

Intermediary Liability and Hate Speech

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ABSTRACT

The study of intermediary liability and hate speech in India is complex. India's 1.25 billion people are spread across twenty-nine states, speak over twenty languages, belong to different castes, and practice a variety of religions. At times, tensions between different groups have developed, and hate speech has instigated riots, protests, and violence. Though hate speech is a well-recognized problem in India, in most instances the law has not been used effectively to punish individuals who promulgate hate speech, particularly politicians. However, this relaxed standard of enforcement is not applied to intermediary platforms, which have been required to comply with removal requests under the threat of severe sanctions, including blocks and fines. These removal requests, which are made by courts, the executive branch, and individuals, are based on the belief that hate speech posted on intermediary platforms can create rifts between communities and lead to dire real-world consequences. Therein lies the contradiction – while there is no doubt that hate speech used by individuals in the real-world is detrimental to societal well-being, the same conclusion cannot be drawn about hate speech on intermediary platforms. No studies or statistics have conclusively shown that online hate speech has a negative impact on society. Despite this, intermediary platforms have operated in a vulnerable position. This uncertainty has adversely impacted free speech because the threat of legal sanctions has caused intermediaries to over-comply with removal requests. Intermediary platforms have rarely contested such requests, a practice that has created a dearth of judicial analysis on the issue. Recently, through a landmark decision of the Supreme Court of India, the regime governing intermediary liability for hate speech was significantly liberalized. However, there are still several issues that must be addressed. These include maximizing the role of courts in determining whether to hold intermediary platforms liable for hate speech originating from users and reconsidering the link between online hate

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speech and actual societal harm caused. These changes will only be created through strong legal challenges to the present regime of intermediary liability for hate speech, which are absolutely essential for the evolution of the law.

I. INTRODUCTION

The issue of hate speech is a pressing concern in all democratic societies that respect individual rights. Laws around the world recognize that the prevention of hate speech is a sufficient reason to place reasonable restrictions on the freedom of speech and expression.¹ Hate speech can create discord between communities, alienate minority groups, and exacerbate pre-existing differences between individuals, thereby threatening the stability of society.

The use of hate speech has grave implications in India. Given India's socio-economic, religious, and ethnic diversity, such speech can cause significant anger amongst thousands of people. In the past, the anger caused by hate speech has boiled over into communal riots, religious clashes, and other forms of violence. Despite the existence of several statutes prohibiting the use of hate speech, there has been little action taken to prevent individuals from delivering hate speech targeting specific ethnicities, religions, or castes. Whether intentional or in the heat of the moment, hate speech has been repeatedly used as a tool by politicians to polarize communities and enflame ethnic passions. Reported instances of hate speech by regular citizens are less numerous than those of politicians.

With over 350 million Internet users in 2015, a number expected to increase to 500 million by 2017, the Internet carries significant potential to disseminate ideas throughout India.²

¹ See generally Press Unit, *Factsheet – Hate Speech*, EUROPEAN COURT OF HUMAN RIGHTS, available at http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (last visited Nov. 15, 2015); Corey Shefman, *Want to Protect Freedom of Expression? Strengthen Hate Speech Laws*, CBC NEWS (Jan. 27, 2015), available at <http://www.cbc.ca/news/canada/manitoba/want-to-protect-freedom-of-expression-strengthen-hate-speech-laws-1.2933039> (last visited: Nov. 16, 2015); PROFESSOR M.K. BHANDARI & DR. MITHILESH NARAYAN BHATT, *HATE SPEECH AND FREEDOM OF EXPRESSION: BALANCING SOCIAL GOOD AND INDIVIDUAL LIBERTY* (2012), available at

http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22819.

² Neha Alawadhi, *India's Internet User Base 354 Million, Registers 17% Growth in First 6 Months of 2015 IMAI Report*, THE ECONOMIC TIMES (Sept. 3, 2015), available at http://articles.economictimes.indiatimes.com/2015-09-03/news/66178659_1_user-base-iamai-Internet-and-mobile-association (last visited June 28, 2015); Tech Desk, *IAI Says India Will Have 500 Million Internet Users by 2017*, THE INDIAN EXPRESS (July 21, 2015), available at

However, the Internet does not discriminate between users or content – without a control mechanism to check what is being shared, the rapid spread of deleterious content, such as hate speech, can have real-world repercussions. Historically, the government has prevented the proliferation of hate speech through the Internet by holding intermediary platforms liable for hate speech published on their forums.

Primarily, this article will analyse the legal status of intermediary platforms and hate speech in India. By examining cases and real-life instances of hate speech, it will explain how the liability of intermediaries has been increasingly found due to the growth of online hate speech in India. The article will elaborate on the chilling effect on freedom of speech that has been created by imposing liability on intermediaries for hate speech published on their forums. It will further explain how the landmark *Shreya Singhal* judgment has partially addressed this effect. Finally, extrapolating from the developments seen so far, several recommendations for the creation of a better liability regime for intermediaries are put forth.

