ANALYSIS OF INDIA'S INTERNET CENSORSHIP MEASURES IN LIGHT OF AMERICAN CONSTITUTIONALISM

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The article focuses on the freedom of speech on the internet in India and its comparison with the principles of the American Constitution. It explains the importance of free speech in the American constitutional context and also how foreign judgments and doctrines can help fill gaps in the Indian judicial thought process. This paper specifically concentrates on the new Intermediary Guidelines in India and their implications on free speech and the importance of judicial scrutiny. The article focuses on the need to safeguard the forums for public debate, especially the internet which is very accessible to the general public and utilised on a daily basis for this purpose, while addressing some of the concerns that arise from its misuse such as fake news, slander, and invasion of privacy. In this article, the author analyses the IT Rules and then calls for their revision based on the principles of democracy. It also gives an insight into the possible impact on freedom of speech because of ambiguous rules and increased self-regulation and censorship by the intermediaries. Finally, the article calls for moderation in the freedom of speech and the need to regulate it, with lessons from American constitutionalism to improve India's constitutional objectives.

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INTRODUCTION

The internet, like any medium of communication, can be abused by people to spread misinformation, defraud, scam, spread propaganda, and terrorism, and it is the duty of the State to regulate this domain just like ordinary speech, in order to preserve and promote its democratic and constitutional goals. Theoretically, however, this proposition is inimical to the classical liberalist, John Stuart Mill's ideas espoused in "On Liberty", wherein he grants an exclusive status to speech, propositioning that it is "a basic right for human flourishing"[2] and is immune even from the tenants of the "Harm Principle".[3] Whether this postulation can be attributed to his assumption about the inherent "harmlessness" of speech or an anti-paternalistic approach is a matter of legal and philosophical debate.

Thinkers like Dworkin, Nagel and Rawls too have advocated for similar legal protection to be accorded to public expression of "dangerous" ideas.[4] American free speech constitutionalism derives its validity from the First Amendment of the United States. A number of essential liberties are guaranteed by the First Amendment of the US Constitution, including the freedom of assembly, expression, religion, and the press, as well as the ability to petition the government. It guarantees people's freedom to express themselves, follow their religion, congregate in peace, and criticise the government without fear of retaliation or censorship. This pillar of American democracy symbolises the country's dedication to upholding individual liberty and encouraging a varied and lively public conversation.

While the tenets of classical liberalism have historically aligned with and helped build the American constitutional tradition, there are numerous philosophical, socio-legal, and most importantly, practical considerations that run contrary to free-speech absolutism, and even the United States couldn't practically sustain the literal "purity of interpretation"[5] that came with the First Amendment and post 1919, courts had to develop certain

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[2] JOHN S. MILL, ON LIBERTY (Batoche Books, 1859).
[3] *Id.*
[4] W. Jeffrey Howard, *Dangerous Speech*, 47 PHIL. & PUB. AFFS. 208 (2019).
[5] Christopher M. Schultz, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573 (1999).

legal standards and doctrines to discern "low value" speech from "high value" vis-à-vis the potential of the impugned speech to further the "First Amendment values".[6] These values consist of expressions that further society's interests in transmitting ideas, discerning the truth and creative expression.[7]

Through judicial and jurisprudential developments, certain classes of speech have been termed "low value"– obscenity, child pornography, incitement, commercial speech and fighting words.[8] Such speech is subject to greater judicial scrutiny and censorship compared to "high value" speech, which is broad-based and arguably consists of all speech excluding the above-mentioned categories, and it, on the contrary, receives almost absolute protection against legal coercion.[9]

The Indian constitutional tradition differs significantly in the sense that certain categories of restrictions are embodied within Article 19 i.e. the provision that grants us the "fundamental" right to free speech. Through decades of judicial interpretation and lawmaking, three criteria for "constitutional censorship" were established – first, the restriction can only be imposed through legislative action (not administrative or executive), second, it should fall under one of the grounds specified under Art 19(2), and such restriction must be reasonable, proportionate and strike a proper balance between freedom guaranteed under Art. 19(1) and the restrictions made permissible under Art. 19(2).

While the "no-go zones" mentioned under subsection 2 are broad-based, including categories like "public order" and "morality and decency", it is qualified with the prerequisite of "reasonableness" and the reasonableness of the same is subject to the scrutiny of the court, which is armed with the potent principles of natural justice. In terms of real-life speech, courts are a viable refuge to contest one's case, however, as we will explore hereunder, the validity of every piece of media or communication censored by a social media intermediary cannot be challenged in the court, owing to the private and contractual nature of "Terms and Conditions" and "User Agreements"

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[6] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).
[7] SCHULTZ, *supra* note 5.
[8] *Id.*
[9] STONE, *supra* note 6.

governing the same. Moreover, with the new fact-check units that essentially let states monitor and indirectly censor content, censorship by the state shall take place behind the veil of a private company, leading to potential violations of our Fundamental Rights under Articles 19(1) and 21, which cannot even be subject to judicial scrutiny. In this paper, the author will explore the constitutionality of the new IT Rules and its recent amendments in light of American free speech constitutionalism.

