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# Legality of Social Media Algorithms: How They Shape our Minds and Democracy

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## ABSTRACT

*“You can sway a thousand men by appealing to their prejudices quicker than you can convince one man by logic.”*

**- Robert A. Heinlein**

*This quote perfectly captures the essence of the role played by social media companies in polarization of public opinion and spreading of fake news. With information overload, people are grateful to the social media companies for telling them what to read next. This is done by creating a personalized wall of news-feed based on their likes and dislikes and it is known as “Filter Bubbles”. It curates a news-feed of each individual in such a way that people’s virtual exposure is limited to their community of interest. Through this paper, the author aims to test the legality of this technology when applied in the political context, within the Indian legal framework. Firstly, the technology will be tested against the legal theory of “Marketplace of Ideas” which advocates free flow of ideas and curtails censorship. Courts often rely on this theory to uphold freedom of speech and expression and refuse to regulate fake news on social media. Additionally, the author will also test the Constitutionality of Filter Bubbles under Article 19 and lastly, the position of intermediary liability under the Information Technology (Amendment) Act, 2008 will be discussed keeping in mind the use of Filter Bubbles by the intermediaries. In concluding the paper, the author will demonstrate how the Filter Bubbles invalidate the theory of the Marketplace of Ideas; how it violates an individual’s right to know, which is an integral part of freedom of speech and expression; and lastly, how the use of Filter Bubbles make the safe harbour provisions for intermediary liability inapplicable.*

## I. INTRODUCTION

The menace of fake news in the 21<sup>st</sup> century is attributable to social media. Regulation of social media has created a two pronged problem, one relates to the technological aspect and the other relates to the legal issues in tackling it.

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Although the Judiciary and the Government have acknowledged the distinction between print media and social media, it has only identified the distinction with respect to social media having a wider reach than print media.

When it comes to the legal issues, regulating social media invites Constitutional scrutiny as it relates to putting restrictions on the freedom of speech and expression under Article 19(1)(a). The next challenge comes in terms of accountability. Since social media platforms are viewed as “intermediaries”<sup>2</sup>, they are protected from liability of any content posted on their website.

In this paper, the author will focus on one of the technological aspect of social media known as “Filter Bubbles”, which are used to create personalized news feeds and unique search results on social media websites. This is done based on an individual’s past activities on the internet. Placing reliance on this, the author will demonstrate the inadequacy and inapplicability of certain legal principles, like the concept of “Marketplace of Ideas”, that is used by the courts in the regulation of fake news.

Additionally, the author will also demonstrate how Filter Bubbles violate the fundamental rights of people and a way to hold the social media websites accountable. To understand this, it is first essential to have a background of the Constitutional framework behind the freedom of speech and expression in India.

## **II. THE ESSENCE OF DEMOCRACY LIES IN THE FREEDOM OF SPEECH AND EXPRESSION**

The underpinning ideology behind guaranteeing certain fundamental rights, under Part III of the Indian Constitution, is the protection of personal liberty. The fundamental right to freedom of speech and expression forms the backbone of personal liberties as it enables a person to profess his/her opinion freely, through any mode.<sup>3</sup>

A Democratic society thrives only when this right to freedom of speech and expression is realized effectively. This has been emphasized by various jurists around the globe and Justice Patanjali Sastri has succinctly observed that -

*“Freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of Government, is possible.”*<sup>4</sup>

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<sup>2</sup> Information Technology (Amendment) Act, No. 10 of 2008 (India), section 2(w).

<sup>3</sup> INDIA CONST. art.19, cl.1 (a).

<sup>4</sup> Louise De Raedt v. Union of India, (1991) 3 SCC 554 (India).

Technology has made it possible for each and every individual to exercise their freedom of speech and expression effectively. Not only do people have a platform to voice their views, they have the power to reach masses of audience on a global scale like never before. On the face of it, it creates the perfect platform for an efficient functioning of a democracy but like all things, this also has a flip side which is commonly known as fake news.

