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# FREEDOM OF SPEECH AND EXPRESSION IN THE DIGITAL AGE: CONSTITUTIONAL CHALLENGES

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## ABSTRACT

With the advent of time there has been transitional shift from the physical assemblies to digital sphere which has developed the relationship between the individual, the state, and communication forums. The aim of the paper is to make analysis of the constitutional challenges to freedom of speech and expression. Through this paper we have made a comparative analysis with the primary focus on Indian laws while also dealing with laws related with the United States of America, the European Union and Brazil.

While dealing with the laws in India, although there has been rapid expansion of digital rights through various judicial doctrines such as the "Parity Principle" established in *Shreya Singhal v. Union of India* and the "Proportionality Mandate" in *Anuradha Bhasin v. Union of India*.

Through this paper we have also tried to highlight the American "marketplace of ideas" doctrine with the European Union's "systemic risk" framework under the Digital Services Act (DSA), showcasing a global shift toward proactive platform accountability.

**Keywords:** Speech, Expression, Fundamental Rights, Reasonable Restrictions

## 1. INTRODUCTION

The transition of the public outreach from physical world to meta physical digital architectures has fundamentally reconfigured the relationship between the individual, the state, and the platforms of communication. Although the constitutional protections for speech were forged in the period of the printing press, in today's time and age they are being stress-tested by technologies that offer instantaneous global connect, algorithmic amplification, and pervasive surveillance.<sup>1</sup> This explores the friction between sovereign regulatory impulses and the right to free expression, mainly on the constitutional landscapes of India, the United States, and the European Union.<sup>2</sup>

### Theoretical Foundations of Expressive Liberty

The conceptual idea of free speech defers across democratic landscape, leading to divergent legal responses to these challenges. In the United States, the First Amendment is often seen through the lens of a "marketplace of ideas," a doctrine with the belief that free competition between ideas will eventually outplay falsehoods.<sup>3</sup> But, this laissez-faire attitude faces a profound crisis in an era where platform algorithms do not prioritize truth but engagement, often amplifying sensationalism or misinformation over reasoned discourse.<sup>4</sup>

The ideas of market place given by thinkers such as John Stuart Mill and later articulated by Justice Oliver Wendell Holmes, is based on the hypothesis.<sup>5</sup> This change has led to various public discourse in the public square whereby which challenging the possibility of marketplace with the unidentified ideas.<sup>6</sup>

The constitution of the United States provides us with a clearer though process on protection of rights. The First Amendment was brought to bring umbrella of rights related with speech, press, assembly.<sup>7</sup> A back drop of this constitutes the challenges of privacy in today's time and age.<sup>8</sup> As in present time the digital sphere is taken over by commercial giants in such an

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<sup>1</sup> Tim Wu, *Is the First Amendment Obsolete?*, 117 Mich. L. Rev. 547, 548–50 (2018).

<sup>2</sup> *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1 (India); *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. I-317.

<sup>3</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>4</sup> Jack M. Balkin, *Free Speech in the Algorithmic Society*, 51 U.C. Davis L. Rev. 1149, 1153–55 (2018).

<sup>5</sup> John Stuart Mill, *On Liberty* 76–80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>6</sup> Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* 9–15 (2017).

<sup>7</sup> U.S. Const. amend. I; *Stanley v. Georgia*, 394 U.S. 557, 564–65 (1969).

<sup>8</sup> Neil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387, 389–92 (2008).

environment how would the personal data of an individual would be secured.<sup>9</sup>

<b>Theoretical Framework</b>	<b>Core Assumption</b>	<b>Digital Challenge</b>	<b>Regulatory Response</b>
<b>Marketplace of Ideas</b>	Competition leads to truth	Algorithmic amplification of sensationalism	Systemic risk assessment (EU DSA)
<b>Self-Correction</b>	Errors are corrected by "more speech"	Speed of misinformation outpaces correction	Fact-checking mandates and takedowns
<b>Individual Autonomy</b>	Speech is vital for self-direction	Predictive analytics influence thought patterns	Data protection (DPDP Act)
<b>Democratic Participation</b>	Speech facilitates political education	Digital divide and censorship of dissent	Universal access initiatives

Now if we see this through the prism of Indian constitution, the constitution under Article 19(1)(a) gives rights to citizen for speech and expression but that right is not absolute.<sup>10</sup> Under Article 19(2) the union has imposed “reasonable restrictions” on grounds such as national security, public order and decency.<sup>11</sup> The constitution is clear and makes a balance between the rights and personal liberties.<sup>12</sup> In it noteworthy to mention that in the Indian context the whole debate revolves around what would constitute “reasonable” per say as per the constitution of India.<sup>13</sup>

<sup>9</sup> Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 6–10 (2004).