II. HISTORY OF INTERMEDIARY LIABILITY

Though the Information Technology Act (“IT Act”) was enacted in 2000, it did not place limits on the liability of intermediaries for user-generated content until 2008.³ This led to the infamous Baazee.com case in 2004, after which the treatment of intermediaries changed substantially.⁴ Avnish Bajaj, CEO of eBay’s Indian subsidiary Baazee.com, was arrested after a user-generated video clip showing pornographic acts between two teenagers was uploaded to the website. At the time the upload occurred, Baazee.com did not have a policy of exercising editorial control over user-uploaded content. Despite this, Bajaj was prosecuted under the IT Act for publishing electronic content that was prohibited under the laws of India.⁵ The arrest led to outrage from several quarters, including from eBay, the U.S. State Department, and experts within India.⁶ Consequently, in 2008 India amended Section 79 of

<http://indianexpress.com/article/technology/tech-news-technology/iamai-says-india-to-have-236-million-mobile-Internet-users-by-2016/> (last visited June 28, 2015).

³ The Information Technology Act, 2000, No. 21 of 2000, INDIA CODE, <http://indiacode.nic.in> [hereinafter “IT Act”].

⁴ Avnish Bajaj v. State of Delhi, (2005) 116 DLT 427 (India).

⁵ APAR GUPTA, COMMENTARY ON INFORMATION TECHNOLOGY ACT, (2011), 286.

⁶ Henry Gomez and Chris Donlay, *eBay Statement Regarding Baazee.com and the Arrest of Avnish Bajaj*, EBAY (Dec. 18, 2004), available at <https://investors.ebayinc.com/ReleaseDetail.cfm?releaseid=150766> (last visited June 27, 2015); Harbaksh Singh Nanda, *Experts Say India’s Cyber Law is Outdated*, UNITED PRESS UPDATE, available at http://www.upi.com/Business_News/Security-Industry/2004/12/22/Experts-say-Indias-cyber-law-

the IT Act to exempt intermediaries from liability in certain cases.⁷ This attempt at modernizing the IT Act was intended to ensure that the IT Act would keep up with developments in e-commerce, such as the growth of online intermediaries.⁸

Prior to the amendment of the IT Act, the Standing Committee on Information Technology expressed its opposition to excusing intermediary platforms from liability for user-generated content. In its report, the Committee stated:

“Under the proposed amendments, the intermediaries/service providers shall not be liable for any third party information data.... The Committee do not agree with this. What is relevant here is that when [the] platform is abused for transmission of allegedly obscene and objectionable contents, the intermediaries/service providers should not be absolved of responsibility. The Committee, therefore, recommend that a definite obligation should be cast upon the intermediaries/service providers in view of the immense/irreparable damages caused to the victims through reckless activities that are under taken in the cyberspace by using the service providers' platform. Casting such an obligation seems imperative...”⁹

Intermediaries were deeply concerned about the position adopted by the Standing Committee on Information Technology and the Indian government.¹⁰ Intermediaries argued that holding them liable for actions of users would be fundamentally unjust, as such a policy ignores the origin of the content and fails to appreciate the benefits Indian citizens derive from

is-outdated/45071103731445/ (last visited June 27, 2015); John Ribiero, *Experts Criticize Arrest of Baazee.com CEO*, MACWORLD (Dec. 20, 2004), available at <http://www.macworld.com/article/1041530/experts.html> (last visited June 27, 2015).

⁷ Information Technology (Amendment) Act, 2008, No. 10 of 2009, INDIA CODE, <http://indiacode.nic.in> [hereinafter “IT Amendment Act”]; see generally Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet 2011*, CENTRE FOR INTERNET & SOCIETY – BANGALORE, at 3 (2011), available at <http://cis-india.org/Internet-governance/intermediary-liability-in-india.pdf> (last visited June 26, 2015).

⁸ Martin H. Thelle, et al., *Closing the Gap – Indian Online Intermediaries and a Liability System Not Yet Fit for Purpose*, COPENHAGEN ECONOMICS 1, 18 (2014), available at http://www.globalnetworkinitiative.org/sites/default/files/Closing%20the%20Gap%20-%20Copenhagen%20Economics_March%202014_0.pdf (last visited June 25, 2015).

⁹ STANDING COMMITTEE ON INFORMATION TECHNOLOGY, LOK SABHA REPORT 49 (2007), available at http://164.100.40.18/parliament/standing_reports/loksabha14/REPORT-I.T.-50E.pdf (last visited June 29, 2015).

¹⁰ Rishi Jaitly, *Intermediary Liability and the Future of the Internet in India*, GOOGLE PUBLIC POLICY BLOG (Oct. 14, 2007), available at <http://googlepublicpolicy.blogspot.in/2007/10/intermediary-liability-and-future-of.html> (last visited July 29, 2015).

intermediary platforms.¹¹ The IT Amendment Act appears to take these concerns into account, as the legislation included safe harbour provisions for intermediaries. The IT Amendment Act protected intermediaries from legal liability, provided that the modified conditions under Section 79 were satisfied.¹² However, the IT Amendment Act was ambiguous due to the inclusion of a “due diligence” clause in the requirements. Subsequently, the Information Technology (Intermediary Guidelines) Rules (“IT Intermediary Guidelines”) were introduced in 2011 to clarify the requirements to avoid liability.¹³

III. CURRENT POSITION OF INTERMEDIARY LIABILITY

3.1. Legal Provisions

The IT Act defines an “intermediary” with respect to electronic records as “any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record.”¹⁴ This broad definition encompasses telecom service providers, network service providers, Internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places, and cyber cafes.¹⁵ An intermediary may escape liability for any third-party information, data, or communication link hosted on its forums or websites if it proves that:

- the function of the intermediary was limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted;
- the intermediary did not initiate the transmission;
- it did not select the receiver of the transmission;
- it did not select or modify the information contained in the transmission; or

¹¹ *Id.*

¹² IT Amendment Act, *supra* note 7, at § 79.