### **III. FAKE NEWS AND REGULATIONS:**

Society has never been devoid of fake news or disinformation. It's prevalence did cause problems in times before social media, however, social media has only increased the gravity of the situation. From Constitutional point of view, the entire world faces the challenge of balancing free speech and regulating fake news.

Fake news, albeit undefined, generally consists of the following elements -

- a. Transmitting deceptive or misleading content through a media (social media in this context);
- b. The misleading content often takes an advantage of people's cognitive biases and errors in judgment;
- c. The purpose of doing so is generally to advance a commercial or a political agenda.<sup>5</sup>

There are two aspects of law that regulates fake news in India: The powers of the Government to restrict speech under various laws and the role of the Judiciary in deciding the reasonability of restrictions under the Constitutional framework.

While the focus of this paper is on the Constitutional aspect, it is pertinent to note that certain powers that the Government possesses with respect to regulation of fake news.

#### **(A) POWERS OF GOVERNMENT:**

In India, by and large, the Government has used Sections 69A and 79(3)(b) of the Information Technology (Amendment) Act, 2008 to restrict or block information on social media sites to regulate fake news. Section 69A allows the Government to block access to websites, tweets, social media accounts or any information accessible through a computer resource if it believes it to be necessary in the interest of sovereignty, integrity, public order or preventing incitement to commission of cognizable offence.

The farmer's protests in India have taken over the internet and the Government has responded

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<sup>5</sup>M.R. Leiser, *Regulating Computational Propaganda: Lessons from International Law*, LEIDEN UNIVERSITY (Jan. 29, 2021, 8:05 pm), <https://scholarlypublications.universiteitleiden.nl/handle/1887/83088>.

by ordering Twitter to block as many as 1,178 accounts over their alleged links with Khalistan.<sup>6</sup> The Government has also resorted to internet lock-downs to restrict the freedom of speech and expression of citizens. Infamously, India has restricted the access to internet more than any other nation<sup>7</sup> and the restrictions have grown 5 times since 2016.<sup>8</sup>

Therefore, it is clear that, instead of addressing the concern of fake news, the Government is putting unreasonable restrictions on freedom of speech and expression. Sections 69A and 79(3)(b) were held Constitutionally valid,<sup>9</sup> however, the Government is clearly misusing these Sections to control the information flow on social media in the name of sovereignty and security. The guidelines laid down by the Judiciary with respect to this are rarely followed. The principles laid down by the Judiciary are listed below.

**(B) ROLE OF JUDICIARY:**

Because of the importance that freedom of speech and expression holds in the preservation of Democracy, the Constitution has laid down well defined grounds under which this right can be subject to censorship.<sup>10</sup> Moreover, the judiciary has to ensure that the restrictions placed are reasonable and not arbitrary and that they strike a balance between personal liberty and social control permitted under 19(2).<sup>11</sup> Article 19(2) lays down the following grounds for restriction of freedom of speech and expression:

- a. *Sovereignty and integrity of India*
- b. *Security of State*
- c. *Friendly relations with Foreign States*
- d. *Public Order*
- e. *Decency or Morality*
- f. *Contempt of Court*
- g. *Defamation*
- h. *Incitement of an offence.*

Additionally, Article 19 also requires the restrictions to be reasonable. The tests of reasonable

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<sup>6</sup> BusinessToday.in, *Farmers' protests: Centre asks Twitter to block 1,178 more accounts with Khalistan, Pakistan links*, BUSINESS TODAY (Feb. 8, 2021, 11:15 am), [https://www.businesstoday.in/latest/trend\\_s/farmers-protests-twitter-block-1178-more-accounts-with-khalistan-pakistan-links/story/430568.html](https://www.businesstoday.in/latest/trend_s/farmers-protests-twitter-block-1178-more-accounts-with-khalistan-pakistan-links/story/430568.html)