<sup>10</sup> India Const. art. 19, § 1, cl. a.

<sup>11</sup> India Const. art. 19, § 2

<sup>12</sup> State of Madras v. V.G. Row, A.I.R. 1952 S.C. 196, 199 (India).

<sup>13</sup> Superintendent, Cent. Prison v. Ram Manohar Lohia, A.I.R. 1960 S.C. 633, 637 (India); Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1, ¶¶ 38–40 (India)

## 2. The Evolution of Intermediary Liability and Principle of the Safe Harbor

The principle of “safe harbor” provides immunity to the intermediaries from the liability for content which is been uploaded by the user who is using that particular platform.<sup>14</sup><sup>15</sup> Section 230 of the Communication Decency Act of the United States acted as a tool to protect the online service providers based on the speech made by any user on their platform.<sup>15</sup> The idea being this was to allow the platform to flourish without creating unnecessary liabilities upon the provider.<sup>16</sup>

But it is also important to consider that with the advent of AI and the LLM learning model the line is not becoming more transparent than ever before.<sup>17</sup> The courts in US have also been very critical on this aspect and stated that section 230 cannot be stretched to extremes.<sup>18</sup>

The Union of India has brought a legislation Information Technology Act, 2000 whereby which section 79<sup>19</sup> provides for a safe harbor.<sup>20</sup> The landmark case of *Avnish Bajaj v. State* (2008), was pivotal in interpretation of Section 79 of the IT Act, 2000.<sup>21</sup> After which amendments and the passage of the IT Rules in 2011 and 2021 have significantly increased the expectations placed on intermediaries.<sup>22</sup>

The IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, brought a stricter approach for better due diligence on the social media intermediaries (SSMIs). In these Rules there have been explicit Rules to remove the content within 24 to 72 hours upon either receiving government notice or any court order.<sup>23</sup> The government is intending to bring an amendment draft whereby which the issue of deep fake would be addressed.<sup>24</sup>

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<sup>14</sup> Information Technology Act, No. 21 of 2000, § 79, India Code (2000).

<sup>15</sup> U.S.C. § 230(c)(1) (2018); Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 2–3 (2019).

<sup>16</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–34 (4th Cir. 1997).

<sup>17</sup> Jack M. Balkin, *Free Speech in the Algorithmic Society*, 51 U.C. Davis L. Rev. 1149, 1160–65 (2018).

<sup>18</sup> *Gonzalez v. Google LLC*, 598 U.S. 617, 624–26 (2023); *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 483–85 (2023)

<sup>19</sup> Information Technology Act, No. 21 of 2000, § 79, India Code (2000).

<sup>20</sup> *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1, ¶¶ 117–19 (India).

<sup>21</sup> *Avnish Bajaj v. State (NCT of Delhi)*, 150 (2008) D.L.T. 769 (Del. H.C.) (India).

<sup>22</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, rr. 3–4 (India).

<sup>23</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, rr. 3–4 (India).

<sup>24</sup> Ministry of Electronics & Information Technology, Government of India, *Draft Amendments to the Information Technology Rules (Artificial Intelligence and Synthetic Media Regulation Proposals, 2023–2025)*.

Jurisdiction	Primary Law	Liability Standard	Recent Developments
United States	Section 230 CDA	Broad immunity; "Good Samaritan" provision	Scrutiny of algorithmic recommendations
European Union	Digital Services Act (DSA)	Systemic risk and "duty of care" model	Tiered obligations for VLOPs
India	Section 79 IT Act	"Actual knowledge" and due diligence	2025 Draft Rules on deepfakes and SGI
Brazil	Marco Civil da Internet	Liability for noncompliance with court orders	Mandatory local legal representation