¹³ Information Technology (Intermediary Guidelines) Rules, 2011, Gazette of India, pt. III sec. 4 (Apr. 11, 2011) [hereinafter “IT Intermediary Guidelines”].

¹⁴ IT Act, *supra* note 3, at § 2(1)(w).

¹⁵ *Id.*

- the intermediary exercised due diligence while discharging its duties under the IT Act and also observed guidelines of the Central Government, if any.¹⁶

These exemptions do not apply if the intermediary conspired, abetted, aided, or induced the commission of the unlawful act or if, after receiving actual knowledge or notification from the government about any information, data, or communication link being used to commit an unlawful act through the intermediary, the intermediary fails to expeditiously remove or disable access to that material.¹⁷ The Central Government may ask an intermediary to block access to specific hosted content in the interest of the sovereignty and integrity of India, India's national defence, security of the State, maintaining friendly relations with foreign States, keeping public order, or preventing incitement of the commission of any cognizable offence.¹⁸ If the intermediary fails to comply with such a government order, it may be punished with up to seven years of imprisonment and also be liable for a fine.¹⁹

The use of the term “due diligence” in Section 79(2)(c) of the IT Act creates ambiguity because the Act does not define what constitutes “due diligence.” Since the exercise of “due diligence” requires intermediaries to self-regulate,²⁰ the government sought to clarify this provision by enacting the IT Intermediary Guidelines.²¹

¹⁶ *Id.* at § 79(2) (“Exemption from liability of intermediary in certain cases: (2) The provisions of sub-section (1) shall apply if— (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; (b) the intermediary does not— (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf”).

¹⁷ *Id.* at § 79(3) (“Exemption from liability of intermediary in certain cases: (3) The provisions of sub-section (1) shall not apply if— (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Explanation.—For the purpose of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary”).

¹⁸ *Id.* at § 69A(1) (“Power to issue directions for blocking public access of any information through any computer resource: (1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing by order, direct any agency of the Government or intermediary to block for access by the public any information generated, transmitted, received or stored in any computer resource”).

¹⁹ *Id.* at § 69A(3) (“The intermediary, who fails to comply with the direction issued under this Section, shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.”).

²⁰ VAKUL SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE 292 (4th ed. 2015).

²¹ IT Intermediary Guidelines, *supra* note 13.

India's policy of intermediary liability for user-generated content is based on the European Union E-Commerce Directive (2000/31/EC), which, *inter alia*, seeks to regulate liability for intermediaries.²² The Directive classifies intermediaries based on their functions of acting as "mere conduits," "caching," and "hosting."²³ Further, it does not impose an obligation on intermediaries to monitor the information that they transmit or store.²⁴ However, the Directive has not been completely incorporated into the Rules.²⁵ For instance, while the Directive distinguishes between intermediaries acting as "mere conduits" or actively caching and hosting material, and specifies the qualifications and due diligence requirements for different classes of intermediaries, the Rules do not make these distinctions.²⁶ However, both the Directive and the Rules are silent about counter-notices and put-back procedures if the challenged material is found to have been incorrectly removed.²⁷

The Rules provide for a privately-administered takedown mechanism, perhaps in order to provide a faster redressal process than would be possible through the Judiciary and the Executive. Once an intermediary receives information that unlawful material has been hosted, displayed, uploaded, modified, published, transmitted, updated, or shared on its platform, it is required to act within thirty-six hours to remove such information.²⁸ A statement issued by the Ministry of Communications and Information Technology explained that "[the intermediary]...shall act within thirty-six hours" means that the intermediary must respond to the complainant within thirty-six hours of receiving the complaint, and must address the issue itself within one month of its receipt of the complaint.²⁹ Intermediaries also have the right to terminate access or usage rights of users who fail to comply with rules and regulations.³⁰ Intermediaries are required to remove content that, *inter alia*, is blasphemous, hateful,

²² Ministry of Communications & IT, Report of the Expert Committee on Amendments to IT Act 2000 (Aug. 2005), available at <http://deity.gov.in/content/report-expert-committee-amendments-it-act-2000-3> ("This section is revised in lines with the EU Directives on E-Commerce 2000/31/EC issued on June 8th 2000").

²³ Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internet Market ("Directive on Electronic Commerce"), O.J. (L 178) 1, art. 12-14.

²⁴ *Id.*, at art. 15.

²⁵ Dara, *supra* note 7, at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ IT Intermediary Guidelines, *supra* note 13, at Rule 4.

²⁹ Ministry of Communications and Technology, Clarification on the Information Technology (Intermediary Guidelines) Rules, 2011 Under Section 79 of the Information Technology Act (Mar. 18, 2014), available at <http://cyberlawindia.com/wp-content/uploads/2014/06/Clarification-79rules1.pdf> (last visited July 12, 2015).

³⁰ IT Intermediary Guidelines, *supra* note 13, at Rule 5.

racially or ethnically objectionable, disparaging, or otherwise violates any law in force.³¹ However, the Act and the Rules do not provide the definitions of these terms.

