code. Section 92 further allowed the District Magistrate, the Chief Judicial

³⁶ The Information Technology Act, No. 21 of 2000, INDIA CODE (2000), §§ 69, 69A, 69B, 79. In *Shreya Singhal*, (2015) 5 SCC 1, ¶¶ 117, 119, the Supreme Court read down section 79(3)(b) to mean that an intermediary must act on receiving actual knowledge of a court order, or on being notified by the appropriate government, that unlawful content is to be removed. *See also* Neshapriyan M, *supra* note 1.

³⁷ The Indian Telegraph Act, No. 13 of 1885, INDIA CODE (1885), § 5(2); Indian Telegraph Rules, 1951, r. 419A, inserted by G.S.R. 193(E) (Mar. 1, 2007) (India).

³⁸ The Telecommunications Act, No. 44 of 2023, INDIA CODE (2023), § 20(2); Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024 (notified Dec. 6, 2024) (India).

Magistrate, the Court of Session or the High Court to require any document, parcel or “thing” in the custody of a postal or telegraph authority to be delivered for such a proceeding. From 1 July 2024 these powers are contained in sections 94 and 95 of the Bharatiya Nagarik Suraksha Sanhita, 2023, section 94 now expressly extending to electronic communication.³⁹

Besides these two statutes, several others provide for the interception of communications and for the use of intercepted communications. Section 46 of the Unlawful Activities (Prevention) Act, 1967, for example, makes evidence collected through interception under the Telegraph Act or the Information Technology Act admissible against the accused in a trial for an offence under that Act.⁴⁰

VII. CONCLUSION

Social media is an incredibly effective means of exercising the right to free speech and expression. It is also being used more and more for unlawful ends, which is why regulation of these platforms is necessary. Such regulation should not violate people’s rights. Together, the government, service providers and users can create a new and positive social media culture in the country, and service providers can help to maximise the benefits of government regulation by giving timely updates.⁴¹

Fake news is undoubtedly pervasive in society and needs to be checked by the authorities without delay. It spreads primarily through digital channels such as WhatsApp forwards and morphed videos and pictures. The approach the authorities appear to be taking, however, may not be the most effective one, and the government must exercise its power with caution if it is to avoid criticism that its measures are arbitrary.⁴²

Government regulation is acceptable so long as it serves the people’s interests; the problem arises when censorship is imposed in the name of regulation. Many countries govern digital media through laws and regulations on content moderation, takedown procedures and hosting liability for unlawful content, and these frequently try to balance the advancement of free speech against the protection of people and society from harm. Striking the right balance between controlling digital media and preserving the right to free speech and expression is a constant struggle that demands careful thought about the conflicting interests at stake. This paper has attempted to analyse how, in the context of social media, the right to freedom of speech and

³⁹ The Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (1974), §§ 91–92 (repealed); The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, INDIA CODE (2023), §§ 94–95.

⁴⁰ The Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (1967), § 46.

⁴¹ Neshapriyan M, *supra* note 1.

⁴² Fernandez, *supra* note 3.

expression is both realised and regulated, and how the law secures and governs its exercise in contemporary times.
