

India Digital Freedoms Series

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# CENSORSHIP: THREATS TO DIGITAL EXPRESSION

BY MATAM MANOGNA, TORSHA SARKAR, GURSHABAD GROVER AND KANAV KHANNA

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# CENSORSHIP: THREATS TO DIGITAL EXPRESSION

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This brief on online censorship is part of the Centre for Internet & Society's Report on digital civic space in India, examining the effects of policy and legal frameworks on digital rights for Indian civil society. For more background and to read the rest of the report, [click here](#).

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# I. INTRODUCTION

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India has for some time been regarded as a ‘digital decider’<sup>1</sup> for the future of the internet, with the potential to support a global internet governance approach that prioritizes freedom, openness and multi stakeholder cooperation. When it comes to expression online, the question remains as to whether India will be an authoritarian domain where state control and/or private interests shape the contours of free online speech, or a force for democracy through which the benefits of greater access and expression are felt by all.

For journalists and human rights defenders in India, the pendulum has increasingly swung towards authoritarianism. On the World Press Freedom Index, compiled by global media watchdog Reporters without Borders, India ranks 136 out of 180 countries - a startling result for the world’s largest democracy, where the right to free speech is considered sacrosanct by the Constitution<sup>2</sup>. Reporters without Borders has placed India alongside China, Russia, and Saudi Arabia as the world’s worst digital predators suppressing human rights online and prioritizing government control over the internet and internet users<sup>3</sup>. The erosion of free speech - both online and offline - has hindered the ability of civil society, and in particular, journalists and human rights defenders to disseminate information and hold the government to account.

The following analysis maps trends and tools of online censorship in India and then assesses the legal framework that underpins it, followed by concluding thoughts.

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1 Robert Morgus, “The Digital Deciders,” October 23, 2018, <https://www.newamerica.org/cybersecurity-initiative/reports/digital-decidors/>.

2 Soutik Biswas, “The fear of censorship in Indian media,” BBC News, August 11, 2015 <https://www.bbc.com/news/33844154>.

3 Peter Beaumont, “List of world’s worst ‘digital predators’ stretches from India and Brazil to US,” The Guardian, March 12, 2020 <https://www.theguardian.com/global-development/2020/mar/12/list-of-worlds-worst-digital-predators-stretches-from-india-and-brazil-to-us>.

# II. MAPPING ONLINE CENSORSHIP IN INDIA

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## Defamation

Defamation laws in India, which includes both criminal and civil defamation, have produced a unique chilling effect on free speech and participative democracy in India. In the last decade, defamation lawsuits have become a powerful tool for suppressing criticisms, often relied upon by powerful individuals and corporations, including politicians and business conglomerates<sup>4</sup>.

For example, in 2017, Home Minister Amit Shah's son Jay Shah accused The Wire, an independent online news media portal, of criminal defamation, and sued The Wire for 100 crores in a civil defamation case<sup>5</sup>. In the article at issue, The Wire alleged that a company owned by Shah had witnessed tremendous increase in its revenue within a year of the Bharatiya Janata Party (BJP) coming to power in 2014. The suit filing led the court to issue a gag order barring The Wire from publishing stories on Shah<sup>6</sup>. While The Wire initially filed to quash the defamation charges, it later withdrew the application and instead chose to contest the case in trial<sup>7</sup>.

Media freedom has been further hindered by the initiation of numerous defamation suits following investigations into the billion-dollar Rafale defence deal. The Rafale defence deal involved the Indian Defence Ministry's purchase of 36 fighter aircraft from France for €7.8 billion – an issue of legitimate public interest due in no small part to the alleged lack of transparency, numerous irregularities, and possible corruption surrounding the deal<sup>8</sup>. Given the controversy, journalists published numerous print and online articles looking into the matter, and were subsequently sued (along with several Congress leaders) by Anil Ambani's Reliance Group for defamation. Reliance Group filed a 10,000 crore suit against NDTV, a 5,000 crore suit against the National Herald<sup>9</sup>, and a 7,000 crore suit against Seema Mustafa, founding editor of the Citizen, India's

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4 Gautam Bhatia "Free Speech and Civil Defamation," Centre for Internet Society, June 25, 2014, <https://cis-india.org/internet-governance/blog/free-speech-and-civil-defamation>.

5 "Jay Shah files criminal defamation case against 'The Wire,'" January 8, 2018 <https://www.thehindubusinessline.com/news/national/jay-shah-files-criminal-defamation-case-against-the-wire/article9895618.ece>.

6 "Indian court bars The Wire from publishing stories on businessman Jay Shah" Committee to Project Journalists, October 24, 2017, <https://cpj.org/2017/10/indian-court-bars-the-wire-from-publishing-stories/>.

7 The defamation case that the Wire faces shares similarities with strategic lawsuits against public participation (SLAPP). SLAPP are used by the wealthy and powerful to intimidate, censor and financially drain people/organisations who are public spirited and wish to hold them accountable for their actions, <https://anti-slapp.org/what-is-a-slapp>.

8 Rakesh Sood, "Decoding the Rafale controversy," The Hindu, October 16, 2018, <https://www.thehindu.com/opinion/lead/decoding-the-rafale-controversy/article25230283.ece>.

9 Id.

first independent online newspaper<sup>10</sup>. The Citizen released a statement on its website rejecting the charges made by Ambani and all “attempts to silence the media,” and reaffirming that “independent media – devoid of political or corporate funding – is crucial to the future of journalism”<sup>11</sup>. In May 2019, the Reliance Group withdrew the defamation case against the National Herald<sup>12</sup>, as the “*subject matter [wa]s pending for adjudication before the Hon’ble Supreme Court*”<sup>13</sup>. In December 2018, the Supreme Court dismissed all petitions, instead seeking a court-monitored probe into Rafale fighter jet deal<sup>14</sup>.

In another case, J Jayalithaa, the former chief minister of Tamil Nadu, filed over 1,000 defamation cases during her six terms in an attempt to silence her rivals and critics, from civil society groups to journalists to political opponents<sup>15</sup>. In one of these cases, a prominent social activist was targeted for sending WhatsApp messages critiquing state relief efforts during the 2015 floods<sup>16</sup>.

Journalists and activists have noted the burden of bearing frivolous defamation suits (akin to “Strategic Lawsuits Against Public Participation”), speaking of the financial cost of weathering criminal complaints as well as subsequent abuse and harassment on social media, including having personal information exposed<sup>17</sup>. In 2018, a founding editor of The Wire noted that the news outlet was grappling with “at least seven different defamation cases.”<sup>18</sup> In an environment where



On former minister filed over 1,000 defamation cases during her six terms in an attempt to silence her rivals and critics, from civil society groups to journalists to political opponents.

10 “After Suing NDTV, Reliance Group Files Rs 7,000 Crore Suit Against The Citizen,” The Wire, October 23, 2018, <https://thewire.in/media/ndtv-reliance-group-rs-7000-defamation-suit-the-citizen>.

11 Id.

12 “Anil Ambani To Withdraw Defamation Suits Against Congress, National Herald,” NDTV, May 21, 2019, <https://www.ndtv.com/india-news/anil-ambani-to-withdraw-defamation-suits-against-congress-national-herald-2040880>.

13 Id.

14 “Rafale Deal: Supreme Court Dismisses Petition Saying ‘Detailed Probe Not Required,’” Huffington Post, December 14, 2018, [https://www.huffingtonpost.in/entry/no-probe-into-rafale-deal-supreme-court-dismisses-petition\\_in\\_5c1330f7e4b0860b8b5cc585?utm\\_hp\\_ref=in-rafale](https://www.huffingtonpost.in/entry/no-probe-into-rafale-deal-supreme-court-dismisses-petition_in_5c1330f7e4b0860b8b5cc585?utm_hp_ref=in-rafale); then Chief Justice Mr. Ranjan Gogoi, post retirement, was made a member of the Rajya Sabha in the March of 2020. This not only casts aspersions on the judgments he gave during his tenure but also raises questions about the independence of India’s judiciary.