The intermediary liability provisions under Section 79(3)(b) of the IT Act and Rule 3(4) were analysed by the Supreme Court of India in *Shreya Singhal v. Union of India*.³² Prior to this decision, intermediaries who received a removal request were required to use their own judgment in determining whether the challenged content should be removed.³³ In *Shreya Singhal*, the Supreme Court interpreted the Section and Rule as requiring an intermediary to expeditiously remove or disable access to challenged material only after a court order has been passed directing it to remove such content.³⁴ The Supreme Court took note the difficulties faced by intermediaries such as Google and Facebook, since hundreds of removal requests were made every day and under the existing policy they were required to judge the legitimacy of each one.³⁵ Applying Principle 2 of the Manila Principles,³⁶ the Supreme Court ruled that Section 79 did not render intermediaries liable for illegal content unless they failed to comply with a court order, as opposed to a mere request made by a private party.³⁷ Since the judgment was issued on March 24, 2015, it is too early to evaluate the actual impact this decision has had on intermediaries.

3.2. Legal Compliance by Intermediaries

Most intermediaries publish detailed community guidelines or standards that prohibit users from uploading content that violates the domestic laws of countries they operate within. Even though content is not monitored when uploaded, these policies make it clear that the content will be removed upon the intermediary's receipt of a valid complaint.

³¹ IT Intermediary Guidelines, *supra* note 13, at Rule 2(b).

³² *Shreya Singhal v. Union of India*, (2015) 2 RCR 403 (India).

³³ Jyoti Panday, *The Supreme Court Judgment in Shreya Singhal and What It Does for Intermediary Liability in India?*, THE CENTRE FOR INTERNET AND SOCIETY (Apr. 11, 2015), available at <http://cis-india.org/Internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability> (last visited Nov. 16, 2015).

³⁴ *Id.* at para. 117.

³⁵ *Id.*

³⁶ *Id.*; MANILA PRINCIPLES ON INTERMEDIARY LIABILITY, <https://www.manilaprinciples.org/> (last visited July 12, 2015), at Principle 2 (Content must not be restricted without an order by a judicial authority).

³⁷ Jeremy Malcolm, *Indian Victory Bears Out the Need for the Manila Principles*, ELECTRONIC FRONTIER FOUNDATION (Mar. 24, 2015), available at <https://www.eff.org/deeplinks/2015/03/indian-victory-bears-out-need-manila-principlesn> (last visited July 12, 2015).

YouTube expressly disallows hate speech on its website.³⁸ YouTube's policy defines hate speech as content that promotes violence or hatred against individuals or groups based on attributes such as race, ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation or gender identity.³⁹ Users have the option of reporting hate speech-related content by either flagging the video or filing an abuse report with YouTube.⁴⁰ Flagged videos are constantly reviewed by YouTube's staff or Nodal Officer, and anything that violates YouTube's Community Guidelines, including those that contain hateful content, are removed from YouTube.⁴¹ Hateful comments and channels are dealt with in a similar manner.⁴² Abuse reports accord broader protection than flagging individual videos, and can be filed against multiple videos, comments, or a user's entire account.⁴³

Facebook prohibits hate speech in a manner similar to YouTube, including content that directly attacks people on the basis of their race, ethnicity, national origin, sexual orientation, religious affiliation, disabilities or diseases, and gender identity.⁴⁴ Facebook also relies on its users to report such content.⁴⁵ Any content that violates local laws may be reported to Facebook as well, even if it does not violate Facebook's Community Standards.⁴⁶

Twitter does not explicitly address hate speech in its policies, but prohibits abusive behaviour on its website.⁴⁷ Users are prohibited from making threats or promoting violence against a person or group on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, age, or disability; this prohibition is similar to the hate speech policies of Facebook and YouTube.⁴⁸ If reported content is found to violate Twitter's abusive behaviour

³⁸ *Policy Center*, YOUTUBE, available at <https://support.google.com/youtube/answer/2801939> (last visited July 12, 2015).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Community Guidelines*, YOUTUBE, available at

<http://www.youtube.com/yt/policyandsafety/communityguidelines.html> (last visited July 12, 2015).

⁴² *Id.*

⁴³ *Policy Center*, *supra* note 38.

⁴⁴ *Community Standards*, FACEBOOK, available at <https://www.facebook.com/communitystandards> (last visited July 12, 2015).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Abusive Behaviour Policy*, TWITTER, available at <https://support.twitter.com/articles/20169997> (last visited July 15, 2015).

⁴⁸ *Id.*

policy, Twitter can take action ranging from user warnings to suspending the originating account.⁴⁹

IV. INTERSECTION – LIABILITY OF INTERMEDIARIES FOR HATE SPEECH

4.1. Legal Position of Hate Speech

Article 19(1)(a) of the Constitution of India guarantees every citizen the right to freedom of speech and expression.⁵⁰ This freedom includes the right to express one's convictions and opinions freely, and is ensured by the freedom of circulation.⁵¹ However, the freedom of speech and expression is not absolute, as there are limits on the type of material one may publish or speak without incurring liability.⁵²

“Hate speech” is not explicitly defined under the Constitution of India. However, it is generally understood to mean speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the expression is likely to provoke violence.⁵³ The Human Rights Commission has defined “hate speech” as speech intended to degrade people based on their race, gender, age, ethnicity, nationality, religion, sexual orientation, gender identity, disability, social class, appearance, and any other distinction that might be considered by some as a liability.⁵⁴

The Indian judiciary has recognized hate speech as an effort to marginalize individuals based on their membership in a group.⁵⁵ In addition, it seeks to delegitimize members of that group in the eyes of the majority, thereby reducing their social standing and acceptance within society.⁵⁶ Hate speech lays the groundwork for broad attacks on vulnerable populations that

⁴⁹ *Reporting Abusive Behavior*, TWITTER, available at <https://support.twitter.com/articles/20169998> (last visited July 15, 2015).