<sup>7</sup> Archana Chaudhary & Bloomberg, *India Internet shutdown inflames backlash over farmer protests*, FORTUNE (Feb. 6, 2020, 10:40 pm), <https://fortune.com/2021/02/05/india-internet-shutdown-protests-backlash/>

<sup>8</sup> Sanjana Rajgarhia, *Media Manipulation in the Indian Context: An Analysis of Kashmir-Related Discourse on Twitter*, HARVARD KENNEDY SCHOOL (Jan. 25, 2021, 2:15 pm), [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final\\_AWP\\_147.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_AWP_147.pdf)

<sup>9</sup> *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

<sup>10</sup> INDIA CONST. art.19, cl. 2.

<sup>11</sup> *Chintamani Rao v. State of MP*, (1950) SCR 759.

restrictions requires:<sup>12</sup>

- a. Restriction must not be arbitrary and must be deliberated with reason.
- b. A restriction must have a direct nexus with the purpose mentioned in Article 19(2).
- c. The restriction can be imposed only by or under the authority of law.

Restriction on freedom of speech cannot be imposed on the ground of “public welfare” unless direct nexus is shown between restriction and grounds mentioned under clause 19(2).<sup>13</sup> This is important so that the restrictions are justified on the ground that imminent threat exists which will seriously affect the public order. In the landmark judgment of *S. Rangarajan Vs. P. Jagjivan Ram & Ors.*<sup>14</sup>, the court laid down the test of direct nexus stating that -

*“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. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance of the views of others. Intolerance is as much dangerous to democracy as to the person himself.”*

Therefore, it can be gathered that speech cannot be censored merely because it is alleged to be “fake”, unless the test of direct nexus is satisfied. While acknowledging the menace caused to migrant workers during the COVID-19 lock-down, the court refused to interfere with the freedom of speech and expression of people to have a free discussion about the pandemic. Instead, the court cautioned the media stating that -

*“In particular, we expect the media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated. A daily bulletin by the Government of India through all media avenues including social media and forums to clear the doubts of people would be made active within a period of 24 hours as submitted by the Solicitor General of India. We do not intend to interfere with the free discussion about the pandemic, but direct the media refer to and publish the official version about the developments.”*<sup>15</sup>

Additionally, the court places reliance on individual’s common sense and ability to identify the truthfulness of information and to reject the rest.<sup>16</sup> The court has categorically held that individuals need to tolerate non-conventional ideas of morality and such ideas are well within

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<sup>12</sup> N.K. Bajpai v. Union of India, (2012) 4 SCC 653.

<sup>13</sup> Sakal Papers (P) Ltd., And Ors. v. Union of India, (1962) AIR 305.

<sup>14</sup> S. Rangarajan v. P. Jagjivan Ram & Ors., (1989) 2 SCC 574.

<sup>15</sup> Alakh Alok Srivastava v. Union of India, 2020 SCC OnLine SC 345.

<sup>16</sup> Dennis v. United States, 341 U.S. 494 (1951).

the framework of Constitutional scheme unless they are shown to incite offence.<sup>17</sup>

This idea that individuals need to exercise prudence while determining whether a news is true or not originates from the concept of “Marketplace of Ideas”, which was first conceptualized in American jurisprudence.

#### **IV. THE CONCEPT OF MARKETPLACE OF IDEAS AND ITS APPLICATION IN INDIA:**

##### **(A) DEFINING THE CONCEPT OF MARKETPLACE OF IDEAS:**

The strict standard for curtailing freedom of speech and expression, as seen above, originates from the concept of Marketplace of Ideas. John Stuart Mill was one of the biggest advocates of free speech. In his book - “*On Liberty*”<sup>18</sup>, Mill observed that truth can never be discovered in only one idea or through the narrow lenses of censorship. The only way to examine the falsity of any idea is to let it compete in the diverse spectrum of ideas (marketplace) where the idea will either survive or fail the scrutiny of public debates.