15 Aditya Iyer, “The art of defamation: Jayalalithaa’s most useful tool,” Hindustan Times, July 29, 2016, <https://www.hindustantimes.com/india-news/the-art-of-defamation-jayalalithaa-s-most-useful-tool/story-r61qijPEbaXiKBw5nNGBLK.html>.

16 Id.

17 CPJ, “Weight of legal cases and threats leave India’s journalists feeling exposed and alone,” ifex, <https://ifex.org/weight-of-legal-cases-and-threats-leave-indias-journalists-feeling-exposed-and-alone/>.

18 Id.

independent news media and civil society organizations are facing increasing burdens and funding shortages, the practical and psychological effects of retaliatory defamation cases constitute a major threat to free expression, civic space, and the public interest.

## Hate Speech

In India, legal provisions around hate speech have been previously misused to target marginalized communities and dissenting voices<sup>19</sup>. Numerous hate speech cases have been brought against individuals for posts they made on social networking websites. For instance, in 2012 two young women in Palghar, Maharashtra were arrested under hate speech laws after one posted a comment on Facebook criticizing the shutdown of transport and services in several parts of the state, and the other liked the post<sup>20</sup>. The police charged the women with making statements that would be “likely” to create or promote enmity or ill-will between two classes of people or religious groups, on the basis of the fact that the poster was Muslim and the comment related to a Hindu leader<sup>21</sup>.

More recently, in 2017, a college professor was arrested for blasphemy<sup>22</sup> for questioning the celebration of Maratha King Chhatrapati Shivaji’s birthday twice in a year in a WhatsApp group<sup>23</sup>. In 2018, Abhijit Iyer-Mitra, a senior research fellow at the Institute of Peace and Conflict Studies, was arrested for blasphemy and inciting crime<sup>24</sup> for making satirical remarks about the Konark temple on Twitter<sup>25</sup>.

## Sedition

India’s law on sedition is a relic from the colonial era used to suppress the demands of freedom and autonomy by the people. Its blatant misuse is a consequence of its harsh nature and selective application by the authorities. Despite a narrow scope, the provision has been widely misused to suppress dissent and has consequently chilled

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19 Devika Agarwal, “Casteist remarks on social media now punishable: What fighting online hate speech in India entails,” Firstpost, July 15, 2017 <https://www.firstpost.com/india/casteist-remarks-on-social-media-now-punishable-what-fighting-online-hate-speech-in-india-entails-3815175.html>; Nileena MS, “Amid lockdown, Delhi Police target and arrest anti-CAA protestors from Jamia Nagar,” The Caravan, April 15, 2020 <https://caravanmagazine.in/politics/anti-cao-protesters-jamia-arrested>; Hannah Ellis-Peterson, “Two Muslim students face ‘bogus’ charges of inciting Delhi riots,” The Guardian, April 22, 2020. <https://www.theguardian.com/world/2020/apr/22/two-muslim-students-face-bogus-charges-of-inciting-delhi-riots>; “Stifling Dissent”, Human Rights Watch <https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india>.

20 “How the nightmare unfolded,” Mumbai Mirror, November 20, 2012, <http://www.mumbaiirror.com/mumbai/others/How-the-nightmare-unfolded/articleshow/17857060.cms>.

21 Zulfikar Memon, “Why Shaheen shouldn’t have been booked under 295 (A),” Mumbai Mirror, <http://www.mumbaiirror.com/mumbai/others/How-the-nightmare-unfolded/articleshow/17857060.cms>.

22 Section 295A of the Indian Penal Code is often referred to as the ‘blasphemy’ offence.

23 Express News Service, “Mumbai: Professor held after WhatsApp post ‘incites violence’” The Indian Express March, 20, 2017 <https://indianexpress.com/article/cities/mumbai/mumbai-professor-held-after-WhatsApp-post-incites-violence-4576642/>.

24 Section 295A, 505, Indian Penal Code, 1862.

25 Shoaib Daniyal, “Defence analyst’s arrest in Odisha for tweets about deity highlights India’s curbs on free speech” Scroll, October 25, 2018 <https://scroll.in/article/899506/defence-analysts-arrest-in-odisha-for-tweets-about-deity-highlights-indias-curbs-on-free-speech>.

free speech in Indian society. The number of sedition cases has shot up since 2014<sup>26</sup>, targeting social media critics and other online civil society voices.

For instance, in 2019, a man was arrested in Chhattisgarh under sedition charges (later dropped) for posting a video on social media where he allegedly “spread rumours” about power cuts<sup>27</sup>. In another instance, a man from Uttar Pradesh was arrested for a five-year old Facebook post of a morphed photo of Prime Minister Narendra Modi<sup>28</sup>. The sedition law has also been used to arrest human rights defenders<sup>29</sup> and individuals<sup>30</sup> criticizing the government.

## Internet-Related Offences

While the offences covered previously are regularly used to curtail expression online, India’s Information Technology Act contains provisions that specifically criminalize numerous other acts of expression online, including publishing obscene or offensive material<sup>31</sup>. For instance, in March 2016, a journalist was arrested in Chhattisgarh under the Act for commenting on WhatsApp about a vigilante group reported to have close ties with the local police<sup>32</sup>. In March 2017, a complaint was lodged against a woman for posting an allegedly morphed image of the Uttar Pradesh Chief Minister Ajay Bisht on Facebook that showed the politician in a “*poor light*”<sup>33</sup>. Similarly, a man was arrested in the same month for posting on Facebook another allegedly morphed picture of Uttar Pradesh Chief Minister Ajay Bisht<sup>34</sup>. Around the same time, a non-bailable warrant, citing the Act, was issued against a Bengali poet for posting a poem on Facebook about the Uttar Pradesh Chief Minister<sup>35</sup>. In 2017, a teenage Muslim boy was arrested after being charged with ‘hacking’, ‘cheating’, and later ‘sedition’, and spent 42 days in jail

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26 “Sedition a potent weapon for India’s rulers: 179 arrests, 112 cases filed, 2 convictions,” National Herald <https://www.nationalheraldindia.com/india/sedition-a-potent-weapon-for-indian-rulers-179-arrests112-cases-filed-2-convictions>.

27 “Sedition Law Must Not be Invoked for Critical Social Media Posts,” The Wire, June 16, 2019, <https://thewire.in/government/chhattisgarh-man-arrested-for-spreading-rumours-about-power-cuts>.

28 Abdul Alim Jafri “5 Years After FB Post on Modi, UP Man Arrested And Charged With Sedition,” News Click, July 27, 2019 <https://www.newsclick.in/5-years-fb-post-modi-up-man-arrested-charged-sedition>.

29 Ratnadip Choudhury “Manipur Activist Charged With Sedition After Facebook Post On BJP MP,” NDTV, July 29, 2020 <https://www.ndtv.com/india-news/manipur-activist-erendro-leichombam-charged-with-sedition-for-social-media-post-on-bjp-mp-sanajaoba-leishemba-2270485>.

30 Manvir Saini, “Facebook user booked for sedition over comments on BJP,” Times of India, October 4, 2016 <https://timesofindia.indiatimes.com/city/chandigarh/Facebook-user-booked-for-sedition-over-comments-on-BJP/articleshow/54669391.cms>.

31 See Section 66A and 67 of the IT Act respectively. Note that s 66A was struck down by the Supreme Court of India in 2015.

32 Id.; Raksha Kumar, “Journalist arrested in Chhattisgarh for posting comments on WhatsApp,” Scroll, March 22, 2016 <https://scroll.in/article/805521/journalist-missing-in-chhattisgarh-after-bastar-police-pick-him-up>.

33 Id.; Staff, “Bengaluru Woman Booked For Posting ‘Objectionable Content’ About Yogi Adityanath On Facebook” Huffington Post India, March 21, 2017 [https://www.huffingtonpost.in/2017/03/21/bengaluru-woman-booked-for-posting-objectionable-content-about\\_a\\_21904458/](https://www.huffingtonpost.in/2017/03/21/bengaluru-woman-booked-for-posting-objectionable-content-about_a_21904458/).