⁵⁰ INDIA CONST. art. 19, § 1 cl. a.

⁵¹ *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 (India); ARVIND P. DATAR, DATAR COMMENTARY ON CONSTITUTION OF INDIA 549 (2nd ed. 2007).

⁵² *Romesh Thappar v. State of Madras*, (1950) SCR 594{ TA \l "Romesh Thappar v. State of Madras, AIR 1950 SC 124" \s "Romesh Thappar v. State of Madras, AIR 1950 SC 124" \c 1 }.

⁵³ *Hate Speech*, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁵⁴ Teesta Setalvad, *Hate Speech and Writing, Part II: Brief Analysis on Law and Judgments, India*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/TeestaSetalvadPart2.pdf> (last visited July 15, 2015).

⁵⁵ *Pravasi Bhalai Sangathan v. Union of India and Ors.*, (2014) SC 1591 (India), at para. 7.

⁵⁶ *Id.*

can range from discrimination to ostracism, segregation, deportation, violence, and genocide in the most extreme cases.⁵⁷ However, the effect of hate speech must be judged based on the standards of reasonable, strong-minded people and not those of weak and vacillating minds.⁵⁸

Clause (2) of Article 19 specifies grounds upon which reasonable restrictions may be imposed on the freedom of speech and expression.⁵⁹ Such grounds that are related to hate speech include the sovereignty and integrity of India, public order, and incitement to an offence.⁶⁰

A. Sovereignty and Integrity – Several laws impose restrictions on the freedom of speech and expression when statements threaten the sovereignty and integrity of India by leading to violence.⁶¹ The words “sovereignty and integrity” were included in Article 19(2) due to the religious and ethnic tensions prevalent in India following independence from Britain.⁶² This provision sought to impose restrictions on those who wanted to secede from India by limiting their ability to incite violence and division between segments of society.⁶³

There are contemporary instances of public figures using hate speech that affects the sovereignty and integrity of India. For example, Varun Gandhi, a leader of the Bharatiya Janta Party (BJP), delivered a speech wherein he said, “[a]ll the Hindus stay on this side and send the others to Pakistan,”⁶⁴ and “[t]his is the lotus hand. It will cut their [Muslims’] throats after elections.”⁶⁵ This attempt to divide voters on religious grounds led to a case being filed against Gandhi for using hate speech.⁶⁶ However, even though his statements went against the ideals of integrity, he was still fielded as a candidate in the elections.⁶⁷

⁵⁷ *Id.*

⁵⁸ *Ramesh v. Union of India*, 1988 AIR 775 (India).

⁵⁹ INDIA CONST., *supra* note 50, at art. 19(2).

⁶⁰ *Id.*

⁶¹ *Freedom of Expression*, CENTRE FOR INTERNET AND SOCIETY, available at <http://cis-india.org/Internet-governance/blog/freedom-of-speech.pdf> (last visited July 19, 2015).

⁶² MADABHUSHI SRIDHAR, *THE LAW OF EXPRESSION* 631 (Asia Law House, 1st ed., 2007).

⁶³ *Id.*

⁶⁴ Manoj Mitta, *Hatred Justified?*, TIMES OF INDIA (Mar. 29, 2009), available at <http://timesofindia.indiatimes.com/home/sunday-times/deep-focus/Hatred-Justified/articleshow/4329003.cms> (last visited July 19, 2015).

⁶⁵ *Id.*

⁶⁶ Associated Press, *Nehru's Great-Grandson Arrested for Inciting Anti-Muslim Violence*, THE GUARDIAN (Mar. 28, 2009), available at <http://www.theguardian.com/world/2009/mar/28/nehru-gandhi-india-election-arrest> (last visited July 19, 2015).

⁶⁷ Soli J. Sorabjee, *Who'll Silence Varun?*, INDIAN EXPRESS (Mar. 27, 2009), available at <http://archive.indianexpress.com/news/who-ll-silence-varun-/439578/0> (last visited July 17, 2015).

B. Public Order – The restriction on the freedom of speech prohibiting hate speech that endangers the public order was introduced through the Constitution (First Amendment) Act, 1951.⁶⁸ While several differing definitions have been offered in the past,⁶⁹ the established method for determining what constitutes a breach of public order is to examine whether a given act leads to a disturbance of the current life of the community or merely affects an individual without disturbing the tranquillity of society.⁷⁰ If an act is found to disturb the life of the community, it constitutes a breach of public order.⁷¹

An example of such activity is the rioting and violence that took place in Mumbai from 1992 to 1993. These riots were directed against Muslims, and were undertaken by Hindus who had been incited by propaganda published by communal organizations and newspaper writings.⁷² The hateful material targeting Muslims that caused the riots was disseminated by members of the political party Shiv Sena.⁷³ The act of publishing such propaganda is similar in nature to incitement to commit an offence, since both are governed by laws designed to punish or prevent such actions if they lead to a breach of the public order.⁷⁴

If any individual or group of persons attempts to incite mutual hatred that is likely to create disharmony and disturb the public peace through inflammatory speech, the judiciary is empowered to prevent such actors from performing such an act.⁷⁵ Hate speech is punishable under the provisions of the Indian Penal Code (“IPC”). Section 153A prohibits anyone from promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to the maintenance of harmony between different religious, racial, lingual, or regional groups, castes, or communities.⁷⁶ A person

⁶⁸ INDIA CONST. art. 3(2), *amended by* The Constitution (First Amendment) Act, 1951.