Therefore, truth will out itself not by censorship but by the free flow of ideas.<sup>19</sup> This is known as the “*Marketplace of Ideas*” and was documented by Justice Holmes in his dissenting opinion in *Abrams v United States*<sup>20</sup> –

*“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”*

This school of thought admonishes censorship and holds that political truth can only be discovered through uncensored freedom of speech.<sup>21</sup> The courts in India have also followed in the footsteps of the American courts and relied on the theory of Marketplace of Ideas to curtail censorship on the freedom of speech and expression.

##### **(B) APPLICATION OF MARKETPLACE OF IDEAS BY THE INDIAN COURTS:**

In *Yashwant Sinha & Ors. v CBI*<sup>22</sup>, the court recognized that the Marketplace of Ideas is based on the ability of public to identify and deduce the truth from the media. This ability in turn

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<sup>17</sup> S. Khusboo v. Kanniammal & Anr., (2010) INSC 347.

<sup>18</sup> JOHN STUART MILL, ON LIBERTY 19-22 (Batoche Books Kitchener, 2001)

<sup>19</sup> David Schultz, *Marketplace of Ideas*, THE FIRST AMENDMENT ENCYCLOPEDIA (Feb. 1, 2021, 1:05 pm), <https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas>

<sup>20</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>21</sup> *Whitney v. California*, 274 U.S. 357 (1927)

<sup>22</sup> *Yashwant Sinha & Ors. v. Central Bureau of Investigation through its Director & Anr.*, 2019 SCC OnLine SC 517.

results in the unfettered powers of the press and media houses under the freedom of speech and expression.

In the celebrated case of *Shreya Singhal*,<sup>23</sup> the Supreme Court of India placed reliance on *Abrams*<sup>24</sup> to hold the draconian provisions laid down under section 66A of the Information Technology (Amendment) Act, 2008 violative of freedom of speech and expression. Section 66A was challenged on the grounds of arbitrariness as it gave wide powers to the regulatory authorities to arrest people if any information sent through a computer device caused annoyance, grievance, was offensive, caused insult etc. to anyone.

Section 66A was incorporated under the Information and Technology Act, 2000 for combating fake news. However, the court rightly stated that the terms like “offensive”, “annoyance”, “insult”, etc. as used in the Section were arbitrary and outside the scope of Article 19(2), hence violative of freedom of speech and expression.

While applying the concept of Marketplace of Ideas, the court modified it to incorporate the Constitutional provisions under Article 19(2), by drawing a difference between discussion, advocacy and incitement. The court stated that interference or censorship is only valid when the speech results in incitement-

*“Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.”*

Drawing a difference between advocacy and incitement, the court reiterates that freedom of speech and expression includes the right to preach unpopular views unless it leads to incitement, such speech cannot be restricted.

Additionally, the petitioners therein drew a distinction between the print media and social media to argue in favour of the reasonability of restrictions placed under Section 66A. The distinction was focused on how social media has more reach than print media. However, the

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<sup>23</sup> *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

<sup>24</sup> *Abrams v. United States*, 250 U.S. 616 (1919).



court rejected this contention placing reliance on *Cricket Association of Bengal case*<sup>25</sup> and holding that - “*The virtues of the electronic media cannot become its enemies.*”

The court identified that the right to freedom of speech includes right to publish opinions to a wide range of audience. Although the impact of such media is more than the print media, regulation of social media in addition to grounds stated under the constitution of India would fail the test of reasonableness.

It can be reasonably concluded that the concept of Marketplace of Ideas relies heavily on the fact that individuals are being exposed to all the diverse ideas through which they can take knowledgeable and informed decisions to discover the truth. Additionally, social media’s wide reach is not considered as a differentiating factor to put additional restrictions on freedom of speech and expression and therefore, courts are hesitant towards regulating freedom of speech and expression.