METHODOLOGY

The author has employed and relied upon comparative materials to highlight lacuna in our judicial reasoning when it comes to the regulation of speech on the internet and to propel our unique "living originalism" in modern times by using these doctrines to stimulate an internally significant constitutional conversation. In this paper, the author has referred to primary sources from American jurisprudence for the purpose of comparative analysis. These range from the Amendments in the US Constitution to tests and theories developed by American courts for the purpose of interpreting their scope. The model used is dialogical, and the goal of the paper is to highlight foreign doctrines that can aid in achieving our constitutional goals when it comes to free speech, with the advent of new technologies and forums.[10]

CYBER-SPEECH REGULATION IN INDIA

India is a signatory to the Universal Declaration on Human Rights (UDHR) law, and the International Covenant of Civil and Political Rights (ICCPR), many provisions of which correspond to and are symbiotic with the judicially protected Fundamental Rights guaranteed to Indian citizens under Part III of the Constitution.[11] Arts. 19[12] and 20[13] of the ICCPR

[10] Sujit Choudhry, *Living Originalism in India: Our Law and Comparative Constitutional Law*, 25 YALE J. L. & HUMAN. 1 (2013).

[11] A. Raza, *'Freedom of Speech and Expression' as a Fundamental Right in India and the Test of Constitutional Regulations: The Constitutional Perspective*, 43(2) INDIAN BAR REV. 87 (2016).

[12] International Covenant on Civil and Political Rights art. 19, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[13] International Covenant on Civil and Political Rights art. 20, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

acknowledges the varying substantive values that can exist with respect to acceptable speech and allow "necessary" limitations on the right to free speech, manifestly calling for the application of Due Process while assessing speech, and not for a mechanical procedure established by law. Similarly, Art. 29[14] of the UDHR reiterates that only such restrictions on rights and freedoms are permissible which are "determined by law".

However, an important distinction needs to be made on constitutional reservations with free speech (Art 19(2)) and the separate grounds introduced in the Information Technology Rules, 2021 (**"IT Rules"**). One particularly debated regulation is Rule 3,[15] which makes it obligatory for social media intermediaries (**"SMI"**) to monitor and promptly remove content on receiving knowledge of the same, whether from a platform user or the government. However, the grounds of such censorship have vague connotations and are highly susceptible to subjective interpretation. Usage of phrases like "harmful to children", "ethically and racially objectionable", and "insulting to other nations" stretch the scope of prohibition beyond the permitted grounds in Art. 19(2). *Shreya Singhal v. Union of India* primarily struck down S. 66A for laying down amorphous and broad standards for censorship and reiterated that orders to censor content must be backed by reasons.[16]

There is no requirement under the Act for the intermediary to apply its own mind on the basis of broad-based categories, and such a provision would be unconstitutional, as per this judgement, especially if it's accompanied by penalisation. Additionally, with regards to S. 79(3)(b) of the Act which mandates that the intermediary must expeditiously remove certain content on receiving actual knowledge by a court order, it was noted in *Shreya Singhal* that it must be read down to include only the subject matter listed in Art 19(2). Any "unlawful" speech beyond the categories listed in Art 19(2) cannot be part of Section 79[17] or the guidelines formulated under it because the Constitution of a country forms the basis for assessing the

[14] Universal Declaration of Human Rights art. 29, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).
[15] Rule 3, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
[16] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 106.
[17] *Id.* ¶ 117.

legality of any statute, and there is no fundamental distinction between speech on the internet and in real life. If speech, including mass media through any other medium is not subject to restrictions extraneous of Art 19(2), neither should online speech. Further, SMI would be held liable lest they knowingly host, publish or transmit such content, which would lead to sweeping, impetuous and extensive censorship on their part to evade liability.[18]

Needless to say, the want for online speech regulation in the Indian scenario is urgent, as more than half a dozen people have died in violence caused due to misinformation spread on social media platforms like WhatsApp and Facebook, the most recent being a mob-killing instigated by online rumours in a village.[19] Another wave of fake news spread after the Pulwama attack, fuelling conspiracy theories involving local Kashmiris and the opposition party, with morphed pictures of Rahul Gandhi with suicide bombers spreading on WhatsApp.[20] and in the last 7 years, India saw a 500% increase of cases filed under 153A (Promotion of enmity between different groups on grounds of religion) of the Indian Penal Code.[21] In light of these events, it is no surprise that India is one of the first countries to legislate, *albeit* loosely, on the question of intermediary liability.[22]

However, it is also imperative to mention that these private intermediaries play a crucial role in providing a virtual infrastructure for a free exchange

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[18] Pritika Advani, *Intermediary Liability in India*, 48(50) EPW (2013).

