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Recalibrating Free Speech in the Digital Age: Hate Speech, Fake News, and Article 19(1)(a) in India—A Comparative and Reformatory Analysis

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ABSTRACT

In order to determine whether the current legal framework—which includes the Information Technology (IT) Rules, 2021, sedition laws, and online censorship practices—aligns with the constitutional guarantee of free speech under Article 19(1)(a) and international human rights standards, this paper critically examines the intersection of human rights and digital regulation in India. This analysis's main research questions are: How well do India's laws governing digital speech adhere to the necessity, proportionality, and procedural fairness requirements set forth in both international law and the Indian Constitution? Which procedural and doctrinal flaws run the risk of jeopardizing the defence of fundamental rights in the digital age?

The overbroad and ambiguous character of current statutory provisions, when combined with executive-driven enforcement and inadequate judicial oversight, poses a serious threat to free speech and disproportionately affects marginalized voices. A significant shortcoming of the current system, according to the paper, is the absence of strong procedural protections, openness, and independent evaluation in content moderation, both by the government and private platforms. The paper suggests evidence-based legislative and regulatory reforms by referencing international instruments like the ICCPR and the Santa Clara Principles and drawing on comparative viewpoints from countries like the US and Germany.

These include defining hate speech precisely, creating impartial oversight organizations, enhancing procedural equity in content moderation, and protecting individual privacy. By filling in these gaps, the study adds to the current discussion about readjusting India's free speech laws by providing a road map for bringing domestic legislation into compliance with international human rights standards and guaranteeing that digital regulation respects democratic principles and the rights of all citizens.

KEYWORDS

Freedom of Expression, Hate Speech, Fake News, Article 19(1)(a), Digital Regulation.

INTRODUCTION

A new era of communication is upon us in India as the consequence of the digital transformation of public discourse, which is characterized by both enormous opportunities and formidable challenges. People can now more actively engage in public discourse thanks to the democratization of information distribution brought about by the growth of social media platforms and digital news sources¹. But this same technological development has also made it easier for hate speech and fake news to proliferate quickly, which are issues that seriously jeopardize social cohesiveness and the standard of democratic discourse².

The constitutional right to free speech under Article 19(1)(a) takes on new importance in this changing environment. Although it is the cornerstone of India's democratic system, the right to freedom of speech and expression is not without restrictions. For the sake of public order, decency, and India's sovereignty and integrity, the State has the authority to impose reasonable restrictions. There are serious concerns about whether the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, the ongoing use of sedition laws from the colonial era, and the growing use of online censorship tools are consistent with the constitutional idea of free speech.

This article critically analyses whether the current legal and regulatory framework in India, which includes the IT Rules 2021, laws against sedition, and online censorship practices, aligns with

¹ Pratik Sinha and Arjun Sidharth, 'The Anatomy of Fake News in India' (2019) 54(3) EPW 30.

² UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2021) A/HRC/47/25.

the tenets of Article 19(1)(a). In doing so, it highlights significant doctrinal and legislative flaws, makes evidence-based reform recommendations, and draws on comparative viewpoints from countries like the US and Germany. The goal of the analysis is to add to the continuing discussion about how to balance the demands of free speech with the need to address the dangers of hate speech and false information in the digital age.

CONSTITUTIONAL AND STATUTORY FRAMEWORK: ARTICLE 19(1)(A) AND ITS LIMITS

Article 19(1)(a): The Bedrock of Free Speech

The Indian Constitution's Article 19(1)(a) affirms that everyone has the fundamental right to freedom of speech and expression. The Supreme Court has repeatedly acknowledged this clause as the cornerstone of Indian democracy³, with its roots in the Preamble's guarantee of "liberty of thought and expression." The right extends beyond written or spoken words and includes artistic, cinematic, and digital expression as well as symbolic actions like raising the flag or remaining silent⁴. The Supreme Court has further ruled that, in accordance with Article 21, this right is inseparable from the right to life, highlighting its fundamental position within the constitutional framework.

The evolving nature of communication in the digital age has been reflected in the jurisprudence surrounding Article 19(1)(a). The freedom of the press, commercial speech, broadcasting, and information access are now all specifically included in the right to free speech. These rights have gained even more prominence as social media and online platforms have grown in popularity. The Right to Information (RTI) is a fundamental right since the Supreme Court has acknowledged it as a component of free speech⁵.

Article 19(2): Reasonable Restrictions: Juxtaposing Social Order and Liberty
 The right to freedom of speech and expression is not unqualified, despite its extensive reach. In order to protect India's sovereignty and integrity, security, friendly relations with other countries, public order, decency or morality, contempt of court, defamation,

³ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, *Express Newspapers Ltd. v. Union of India* AIR 1958 SC 578 .

⁴ *Anuradha Bhasin v Union of India* (2020) 3 SCC 637, *Faheema Shirin RK v State of Kerala* 2019 SCC OnLine Ker 2976, *Indian Express Newspapers v Union of India* (1985) 1 SCC 641.

⁵ *Secretary-General, Supreme Court of India v Subhash Chandra Agarwal* (2019) SCC OnLine SC 1459, *State of U.P. v. Raj Narain* (1975) 4 SCC 428.

and incitement to an offense, the State may impose "reasonable restrictions," according to Article 19(2). In order to prevent undue compromise of the fundamental principles of free speech, the Supreme Court has repeatedly stressed that these limitations must be reasonable, proportionate, and enacted by law⁶.