The European Union’s Digital Services Act (DSA), brought a legislation in 2022, in which a shift toward a proactive "systemic risk" framework was taken into consideration.<sup>25</sup> Not like the Indian or US legislation, the DSA requires Very Large Online Platforms (VLOPs) to perform periodic analyses of how algorithmic recommender systems affect civic discourse and democratic processes.<sup>26</sup> This departs from the idea that platforms are merely passive conduits, instead treating them as powerful actors with a responsibility to mitigate the viral distribution of harmful media.<sup>27</sup>

**a. Judicial Paradigms: Shreya Singhal and Anuradha Bhasin**

The Indian Supreme Court has been instrumental in establishing the doctrines to protect freedom of speech and to establish that right to internet also comes under the ambit of right o

<sup>25</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of Oct. 19, 2022 on a Single Market for Digital Services (Digital Services Act), 2022 O.J. (L 277) 1.

<sup>26</sup> Id. arts. 34–35.

<sup>27</sup> Nicolas Suzor, Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms, 4 Soc. Media + Soc’y 1, 3–6 (2018).

life.<sup>28</sup>

### **b. The Watershed of *Shreya Singhal v. Union of India***

The Hon'ble Supreme Court in the *Shreya Singhal v. UOI* has been instrumental in upholding the principles of free speech enshrined under the constitution.<sup>29</sup> The Apex court struck down Section 66A of the IT Act deeming it to be unconstitutional and vague and against the spirit of free speech.<sup>30</sup>

The court also adopted the "Clear and Present Danger" test from the American jurisprudence.<sup>31</sup> The court held that the restriction of speech is valid as per Article 19(2) but there should be a reasonable nexus and can not be done abruptly.<sup>32</sup> The order of the court categorically stated that the government should not use its position of power to suppress dissent and free speech.<sup>33</sup>

### **c. Due Process and Proportionality in *Anuradha Bhasin***

In the landmark judgement of *Anuradha Bhasin v. Union of India*<sup>34</sup> which stated that indefinite internet shutdown of internet in Jammu and Kashmir would be violation of the fundamental rights of the constitution. The Court through its judgment stated that internet access a standalone fundamental right, it solidified that freedom of speech and expression *through* the medium of the internet is constitutionally protected under Article 19(1)(a).<sup>35</sup>

The judgement delivered in *Anuradha Bhasin* laid down the principle that there cannot be indefinite restriction on usage on internet as right to use internet comes under the umbrella of rights under the fundamental right through Article 21 of the constitution.<sup>36</sup> The Court also established procedural safeguards, ruling that internet shutdowns cannot be indefinite and must be subject to periodic review and public disclosure and the position of reasonable restriction

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<sup>28</sup> *Shreya Singhal v. Union of India*, (2015) 5 S.C.C. 1 (India); *Anuradha Bhasin v. Union of India*, (2020) 3 S.C.C. 637 (India).

<sup>29</sup> *Shreya Singhal*, (2015) 5 S.C.C. ¶¶ 1–7.

<sup>30</sup> *Id.* ¶¶ 83–90.

<sup>31</sup> *Id.* ¶¶ 24–30.

<sup>32</sup> *Id.* ¶¶ 38–44; *Superintendent, Cent. Prison v. Ram Manohar Lohia*, A.I.R. 1960 S.C. 633, 637 (India).

<sup>33</sup> *Shreya Singhal*, (2015) 5 S.C.C. ¶¶ 101–10.

<sup>34</sup> *Anuradha Bhasin*, (2020) 3 S.C.C. ¶¶ 1–10.

<sup>35</sup> *Id.* ¶¶ 23–30.

<sup>36</sup> *Id.* ¶¶ 69–74; *Modern Dental Coll. & Research Ctr. v. State of Madhya Pradesh*, (2016) 7 S.C.C. 353, ¶¶ 60–64 (India).

should not be used for indefinite period of time.<sup>37</sup>

Case Name	Core Constitutional Issue	Primary Holding	Practical Impact
<i>Shreya Singhal (2015)</i>	Vagueness of Section 66A IT Act	Adopted "Clear and Present Danger" test	Invalidated arbitrary arrests for social media posts
<i>Anuradha Bhasin (2020)</i>	Internet shutdowns in J&K	Mandated proportionality and transparency	Limited the duration and scope of internet blackouts
<i>K.S. Puttaswamy (2017)</i>	Right to Privacy	Privacy is a fundamental right under Article 21	Provided a basis for challenging mass surveillance
<i>Pravasi Bhalai Sangathan (2014)</i>	Hate speech regulation	Observed need for regulation but no specific criteria	Led to Law Commission recommendations for hate speech laws