⁶⁹ Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 SCR 821 (India) (holding that “public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.”); *but see* Ram Manohar Lohia v. State of Bihar & Ors., (1966) 1 SCR 709 (India) (carved a distinction between an act that affects public order but not the security of the State).

⁷⁰ Arun Ghosh v. State of West Bengal, (1970) 3 SCR 288; Shreya Singhal, *supra* note 32.

⁷¹ *Id.*

⁷² Justice B.N. Srikrishna, *Full Srikrishna Report*, SABRANG COMMUNICATIONS, *available at* <http://www.sabrang.com/srikrish/vol1.htm> (last visited July 19, 2015).

⁷³ *Id.*

⁷⁴ CENTER FOR INTERNET AND SOCIETY, *supra* note 61.

⁷⁵ CODE CRIM. PROC. § 144; State of Karnataka v. Dr. Praveen Bhai Togadia, 2004 SCR 2081 (India).

⁷⁶ PEN. CODE § 153A; § 153A(1)(b).

found guilty of performing such acts may be punished with up to three years of imprisonment, with a fine, or both.⁷⁷

Similarly, Section 295A of the IPC prohibits deliberate and malicious acts intended to outrage the feelings of any class through insulting its religion or religious beliefs.⁷⁸ The elements of the offense under this Section are:

- The accused must insult or make an attempt to insult the religion or religious beliefs of any class of persons;
- The insult must be with the deliberate and malicious intention of outraging the religious feelings of the said class of citizens;
- The insult must be by words, either spoken or written or by signs or by visible representation or otherwise.⁷⁹

The punishment for such acts is the same as that under section 153A.⁸⁰

Courts are tasked with subjectively determining what qualifies as a legitimate exercise of freedom of speech and expression. For example, a court reviewing an article containing healthy and legitimate criticism of Islam with the goal of reforming the religion was held to not violate Section 153A.⁸¹ When the expressed views are purely political in nature, even if they call upon the poorer segments of society to rebel against capitalist ideas, they do not violate the IPC.⁸²

However, if a political statement is presented in a manner designed to promote feelings of enmity, hatred, or ill-will between religious groups or communities, it will violate Section 153A.⁸³ Similarly, if a writing is calculated to promote feelings of enmity or hatred, the writer may not claim that the writing contained a truthful account of past events or is otherwise supported by authority as a defence.⁸⁴

⁷⁷ *Id.*

⁷⁸ *Id.* at § 295A.

⁷⁹ K. D. GAUR, TEXTBOOK ON THE INDIAN PENAL CODE 420 (Universal Law Publishing, 4th ed., 2009).

⁸⁰ *Id.*

⁸¹ State of Maharashtra v. Ganpate Vasudeo Behera, (1978) Crim. L. Rptr. 178 (184-85) (India); GAUR, *supra* note 79, at 262 n.6.

⁸² Shiv Kumar Mishra v. State of Uttar Pradesh, 1978 Crim. L. J. 701 (India); GAUR, *supra* note 79 at 262 n.6.

⁸³ Babu Rao Patel v. State (Delhi Administration), 1980 SCR 763 (India).

⁸⁴ G. V. Godse v. Union of India, AIR 1971 Bom 56 (India).

The constitutionality of Section 295A was challenged in *Ramji Lal Modi v. State of Uttar Pradesh*, on the grounds that it infringed upon the fundamental right to freedom of speech and expression.⁸⁵ The Supreme Court upheld the Section, holding that it had been enacted in the interest of public order and limited its prohibition to aggravated forms of insult to religion that were made with the deliberate and malicious intent of outraging a specific class of citizens.⁸⁶

Under the Representation of the People Act, 1951, which applies to electoral practices, an attempt to promote or the actual promotion of enmity or hatred between different classes of citizens on the grounds of religion, race, caste, community, or language by an election candidate or his agent to further his or her election prospects is a “corrupt practice.”⁸⁷ In *Das Rao Deshmukh v. Kamal Kishore Kadam*, the Supreme Court examined the question of whether a poster that requested votes so that the candidate could “teach Muslims a lesson” violated the Representation of the People Act.⁸⁸ The Supreme Court held that such content was potentially offensive and was likely to rouse passion in the minds of voters who were members of certain communities.⁸⁹ The Supreme Court also held that it was likely to cause disharmony and hatred between Hindus and Muslims, thereby offending the secular structure of India.⁹⁰ Therefore, the challenged poster violated Section 123(3A) of the Representation of the People Act.⁹¹

While it might appear that the courts have strictly applied the laws to those who engage in hate speech, there have been several instances of individuals escaping liability for their acts, especially during political speeches.⁹² Politicians have frequently included hate speech against specific religions and communities in their political statements with impunity.⁹³

- Azam Khan, leader of the Samajwadi Party, was booked under Sections 153A and 295A of the IPC for remarking that the Kargil war was won through the sacrifices of

⁸⁵ *Ramji Lal v. State of Uttar Pradesh*, 1957 AIR 620 (India).

⁸⁶ *Id.*

⁸⁷ Representation of the People Act, 1951, No. 43, Acts of Parliament, 1951 (India), § 123(3A).