Key Judicial Pronouncements: Shaping Free Speech in the Digital Age

1. In the landmark case of *Romesh Thappar v. State of Madras*⁷, the Court established the principle that free expression is necessary for public education and democratic participation by stating that "freedom of speech and of the press lay at the foundation of all democratic organizations." This case also made it clear that "public order" as a basis for restriction must be construed narrowly, encompassing issues that impact public peace and tranquillity in addition to law and order.
2. *Union of India v. Sakal Papers*⁸ (1962): In this case, the Supreme Court overturned import restrictions on newsprint, ruling that the fundamental right to free speech and expression cannot be restricted by state action, even if it is indirect. The judiciary emphasized that any legislation affecting free speech must be carefully examined for its immediate and direct impact on the right to free speech.
3. *Union of India v. Maneka Gandhi*⁹ (1978): The case is praised for broadening the definition of personal freedom, but it also reaffirmed how crucial free speech is to democratic government. The Court affirmed that the right to free speech is universal and that online rights must be equivalent to offline rights, echoing international human rights norms.
4. *Union of India v. Shreya Singhal*¹⁰ (2015): In a historic ruling, the Supreme Court declared that Section 66A of the Information Technology Act of 2000 was unconstitutional due to its ambiguity and potential to stifle free expression online. The Court held that only speech that incites impending criminal action can be restricted, making a distinction between advocacy, free speech, and incitement. Crucially, it stipulated that intermediaries must only remove content in response to a court order, strengthening procedural protections and ensuring that restrictions are appropriate.

⁶ *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

⁷ *Romesh Thappar v State of Madras* AIR 1950 SC 124.

⁸ *Union of India v Sakal Papers* AIR 1962 SC 305.

⁹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

¹⁰ *Shreya Singhal v Union of India* (2015) 5 SCC 1.

5. In determining the constitutional limits of India's sedition law under Section 124A of the IPC, the Supreme Court's 1962 ruling in *Kedar Nath Singh v. State of Bihar*¹¹ continues to be crucial. Only speech or actions that incite violence or have the potential to cause public disorder can be punished as seditious¹², the Court ruled, upholding the constitutionality of sedition but drastically limiting its application. A principle that protects the right to dissent and makes sure that Section 124A is not abused to suppress lawful political expression is that simple criticism of the government, no matter how intense or inflammatory, does not amount to sedition. This constitutional safeguard against the capricious use of criminal law to stifle dissent is necessary to reconcile the law of sedition with the fundamental right to freedom of speech and expression under Article 19(1)(a).
6. A number of other significant cases further define the limits of state power in relation to free speech and digital regulation. The Supreme Court acknowledged the right to privacy as a fundamental right in *K.S. Puttaswamy v. Union of India*¹³ (2017), which directly affects the IT Rules, 2021's requirements for digital surveillance and traceability. The constitutionality of criminal defamation was addressed in *Subramanian Swamy v. Union of India*¹⁴ (2016), where the court upheld the law while acknowledging concerns about its chilling effect on speech.
7. In order to prevent arbitrary limitations on digital access, *Anuradha Bhasin v. Union of India*¹⁵ (2020) established procedural safeguards for internet shutdowns, requiring transparency, publication of orders, and periodic review. When taken as a whole, these rulings highlight the need for proportionality, procedural justice, and unambiguous legal standards when regulating speech, both online and offline, to prevent state action from unduly violating fundamental rights.

The principles of Article 19(1)(a) and the judicial protections surrounding Article 19(2) have taken on new importance in the current digital environment, where social media and online platforms play a major role in public discourse. In the face of issues like hate speech, fake news, and state censorship, the judiciary's insistence on proportionality, accuracy, and procedural fairness in speech restrictions is essential to

¹¹ *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955.

¹² *Balwant Singh v. State of Punjab* (1995) 3 SCC 214

¹³ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

¹⁴ *Subramanian Swamy v Union of India* (2016) 7 SCC 221.

¹⁵ *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.

upholding democratic values. The constitutional guarantee of free speech continues to serve as a safeguard against capricious state action and a basis for active democratic participation as technology continues to transform forms of expression.

The proliferation of social media and online platforms has both broadened the avenues for public participation and intensified the dissemination of hate speech, misinformation, and disinformation. This evolving digital landscape has exposed the limitations of existing legal frameworks and has prompted the State to increasingly invoke statutory restrictions—often through broadly worded provisions such as sedition and incitement—to regulate speech. Such measures, while ostensibly aimed at maintaining public order, have raised legitimate concerns about their chilling effect on dissent, journalistic independence, and the vibrancy of democratic debate. The underlying equilibrium that Article 19(2) aims to achieve is undermined by the risk of arbitrary or overbroad application, which is further increased by the imprecision and ambiguity of many of these laws.

At the same time, India's sociopolitical climate, which is characterized by increased political polarization and communal tensions, has made the task of defending free speech even more difficult. Intermediaries' regulatory responsibilities under laws such as the IT Rules, 2021¹⁶, have also drawn criticism for possibly encouraging excessive censorship and suppressing free speech online. The Supreme Court has reaffirmed the need for proportionate and narrowly tailored restrictions in seminal rulings like *Shreya Singhal v. Union of India* (2015), but putting these principles into practice continues to be a difficult task. Article 19(1)(a)'s continued relevance in this context is contingent upon careful judicial monitoring, accurate legislative drafting, and a steadfast dedication to the core principles of democracy and pluralism.

INTERNATIONAL HUMAN RIGHTS STANDARDS ON FREEDOM OF EXPRESSION: LEGAL TESTS, JURISPRUDENCE, AND PROCEDURAL SAFEGUARDS

With its roots in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹⁷, international human rights law provides a fundamental framework for freedom of expression. This clause upholds the universal right to free speech while allowing for strictly limited limitations to safeguard conflicting interests like public order, national security, or other people's rights. A

¹⁶ Ramanujam A and Gupta A, 'Intermediary Liability in India' (2021) 13 NUJS L Rev 89, examining chilling effects of compliance.