34 Id. *citing* Vinit, “Offensive Facebook Post on Yogi: Rahat Khan’s Bail Plea Will be Heard on Monday”, Hindustan Times, March 25, 2017 <https://www.hindustantimes.com/noida/offensive-facebook-post-on-yogi-rahat-khan-s-bail-plea-will-be-heard-on-monday/story-PBQD9yO5GB9iXui2veWYgJ.html>.

35 Id.; DNA Web Team, “Poem against Adityanath: Non-bailable warrant against Bengali poet Srijato for ‘hurting religious sentiments’” DNA India, March 23, 2017 <https://www.dnaindia.com/india/report-poem-against-adityanath-non-bailable-warrant-against-bengali-poet-srijato-for-hurting-religious-sentiments-2365518>.

(where he was allegedly tortured) for a facetious comment on Facebook criticizing a decision of the Uttarakhand High Court that declared the Ganga river a living entity<sup>36</sup>.

## Censorship During COVID-19

Misinformation about the COVID-19 pandemic has been on the rise in India since January 2020<sup>37</sup>. Much of the misinformation early on dealt with cures and remedies to fight COVID-19; however, after the Tablighi Jamaat incident in April, misinformation regarding the Muslim community being intentional vectors of the virus was widely circulated<sup>38</sup>. This concerted disinformation campaign against the Muslim community has fanned existing Islamophobia in Indian society and translated into numerous instances of violence<sup>39</sup>. Media attention and government action have focused heavily on the organisers of Tablighi Jamaat, compared to lockdown and social distancing violations by other religious congregations<sup>40</sup>.

Certain state governments have taken sparse and disconnected steps against actors disseminating misinformation or disinformation<sup>41</sup>. In the past, the local governing authorities have shut down internet services to combat the consequences of disinformation spread<sup>42</sup>. Apart from infringing upon the civic rights of the people subjected to them, internet shutdowns have not effectively combatted or prevented the repercussions of misinformation spread among a population<sup>43</sup>. People need access to the internet in order to fact check information that reaches them<sup>44</sup>.

Many legislators and established media houses, instead of battling misinformation,

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36 Id. citing Pheroze L. Vincent, "The Price of "Galat" Comment in UP - Teenager says he was Picked Up, Tortured and Charged with Hacking," The Telegraph, October 11, 2017, [https://web.archive.org/web/20180130081640/https://www.telegraphindia.com/1171011/jsp/frontpage/story\\_177518.jsp](https://web.archive.org/web/20180130081640/https://www.telegraphindia.com/1171011/jsp/frontpage/story_177518.jsp).

37 Prachi Salve "Manipulative Fake News On The Rise In India Under Lockdown," IndiaSpend, May 3, 2020, <https://www.indiaspend.com/manipulative-fake-news-on-the-rise-in-india-under-lockdown-study/>; Akbar, S., Kukreti, D., Sagarika, S., Pal, J., "Temporal patterns in COVID-19 related digital misinformation in India" <http://joyojeet.people.si.umich.edu/temporal-patterns-in-covid-19-misinformation-in-india/>.

38 Id. citing Akbar S.

39 "Virus misinformation fuels hatred against Muslims in India" Times of India, May 6, 2020 <https://timesofindia.indiatimes.com/blogs/foreign-media/virus-misinformation-fuels-hatred-against-muslims-in-india-afp/>; Sameer Yasir, "India is Scapegoating Muslims for the Spread of the Coronavirus," Foreign Policy, April 22, 2020 <https://foreignpolicy.com/2020/04/22/india-muslims-coronavirus-scapegoat-modi-hindu-nationalism/>.

40 Kumar Buradikatti "Officers suspended for allowing temple car festival in Kalaburagi," The Hindu, April 17, 2020 <https://www.thehindu.com/news/national/karnataka/lockdown-officers-suspended-for-allowing-temple-car-festival-in-kalaburagi/article31362131.ece>.

41 "Telangana: Three journalists booked for fake news on coronavirus," Indian News Express, April 20, 2020 <https://www.newindianexpress.com/states/telangana/2020/apr/20/telangana-three-journalists-booked-for-fake-news-on-coronavirus-2132573.html>; "Kannada News Channel Served Notice for 'Helicopter Money' Programme," The Wire, April 17, 2020, <https://thewire.in/media/kannada-news-channel-helicopter-money-india>; "Mumbai Police Arrest ABP Reporter For Triggering Crowds At Bandra Station" Huffington Post, April 15, 2020, [https://www.huffingtonpost.in/entry/lockdown-migrant-workers-bandra-mumbai\\_in\\_5e96d4f9c5b6ac7eb262ef88](https://www.huffingtonpost.in/entry/lockdown-migrant-workers-bandra-mumbai_in_5e96d4f9c5b6ac7eb262ef88).

42 Matt Burgess, "To fight fake news on WhatsApp, India is turning off the internet," Wired, October 18, 2018. <https://www.wired.co.uk/article/WhatsApp-web-internet-shutdown-india-turn-off>.

43 "India fighting digital misinformation and online fake news," LawEscort, Feb 22, 2020 <https://lawescort.in/2020/02/india-fighting-digital-misinformation-and-online-fake-news/>.

44 Shruti Jain, "Mobile net ban during peaceful protest leaves farmers confused," Internet Shutdown Stories, Centre for Internet and Society, [https://cis-india.org/internet-shutdown-stories/at\\_download/file](https://cis-india.org/internet-shutdown-stories/at_download/file).

have been involved in disseminating the same<sup>45</sup>, and have failed to produce civic rights-respecting solutions to these problems<sup>46</sup>. On the pretext of reigning in misinformation, governments across the states have suppressed criticism and dissent<sup>47</sup>. As many as twenty-two first information reports (FIRs) have been filed against journalists during this time period, with fifty-five journalists either arrested or threatened for reporting on India's COVID-19 situation<sup>48</sup>.

As one example of a journalist censored for COVID-19 reporting, Zubair Ahmed, a journalist in the Andaman and Nicobar islands, reported a peculiar incident of how a family of four had been put under quarantine for having spoken to a relative through a phone who had tested positive<sup>49</sup>. He then tweeted the following:

*“Can someone explain why families are placed under home quarantine for speaking over phone with Covid patients?”*

*”Request #Covid19 quarantined persons not to call any acquaintance over the phone. People are being traced and quarantined on the basis of phone calls.”*

Zubair was arrested for these tweets under various sections of the Disaster Management Act 2005 and the Indian Penal Code 1860, and booked for publishing statements with an intent to spread fear or alarm among people as well as for giving false warnings<sup>50</sup>.

In another instance, the founder of online media portal ‘SimpliCity’, Andrew Sam Raja Pandian, was arrested in relation to SimpliCity’s publication regarding alleged corruption in the public distribution system during the pandemic and alleged shortcomings of the healthcare system in the state of Tamil Nadu<sup>51</sup>. A Coimbatore government official declared the report to be ‘false’ and ‘provocative’ against the State

45 “Here’s A List Of Leaders Who Are Guilty Of Pushing Fake News,” Outlook Magazine, April 4, 2018, <https://www.outlookindia.com/website/story/heres-a-list-of-leaders-who-are-guilty-of-pushing-fake-news/310503>; “ABP News quotes ICMR study to praise lockdown, ICMR says no such study published,” Alt News, April 15, 2020, <https://www.altnews.in/abp-news-falsely-quoted-icmr-report-health-ministry-confirmed-theres-no-such-research/>; Ritika Jain, “Covid-19: How fake news and Modi government messaging fuelled India’s latest spiral of Islamophobia,” April 21, 2020 <https://scroll.in/article/959806/covid-19-how-fake-news-and-modi-government-messaging-fuelled-indias-latest-spiral-of-islamophobia>.