[19] Elyse Samuels, *How misinformation on WhatsApp led to a mob killing in India - ...* WASHINGTON POST (2020) https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/.

[20] Kunal Purohit, *WhatsApp rumours have led to 30 deaths in India. Who's next?*, SOUTH CHINA MORNING POST, (2019) https://www.scmp.com/week-asia/society/article/2187612/whatsapp-rumours-have-led-30-deaths-india-social-media.

[21] N. Jacob, *Data check: In Seven Years, India has seen a 500% rise in cases filed under its hate-speech law*, SCROLL.IN (2022) https://scroll.in/article/1026701/data-check-in-seven-years-india-saw-a-500-rise-in-cases-filed-under-its-hate-speech-related-law/.

[22] R. Chhaya and A. Afaq, *Information technology (guidelines for intermediaries and digital media ethics code), 2021: Critical Study*, J. PATENT & TRADEMARK OFFICE SOCIETY, 623–635 (2022).

of ideas, and it is pertinent to note that the internet penetration rate in India stands at around 50% of the population or 692 million people and is growing at the rate of 8% per year.[23] We can reasonably deduce from these facts that the debate and discussion regarding current issues, government policies and other important facets of public life as well as the volume of social and digital news and opinion pieces being communicated to the public is immense. It is as important to protect this engaged space for public dialogue, as it is to curb social evils like defamation, and criminal activity including identity phishing, credit card fraud, bank impersonation scams, copyright infringement, content piracy and so on. Considering our constitutional mandate, certain forms of speech which are violative of other's moral and legal rights, as well as averse to public order should be regulated, however, as mentioned above, it is equally necessary to protect forums that act as primary conduits to communicate and exchange ideas for more than 500 million people. Rendering these forums susceptible to liability by way of rules that are unpredictable and vague, as the researcher will elaborate upon in the following sections, can lead to intermediaries themselves erring on the side of caution[24], and being less discerning while censoring content, and being driven by self-preservation. In fact, such liability can threaten the very existence of social media and e-commerce platforms itself.

It is due to the above-mentioned reasons that immunity to such liability was given to intermediaries under S.79 of the Information Technology Act, 2000.[25] The genesis of S. 79, in the essence that it exists contemporarily, can be attributed to the decision in *Avnish Bajaj v. State*[26], wherein the court refused to exempt the Managing Director of a certain website from liability, citing lack of filters and Due Diligence on their part for hosting an objectionable advertisement for a mobile phone. The addition of S. 79 (safe harbour clause) to the IT Act vide an amendment was made after this decision. Since many computer resources act as conduits for the exchange of information between parties unrelated to it, the imposition of liability on them is considered antithetical to the development of technology.

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[23] S. Kemp, *Digital 2023: India - DataReportal – global digital insights*, DATAREPORTAL, https://datareportal.com/reports/digital-2023-india.
[24] ADVANI, *supra* note 18.
[25] Information Technology Act, 2000, No. 21, Acts of Parliament, § 79.
[26] Avnish Bajaj v. State, 2008 SCC OnLine Del 688.

Additionally, regulating intermediary platforms in the past was considered difficult, as algorithmic censorship was not commonplace. Self-monitoring a computer resource two decades ago would require considerable manpower and resources. S. 79 of the Act limits the liability of ISPs and other intermediaries that host or transmit third-party content as long as they comply with certain stipulations. These include not initiating the transmission of the information, not modifying the content, observing due diligence and any guidelines as may be prescribed by the Central Government in this regard and expeditiously removing or disabling access to any unlawful material being hosted on it, on being notified by the appropriate Government or its agency. Further, the definition of intermediary under S. 2(w)[27] of the Act, formulated after this case, brought India closer to international standards. With the new IT Rules, this safe harbour protection has been qualified and certain external checks have been placed upon the free flow of information and content across social media, digital media, and OTT platforms.

We will examine the constitutionality of the checks hereunder, through the lens of American free speech constitutionalism. Since after the First World War, the First Amendment, and the right to freedom of speech have assumed a special status, both culturally and constitutionally, within the "American constitutional enterprise".[28] This significance accredited to free speech inevitably led to the development of a jurisprudential and judicial landscape that ensured maximum protection to speech, and it would be socially and legally relevant to explore doctrines, processes and theories that developed under this ideological framework and assess the desirability of their application on India, to further our original constitutional goals[29]. At the outset, the researcher reiterates that every country has their own set of substantive values, and the following analysis doesn't argue for an all-

[27] § 2(w): "Intermediary" means any person who on behalf of another person receives, stores or transmits electronic record or provides any service with respect to that record and …network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces and cyber cafes.

[28] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

[29] Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762.

encompassing 'free marketplace of ideas'[30], or even exaltation of free speech over other values like public order or state security, which was the case in the infamous *per curiam* decision of *Brandenburg v. Ohio*.[31] It is rooted in our Constitution that speech, threatening state security, foreign relations, public order and state sovereignty does warrant some form of regulation and even prohibition.