¹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

strict three-part test must be met by any restriction¹⁸: (1) it must be mandated by a law that is easy to understand and accessible; (2) it must pursue a legitimate goal listed in international law; and (3) it must be necessary and proportionate—using the least invasive methods possible without unduly suppressing protected speech. The UN Human Rights Committee's General Comment¹⁹, which expounds on the extent and acceptable constraints of Article 19, further highlights the importance of contextual analysis of the speaker's intent and immediate causal connection to harm in the context of hate speech regulation.

These principles are applied in instructive ways in European jurisprudence. The European Court of Human Rights (ECtHR) reversed a journalist's conviction for airing interviews with racist organizations in *Jersild v. Denmark* (1994)²⁰, concluding that the documentary served the public interest by exposing extremism. The Court emphasized that journalistic context and intent disqualified hate speech liability. In contrast, the ECtHR maintained a conviction for defaming religious doctrines in *E.S. v. Austria*²¹ (2018), concluding that the remarks veered into needless incitement that was likely to incite intolerance. These decisions demonstrate the context-dependent balance that international norms demand, preserving free speech while allowing limitations only in cases where speech directly jeopardizes public order or human dignity.

Strong procedural safeguards are necessary for the fair and efficient implementation of such restrictions in the digital age. The availability of channels for users to offer feedback, submit appeals, and seek redress for moderation decisions is crucial, as are transparent legal frameworks and content moderation policies. This is especially important in a time when algorithmic decision-making can result in disproportionate censorship or the suppression of free speech, a phenomenon known as the "black box effect."²² Concerns regarding digital prior restraint and collateral censorship are also growing, as private platforms may bypass or leach content without sufficient due process safeguards in response to social or regulatory pressure.

In order to establish a safe, welcoming, and open digital environment, it is crucial to encourage continued cooperation

¹⁸ UNHRC, 'General Comment No 34: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34

¹⁹ UN Human Rights Committee, 'General Comment No 34: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34.

²⁰ *Jersild v Denmark* (1994) 19 EHRR 1 (ECtHR).

²¹ *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018).bla

²² Tarleton Gillespie, 'Platforms Are Not Intermediaries' (2018) 2 Georgetown Law Technology Review 198.

between governments, social media companies, and civil society organizations. This kind of collaboration is necessary to guarantee that legal frameworks protect and preserve basic human rights while simultaneously successfully tackling the problems caused by hate speech and false information in the digital era.

HATE SPEECH AND FAKE NEWS IN THE DIGITAL ERA

Through both phenomenal possibilities for the exercise of free speech and potent challenges in the form of hate speech and fake news, the digital revolution has fundamentally changed the nature of public discourse. These issues have become especially urgent in India because of the country's large and diverse population, rapid digitization, and strong adherence to democratic principles. The societal, legal, and regulatory reactions to these phenomena are still developing, and the special features of digital communication add to their complexity.

Defining the Problem

Hate Speech: While there isn't a single, widely recognized definition of hate speech, it's generally understood to be any speech or expression that aims to denigrate, degrade, threaten, or incite animosity toward people or groups because of characteristics like religion, ethnicity, caste, gender, sexual orientation, or other identity markers²³. Hate speech has the power to erode social cohesiveness and promote pervasive intolerance, which can have negative effects beyond its immediate targets. Social norms, cultural context, and the inherent subjectivity in defining what qualifies as "offence" or "incitement" make it difficult to identify and regulate hate speech. Despite making some types of hate speech illegal under laws like Sections 153A and 295A of the IPC, Indian law still struggles to establish boundaries that do not violate speech that is protected by the constitution²⁴.

Fake News: The intentional production and distribution of inaccurate or misleading information, frequently for ideological, financial, or political reasons, is referred to as fake news. Misinformation has spread quickly through text, photos, and videos thanks to the digital ecosystem's low publication barriers and viral potential. The issue has been made worse in India by elements like linguistic diversity, digital illiteracy, and the country's rapidly expanding internet user base, which makes it harder for people to tell the difference between authentic and fake

²³ UN Office of the High Commissioner for Human Rights, *Rabat Plan of Action on the Prohibition of Incitement to Hatred* (2013).

²⁴ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

content. Fake news has far-reaching effects, from manipulation of election results to damage to one's reputation and public fear.

By enabling marginalized groups to take part in national and international discussions, digital platforms have significantly democratized public discourse. But this increased accessibility has also made it possible for hate speech and false information to spread quickly and frequently unchecked. Because of the speed and virality of online content, harmful messages can reach millions of people in a matter of minutes, and extreme viewpoints are encouraged by the anonymity of digital spaces. Social media algorithms, which are intended to maximize engagement, often magnify sensational or divisive content, and algorithm-driven echo chambers serve to polarize communities and reinforce preexisting biases. Digital platforms frequently have weak gatekeeping because they lack strong editorial oversight and conformity to local legal or cultural norms, in contrast to traditional media²⁵. Effective moderation is difficult due to the large volume and linguistic diversity of user-generated content, as automated tools are unable to capture subtleties and human oversight. Additionally, the worldwide scope of the internet makes it more difficult to establish consistent international standards and enforce national laws.