Rights and Risks Analysis Group “India: Media’s Crackdown During COVID19 Lockdown,” <http://www.rightsrisks.org/wp-content/uploads/2020/06/MediaCrackdown.pdf>.

46 “Maximum Covid-19-related fact checks in April related to communal rumours: BOOM study,” Indian Express, May 9, 2020, <https://indianexpress.com/article/india/fake-news-in-the-time-of-coronavirus-boom-analyses-178-fact-checks-on-covid-19-related-misinformation-since-january-6401441/>.

47 Rohan Venkataramakrishnan “India’s government wants to censor the media to fight Covid-19 – but transparency is a better weapon,” Scroll, April 1, 2020 <https://scroll.in/article/957849/indias-government-wants-to-censor-the-media-to-fight-covid-19-but-transparency-is-a-better-weapon>.

48 Rights and Risks Analysis Group “India: Media’s Crackdown During COVID19 Lockdown,” June 15, 2020. <http://www.rightsrisks.org/wp-content/uploads/2020/06/MediaCrackdown.pdf>; “55 Indian Journalists Arrested, Booked, Threatened For Reporting on COVID-19: Report,” June 16, 2020 <https://thewire.in/media/covid-19-journalists-arrested-booked-report>.

49 Sanyukta Dharmadhikari “Andaman journalist arrested for asking COVID-19 related question on Twitter?,” Newsminute, April 28, 2020 <https://www.thenewsminute.com/article/andaman-journalist-arrested-asking-covid-19-related-question-twitter-123481>.

50 Section 505, Indian Penal Code 1860; Section 54, Disaster Management Act 2005.

51 “News portal founder arrested in Coimbatore,” The Hindu, April 23, 2020 <https://www.thehindu.com/news/cities/Coimbatore/news-portal-founder-arrested-in-coimbatore/article31418909.ece>.

government<sup>52</sup>. Pandian was accused of violating sections 188 and 505 of the IPC for disobeying the orders of a public servant and inciting mischief, as well as section 3 of Epidemic Diseases Act for violating pandemic protocols<sup>53</sup>.

On 23 May 2020, the Mumbai Police Commissionerate used its wide discretionary powers under section 144 of the Code of Criminal Procedure to issue guidelines as to the use of social media, which effectively sought to gag any person criticising the actions of the state government by defining prohibited information to include any remarks that could incite mistrust towards the government<sup>54</sup>. The gag order referred to problems faced by the government vis-à-vis fake news and misinformation in social media, and held people designated as admins (administrators) of WhatsApp groups personally responsible for the spread of disinformation in those groups<sup>55</sup>.

The Indian government even blamed misinformation for the mass exodus of migrant labourers during the country-wide lockdown. In the face of starvation, homelessness and vulnerability to the virus, migrant labourers sought to return to their towns and villages. With transport services disbanded, a sizable population of the migrants took to walking enormous distances to their homes<sup>56</sup>. With the aim of alleviating the conditions of migrants, two petitions were filed in the Supreme Court where the Central government was called to answer for the predicament faced by the migrants. The government submitted that the mass exodus of migrants was triggered by dissemination of misinformation<sup>57</sup>, and sought to remedy this through pre-censorship of media requiring that media entities not publish news related to COVID-19 without first ascertaining the factual position from the Central Government. The Supreme Court has refused to allow this request for prior censorship by the central government<sup>58</sup>.

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52 Id.

53 "Police in India's Tamil Nadu state arrest journalist over COVID-19" CPJ, April 24, 2020, <https://cpj.org/2020/04/police-in-indias-tamil-nadu-state-arrest-journalis/amp/>.

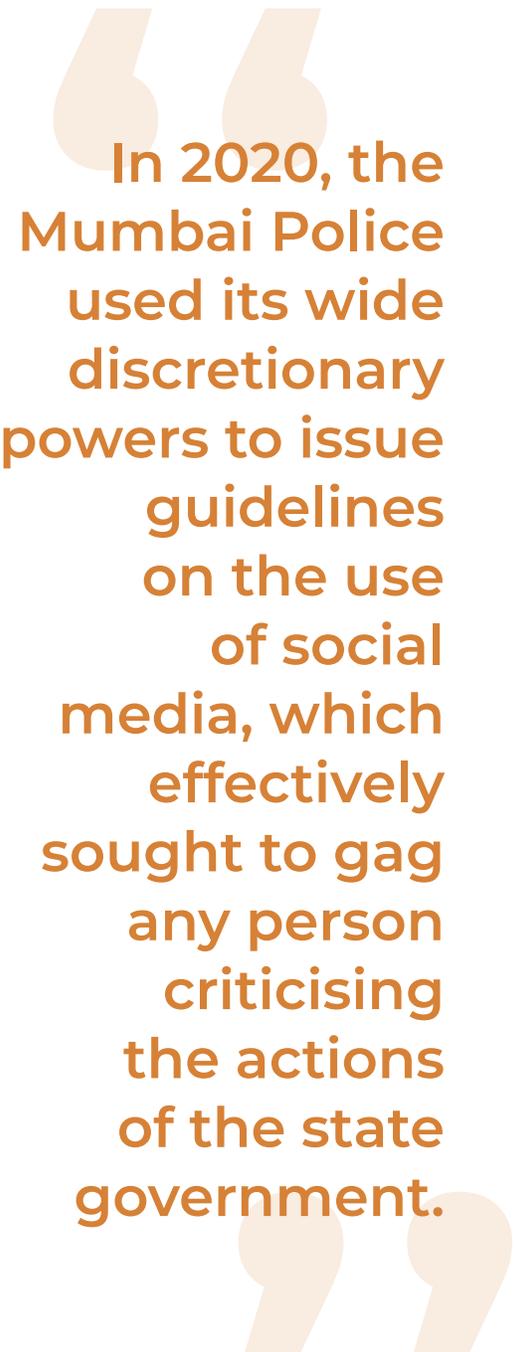
54 Sukanya Shantha, "Mumbai Police Issues Gag Order, Declares Criticising Government a Crime" May 27 2020, <https://thewire.in/rights/mumbai-police-gag-order-section-144>.

55 Id.

56 "In long walk back home, migrants battle hunger, scourge of Covid-19," Hindustan Times, May 16, 2020 <https://www.hindustantimes.com/india-news/in-long-walk-back-home-migrants-battle-hunger-scourge-of-disease/story-TizRfUz69osJQ0Uqmm6jZN.html>.

57 "Coronavirus v. Free Speech: Modi Government Opens New Battlefield in Supreme Court," The Wire, April 1, 2020 <https://thewire.in/law/coronavirus-v-free-speech-modi-government-opens-new-battlefront-in-supreme-court>.

58 Id.



**In 2020, the Mumbai Police used its wide discretionary powers to issue guidelines on the use of social media, which effectively sought to gag any person criticising the actions of the state government.**

# III. RELEVANT DOMESTIC LAWS

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## Constitutional Rights

Article 19(1)(a) of the Indian Constitution guarantees the right to “freedom of speech and expression.”<sup>59</sup> Several other related rights also flow through Article 19 and other articles of the Constitution, including the freedom of association and assembly<sup>60</sup>, the freedom to disseminate information<sup>61</sup>, the right to receive information<sup>62</sup>, and the freedom of the press<sup>63</sup>. These rights are guaranteed regardless of the medium, i.e any expression (written, verbal, radio waves, on the internet or otherwise) is protected by the Constitution<sup>64</sup>.

Article 19(2) circumscribes the exercise of this right, allowing the Government to pass laws that provide for “reasonable restrictions” on the freedom of expression, amongst other grounds, in the interest of national security, sovereignty and integrity; public order; and decency and morality<sup>65</sup>.

Over the years, the judiciary has developed principles and tests to determine whether state-imposed restrictions on expression pass constitutional scrutiny. First, the said restriction must be provided by law. Second, the restriction must relate to one of the grounds specified in Article 19(2)<sup>66</sup>, and must not be vague<sup>67</sup>. Third, the government must demonstrate a rational connection of the restriction with the given legitimate intent and aim of the state. Additionally, the court has often used the “proportionality” doctrine to assess the constitutionality of such restrictions: to satisfy this test, the restriction must not be excessive, or must be demonstrably the least-restrictive measure to ensure the government’s aim<sup>68</sup>.