Although India has such robust legal mechanism there is huge gap between the bare text and the reality.<sup>38</sup> State and Union Authorities often justify these measures as necessary to prevent the spread of misinformation or communal violence, but critics argue they are frequently used to stifle dissent and control narratives during periods of political instability.<sup>39</sup>

### 3. National Security and the "Functional Contraction" of Digital Rights

There has been divergent opinion amongst scholars while some of are the opinion that there has been increasing attempts to protect free speech but these attempts do not transgress in reality. Hence, this attempt of increasing free speech is more theoretical in nature than

<sup>37</sup> Anuradha Bhasin, (2020) 3 S.C.C. ¶¶ 99–104.

<sup>38</sup> Anuradha Bhasin v. Union of India, (2020) 3 S.C.C. 637, ¶¶ 99–104 (India).

<sup>39</sup> Faheema Shirin R.K. v. State of Kerala, 2020 S.C.C. OnLine Ker 2976, ¶¶ 13–19 (India); Software Freedom Law Ctr., Internet Shutdowns in India Report (2023).

practical.<sup>40</sup>

#### 4. Global Sovereignty and the Suspension of Platforms

The digital age has brought transnational platforms into direct conflict with sovereign states over the limits of their jurisdiction.<sup>41</sup> The 2024 suspension of the platform X (formerly Twitter) in Brazil serves as a definitive case study in this tension.<sup>42</sup>

##### a. The Brazilian Case: Sovereignty vs. Corporate Evasion

The Brazilian Supreme Court (STF)<sup>43</sup> suspended X after the company refused to comply with judicial orders to block accounts associated with "extremist groups and digital militias" and withdrew its legal representation from the country to evade liability.<sup>44</sup> Justice Alexandre de Moraes argued that freedom of expression is not absolute and cannot be used as a "shield" for illegal activities or attacks on the democratic rule of law.

##### b. The US Response and the "Weaponization" Debate

In contrast, the US House Judiciary Committee released a report characterizing the Brazilian actions as a "censorship campaign" and an "attack on free speech abroad".<sup>45</sup> This highlights the fundamental divide in constitutional philosophy: while the US prioritized the platform's editorial freedom and the rights of account holders, Brazil prioritized social stability and the integrity of its judicial system.<sup>46</sup> This conflict illustrates the difficulty of constructing a global legal framework for digital governance when fundamental principles of expression and sovereignty are in such stark opposition.<sup>47</sup>

#### 6. Conclusion

The digital age demands a robust legal framework that preserves the core values of liberty but

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<sup>40</sup> David Cole, *We Kill People Based on Metadata*, N.Y. Rev. Books (May 10, 2014).

<sup>41</sup> Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639, 642–48 (2014).

<sup>42</sup> Jack Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* 183–88 (2006).

<sup>43</sup> Lei No. 12.965, de 23 de Abril de 2014, Diário Oficial da União [D.O.U.] de 24.04.2014 (Braz.) (Marco Civil da Internet).

<sup>44</sup> Id. art. 19.

<sup>45</sup> U.S. Const. amend. I.

<sup>46</sup> *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>47</sup> Jack M. Balkin, *Digital Speech and Democratic Culture*, 79 N.Y.U. L. Rev. 1, 5–10 (2004).

also creates an ecosystem where this liberty is not misused.<sup>48</sup> The Constitution of India under Article 19(a) has beautifully mentioned the phrase freedom of speech and expression. Whereby which giving the right to every citizen of India to have free speech but the constitution was also careful that this phrase should not be misused and hence under Article 19(2) mentioned reasonable restrictions. Indicating that there would be certain occasions when freedom of speech and expression would be curtailed. But state and union authorities have used this expression to silence dissent rather than upholding the true spirit of the constitution.<sup>49</sup>

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<sup>48</sup> Gillian K. Hadfield & Jamie Heine, Life in the Law's Shadow: Digital Constitutionalism, 2020 Wis. L. Rev. 457, 462–70 (2020).

<sup>49</sup> Jack Balkin, The Future of Free Expression in a Digital Age, 36 Pepp. L. Rev. 427, 430–40 (2009).