These dynamics have a big effect on society. Unchecked hate speech and fake news propagation exacerbates social divisions, encourages violence, and erodes public confidence in the media and democratic institutions. By influencing elections and public opinion, manipulation of digital information can threaten democratic processes. Overzealous or capricious regulation, particularly by private platforms, runs the risk of stifling legitimate dissent and minority voices through over-censorship. Coordinated disinformation campaigns and cyber defamation can seriously damage a person's reputation and cause financial harm, while hate speech targets communities and individuals with psychological distress and social exclusion.

A complex, multifaceted strategy that strikes a balance between the necessity of preventing harm and the imperative of preserving free expression is needed to address these issues. While adhering to the constitutional principles underlying Article 19(1)(a), legal regulation must be supported by digital literacy programs, strict content moderation procedures, and proactive community involvement.

²⁵ ARTICLE 19, *Global Principles on Freedom of Expression and Platform Governance* (2022).

INDIA'S LEGAL AND REGULATORY FRAMEWORK

The IT Rules, 2021

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021)²⁶ are a major regulatory change that was introduced in India in response to the rise in hate speech and fake news in the digital age. Social media sites and digital news publishers are subject to stringent requirements under these regulations, which require that offensive content be removed quickly—typically within 24 to 72 hours—after being brought to the attention of courts or government organizations. In addition, platforms must designate compliance officers who are based in India; if they don't comply, they risk losing their "safe harbour" protections under Section 79 of the IT Act. The government claims that these actions are required to prevent the spread of harmful content and maintain public order, but critics argue that the regulations give executive authorities excessive power, allowing content removal without prior judicial review and creating the risk of over-censorship and stifling free speech.

The IT Rules, 2021's "traceability" requirement, which requires messaging platforms to reveal the source of content that has been flagged when directed to do so by authorities, is one of its most controversial features. As platforms like WhatsApp have pointed out in ongoing litigation, this provision, which is supposedly meant to address serious offenses like mob violence and threats to national security, has been contested for its potential to compromise user privacy and the integrity of end-to-end encryption²⁷. The ambiguity of important terms like "harmful" or "misleading" content, which lack precise statutory definitions and run the risk of arbitrary or inconsistent enforcement, has also drawn criticism from legal experts and civil society organizations. The situation is made more difficult by the use of automated content moderation algorithms, which frequently have trouble understanding linguistic and cultural quirks, particularly in a linguistically diverse nation like India.

The conflict between the need to address actual harms caused by hate speech and digital disinformation and the constitutional mandate to protect freedom of expression under Article 19(1)(a), subject to only "reasonable restrictions" under Article 19(2), is reflected in the broader regulatory approach embodied in the IT Rules, 2021. Critics contend that because the rules are

²⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Notification No. G.S.R. 101(E), 25 February 2021.

²⁷ *WhatsApp LLC v Union of India* WP(C) 10148/2021 (Delhi High Court, pending).

subordinate legislation, they might go beyond the purview of the parent IT Act and fail to provide the substantive and procedural protections demanded by international human rights standards and the constitution. It is clear from the ongoing legal and policy discussion that in order to guarantee that regulatory interventions are both successful and in line with India's democratic and constitutional values, a more complex and participatory legislative process, based on openness, stakeholder consultation, and judicial supervision, is necessary.

JUDICIAL REVIEW

The ongoing conflict between executive power and constitutional protections for fundamental rights in India's digital regulatory environment is brought to light by the Bombay High Court's interim order in AGIJ Promotion of Nineteenonea Media Pvt. Ltd. v. Union of India²⁸(2021), which stayed some provisions of the IT Rules, 2021. Concerns regarding excessive executive control, a dearth of substantive procedural safeguards, and the lack of judicial review prior to content removal—a framework that runs the risk of permitting censorship, capricious decision-making, and a decline in user trust—were at the heart of the Court's reasoning. The Rules give the government disproportionate authority to control online speech by giving non-judicial organizations and interdepartmental committees the authority to order content removal, which gives rise to justifiable concerns about overreach and dissent suppression. Given the constitutional mandate under Article 19(1)(a) and the precedent set by cases such as Shreya Singhal, the judiciary's involvement in AGIJ highlights the need for judicial oversight to guarantee that any restrictions on free speech are both necessary and proportionate.

The IT Rules, 2021's inherent ambiguity, especially with regard to ill-defined terms like "harmful," "offensive," or "misleading" content, exacerbates these worries even more. When coupled with the possibility of sanctions, this ambiguity encourages platforms to err on the side of excessive censorship, which stifles free speech and pluralistic debate. Platforms like WhatsApp have invoked the Supreme Court's historic K.S. Puttaswamy ruling on the right to privacy in order to challenge the contentious "traceability" requirement, which requires platforms to identify the sender of messages and compromises end-to-end encryption. Critics further contend that the IT Rules run the risk of being unconstitutional because they are subordinate legislation that

²⁸ AGIJ Promotion of Nineteenonea Media Pvt. Ltd. v. Union of India (2021) W.P. (C) 1010/2021.

may go beyond the authority granted by the parent IT Act, 2000, especially in the absence of meaningful parliamentary oversight. In light of changing technological and regulatory challenges, the AGIJ case thus serves as an example of the judiciary's vital role in examining executive action and defending constitutional principles.

Sedition Laws (Section 124A IPC)

According to Section 124A of the Indian Penal Code²⁹, sedition is defined as any act—whether through written or spoken words, signs, or outward manifestations—that incites or seeks to incite hatred or contempt, or that provokes or seeks to incite disenchantment with the legally established Indian government. Although the section makes it clear that legitimate criticism of government actions, intended to change them without inciting hatred or contempt, does not amount to sedition, the definition of "disaffection" under this provision is broad and includes disloyalty and all sentiments of enmity. The prescribed penalty is harsh and can include a fine in addition to a life sentence or a maximum sentence of three years in prison. Notably, sedition is a crime for which there is no bail, and those found guilty may lose other civil liberties as well as their ability to work for the government.