⁸⁸ *Das Rao Deshmukh v. Kamal Kishore Kadam*, (1996) 1996 AIR 391.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Baba Umar, *Getting Away With Hate Speech in India*, AL JAZEERA (Apr. 24, 2014), available at <http://www.aljazeera.com/indepth/features/2014/04/getting-away-with-hate-speeches-india-201442474555948198.html> (last visited July 25, 2015).

⁹³ See Neha Mahajan, *Our Netas and Their Love for “Hate Speeches,”* HINDUSTAN TIMES (Sep. 11, 2014), available at <http://www.hindustantimes.com/india-news/our-netas-and-their-love-for-hate-speeches/article1-1262769.aspx> (last visited July 25, 2015).

Muslims but not Hindus.⁹⁴ His statements were censured because they sought to divide religious communities on an extremely sensitive issue.⁹⁵

- A leader of the BJP was noted saying that there was no place for people in India who opposed Narendra Modi, BJP's prime ministerial candidate, and that such people should leave to Pakistan.⁹⁶
- Pravin Togadia, President of the Vishwa Hindu Parishad, gave a speech targeting Muslims who bought properties in Hindu areas.⁹⁷ He was noted telling members of his party and other right-wing party members "[i]f he [Muslim occupant] does not relent, go with stones, tyres and tomatoes to his office. There is nothing wrong in it... I have done it in the past and Muslims have lost both property and money."⁹⁸
- Raj Thackeray, the Chief of the Maharashtra Navnirman Sena (MNS), has repeatedly made hateful remarks targeting non-Maharashtrians, including comments that refer to Biharis as "infiltrators" who should be thrown out of Maharashtra.⁹⁹ The Delhi High Court noted that there were over 173 First Instance Reports ("FIRs") pending against him, yet he had never appeared before the court.¹⁰⁰ Attempts to arrest him for his speeches have led to violent incidents that have resulted in several deaths.¹⁰¹

⁹⁴ Mohammed Faisal Fareed, *Day After EC Crackdown, Azam Khan Booked for Kargil Remarks*, INDIAN EXPRESS (Apr. 13, 2014), available at <http://indianexpress.com/article/india/politics/fir-against-sp-leader-azam-khan-over-hate-speech/> (last visited July 25, 2015); See Center for Strategic and International Studies, *Kargil: What Does It Mean?*, SOUTH ASIA MONITOR (Jul. 19, 1999), available at <http://csis.org/files/media/isis/pubs/sam12.pdf> (last visited July 25, 2015) (the Kargil war was the heaviest fighting between India and Pakistan since 1971 that resulted in over 1,000 dead on both sides).

⁹⁵ *Economic Times*, *Azam Khan Rakes Controversy With Kargil Soldiers Remark; EC Seeks Details of Speech*, ECONOMIC TIMES (Apr. 9, 2014), available at http://articles.economicstimes.indiatimes.com/2014-04-09/news/49000072_1_azam-khan-kargil-war-indian-army (last visited July 25, 2015).

⁹⁶ Al Jazeera, *BJP Leader Criticised for "Pakistan Remark"*, AL JAZEERA (Apr. 20, 2014), available at <http://www.aljazeera.com/news/southasia/2014/04/bjp-leader-criticised-pakistan-remark-2014420155849254771.html> (last visited July 27, 2015).

⁹⁷ Vijaysinh Parmar, *Evict Muslims From Hindu Areas: Pravin Togadia*, TIMES OF INDIA (Apr. 21, 2014), available at <http://timesofindia.indiatimes.com/india/Evict-Muslims-from-Hindu-areas-Pravin-Togadia/articleshow/34017292.cms> (last visited July 27, 2015).

⁹⁸ *Id.*

⁹⁹ PTI, *Raj Thackeray Slammed for His "Hate Speech;" Case Filed in Bihar*, HINDUSTAN TIMES (Sep. 3, 2012), available at <http://www.hindustantimes.com/mumbai/raj-thackeray-slammed-for-his-hate-speech-case-filed-in-bihar/article1-923781.aspx> (last visited July 27, 2015).

¹⁰⁰ PTI, *HC Slams Raj Thackeray, Says Stop Making Remarks Against UP, Bihar People*, INDIAN EXPRESS (Apr. 16, 2015), available at <http://indianexpress.com/article/india/india-others/stop-making-remarks-against-the-people-of-up-and-bihar-hc-to-raj-thackeray/> (last visited July 27, 2015).

¹⁰¹ TNN, *Four Killed in Clash After Raj's Arrest*, TIMES OF INDIA (Oct. 22, 2008), available at <http://timesofindia.indiatimes.com/city/mumbai/Four-killed-in-clash-after-Rajs-arrest/articleshow/3626619.cms?referral=PM> (last visited July 27, 2015).

- As recently as June 2015, the nephew of West Bengal Chief Minister threatened to “gouge out eyes and chop off hands” of those who went against the people of the West Bengal.¹⁰²

As demonstrated by the preceding examples, politicians are often not deterred from making provocative statements targeting castes, religions, and sects despite the existence of anti-hate speech laws.¹⁰³ The root of the problem is the lack of effective enforcement of these laws.¹⁰⁴ Courts have recognized that effective regulation of hate speech at all levels is required, and that law enforcement authorities must ensure that the existing laws are not rendered meaningless due to lack of enforcement.¹⁰⁵

However, there has been a distinct lack of effective regulation or enforcement of anti-hate speech laws. In a public interest lawsuit filed against politicians for making provocative and hateful speeches, the Supreme Court refused to intervene, holding that a person’s speech might not qualify as hate speech because individuals are entitled to their personal views and opinions.¹⁰⁶ Only a year prior, in *Pravasi Bhalai* the Supreme Court ordered the Election Commission to curb political leaders from delivering hate speeches.¹⁰⁷ Going in a complete circle, the Supreme Court asked the Law Commission to determine what would constitute “hate speech.”¹⁰⁸ Several civil liberties lawyers believe that such judicial vacillation is simply an excuse to avoid acting against politicians.¹⁰⁹ The result of this lack of regulation and clarity is that politicians are rarely, if ever, punished for including hate speech in their political statements. Therefore, direct enforcement of the anti-hate speech laws of India continues to be a major issue.