CONSTITUTIONALITY OF IT RULES, 2021 IN LIGHT OF AMERICAN CONSTITUTIONALISM

Under the Information Technology Act, 2000, intermediaries including social media and marketplace intermediaries were exempt from liability accruing to any content, information, or data they provided a forum for.[32] They were construed as mere conduits for two parties to exchange ideas or conduct business. E-commerce Rules, 2020 are beyond the scope of this research, so the focus of this research will be social, digital media intermediaries and marginally, OTT platforms.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (**"IT Rules, 2021"**), were formulated under the mandate of Section 87(2)(z)[33] and (zg)[34] of the Act, to prescribe guidelines for the due diligence to be conducted by the intermediaries to retain the protection of S. 79. It also prescribes the procedures to be followed by the government to block access to any content under S.69A and B of the Act. The Supreme Court urged the Central Government to legislate on guidelines under the IT Act, 2000, after videos involving gang rape and child pornography circulated on the internet. A committee was formed which made various recommendations, one of them reiterating the necessity of imposing strict intermediary liability on hosting platforms in light of this case.[35]

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[30] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[31] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[32] Information Technology Act, 2000, No. 21, Acts of Parliament, § 79.
[33] Information Technology Act, 2000, No. 21, Acts of Parliament, § 87(2).
[34] Information Technology Act, 2000, No. 21, Acts of Parliament, § 87(2)(zg).
[35] Prajwala Letter (Videos of Sexual Violence & Recommendations), In Re, (2018) 17 SCC 79.

Following this, IT Rules, 2021 were formulated, suppressing the 2011 Rules made on similar lines. The main difference between IT Rules and the Act is that earlier, the intermediary was to be held liable if it omitted to remove information in contravention of a court order or some instruction by a government agency, but now liability can accrue from failure to self-monitor and remove the 'offensive' content on complaint by an interested party within 36 hours as per Rule 3 of the IT Rules[36] These Rules mandate SMIs to perform greater due diligence with respect to the content hosted on or transmitting through their platforms. The intermediaries are also obligated to remove information that a government body called a "Fact check unit" will determine as false. The government will also be able to direct the SMI to break encryption to determine the first originator of a particular piece of content as per the 2023 Amendment to the Rules. While the new Rules would lead to some beneficial outcomes by mandating the issuance of user policies and notices, as it would promote user standards and lead to greater transparency, security and trust between the users and the platform, they are ultra vires the original delegating intent of the Act.[37]

A. RULE 3(2)

However, the grounds mentioned in Rule 3(1)(b)[38] of the Rules for the removal of content through such self-appraisal or complaint are vague, with a broad interpretative scope. The terms mentioned have not been defined anywhere, neither in the Constitution nor in the General Clauses Act. Imposition of liability on failure to delete information on this basis would lead to broad-based censorship, through various technical and manual methods like keyword filtering, something used widely in countries that want to suppress information like China.[39] In *Shreya Singhal v. Union of India* (2015)[40], S. 66A of the IT Act was declared unconstitutional owing to

[36] Information Technology (Intermediate Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3.
[37] CHHAYA & AFAQ, *supra* note 22.
[38] Information Technology (Intermediate Guidelines) Rules, 2011, Rule 3(1)(b), India.
[39] WeiMing Ye & Luming Zhao, *"I know it's sensitive": Internet censorship, recoding, and the sensitive word culture in China*, 51 DISCOURSE CONTEXT & MEDIA 100666, (2023), https://doi.org/10.1016/j.dcm.2022.100666.
[40] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

its vagueness and disproportional censorship potential. It was held to have a 'chilling effect on the freedom of speech and expression' as the grounds mentioned – speech meant to cause annoyance, inconvenience or gross offence- were subjective and didn't have a close enough nexus with disruption of public order under Art 19(2).[41] To establish this, reliance was placed on an American case[42], which held that speech on the Internet is entitled to the same level of protection as that given to print media. The impugned legislation in this case was the Communications Decency Act which contained a provision to protect minors from "patently offensive" speech on the internet. The court declared the Act unconstitutional, citing the three-part obscenity test established in the *Miller*[43] case and concluding that the terms "indecent" and "patently offensive" failed to establish any reasonably narrow or precise criteria to censor speech. In the *Shreya Singhal*[44] judgement, a similarity was drawn between "patently offensive" and "grossly offensive" and the broad censorship potential, owing to the lack of precision and definition of such terms, was deemed unacceptable. In Shreya, further reference was made to the American case *Federal Communications Commission v. Fox Television Stations*[45]and due process considerations of a 'precise notice' of law – a fair notice to inform persons or entities of conduct that was forbidden- was given weight even though due process isn't applicable in India, in the form it takes in the US, as 'personal liberty' under Art. 21 must be interpreted in a narrower sense than 'liberty' more generally under the Fourteenth Amendment.[46] In this case, the Supreme Court's recourse to American judgements to define the scope of Art. 19 and reinterpret the provisions of the IT Act helped safeguard our fundamental right to free speech and nullify an excessively restrictive provision.