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59 Article 19(1)(a), the Indian Constitution.

60 Article 19(1)(b), the Indian Constitution; Article 19(1)(c), the Indian Constitution.

61 *Express Newspapers v Union of India* AIR (1986) SC 872.

62 However, such a right has been recognised as flowing through Article 21 as well. See *Reliance Petrochemical Limited v Indian Express Newspapers* AIR (1989) 190. Also see Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (Oxford University Press) 257.

63 (1948) 7 Constituent Assembly Debates 780; *RP Limited v Indian Express Newspapers* AIR (1989) SC 180.

64 *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) SCC (2) 161; *Shreya Singhal v Union of India* (2015) 5 SCC 1.

65 Article 19(2), the Indian Constitution.

66 These grounds, specified in Article 19(2) are “in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.” DD Basu, *Law of the Press* (5th edn, Lexis Nexis 2010) 20.

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

68 *Mohd. Faruk v State of Madhya Pradesh and Ors* (1970) SCR (1) 156; *Chintaman Rao v State of Madras* (1950) SCR 759.

The following sections detail some pertinent legal provisions that seek to restrict the freedom of expression and have been used to suppress online expression, as discussed above. Please note that provisions in the various Epidemic Diseases Acts, which have been used for censorship during the Covid-19 pandemic, are not covered below since they may vary state-wise.

## Laws on Defamation

India's legal system classifies defamation<sup>69</sup> as an offence of both criminal and civil character. Criminal defamation, as well as civil defamation laws that can be abused, are significant roadblocks to freedom of speech in India, especially given the ambiguity in the contours of the offence<sup>70</sup>.

The defamation offence manifests in two forms: slander (oral) and libel (written/published).

As per section 499 of the Indian Penal Code (IPC), 1860, criminal defamation is understood to be the harm caused to a person's reputation owing to spoken or written words, publication of signs or visible representations, and is coupled with a guilty mind<sup>71</sup>. To establish civil defamation, a statement should be (i) injurious to the reputation of the person in question, (ii) attributable to the person, (iii) published, i.e. made known to a third party, and (iv) the person in question has incurred special damages<sup>72</sup>.

Positing "harm to reputation," a term which is vague and subjective, as a crime against society is highly problematic. Truth is not a complete defence for this offence and the heavy burden of proving exceptions to the provision falls onto the accused. For restrictions on free speech to be reasonable, they

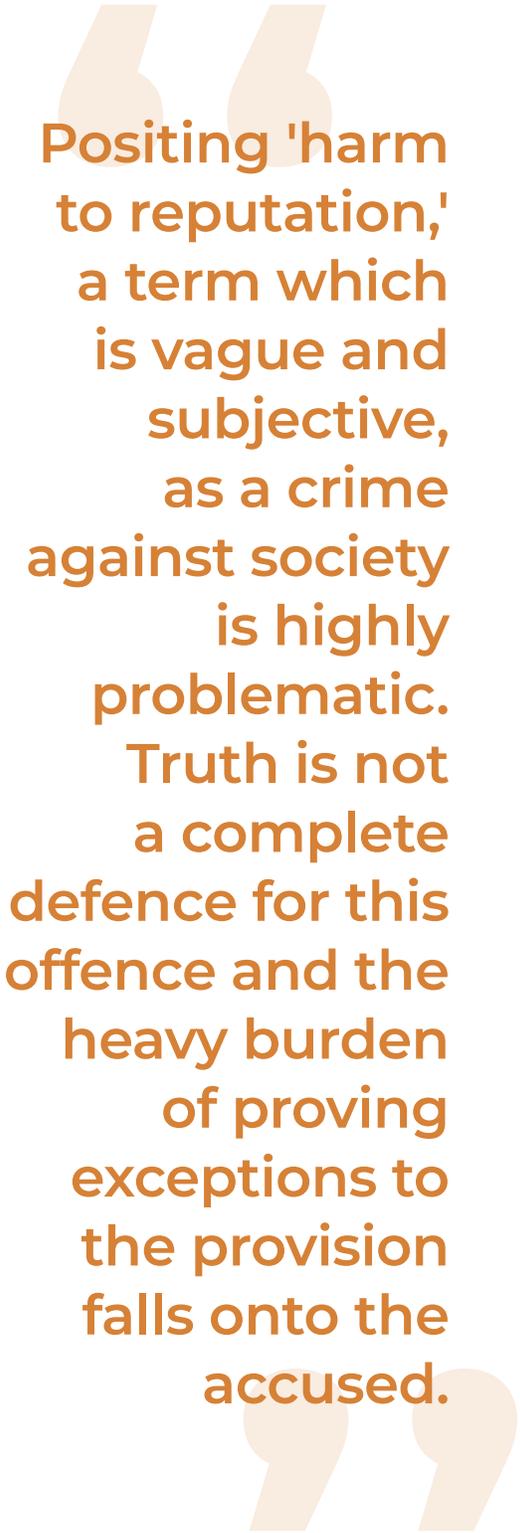
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69 The origins of defamation can be traced back to 17th CE England, where it was used to maintain law and order in a time of avenging personal insults through violent brawls. Nowadays, defamation laws are no longer required to uphold public order. Increasingly, countries around the world have either decriminalised defamation or given it stronger exceptions in favour of free speech.

70 "The need for reform of defamation laws," Live Mint, October 6, 2016 <https://www.livemint.com/Opinion/QyZpUVSMbHqKymUquA7yNK/The-need-for-reform-of-defamation-laws.html>.

71 Section 499, Indian Penal Code 1860. This offence is punishable by imprisonment/fine as per section 500 IPC.

72 "Defamation in Civil Courts - An analysis" TCL <https://www.tclindia.in/defamation-in-civil-courts-an-analysis-indianlaws/>.



Positing 'harm to reputation,' a term which is vague and subjective, as a crime against society is highly problematic. Truth is not a complete defence for this offence and the heavy burden of proving exceptions to the provision falls onto the accused.

need to be constructed in a narrow fashion<sup>73</sup>. However, section 499 of the IPC is vague and broadly worded, allowing its misuse in stifling dissent and free speech.

In the case of *Subramaniam Swamy v. Union of India*<sup>74</sup>, a two-judge bench of the Supreme Court upheld the constitutional validity of section 499. The court's primary reasoning hinged on the need for balancing the fundamental right to freedom of speech and expression on one hand, with the right to reputation under the fundamental right to life and personal liberty under Article 21. The Court, zealous in protecting individual reputation, overlooked the fact that the right to reputation can be enforced only against the State<sup>75</sup>. Therefore, for charges of criminal defamation to stand in court, the state prosecutor would be required to represent an individual who has a grievance against another because their right to reputation, a very subjective and abstract concept, has been infringed. Civil defamation laws are adept at safeguarding an individual's reputation, and it is important to bear in mind that loss of reputation is not a crime against society<sup>76</sup>.

## Laws on Hate Speech

Hate speech is not defined under any law, nor is it comprehensively addressed by umbrella legislation. Instead, India's hate speech laws consist of a host of provisions which include Sections 153A, 505 and 295A of the Indian Penal Code, 1860<sup>77</sup>. Sections 153A and 505 criminalise speech that incites feelings of enmity between social groups. Section 295A, often described as India's variant of a blasphemy law, criminalises speech that insults religious feelings. While the ostensible purpose of these provisions is to ensure the peaceful co-existence of different communities, they have often been enforced to stifle expression that either offends dominant communities or questions the government<sup>78</sup>.

Such practice gives rise to misgivings as to the constitutionality of these provisions. However, the constitutionality of Section 295A was upheld in *Ramji Lal Modi v. Union of India*<sup>79</sup>, where it was challenged on the basis of vague and overbroad language<sup>80</sup> that

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

74 *Subramaniam Swamy v. Union of India*; AIR 2016 SC 2728.