There has been ongoing constitutional discussion and criticism of Section 124A's continued use and existence. Its colonial roots are well known; in 1870, the clause was added to quell anti-colonial dissent³⁰, and it was used against well-known freedom fighters like Mahatma Gandhi and Lokmanya Tilak. The law's ambiguous wording, especially the nebulous concept of "disaffection," critics contend, chills free speech by discouraging people from voicing valid criticism of the government for fear of legal repercussions. In an attempt to balance Section 124A with the constitutional guarantee of free speech under Article 19(1)(a), the Supreme Court held in Kedar Nath Singh's case that only speech or expression that incites violence or has the potential to cause public disorder falls within its purview. However, the law has been used in contentious situations like the 2016 JNU incident, which raises questions about its abuse as a means of suppressing dissent in a democracy. Many commentators believe that the Supreme Court's recurring reminders that freedom of speech is not unqualified and may be subject to reasonable restrictions under Article 19(2) have not sufficiently safeguarded vigorous democratic debate, highlighting the urgent need for a thorough judicial and legislative

²⁹ Indian Penal Code 1860, s 124A (Sedition).

³⁰ Gautam Bhatia, 'The Colonial Origins of Free Speech Exceptionalism' (2020) 65 American Journal of Comparative Law 1.

reconsideration of sedition in modern-day India.

Online Censorship

In India, the government has the authority to order intermediaries to restrict access to online content, especially through the use of Section 69A of the Information Technology (IT) Act³¹. The growing number of nationwide internet shutdowns and website blockings is proof that this statutory mechanism has gained prominence. The purported justification for these regulatory actions is to stop the spread of hate speech, fake news, and disinformation—problems that have been made worse by the explosive growth of digital platforms. But for a number of reasons, this strategy has come under heavy fire. The most significant of these is the lack of transparency: blocking orders are frequently not disclosed to the public or subject to thorough independent or judicial review, which raises questions regarding accountability, fairness, and the validity of executive action. Additionally, the threat of penalties for non-compliance and the broad and occasionally ambiguous criteria for content removal encourage intermediaries to err on the side of excessive censorship, which suppresses free speech and undermines the diversity of opinions necessary for a robust democracy.

Critics contend that the threat of criminal penalties for noncompliance, along with the wide and occasionally ambiguous grounds for blocking, creates a regulatory environment that is vulnerable to overreach and over censorship. By imposing strict takedown timelines and broadening the definition of intermediaries, the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, have exacerbated these worries by exposing a wide range of platforms to possible liability and surveillance. In the 2015 case of *Shreya Singhal v. Union of India*, the Supreme Court maintained the constitutionality of Section 69A³², highlighting its procedural safeguards and narrowly tailored scope while also stressing the importance of accountability and transparency. However, it has been argued that the growing use of mass content blocking and blanket internet shutdowns, frequently during times of civil unrest, has disproportionately limited access to information, undermined economic activity, and stifled free speech. The regulatory environment is made more difficult by the difficulties in policing enormous amounts of digital content, the opaqueness of algorithmic decision-making, and the conflict between private and public interests. These events highlight the urgent need for a more open, inclusive, and rights-respecting legal system that balances

³¹ Information Technology Act 2000, Section 69A.

³² Information Technology Act 2000, s 69A.

the dangers of harmful internet content with India's constitutional guarantee of free speech under Article 19(1)(a).

COMPARATIVE ANALYSIS: UNITED STATES AND GERMANY

In light of their different constitutional traditions and legal systems, the US and Germany have essentially different approaches to controlling hate speech and fake news.

With only a few exceptions for obscenity, genuine threats, and incitement to imminent lawless action, the First Amendment in the US offers remarkably strong protection for the right to free speech³³. The Communications Decency Act's³⁴ Section 230 shields online intermediaries from liability for user-generated content, allowing platforms to host a wide range of speech without worrying about legal ramifications. This robust constitutional shield also extends to the digital realm. Because of this, fake news is not specifically illegal, hate speech is generally protected unless it directly incites violence, and remedies for harm are either left to market-driven solutions through platform policies or are primarily civil (such as defamation suits). Despite maximizing freedom of expression, this model has come under fire for encouraging the spread of false information and dangerous content. Furthermore, worries about accountability and the lack of procedural transparency have been raised by the enormous power that private platforms wield in content moderation, frequently through arbitrary and opaque processes.

Germany, on the other hand, takes a more interventionist approach, which is consistent with its historical and constitutional commitment to striking a balance between the preservation of public order and individual dignity and the right to free speech. Freedom of expression is guaranteed by Article 5 of the Basic Law, which also expressly allows for statutory restrictions to protect these rights. Large social media companies are required by the Network Enforcement Act (NetzDG), which went into effect in 2018, to remove "clearly illegal" content—such as hate speech, Holocaust denial, and incitement to hatred—within 24 hours of notification, or within seven days for less obviously illegal content. Fines for noncompliance can reach €50 million. Additionally, NetzDG requires user notifications, open complaint processes, and biannual public reporting on content moderation operations. Recent changes have mandated the mandatory reporting of specific criminal content to federal authorities, improved oversight, and added appeals procedures. Germany's model has been criticized for encouraging platforms to

³³ Brandenburg v Ohio 395 US 444 (1969).