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[41] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 83.

[42] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[43] Miller v. California, 413 U.S. 15 (1973); the three part obscenity test- whether on application of community standards, the work would appeal to prurient interests, whether it has any political, scientific or artistic value and lastly, whether it depicts sexual conduct in a patently offensive way specifically defined by state law.

[44] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 106.

[45] FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

[46] Sujit Choudhry, *Living Originalism in India? 'Our Law' and Comparative Constitutional Law*, 25(1) YALE J. L. & HUMAN. (2013).

However, the main difference between the two provisions – Rule 3(2) of the Rules and Section 66A of the Act is that the latter involves a criminal liability by an appropriate governmental authority and the former is an obligation/duty on the owner of the computer resource or intermediary with unprescribed liability, if any, to take down certain categories of content under their Terms of Service or Community Guidelines. Rule 3(2) would hence be constitutional due to the following reasons: first, since the categories of content mentioned are censored through the discretion of the private entities, and by way of the User Agreement or Terms of Service Contract, it will fall under the contractual realm and be shielded from Art 19(1) scrutiny.[47] Second, no direct government intrusion is taking place, rather certain categories, albeit vague and extraneous to the grounds in Art. 19(2), have been laid down as guidelines for the private entity to self-govern, which are congruent with the grounds of censorship already present in most community guidelines.

The question of whether SMIs would be liable for failure to remove offensive content, or whether these guidelines are only faciliatory in nature, was addressed in the recent *Tandav*[48] judgement, wherein the court ruled that the Rules lack teeth and do not impose liability that takes away the safe harbour protection under S. 79, therefore they are merely guidelines. However, this is only one precedent, and the ruling can be reversed in the future. With the recent *Tandav* fiasco, it can be concluded that Rule 3(2) does set a dangerous legislative precedent and can have a chilling effect on speech when it comes to the censorship and access removal policies undertaken by private intermediaries. Since a humongous quantum of data passes through their servers, companies can undertake mass censorship through censorship algorithms, which would redact speech irrespective of the context or discursive meaning of the speech.[49] This will lead to the consideration of commercial and political concerns interfering with the daily communications of billions of people as well as lead to a frivolous suppression of critical or satirical content. However, the rules as they stand

[47] J.E. Fradette, *Online Terms of Service: Shield for First Amendment Scrutiny of Government Action*, 89(2) NOTRE DAME L. REV., 947 (2013).
[48] Aparna Purohit v. State of UP, (2021) 3 All LJ 634.
[49] Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHIL. TECH., 739–766 (2021).

currently, cannot be deemed to be unconstitutional due to the veil of private law and the directory nature of the provisions.

B. FACT-CHECK UNIT BY MEITY

Through an amendment to the Information Technology Rules in 2023, the Union government notified an additional check on information dissemination on social media.[50] A fact-check unit ("**FCU**") run by MeitY by way of Rule 3(1)(b)(v) of the IT Rules can now direct the concerned SMI to remove 'fake, false or misleading' information related to the business of the Central Government, and the SMIs are supposed to take reasonable efforts to comply with the same.

In the recent Bombay High Court case *Kunal Kamra v. UOI*[51], the division bench gave a split judgement on the constitutionality of this amendment. Gokhale J. found the provision innocuous, stating that merely taking away safe harbour would not lead to a cent per cent probability of content removal and that the intermediary can still choose to retain the user-generated content and defend itself in court. [52] Patel J. on the other hand, described the choice between losing a trifling piece of content and that of losing safe harbour as a "Hobson's choice"– they would rather sacrifice the user content than risk litigation in a country like India that criminalises a broad swathe of speech.[53] Therefore, the most rational course of action for an intermediary would be to remove the piece of content flagged by the FCU. Very recently, the Supreme Court stayed the petition and it is awaiting a final verdict in the Bombay High Court.[54]

The grounds mentioned for censorship by the FCU – "fake, misleading information" relating to the "business" of the government, are overly broad and not directly connected to the grounds under Art 19(2). S.

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[50] Ministry of Electronics and Information Technology. Information Technology (Intermediary Guidelines) Amendment Rules, Apr. 6, 2023.
[51] Kunal Kumra v. UOI, 2024 SCC OnLine Bom 360.
[52] *Id.* ¶ 17.
[53] *Id.* ¶ 81.
[54] AK Bawa, *'Supreme Court stays Fact-Check Unit notification under IT Amendment Rules 2023 | Awaits Bombay HC judgment,'* LIVE LAW, (Mar. 21, 2024) https://www.livelaw.in/top-stories/supreme-court-kunal-kamra-editors-guild-notifying-fact-check-unit-it-rules-2023-252998.