75 Right to reputation is not to be extended against private persons for the violation of an individual's right to reputation by another individual does not impact the society at large. No private person's reputation is so important that it being tarnished has the capacity to cause lawlessness.

76 "Talk Point: Is it democratic to have harsh criminal law over civil remedies against defamation?" The Print, October 11, 2017 <https://theprint.in/talk-point/talk-point-democratic-harsh-criminal-law-civil-remedies-defamation/12120/>.

77 These are just a few provisions relating to hate speech. For a table of all statutory provisions dealing with hate speech see *Pravasi Bhakath Sangathan v. Union of India* MANU/SC/0197/2014 [10].

78 The most prominent example of this is the arrest of Shaheen Dhada and Rinu Srinivasan in 2012. The two girls were charged under Section 295A (which was later changed to 505A) for a Facebook post questioning the *bandh* in Mumbai on account of the death of a prominent political leader. Rajini Vaidyanathan, "India Facebook arrests: Shaheen and Renu speak out," BBC news, November 26, 2012 <https://www.bbc.com/news/world-asia-india-20490823>.

79 *Ramji Lal Modi v. Union of India*, MANU/SC/0101/1957.

80 "So long as the possibility of [a statute] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void." *Chintaman Rao v State of MP* (1951) AIR 118.

allowed the State to regulate speech it had no constitutional legitimacy to oversee<sup>81</sup>. The Court allowed the State broad discretion to determine what speech would not be in the “*interest of public order*”. However, it narrowed the scope of the provision to only those insults to religion that intentionally sought to disrupt public order. Thereby the Supreme Court found section 295A to be a reasonable restriction on free speech in the interest of public order<sup>82</sup>. The constitutionality of Section 153A has also been upheld based on this line of reasoning in multiple High Court judgements<sup>85</sup>.

Courts have laid down certain restrictions on the application of these provisions. An offence under section 295A requires the deliberate and malicious intent to outrage the religious feelings of a certain class of citizens. Insults to religion offered carelessly, without any deliberate or malicious intention, would not constitute an offence<sup>84</sup>. Similarly, the intention to cause disorder or incite public violence is necessary for an offence under section 153A<sup>85</sup>. Additionally, since section 153A and 505 criminalise promotion of enmity between two different communities, mere incitement of feelings of one community without reference to any other community would not be an offence<sup>86</sup>.

## Laws on Sedition

Section 124A of the Indian Penal Code criminalises all words that bring or attempt to bring hatred or disaffection towards the government. Historically, the term ‘disaffection’ was interpreted to mean ‘absence of affection,’ including feelings of disloyalty towards the government<sup>87</sup>. Further, it was held by the High Court of Bombay that the provision is not restricted to exciting or attempting to excite a rebellion or any actual

81 Gautam Bhatia, “Blasphemy law and the Constitution Blasphemy law and the Constitution” <https://www.livemint.com/Sundayapp/TFCMsgPVQ8rK6dJ2E2kSN/Blasphemy-law-and-the-Constitution.html>.

82 *Ramji Lal Modi v. Union of India* (1957) AIR 620.

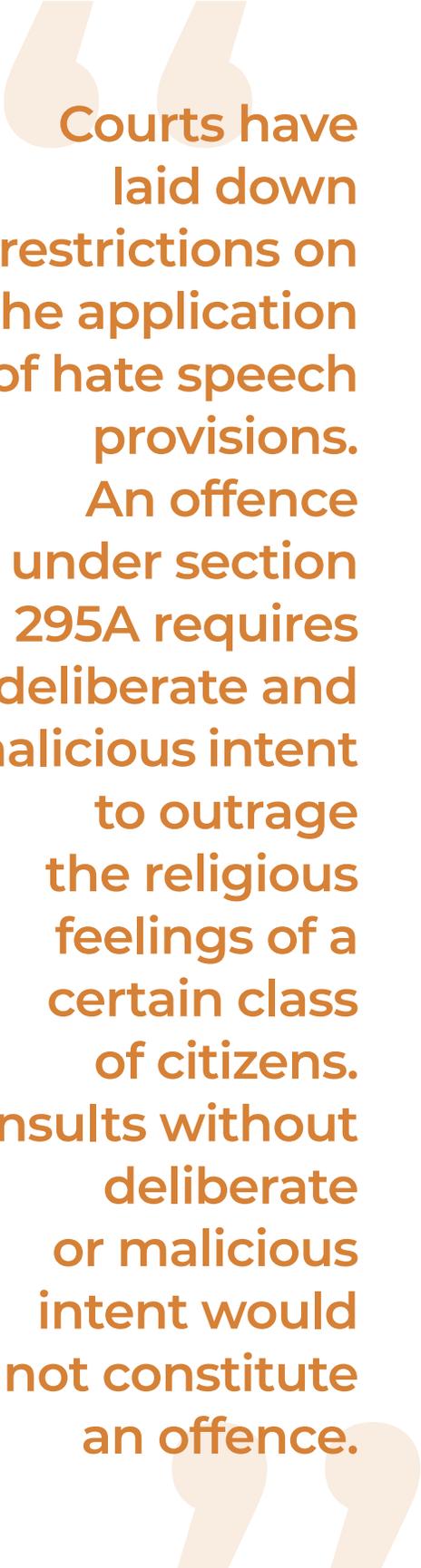
83 *Sheikh Wajih Uddin v. The State* MANU/UP/0093/1963; *Debi Soren And Ors. vs The State* MANU/BH/0091/1954.

84 *Ramji Lal Modi; Sujato Bhadra v. State of West Bengal* MANU/WB/0290/2005.

85 *Manzar Sayeed Khan v. State of Maharashtra* MANU/SC/7279/2007 [11]. The requirement of mens rea for an offence under section 505 was held to be necessary in *Bilal Ahmed Kaloo v. State of Andhra Pradesh* MANU/SC/0861/1997.

86 *Id.*

87 *Queen-Emprees v. Jogendra Chunder Bose* I.L.R. (1892) Cal. 35.



Courts have laid down restrictions on the application of hate speech provisions. An offence under section 295A requires deliberate and malicious intent to outrage the religious feelings of a certain class of citizens. Insults without deliberate or malicious intent would not constitute an offence.

disturbance against the state. Instead, the mere incitement of feelings of enmity is sufficient to be found guilty under the provision<sup>88</sup>.

After the addition of 'public order' as a ground for restriction under Article 19(2), the question of constitutional validity of section 124A came up before the Supreme Court in *Kedarnath Singh v. State of Bihar*<sup>89</sup>. In order to be able to uphold its constitutionality, the court limited the scope and application of the provision, noting that the offence requires the incitement of disorder or the tendency or likelihood of the same<sup>90</sup>. Therefore, words, however strongly worded, that express disapprobation without a tendency to cause public disorder would not come within the ambit of section 124A.

Subsequent to the decision in *Kedarnath*, the offence of sedition has been read to include only those acts or words that incite violence or create public disorder or have the intention or tendency to do so<sup>91</sup>. Courts have also drawn a distinction between strong criticism of the government and disloyalty towards the government. Disloyalty towards the government is not equivalent to commenting on the measures and policies of the government. Exciting feelings of disloyalty implies excitement to public disorder or the use of violence<sup>92</sup>. Consequently, the mere raising of slogans against the state<sup>93</sup> or criticism of the government's actions<sup>94</sup> have not been considered seditious under Section 124A. Similarly, the display of cartoons criticising the government at a public meeting has been held not to violate Section 124A<sup>95</sup>.

## Offences in the Information Technology (IT) Act

The IT Act is particularly relevant to this discussion for the restrictions it seeks to place on online expression, which have often been abused to stifle expression and dissent.

### SECTION 66A

Section 66A was introduced through amendments to the IT Act passed in 2008<sup>96</sup>. The provision criminalised the act of sending, inter alia, "*grossly offensive*" or "*menacing*" information online, including messages intended to cause "*annoyance or inconvenience*" to the recipients<sup>97</sup>.