### **(C) APPLICABILITY OF MARKETPLACE OF IDEAS IN THE DIGITAL SPACE:**

It is contended by the author that the concept of Marketplace of Ideas becomes redundant and obsolete in the virtual space due to “Filter Bubbles” and “Computational Propaganda”. The courts have identified internet as a forum that allows every individual to present his/her opinions and as a community of diverse ideas.

The reality lies in the fact that a personalized online environment is created by algorithms based on a users likes and dislikes, ideologies and interests in such a way that their virtual exposure is limited to their community of interest. Due to the vastness of data on the internet, this is often not realized. People believe themselves to be well-informed and in control of what they are reading which creates the illusion of Marketplace of Ideas. Due to this false understanding, the chances of people getting exposed to crosscutting news are next to negligible<sup>26</sup> and therefore, the internet only provides an illusion of free-flowing ideas and diverse opinions.

## **V. COMPUTATIONAL PROPAGANDA AND FILTER BUBBLES:**

The idea of having Google, Facebook and Amazon recommending what to shop for next or what to read next seems quite innocent and a bit convenient as well. In the millions of options out there on the internet, it is a relief to have a personalized wall of content. This phenomenon of personalizing an individual’s search results or news feed, according to Eli Praiser, is known

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<sup>25</sup> Secretary, Ministry of I & B v. Cricket Association of Bengal & Anr., (1995) 2 SCC 161.

<sup>26</sup> Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, AMERICAN AFFAIRS (Jan. 20, 2021, 4:20 pm), <https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/>

as the “Filter Bubble”.<sup>27</sup>

When two people search for the same thing on the internet, they end up getting different search results based on their past activities on the internet. The rankings in which the results appear also vary and it's been shown by studies that people are more likely to click on higher ranked search results<sup>28</sup> and most people don't even go on the second page of a search engine.

The American Institute for Behavioral Research and Technology<sup>29</sup> studied the phenomenon of biased search rankings on undecided voters in India, during the 2014 Lok Sabha elections. It was observed that such personalized and biased search rankings shifted the voting preferences by a whopping 20% or more. The Facebook-Cambridge Analytica scandal<sup>30</sup> is the proof of ethical and legal violations that results from personalized advertisements and creation of Filter Bubbles in a political environment.

There are severe consequences when Filter Bubbles are applied in the political landscape. It leads to elimination of diverse opinions, which is the cornerstone of making sound political decisions.<sup>31</sup> This results in what is termed as “Computational Propaganda”. It is a term that is used to denote use of digital means to manipulate public opinion by spreading disinformation and half-truths.

Computational Propaganda maybe defined as - *“An emergent form of political manipulation that occurs over the internet. The term describes the assemblage of social media platforms, autonomous agents, algorithms, and big data tasked with manipulating public opinion.”*<sup>32</sup>

Extensive research has been done on the psychological effect of Computational Propaganda and Filter Bubbles,<sup>33</sup> which suggests that human beings are inclined towards searching and sharing news that provides validation to their pre-existing ideologies and biases, without

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<sup>27</sup> Eli Praiser, *Beware online “filter bubbles”*, TED (Jan. 20, 2021, 6:05 pm), [https://www.ted.com/talks/eli\\_praiser\\_beware\\_online\\_filter\\_bubbles?language=en#t-489029](https://www.ted.com/talks/eli_praiser_beware_online_filter_bubbles?language=en#t-489029)

<sup>28</sup> Robert Epstein & Ronald E. Robertson, *The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections*, AMERICAN INSTITUTION FOR BEHAVIORAL RESEARCH AND TECHNOLOGY (Jan. 22, 2021, 10:15 am), <https://www.pnas.org/content/pnas/112/33/E4512.full.pdf?withds=yes>

<sup>29</sup> *Id.*

<sup>30</sup> Carol Cadwallader & Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, GUARDIAN (Feb. 2, 2021, 7:50 pm), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>