³⁴ Communications Decency Act 1996, 47 U.S.C. s 230.

remove excessive amounts of content in order to avoid penalties, which could lead to the suppression of lawful speech and give private entities significant censorship power. However, it is praised for its judicial oversight mechanisms and responsiveness to online harms.

The ongoing global discussion about how to best strike a balance between the demands of public safety, free expression, and the obligations of digital intermediaries in the regulation of online speech is highlighted by these divergent regulatory paradigms. It is crucial to take into consideration India's distinct constitutional, social, and technological context when determining which regulatory paradigm—American or German—might be most advantageous for the nation. The United States model emphasizes expressive liberty and reduces government interference. It is distinguished by the First Amendment's nearly absolute protection of free speech and the wide immunity granted to intermediaries by Section 230 of the Communications Decency Act. This strategy optimizes the marketplace of ideas, but it has also made it possible for hate speech, false information, and damaging content to spread unchecked online.

In the Indian context, where social cleavages are deep and the potential for communal violence is real, such an unrestrained approach is unlikely to be appropriate or effective. The Indian Supreme Court has repeatedly affirmed that freedom of speech under Article 19(1)(a) is subject to "reasonable restrictions" under Article 19(2), reflecting a constitutional consensus that public order, decency, and the integrity of the state are legitimate grounds for regulatory intervention.

In contrast, Germany's model provides a more interventionist and structured framework that might be more appropriate for India's requirements. The Network Enforcement Act (NetzDG) places explicit obligations on platforms to remove obviously illegal content within specified timeframes, subject to judicial oversight. The German Basic Law guarantees free expression but allows statutory restrictions to protect public order and individual dignity. This model aims to strike a balance between individual rights, social harmony, and collective security while acknowledging the harms that hate speech and fake news cause in the real world. Crucially, the German strategy reduces the risks of arbitrary censorship and overreach by incorporating judicial review channels, transparency requirements, and procedural safeguards. The shortcomings of the current regime under Section 69A and the IT Rules, 2021, which have been criticized for opacity, executive overreach, and inadequate accountability, could be addressed for India by implementing some of the model's

components, such as statutory clarity, strong procedural safeguards, transparency in content moderation, and meaningful avenues for redress.

The best course of action is probably a hybrid strategy that incorporates the best features of the German model, such as judicial supervision, transparency, and proportionality, while also taking into account India's social realities and constitutional traditions. With such a framework, India could effectively combat online harms without compromising its fundamental commitment to democratic values and free speech. In order to ensure that regulatory actions are both successful and constitutionally sound, legal reform in this area should be based on the principles of necessity, proportionality, and accountability.

LEGISLATIVE DRAWBACKS IN INDIA

Vague and Overbroad Provisions

- **Uncertain phrasing:** Laws such as Section 295A IPC and Section 66A of the IT Act (which was overturned in *Shreya Singhal v. Union of India*, 2015) use vague language like "offensive" or "outraging religious feelings," which results in inconsistent and subjective enforcement.
- **Chilling Effect:** The Supreme Court acknowledged in *Shreya Singhal* that people are discouraged from exercising their right to free speech because they are afraid of being prosecuted.
- **Broad Definitions in the 2021 IT Rules:** Words like "misleading," "defamatory," and the broad definition of "social media intermediary" run the risk of being overly monitored and removed arbitrarily.

Lack of Independent Oversight

- **Executive Dominance:** The government can censor content with little judicial review or openness thanks to Section 69A of the IT Act.
- **Non-Judicial Committees:** The IT Rules, 2021, give non-judicial adjudicatory bodies the authority to take down content, which raises questions about due process violations and bureaucratic censorship.
- **Insufficient Procedural Safeguards:** Despite the existence of procedural safeguards on paper (as mentioned in *Shreya Singhal*), they are frequently ineffective or badly executed in real-world situations.

Chilling Effect

- **Self-Censorship:** People, journalists, and artists frequently self-censor out of fear of being sued under sedition, defamation, or IT laws.
- **Judicial Recognition:** The Supreme Court has recognized the need for precisely targeted restrictions, highlighting the chilling effect that vague and defamatory laws have on free speech.

WEAK SAFEGUARDS FOR JOURNALISTIC AND ARTISTIC EXPRESSION

- **Press and Artistic Freedom at Risk:** Under a number of laws, including the Emergency period, the M.F. Husain³⁵ and Padmaavat³⁶ controversies, journalists and artists are subject to censorship and legal challenges.
- **Extension to Digital Media:** The IT Rules, 2021, establish a "Code of Ethics" for OTT platforms and digital news, giving the government the authority to censor content and possibly endanger artistic freedoms.

INADEQUATE PROTECTION FOR WHISTLEBLOWERS AND DISSENTERS

- **Targeting Activists:** Laws are used to prosecute protesters and critics (such as during CAA demonstrations), frequently on the basis of incitement to violence and sedition.
- **Selective Enforcement:** The right to dissent is threatened and social divisions are widened by this selective targeting.

Disproportionate and Non-Transparent Measures

India leads the world in internet blackouts, which are frequently enforced with little accountability or openness (Anuradha Bhasin v. Union of India, 2020).

Secret Blocking Orders: Section 69A content blocking is frequently opaque, with little chance for public disclosure or contestation.

Algorithmic Opacity: Decisions are frequently made without clear guidelines or due process, and platform-based content moderation is opaque. End-to-end encryption and privacy rights are at odds with traceability mandates, which require platforms to identify the "originator" of content (IT Rules, 2021). This raises concerns about

³⁵ Jaffrelot C and Kumar S, 'The M.F. Husain Case: Secularism and Artistic Freedom in India' (2012) 47(2) *Economic and Political Weekly* 19.