The provision was challenged and struck down in 2015 in the Supreme Court's landmark

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88 *Queen-Empress v. Balgangadhar Tilak* I.L.R. (1898) 22 Bom. 112.

89 *Kedarnath Singh v. State of Bihar* MANU/SC/0074/1962.

90 Id.

91 *Manubhai Tribhovandas Patel v. State of Gujarat* MANU/GJ/0093/1971; *Sanskar Marathe v. State of Maharashtra* MANU/MH/0608/2015.

92 *Kedarnath Singh*.

93 *Balwant Singh v. State of Punjab*, MANU/SC/0344/1995.

94 *Javed Habib vs. The State (NCT of Delhi)*, MANU/DE/1946/2007.

95 *Sanskaar Marathe*.

96 The Information Technology (Amendment) Act, 2008.

97 Id.

decision in *Shreya Singhal v. Union of India*<sup>98</sup>. The court found that: (i) the provision was not rationally connected with ‘public order’ or any other ground listed in Article 19(2) of the Constitution; (ii) its drafting was vague and overbroad; and (iii) consequently, it cast a chilling effect on the exercise of expression protected by the Constitution<sup>99</sup>.

While the decision has been heralded as a progressive step furthering protection against state infringement of the right to freedom of speech and expression<sup>100</sup>, the court’s decision has not been fully enforced. As noted by the Internet Freedom Foundation, “prosecuting agencies and magistrates across the country have not been proactive in giving effect to *Shreya Singhal*.”<sup>101</sup> As a result, individuals continue to be harassed under section 66A of the IT Act.

## SECTION 67

Section 67 of the IT Act provides for “*punishment for publishing or transmitting obscene material*” online<sup>102</sup>. The section has been liberally used by law enforcement agencies to censor pornography, arrest individuals who non-consensually published intimate media<sup>103</sup>, and to address online harassment<sup>104</sup>. Additionally, section 67 has been also used to book offences involving minors, which is a faulty utilization of the provision, since a separate, specific legal framework exists for the same<sup>105</sup>. And, unfortunately, the provision has been used to censor even non-obscene political speech<sup>106</sup>. The provision has not only been viewed increasingly by law enforcement agencies as a substitute for Section 66A, but has also been frequently employed “*to silence dissent against politicians and those in power, and as a censorship mechanism on artists, filmmakers, journalists, etc.*”<sup>107</sup>

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

99 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (Oxford University Press) 331 *citing* *Shreya Singhal v. Union of India* 2015 (5) SCC 1 p. 13, 37-41, 82, 83, 90.

100 Gautam Bhatia, “The Striking Down of Section 66A: How Indian Free Speech Jurisprudence Found its Soul Again” *Indian Constitutional Law and Philosophy Blog*, <https://indconlawphil.wordpress.com/2015/03/26/the-striking-down-of-section-66a-how-indian-free-speech-jurisprudence-found-its-soul-again/>; Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (Oxford University Press) 330-332.

101 Sekhri, Abhinav and Gupta, Apar, *Section 66A and Other Legal Zombies* (October 31, 2018). *IFF Working Paper No. 2/2018*, <https://ssrn.com/abstract=3275893>.

102 Section 67, IT Act.

103 Note that Section 67A of the IT Act is meant for this purpose.

104 Bishakha Datta, et al., “Guavas and Genitals: A research study in Section 67 of the Information Technology Act”, *IT For Change*, [https://itforchange.net/e-vaw/wp-content/uploads/2018/01/Smita\\_Vanniyar.pdf](https://itforchange.net/e-vaw/wp-content/uploads/2018/01/Smita_Vanniyar.pdf).

105 Section 67A, Information Technology Act, 2000

106 *Id.*

107 *Id.*

# IV. INTERNATIONAL STANDARDS

The right to freedom of opinion and expression is a fundamental, long-established tenet of international law, and extends to opinions and other communications expressed online or through digital platforms.

Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) state that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers.*”<sup>108</sup> The Human Rights Committee of the ICCPR has clarified that this right extends to all electronic and internet-based modes of expression, and that it furthermore protects all forms of opinion, “including opinions of a political, scientific, historic, moral or religious nature.”<sup>109</sup> Similarly, protections for freedom of expression encompass a wide range of topics, from “political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse,” to material that may be considered “deeply offensive.”<sup>110</sup>

On July 5, 2012, the United Nations (UN) Human Rights Council (HRC) unanimously adopted a landmark resolution to protect the free speech of individuals on digital platforms. In particular, the resolution affirmed “that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice.”<sup>111</sup>

Article 19 of the ICCPR provides for limited restrictions on speech or expression, such as speech that imminently incites violence. However, limitations on freedom of speech under international human rights law must be narrowly applied and meet a strict three-part test: any restriction must be

- a) provided by law;*
- b) for the purpose of safeguarding one of the legitimate interests listed in Article 19(3);*  
*and*
- c) necessary to achieve this goal.*

108 Universal Declaration of Human Rights, United Nations General Assembly, Paris, 10 December 1948, <https://www.un.org/en/universal-declaration-human-rights/>, art 19; the right to access information through any media is further reaffirmed by General Assembly Resolution [A/RES/53/144](#) on the Declaration on Human Rights Defenders, and Article 23 of the ASEAN Human Rights Declaration.

109 Human Rights Comm., General Comment No. 34: Article 19: Freedoms of Opinion and Expression, paras 9, 12, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

110 *Id.* at para 11.

111 Human Rights Council, Resolution to the General Assembly on The promotion, protection and enjoyment of human rights on the Internet, 29 June 2012, UN Doc A/HRC/20/L.13. The resolution also recognized “the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms.”

To fulfil the first part of the test, the law must be adequately accessible and formulated with sufficient precision to enable a citizen to regulate his or her conduct (i.e. the “foreseeability” element). The second part of the test requires that legislative measures restricting free expression truly pursue one of the aims listed in Paragraph 3, namely the rights or reputations of others or the protection of national security, public order (‘order public’) or of public health or morals. The third part of the test means that even measures which seek to protect a legitimate interest must meet the requisite, strict standard established by the term “necessary.” Any restriction must restrict freedom of expression as little as possible, and be carefully designed to achieve the objective in question, without being arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest<sup>112</sup>. Internet content regulation that fails to pass scrutiny under any part of this test cannot be considered legitimate under international human rights law.

With respect to defamation as one such limitation, a growing number of international authorities on freedom of expression have called on governments to abolish or consider abolishing criminal defamation. The Human Rights Committee has recommended that States parties “consider the decriminalization of defamation”, noting that “imprisonment is never an appropriate penalty”<sup>113</sup>. The UN rapporteurs on freedom of expression and special representatives of the Organization for Security and Co-operation in Europe, the Organization of American States, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and People’s Rights have further stated that “criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>114</sup>

Based on these standards, it is clear that many instances of India’s use of censorship, defamation, and sedition laws to control speech on digital platforms extends beyond what is permitted under international law. In particular, many of these measures fail the three-part test, and are often disproportionate, unnecessary, or not legitimately in place for one of the designated purposes set forth by Article 19(3). While governing the digital sphere is no easy feat, especially with regards to actual malicious or dangerous content, this governance challenge should not be used as justification to suppress legitimate speech and expression, particularly by civil society, including human rights defenders, journalists, or government critics.

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112 See, e.g., *Handyside v. the United Kingdom*, Judgment of 7 December 1976, para. 49 (European Court of Human Rights); and 58 See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8, (Canadian Supreme Court).

113 General Comment 34, *supra* note 109, at 47.

114 International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2002, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1>.

# V. HOW CAN INDIA'S CENSORSHIP REGIME BE REFORMED?

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## Defamation

As discussed, criminal defamation has had a troublesome history as a tool to stifle criticism of powerful and public individuals. It is necessary to ascertain whether the restrictions imposed by law of defamation are proportional to the objectives sought to be established. An examination of the procedural aspect of defamation reveals infirmities embedded within the system that casts aspersions on any assertions of proportionality. This includes procedures that:

- Require defendants' presence at the place where case has been filed against them;
- Do not limit the number of cases that can be filed against a person who allegedly made defamatory statement.