79(3)(b) of the IT Act also directs intermediaries to remove "unlawful" content on the direction of the government. In *Shreya Singhal*, S.79(3)(b) was declared constitutional on the condition that the orders made under it conform to the grounds laid down in Art 19(2) and liability accrues only on failure to comply with a court or government order and not on general complaints. However, in the *Shreya* case, no link was established between the word "unlawful" in the Act and the grounds under Art 19(2) specifically and in fact the possibility of such linkage was disturbed by purporting that the speech on the internet is intelligibly different from speech in real life and through other modes owing to its high dissemination potential and anonymity. Such distinction is not made in First Amendment jurisprudence owing to the "public forum" doctrine which categorically declares cyberspace to be a public forum, the same as any other real-life venue.

C. PUBLIC FORUM DOCTRINE

One of the tests developed under First Amendment jurisprudence to determine the scope of its application is the forum analysis or designation test. For different forums — public, non-public, and limited, a different level of protection is designated, the constitutional protection of absolute freedom of speech being afforded only to a public forum.[55] In case a physical space is deemed to be a public forum, like a public park or street, the government regulation has to be content-neutral and can only regulate the manner, avenue or time of the speech (irrespective of the message it seeks to convey). Any restrictions on the content of free speech here must be carefully scrutinised.[56] In non-public fora like an airport or a private store, there is greater scope for public power to play its role and balance speech rights against public interests. Finally, limited or designated fora would be spaces assigned for a particular purpose and for a specific group of people. Herein, free speech rights would be significantly limited. However, for this purpose, it is important to remember that judicial scrutiny would be the most stringent when it comes to any regulation of speech in the public fora and a two-pronged test would have to be fulfilled

[55] Enrico Andreoli, *Continuities and Discontinuities. First Amendment and Digital Free Speech in U.S. Constitutionalism*, 56(1) DPCE ONLINE (2023).
[56] Police Dep't v. Mosley, 408 U.S. 92 (1972).

by the state – that the regulation is narrowly tailored and accomplishes some compelling government interest.[57]

In *Packingham v. North Carolina*[58], the court deemed the internet to be a 'modern public forum' and decreed that an act to restrict free speech on social media was violative of the First Amendment. In *Cornelius v. NAACP Legal Def. & Educ. Fund*[59], it was argued that a public forum is wherever the primary purpose of a physical space is the free exchange of ideas i.e., it is not a limited or private forum designated for any particular purpose or accepting a limited membership. Lastly in *Brown v. Ent. Merchs. Ass'n*[60], it was established that the First Amendment will apply irrespective of the change in the mediums of communication. Since the internet was equated to a public forum, strict judicial tests scrutinising any form of regulation on cyberspace would apply as well. Such a regulation would have to be content-neutral, precise and to fulfil a "compelling government interest".

Since it hasn't been established under the Indian context that speech on the internet would be deemed to be the same as speech in real life as speech on the internet can reach a wider audience at a faster rate, the standards for speech restrictions can be different in such a case. In the *Shreya Singhal* judgement, the court declared a provision similar to Rule 3(1)(b)(v) to be constitutional by decreeing that the interpretation of the word "unlawful" under S. 76(3)(b) has to be in conformity with the grounds in the Constitution. However, for such an interpretation, some commonality between speech on the internet and real-life speech needs to be established. The cases cited above essentially equate the internet to physical spaces by deeming it a 'modern public forum' and a similar approach in India would guarantee greater protection for speech on the internet.[61]

D. STATE ACTION DOCTRINE

[57] ANDREOLI, *supra* note 55.
[58] Packingham v. North Carolina 582 U.S. 98 (2017).
[59] Cornelius v. NAACP Legal Def. & Educ. Fund 473 U.S. 788 (1985).
[60] Brown, et al. v. Entertainment Merchants Assn. et al., 564 U.S. 786 (2011).
[61] Information Technology (Intermediate Guidelines) Rules, 2011, Rule 3(1)(b)(v), India.

In the petition filed by Kunal Kamra, the Government made its submissions,[62] primarily contending that the word 'information' under Rule 3(1)(b)(v) of the IT Rules is narrowly tailored and pertains only to the information that has the capacity of being true and false and that humour, satire, or opinion pieces for or against the Government will remain unaffected. Further, the Hon'ble Solicitor General on behalf of the Government contended that the social media intermediary was only required to make 'reasonable efforts' and decide whether to restrict the content or not on receipt of a complaint from the Government. However, if the Government remained adamant, the issue could be later examined by an appropriate judicial authority under Rule 7 of the IT Rules. However, this claim by the Government that the social media entity has any discretion is meaningless. The possibility of prosecution or incurring some form of liability after going through the judicial process may be too tiresome to take on, again and again. The intermediary might just err on the side of caution here too, just delete the impugned information, making the apparent discretion they have virtually meaningless.