<sup>31</sup> Samantha Bradshaw & Phillip N. Howard, *Why Does Junk News Spread so Quickly Across Social Media? Algorithms, Advertising and Exposure in Public Life*, KNIGHT FOUNDATION (Jan. 30, 2021, 3:30 pm), [https://kf-site-production.s3.amazonaws.com/media\\_elements/files/000/000/142/original/Topos\\_KF\\_White-Paper\\_Howard\\_V1\\_ado.pdf](https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/142/original/Topos_KF_White-Paper_Howard_V1_ado.pdf)

<sup>32</sup> SAMUEL C. WOOLLEY & PHILIP N. HOWARD, COMPUTATIONAL PROPAGANDA: POLITICAL PARTIES, POLITICIANS, AND POLITICAL MANIPULATION ON SOCIAL MEDIA 2-5 (Oxford Studies in Digital Politics, 2018).

<sup>33</sup> Ari Ezra Waldman, *The Marketplace of Fake News*, 20:4 U. PA. J. CONST. L. 845, 851 (2018).

doubting its authenticity. Therefore, it is crucial for people to get exposed to different point of views for making informed decisions, and not enter the rabbit-hole of limited ideas.

## VI. HOW TO CREATE ACCOUNTABILITY: A WAY FORWARD:

### (A) FILTER BUBBLES AND VIOLATION OF RIGHT TO KNOW:

Right to know is a fundamental right incorporated in the right to freedom of speech and expression.<sup>34</sup> Citizens are entitled to demand truthful and unbiased information., a demand that cannot be met with the half-truths of Filter Bubbles. Transmitting biased information is considered by the courts as unjustifiable and an onslaught on the vital right of the people to truthful information under Article 19(1)(a).<sup>35</sup>

In *Cricket Association of Bengal*<sup>36</sup>, the court noted that the citizens have a right to be informed adequately and truthfully as a part of freedom of speech and expression. It also expressed anxiety over the ill-effect of one-sided information on the functioning of democracy and highlighted the role of private agencies play in creating such environment in the digital media-  
*“One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 per cent of the population has an access to the print media which is not subject to pre-censorship. When, therefore, the electronic media is controlled by one central agency or few private agencies of the rich, there is a need to have a central agency, as stated earlier, representing all sections of the society.”*

Therefore, the following inferences can be drawn -

- a. That the right to know diverse opinions and truthful information is protected under Article 19(1)(a).
- b. The creation of Filter Bubbles invalidate the application of the Marketplace of Ideas, which is the basis on which courts refuse to regulate speech on social media.
- c. Social media websites play an active role in curating Filter Bubbles, which violate the right to know and therefore, it is crucial to regulate the digital space and hold these platforms accountable.

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<sup>34</sup> Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India, 1985 (1) SCC 641

<sup>35</sup> Yashwant Sinha & Ors. v. Central Bureau of Investigation through its Director & Anr., 2019 SCC OnLine SC 517.

<sup>36</sup> Secretary, Ministry of I & B v. Cricket Association of Bengal & Anr., (1995) 2 SCC 161.

**(B) FILTER BUBBLES AND INTERMEDIARY LIABILITY:**

In India social media websites fall under the definition of intermediaries and are protected from the content that is posted on their website under Section 79 of the Information Technology (Amendment) Act, 2008. Intermediaries are defined as -

*“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-market places and cyber cafes;”*

Section 79 provides 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.”*

This exemption from liability of intermediaries was introduced after the infamous Baazee.com case,<sup>37</sup> where the owner of the website was made liable and put behind bars for offensive content hosted on his website.

From Section 79 we gather that an intermediary will be exempted from liability if it is a mere platform which hosts information on behalf of others and has applied due diligence to ensure lawful use of the website. It will not be exempted if it is responsible for transmission or modification of information or in deciding the receiver of transmission.