³⁶ Santhosh K, 'Padmaavat: The Battle for Artistic Freedom' (2018) 53(8) *Economic and Political Weekly* 12.

surveillance (K.S. Puttaswamy v. Union of India, 2017).

Judicial Pushback: The Supreme Court has stressed the need for proportionality and procedural safeguards while invalidating or restricting overbroad provisions (such as Section 66A in Shreya Singhal).

Comprehensive Reform is Required: Ongoing legislative and regulatory gaps underscore the necessity of clear statutory definitions, impartial supervision, decriminalization of dissent, and strong safeguards for free speech and digital privacy.

REFORMS

A strong, backed by evidence reform agenda for India's laws pertaining to online content, hate speech, and free speech must be based on comparative best practices, constitutional principles, and the realities of the country's pluralistic society. The recommendations that follow provide a thorough framework for legislative and regulatory reform by combining pertinent case law, international evidence, and shortcomings in the current Indian approach.

1. Independent Oversight and Victim-Centered Regulation

For fairness and victim-centered justice, independent commissions to monitor complaints of hate speech and fake news must be established. There are insufficient checks and balances in place in India's current system, where blocking orders and content removal are primarily executive-driven under Section 69A of the IT Act and the IT Rules, 2021. International experience, especially from the UK³⁷ and EU, shows that victim-centered approaches and independent oversight bodies result in more moral, equitable, and efficient regulation. Such reforms improve victim protection and guarantee that freedom of expression is not unduly restricted, as demonstrated by EU directives and the frameworks of the Council of Europe. In India, complaints and takedown/blocking orders could be reviewed by a statutory Free Speech Commission with judicial members, guaranteeing impartiality and due process.

2. Positive Measures Over Punitive Censorship

India should place more emphasis on educational and early detection measures—such as media literacy campaigns, educational programs, and counter-speech initiatives—instead of primarily depending on criminal sanctions. Evidence from six EU nations—Austria, Germany, Hungary, Italy, Poland, and the UK—

³⁷ Communications Act 2003 (UK), ss 3-6 (Ofcom's regulatory duties).

shows that such constructive actions lessen hate speech and foster tolerance, particularly among young people. Projects funded by the UN have also promoted communication and decreased hate crimes in Moldova and the Western Balkans. Preventive measures can address underlying issues and enable citizens to critically assess information, which can lessen the need for punitive censorship in India, where hate speech frequently takes advantage of social and religious fault lines.

3. Transparent, Accountable Content Moderation

To protect rights, content moderation must be transparent and accountable. Platforms must disclose the reasons behind takedowns, offer appeal channels, and submit decisions to judicial review in accordance with Germany's Network Enforcement Act (NetzDG). In contrast to opaque, capricious censorship, this model has produced more consistent and rights-respecting moderation. In India, written justifications, public reporting, and explicit appeal and independent review processes ought to be included with any content removal decisions made by authorities or platforms. The ongoing complaint that Section 69A blocking orders and IT Rules, 2021 takedowns lack due process and transparency would be addressed by this (Shreya Singhal v. Union of India, 2015).

4. Targeted Legal Reform: Narrow Definitions and Proportionality

Because Indian law currently lacks precise, limited definitions of hate speech and fake news, its application is too general and arbitrary. Sections 505 IPC (public mischief), 295A IPC (outraging religious feelings), and 153A IPC (promoting enmity) are frequently invoked without clear criteria, which has chilling effects and selective targeting. In accordance with international best practices, the Law Commission of India suggested new provisions (such as Sections 153C and 505A) in its 267th Report³⁸ that would only punish speech that is extremely dangerous or incites violence. Narrowly tailored laws can effectively protect public order without unduly restricting free speech, as demonstrated by U.S. Supreme Court jurisprudence (e.g., *R.A.V. v. St. Paul*). Only speech that directly incites violence or discrimination should be punished under Indian reform, making sure that any limitations are appropriate and necessary in accordance with the proportionality doctrine (*Modern Dental College v. State of Madhya Pradesh*, 2016).

³⁸ Law Commission of India, 'Report on Hate Speech' (2017) Report No. 267.

5. Capacity Building and Civil Society Engagement

In order to keep an eye on hate speech, spread counternarratives, and assist victims, civil society organizations are essential. Initiatives funded by the UN in Kenya, Côte d'Ivoire, Moldova, and the Balkans have demonstrated how civil society involvement can lessen hate speech and create safer forums for discussion. In India, the ecosystem's ability to respond to online harms without state overreach would be improved by providing funding, training, and legal protections to NGOs, fact-checkers, and community groups.

6. Media Literacy and Digital Education

Including digital education and media literacy in school curricula is a tried-and-true method of fostering students' resistance to hate speech and false information. These initiatives, which have been adopted by Moldova and the EU, have improved critical thinking skills and decreased vulnerability to misinformation. A national media literacy campaign in India, created in collaboration with tech platforms, civil society, and educators, would enable people to recognize and reject hate speech and fake news, lessening the need for harsh government action.

7. Proportional and Transparent Internet Restrictions

India is the trailblazer in internet shutdowns, which are frequently enforced without judicial review and under ambiguous guidelines. Blanket shutdowns compromise civil liberties, economic activity, and information access. Legal reform should require judicial authorization, require public reporting, and limit shutdowns and content blocking to specific, immediate threats. Such measures lessen arbitrary restrictions and protect fundamental rights, as shown by comparative models from the EU and Germany, where judicial oversight and transparency are requirements for content blocking.