However, if the literal argument of the government is considered, they could have a case. The regulation of speech, though generally a constitutional function exercised by the Government, has been transferred to the private entities, to exercise by way of this apparent discretion. Since the censorship is being imposed through self-regulation by the private intermediary, the government merely giving notice of fake or misleading information they may choose to remove, the public character of the impugned measure would be difficult to discern. The self-regulatory actions of the intermediary will be shielded from the scrutiny of Art 19 as they would fall within the realm of contractual law (User Agreement & Community Standards would govern the censorship).[63]

This is another lacuna in our Constitutional jurisprudence that can be filled by taking recourse to foreign judgments and doctrines. In many cases, the

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[62] T. Singh, *"Intermediaries can decide if they want to take down 'fake' information" - the union government concludes its submissions in petition challenging the IT amendment rules, 2023*, INTERNET FREEDOM FOUNDATION (Sept. 23, 2019) https://internetfreedom.in/it-rules-2023-bombay-hc-meity-submissions/.

[63] FRADETTE, *supra* note 47.

American Courts have looked past the 'nominally private' form through which speech on the internet was restricted[64] and isolated the government actions from the private ones, subjecting them to the dictates of the First Amendment. The first of this sort was *Marsh v. Alabama*[65]. In this case, a private entity that owned an entire town was restricting free speech and was indirectly facilitated and supported by the government in doing so. The Court applied the state action doctrine and deemed such censorship to be subject to the First Amendment despite it being implemented through private channels. Such censorship would be scrutinised as if it was engaged in by the government itself.

In *Lebron v. National Railroad Passenger Corp*[66], it was reiterated that the government cannot escape its constitutional responsibility of operating within constitutional limits by delegating its public functions to private entities. It is imperative that our fundamental rights be protected and the censorship conducted under the guise of private self-regulation be subject to appropriate scrutiny. Since our constitutional and judicial conventions do not eschew engagement with comparative materials, the constitutionality of Meity's fact-checking unit can be examined by taking recourse to the state action doctrine and through this analysis, it might be rendered unconstitutional.

E. RULE 4(3)- 'FIRST ORIGINATOR CLAUSE'

The 'First Originator Clause' is a controversial addition to the IT Rules, considering it requires an alteration of the technical aspects of a computer resource to access the private information of users. While the term itself is not defined, the provision mandates the intermediary to break its end-to-end encryption feature and identify the first originator of a disputed message, on intimation from a government agency or a court order.[67] Neither IT Rules nor the Act defines what such first originator or would mean. In S. 2(1)(za)[68] of the Act, an 'Originator' is defined as a person who

[64] D.C. Nunziato, *How (not) to censor: procedural first amendment values and internet censorship worldwide*, 42(4) GEORGET. J. INT. L., 1123 (2011).
[65] Marsh v. Alabama, 326 U.S. 501 (1946).
[66] Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995).
[67] Rule 4(3), The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2023.
[68] Information Technology Act, 2000, No. 21, Acts of Parliament, § 2(1)(za).

sends, stores, transmits or generates information to any other person. The first originator in that context would mean the first person to store, generate or transmit a particular message or media file to any other person over a specific computer resource or intermediary. The issue would arise when one piece of information is being transferred from one computer resource to another, for instance, from WhatsApp to the Telegram messaging app.[69] This would impose an unreasonable duty on the first sender of information to a different computer resource to verify the veracity of the information before forwarding, otherwise, they could be implicated for disrupting public order or endangering the security of the state grounds under Art 19(2), which are vague conceptions in the first place.

Since there is no way of knowing if one is the first originator of certain information on a computer resource, the possibility of being falsely accused of intentionally curating such a message is liable to create fear and anxiety among the public. This apprehension would curb the desire of people to communicate openly and therefore ultimately restrict their freedom of speech and expression within cyberspace. The possibility of surveillance and the precarity of having one's identity revealed would have a 'chilling effect' on free speech. Privacy and autonomy form the very fabric of democratic engagement, for example, our polling booths are within walled enclosures or behind a curtain or some sort of veil to obstruct the view of the onlookers.[70] This "Right to Privacy of Speech" is protected in both Indian and American Constitutionalism. The US Supreme Court has interpreted the First Amendment to cover a variety of privacy-related topics, including the freedom of speech and expression, even though the document doesn't specifically mention a right to privacy.

In *Griswold v. Connecticut (1965)*, the right to privacy was discerned under the Fourteenth Amendment's due process clause. The due process clause forbids state intrusion upon the life, liberty and property of citizens without due process. In this case, William O. Douglas J., speaking for the majority,

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[69] Abhishek Gupta, *A Constitutional Scrutiny of the 'First Originator Clause' of Information Technology Rules 2021*, 4(2) JUS CORPUS L. J. 900, (2023).