Focusing on the words “*select the receiver of the transmission*”, it can be argued that creation of Filter Bubbles implies selection of the receiver of transmission. Targeted advertisements and dark posts (which are only visible to targeted individual)<sup>38</sup> are examples wherein social media websites and search engines select the receiver.

The courts have never considered this aspect to hold an intermediary accountable for fake news as social media websites generally take the stance that they are merely hosting the content and they have adequate policies in place to adhere to legal requirements. Moreover, proving this fact in the court will be difficult from evidentiary aspect as this phenomena operates at an individual level.

Therefore, the way forward should be to regulate the political content and advertisements on social media keeping in mind the impact of Filter Bubbles and the provisions of Section 79. The Election Commission of India has stated that it will require pre-certification for all political advertisements and the expenditure of parties on political advertisements on social media.<sup>39</sup> Both the leading and opposition parties in India use Facebook to target political advertisements and according to Facebook, the Indian National Congress had a total expenditure of \$39,000, and Bhartiya Janta Party of \$70,000 on political online campaigns.<sup>40</sup> However, the issue still remains that there is no way of finding out which individuals were targeted in the process.

This is not merely a technological problem or legal problem, it involves a solution from both the aspects. Technology cannot be merely battled with restrictions as its growth is inevitable and restriction becomes unrealistic and not to mention a violation of fundamental rights. Finding a balance between order and freedom is essential to preserve democracy.

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<sup>37</sup> Avnish Bajaj v. State (N.C.T.) of Delhi, 116 (2005) DLT 427.

<sup>38</sup> Leiser, *supra* note 4, at 9.

<sup>39</sup> Ians, *EC to monitor social media; political ads to be pre-certified*, THE QUINT (Feb. 3, 2021, 4:45 pm), <https://www.thequint.com/news/hot-news/ec-to-monitor-social-media-political-ads-to-be-pre-certified>

<sup>40</sup> Ualan Campbell-Smith & Samantha Bradshaw, *Global Cyber Troops Country Profile: India*, OXFORD INTERNET INSTITUTE, UNIVERSITY OF OXFORD (Jan. 31, 2021, 9:15 am), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/05/India-Profile.pdf>

## VII. CONCLUSION

It is high time for the Judiciary and the Government to acknowledge this aspect of social media to combat fake news and protect people's right to freedom of speech and expression from algorithmic manipulation. Sooner than later, this issue will change the face of Democracy as we know it. Various internet scholars have analyzed the impact of digital manipulation on Democracy and David P. Reed, an internet networking and policy specialist observed that -

*“Democracy in 2030 will be democracy in name only. The mechanisms of widespread corporate surveillance of user behavior and modification of user behavior are becoming so sophisticated that the citizen interests of democratic-structured countries will no longer be represented in any meaningful way. That is, by collecting vast amounts of information about user preferences and responses, and the use of highly targeted behavior modification techniques, citizens' choices will be manipulated more and more in the interests of those who can pay to drive that system.”<sup>41</sup>*

The internet grows with every second that we spend on it. It gains information on our likes, dislikes, opinions and strategically trap us in an inescapable bubble of propaganda. With the free-flow and abundance of information on the internet, most people believe to be making informed decisions and pride themselves to be well-informed. Little do people realise that there are high level of algorithms in place that are shaping the way we make decisions. People have become so dependent on technology to find answers that they forget to question the technology itself. With psychological profiling and targeted advertisements, technology is reshaping the way we think and the way we respond to reality. Everyone has their own reality and the truth often remains untold. In the age of social media do we truly have freedom of speech or are we just the puppets of a technological revolution?

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<sup>41</sup> Jenna Anderson & Lee Rainie, *Concerns about democracy in the digital age*, PEW RESEARCH CENTER (Feb. 4, 2021, 12:45 pm), <https://www.pewresearch.org/internet/2020/02/21/concerns-about-democracy-in-the-digital-age/>