Additionally, in the event of frivolous cases, no mechanisms exist for the defendant to recover the financial costs or other damages incurred as a result of the case. For such reasons, criminal defamation and its associated procedural provisions should be completely removed<sup>115</sup> to protect speech in all forms.

In the USA and in European countries, defamation suits instituted to silent dissent and opposition are often referred to as Strategic Lawsuits Against Public Participation (SLAPP) or simply suits against public participation. Widespread legislation exists recognizing the harmful effect of such suits on democratic participation and prohibiting or penalizing the same. These laws also empower defendants (or the original speaker of the attacked speech) to seek relief for harassment by way of defamation suits, and provide additional procedural safeguards. Instead of sweeping criminal legislation that gives the rich and powerful broad powers of misuse, the Indian state should look to enact similar "anti-SLAPP" laws that condemn such practice<sup>116</sup>.

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115 "Stifling Dissent" (n 19); Shivi, Defamation Law and Judicial Intervention: A Critical Study, Indian Law Institute Law Review, Summer Issue 2016, 170-183. Critique of s.199 CrPC 1973 - the provision mentions "person aggrieved" which has resulted in people who are not directly affected by the alleged defamation becoming a party to the case. Also, multiple cases of defamation can be filed in multiple jurisdictions, making it difficult for the accused to fight back.

116 State Anti-slapp Laws, Public Participation Project, <https://anti-slapp.org/your-states-free-speech-protection>

## Hate speech

The American philosopher Judith Butler had expressed her scepticism of placing the state at the heart of regulation of hate speech. She opined that putting the onus on the state to administer justice in hate speech cases would mean the state utilizes such laws to advance the dominant discourse and suppress deviance<sup>117</sup>. This is exactly what has been happening in the Indian landscape, over the existence of the hate speech laws' long and diverse existence.

Additionally, in the Indian context, the general jurisprudence around hate speech seem to support to the idea that there is “[...]an excess of passion and emotion among the Indian people, because of which speech in unregulated or irrational form is believed to be dangerous [...]”<sup>118</sup>. This is discouraging, since the prioritization of emotion means that there are no thresholds of offence that the law enforcement pays heed to while accepting complaints<sup>119</sup>, leading to rampant misuse, as the above sections have shown.

Former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has noted that for hate speech to be criminalised, it should be of a public nature, should at the very minimum present a real and imminent danger, and must contain an obvious intent to harm<sup>120</sup>. These are important safeguards that would greatly improve the current law, should judicial review choose to incorporate the same into the framework.

However, reform of all the provisions of law related to hate speech might not be sufficient. As section 295A comes close to being equivalent to an anti-blasphemy law, it should be removed. As commentators have argued, India's hate speech laws do not take into account the power dynamics between castes and religions. Coupled with Butler's arguments, this means that the dominant class becomes the custodian of 'community identity', at the cost of silencing marginalized voices. While believers of all religious communities, as well as those who do not adhere to any religion, should indeed be protected, religious beliefs as such should not. Those who engage in violence because their own beliefs are questioned or challenged should not be protected by the law on that account<sup>121</sup>.

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117 Judith Butler, Burning Acts: Injurious Speech (1996), *The University of Chicago Law School Roundtable*, 3(1), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1382&context=roundtable>

118 Anja Kovacks “Unshackling expression: A study on laws criminalising expression online in Asia,” Internet Democracy, March 16, 2008, <https://internetdemocracy.in/reports/unshackling-expression-a-study-on-laws-criminalising-expression-online-in-asia/>

119 Id.

120 Id.

121 Id.

## Sedition

In 2010, the United Kingdom abolished its sedition laws and acknowledged their chilling effect on free speech in a democracy<sup>122</sup>. The then Justice Minister Claire Ward recognised the necessity of abolishing sedition law in the UK specifically to invalidate the notion that UK was standing by its laws on sedition in present times, which has been used as a justification by other nations to suppress dissent and press freedom using such laws<sup>123</sup>.

It has been argued in the past that the judicial test of what constitutes sedition is almost identical to that of the 'public order' requirement under Article 19(2) of the Indian Constitution<sup>124</sup>. The latter is a constitutionally recognized reasonable restriction that the state can impose on speech. However, as observed in the preceding segments, section 124A of IPC has been rampantly used to stifle dissent, public participation and press freedom in India<sup>125</sup>. The congruence of the 'public order' tests with the test of sedition also means that the law criminalizing sedition do not serve any manifest purpose in a democratic society except as a tool of the state to intimidate and harass critics. There is a more constitutionally sound manner of regulating 'illegal' speech through the clause enacted within the Constitution. Therefore, it is strongly recommended that this provision be removed in its entirety.

## On Internet-Related Offences

### SECTION 66A

Section 66A should not still be in operation, given the categorical pronouncement of unconstitutionality five years ago. Yet this provision continues to be deployed to arrest dissenters



Section 66A should not still be in operation, given it was declared unconstitutional five years ago. Yet this provision continues to be deployed to arrest dissenters and government critics.

122 Chitranshul Sinha, *The Great Repression: The Story of Sedition in India*, Penguin Random House India (2019) <https://www.pressgazette.co.uk/criminal-libel-and-sedition-offences-abolished/>

123 "Criminal libel and sedition offences abolished", Press Gazette, January 13, 2010 <https://www.pressgazette.co.uk/criminal-libel-and-sedition-offences-abolished>

124 Gautam Bhatia, "What is Sedition? - I: The Kedar Nath Singh Case," August 12, 2013. <https://indconlawphil.wordpress.com/2013/08/12/what-is-sedition-i-the-ke-dar-nath-singh-case/>

125 Maneesh Chibbar "Indian citizens and media have been terrorised enough with sedition. SC must end it now," The Print, June 17, 2020, <https://theprint.in/opinion/indian-citizens-and-media-have-been-terrorised-enough-with-sedition-sc-must-end-it-now/442914/>

and government critics<sup>126</sup>. Such deliberate administration of section 66A denotes an institution-wide failure across law enforcement and courts in India, whereby decisions from the nation's highest court have not effectively been implemented<sup>127</sup>. This failure can be addressed through the creation of a communication mechanism to ensure that important judgements are followed by circulars and trainings to police departments, high court and district court judges<sup>128</sup>.

## SECTION 67

Section 67 continues to raise concerns: first, that perfectly non-obscene, political criticisms fall under its orbit, leading to rampant misuse, and second, that the legal regulation of 'obscenity', in a modern society, harkens back to puritan ideals around sexual expression and sexuality; accordingly, precedents developed around this provision are regressive and do not focus on consent<sup>129</sup>.

As studies around the operation of this provision have shown, most of the use-cases currently stand in misuse of the main provision, and there are other legal provisions that regulate such use-cases. Accordingly, section 67 currently does not seem to serve any particular purpose apart from being a tool for abuse, and should be scrapped.

Lastly, CSO participation in the reform of censorship laws in India is of paramount importance, and is perhaps one of the primary methods of checking rampant misuse of the laws described above. The sequence of events leading to the repeal of section 66A of the IT Act, and the continuous advocacy around its unconstitutional administration post *Shreya Singhal*, are all evidence of the impact CSOs can have in the decision making processes of the government and the judiciary. Thus, consultation by government with and participation of the civil society sector is critical in effective reform of India's censorship regime.

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126 "How FIR U/s 66A IT Act Has Been Registered? Allahabad HC Pulls Up UP Police," Livelaw, August 8, 2020, <https://www.livelaw.in/news-updates/allahabad-hc-seeks-explanation-from-up-police-161150>. In this case, a High Court refused to quash charges filed under section 66A.

127 Abhinav Sekhri (n 102).

128 Id.

129 Bishakha Datta (n 105)

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