[70] *Free speech is under fire with the rise in global surveillance,* TUTANOTA, (Oct. 17, 2023) https://tutanota.com/blog/free-speech-under-fire-surveillance.

held that even though there is no explicit mention of the right to privacy, it can be discerned from the penumbras of the Due Process clause and the Bill of Rights,[71] and therefore, the right to privacy extends to married couples and their personal decisions regarding the use of contraceptives.

Similarly, in *Roe v. Wade*[72], the court interpreted the right to privacy within "liberty" protected by the Due clause of the First Amendment to include a woman's right to terminate her pregnancy. More particularly in relation to speech, in *Citizens United v. Federal Election Commission (2010)*[73], the Supreme Court addressed the constitutionality of a legislation prohibiting certain forms of political speech and held that there's a broad protection offered to political speech under the First Amendment. While in India, privacy jurisprudence is mostly centred around Art. 19 of the Indian Constitution.

In *PUCL v. Union of India (1997)*[74], the Supreme Court held that unregulated and unauthorised phone tapping violated Art. 19 (Right to freedom of speech and expression) and 21 (Right to life and personal liberty) of the Constitution. The Court in *State of Uttar Pradesh v. Raj Narain*[75], indirectly protected the right to freedom and privacy of speech of the press, when it came to transparency and accountability in governance and the electoral process. Therefore, there is sufficient jurisprudential basis for protecting privacy both in India and in the US.

F. REASONABLE EXPECTATION OF PRIVACY DOCTRINE

The Reasonable expectation of privacy doctrine was developed in the United States primarily in the context of the Fourth Amendment, in search and seizure cases. It pertains to both a physical expectation of privacy, like in homes and a subjective expectation of privacy, that society deems reasonable like protection of privacy during phone calls. It was first expounded in *Katz v. United States*[76], wherein the court expanded the scope of the Fourth Amendment from "unreasonable searches and seizures" of physical property or intrusion in a physical space to a "reasonable

[71] Griswold v. Connecticut, 381 U.S. 479 (1965).
[72] Roe v. Wade, 410 U.S. 113 (1973).
[73] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[74] People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568.
[75] State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428.
[76] Katz v. United States, 389 U.S. 347 (1967).

expectation of privacy" of a person. Since a person would expect their informational privacy to be protected, especially in non-public spaces of communication like the telephone or over the internet, tapping telephone lines or breaking end-to-end encryption would be violative of this doctrine.

Therefore, as per this case, a person must have a subjective reasonable expectation of privacy in a particular circumstance, that must be backed by societal norms and expectations. This concept was further clarified in *Riley v. California*[77], warrantless search and seizure of mobile phones was considered unconstitutional as it is not merely an object that is being seized, but a data repository containing all the sensitive personal information of an individual including their location history, financial information and personal messages. The reasonable expectation of privacy doctrine affords speech a higher degree of protection than the compelling state interest test which is usually employed in the Indian scenario.[78] The compelling state interest test is centred around the state's interests in public security and the other grounds in Art. 19(2) and not the expectation of privacy individuals have when expressing their opinions or views in a particular setting. While the doctrine has evolved with the digital age, the judicial evolution of this doctrine has not kept pace with the development of new technologies.[79] Even then, borrowing American jurisprudence, especially the tests developed under the Fourth Amendment, would protect the right to freedom of speech encapsulated under Art. 19(1) to a greater degree and curb the menace that could be caused by bringing the first originator clause into practice.

CONCLUSION

Through a comparative analysis, we determined that the new Intermediary Guidelines do not stand constitutional scrutiny as they have a disproportionate impact on free speech, as opposed to the public interests it seeks to protect. Such an impact would threaten the very fabric of our

[77] Riley v. California, 573 U.S. 373 (2014).
[78] Sejalsri Mukkavilli, *Surveillance induced chilling effect on speech: Constitutional safeguards in India and USA*, 24 SUPREMO AMICUS, (2021).
[79] Haley Plourde-Cole, *Back to Katz: Reasonable Expectation of Privacy in the Facebook Age*, 38 FORDHAM URB. L. REV. (2010).

democracy since popular participation and engagement are essential components of popular sovereignty. State sovereignty derives its validity from people's sovereignty hence to compromise it would be to topple the very premise of a democratic state. The grounds mentioned in Rule 3(2) like "harmful to children" being extremely vague, the breach of "privacy of speech" and the resulting deterrent effect on our freedom of speech and expression due to the first originator clause under Rule 4(2) and the intrusive, unchecked, and therefore unconstitutional interference by MeitY through a fact-check unit breach the principles of proportionality. Considering the doctrines developed under the First Amendment jurisprudence, we are able to deduce the chilling effect such mechanisms would have on our freedom of speech, especially in the absence of judicial review as such actions, orders and interventions will be shielded from public scrutiny owing to the private or contractual legal veil of User Terms of Agreement, Community Guidelines or other similar agreements with an intermediary. Therefore, IT Rules, 2021, especially the provisions specified and analysed above should be declared unconstitutional and reformulated in light of democratic best practices.