Comprehensive reform of India's legislative framework governing free speech and online content is desperately needed to address the country's enduring problems with ambiguity, executive overreach, and inadequate procedural protections. Adopting a thorough Free Speech Code with precise and unambiguous definitions of hate speech and fake news is one of the main recommendations. This would address the current reliance on ambiguous provisions found in the IT Act and IPC, which have resulted in arbitrary enforcement and a suppression of free speech. The ruling in *Shreya Singhal v. Union of India* by the Supreme Court emphasizes the constitutional requirement that speech restrictions be proportionate and narrowly tailored,

punishing only direct incitement to attack or discrimination. By avoiding overcriminalization, such statutory clarity would bring Indian law into line with global best practices, like Germany's NetzDG.

Establishing independent oversight mechanisms to guarantee that executive action in content regulation is subject to meaningful judicial review is equally important. A crucial check on the current executive-driven process under Section 69A of the IT Act and the IT Rules, 2021, could be provided by a statutory Free Speech Commission with judicial representation that reviews content takedown and blocking orders. In addition to helping rebuild public confidence in the impartiality and fairness of content moderation, this would operationalize the procedural safeguards envisioned in Shreya Singhal. It is also essential to reform the laws pertaining to criminal defamation and sedition. Criminal defamation should be decriminalized to avoid its chilling effect on free speech, while Section 124A (sedition) should be repealed or significantly narrowed to punish only incitement to imminent violence, in accordance with *Kedar Nath Singh v. State of Bihar* (1962).

Legislative priorities must also include safeguarding whistleblowers, artistic expression, and press freedom. The M.F. Husain and Padmaavat controversies demonstrate how arbitrary morality or decency standards can stifle creative and investigative work. Instead, statutory protections should protect journalists, artists, and whistleblowers from unwarranted prosecution and harassment. By requiring the publication of all content blocking and takedown orders, along with justifications and appeal channels, transparency and accountability should be ingrained. This would guarantee due process compliance and address the opacity of Section 69A orders. In addition, in accordance with the right to privacy established in *K.S. Puttaswamy v. Union of India* (2017), the traceability requirements in the IT Rules, 2021, must be repealed or modified in order to protect privacy and encryption.

A significant threat to the structure of free speech in the digital age is the phenomenon of "private censorship" by social media companies. Private platforms function under their own terms of service and community guidelines, and unlike state censorship, which is subject to constitutional and statutory limitations, they have significant authority to remove, demote, or restrict content without the usual procedural safeguards required of government action. Given that big platforms now serve as de facto public squares, influencing the parameters of public discourse and information access, this dynamic is especially worrisome. However, these platforms are not state actors and are typically

exempt from constitutional free speech protections like the First Amendment or Article 19(1)(a) of the Indian Constitution, as stated in U.S. law and echoed in Indian debates.

Such private moderation carries the risk of arbitrary or opaque decision-making, whereby content that expresses minority or dissenting opinions may be removed without adequate explanation or legal redress. A coalition of civil society organizations created the Santa Clara Principles, which provide a normative framework to address these issues by supporting notice, openness, and the right to appeal in content moderation procedures. These guidelines require platforms to post explicit guidelines, give users detailed explanations for takedowns, and set up easily accessible appeal procedures. This strategy is in line with expanding judicial commentary, such as recent findings by the U.S. Supreme Court, which has acknowledged the necessity of procedural fairness and the enormous gatekeeping power of platforms—despite declining to grant private actors constitutional protections for free speech.

In India, cases like the Sanjay Hegde case before the Delhi High Court have brought up the issue of whether social media companies should be regarded as "state" under Article 12 of the Constitution. Although such a duty has not yet been imposed by Indian courts, the need for procedural fairness in private moderation is becoming more pressing due to the growing reliance on digital platforms for political expression and civic engagement. In the absence of strong protections, like those outlined in the Santa Clara Principles, there is a genuine risk of "collateral censorship," in which platforms, driven by risk aversion or regulatory pressure, excessively delete acceptable content, stifling free speech and compromising the public's right to information³⁹. Therefore, in addition to state censorship, any comprehensive regulatory approach must address the substantive and procedural fairness of private content moderation in the digital public sphere.

Last but not least, legislative reform ought to support counter-speech and media literacy programs, encourage proportionality in internet shutdowns, and utilize comparative models for intermediary responsibility. Reliance on punitive measures can be decreased by fostering resilience against hate speech and disinformation through national media literacy campaigns and assistance for civil society involvement. As required by Anuradha Bhasin's judgement, internet shutdowns should be limited to serious threats, subject to judicial authorization, and subject to

³⁹ The Santa Clara Principles on Transparency and Accountability in Content Moderation (2018) <https://santaclaraprinciples.org> accessed 28 June 2025.

stringent time limits. India's regulatory framework will be both efficient and constitutionally sound if it takes inspiration from global models such as Germany's NetzDG but adds more robust protections for free speech. India can more effectively strike a balance between addressing real harms in the digital public sphere and safeguarding fundamental rights by putting these evidence-based recommendations into practice.

CONCLUSION

There are advantages and disadvantages for free speech in the digital age. Overzealous censorship and punitive legislation can suppress legitimate dissent, while hate speech and fake news pose a threat to social harmony and democracy. Although robust expression is intended to be protected by Article 19(1)(a) of the Indian Constitution, existing laws and regulations do not meet this goal. Independent oversight, constructive educational initiatives, open moderation, focused legal reform, and robust civil society involvement are the most successful tactics, according to empirical data from comparable jurisdictions. India can uphold the spirit of Article 19(1)(a) in the twenty-first century by implementing these reforms and creating a digital public sphere that is both responsible and free.