¹⁰² Kolkata Bureau, *A New Low in Hate Speech*, THE HINDU (June 24, 2015), available at <http://www.thehindu.com/todays-paper/a-new-low-in-hate-speech/article7347982.ece> (last visited July 27, 2015).

¹⁰³ *Id.*

¹⁰⁴ Pravasi Bhalai Sangathan, *supra* note 55, at para. 27.

¹⁰⁵ *Id.*

¹⁰⁶ M. L. Sharma v. Election Commission, (2014) CrI. WP. 47 of 2014 (India); K. Rajagopal, *The “Reasonable” Man v. The “Hypersensitive” Man*, THE HINDU (Jan. 18, 2015), available at <http://www.thehindu.com/sunday-anchor/sunday-anchor-reasonable-man-vs-the-hypersensitive-man/article6797226.ece> (last visited July 27, 2015).

¹⁰⁷ *Id.*

¹⁰⁸ *Supreme Court Asks Law Commission to Define What Constitutes Hate Speech*, INDIAN EXPRESS (Mar. 12, 2014), available at <http://indianexpress.com/article/india/india-others/supreme-court-asks-law-commission-to-define-what-constitutes-hate-speech/> (last visited July 29, 2015).

¹⁰⁹ Umar, *supra* note 92.

4.2. Liability of Intermediaries for Hate Speech

In 2011, Kapil Sibal, then the Union Minister for Communications and Information Technology, demanded that intermediaries such as Facebook, Yahoo, Google, and Microsoft block users who posted hate speech on social networking websites.¹¹⁰ Sibal argued that directly prosecuting individuals who posted hate speech would be practically difficult; instead, blocking them from using intermediary platforms would be more a pragmatic penalty.¹¹¹ Sibal offered three reasons in support of this position: many individuals post inflammatory content from overseas, thus escaping Indian jurisdiction; Internet companies had rejected the government's requests to provide individual users' information; and such content had the capacity to incite protests, mobs, and violence between communities.¹¹²

There is a substantial difference between the degrees of enforcement of anti-hate speech laws in real life and the virtual world of the Internet. As has been explained above, direct prosecution of hate speech promulgated by individuals in the real world is relatively rare. The level of enforcement against intermediaries, however, is stricter. In this regard, Siddharth Varadarajan, former editor of *The Hindu*, remarked that while hate speech made in a volatile real-world situation is never prosecuted, the sensitivity towards online content is much higher.¹¹³ He notes that when it comes to online content, the government reacts in a "hyper-sensitive" manner.¹¹⁴ This creates problems for intermediaries, especially news websites, because they need to pay special attention to the comments that are posted.¹¹⁵ Further, since the legal process is costly and time-consuming, intermediaries are often forced to comply with requests to block online content just to avoid litigation.¹¹⁶

During times of riots and civil unrest, the government proactively imposes blocks on websites, accounts of individuals, and hateful content to prevent hate speech from

¹¹⁰ Praveen Swami & Sujay Mehdudia, *Hate Speech Must Be Blocked, Says Sibal*, THE HINDU (Dec. 7, 2011), available at <http://www.thehindu.com/news/national/hate-speech-must-be-blocked-says-sibal/article2691781.ece> (last visited July 29, 2015).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Somi Das, *The Take Down of Free Speech Online*, NEWSLAUNDRY (Apr. 1, 2014), available at <http://www.newslandry.com/2014/04/01/the-take-down-of-free-speech-online/> (last visited July 29, 2015).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

exacerbating an already volatile situation.¹¹⁷ Some civil society actors believe that a crackdown on intermediaries in such circumstances serves the larger interest of public safety.¹¹⁸

In the past, the Indian government has implemented such blocks by contacting intermediaries while also blocking their websites directly via their ISPs.¹¹⁹ For instance, in 2012, thousands of students and workers belonging to North-Eastern communities left cities throughout India and returned to their communities because of fear that they would be attacked due to communal violence in Assam.¹²⁰ This led to the government filing requests with websites such as Google, Twitter, and Facebook to remove inflammatory and harmful content from their websites.¹²¹ In addition to demanding that the sites block access to inflammatory content, the government also set a twelve-hour deadline for Twitter to remove user pages containing hate speech or face a temporary ban from operating in India.¹²²

The government blocked as many as 245 web pages that were hosting distorted videos and content that was being used to spread rumours about violence.¹²³ The governmental website blocks were implemented directly via the sites' ISPs and included parts of Facebook, fundamentalist Pakistani websites, Twitter, and YouTube videos spreading hateful propaganda.¹²⁴ The government claimed that the content had incited Muslims to carry out

¹¹⁷ Pranesh Prakash, *Analyzing Latest List of Blocked Sites (Communalism & Rioting Edition)*, THE CENTRE FOR INTERNET AND SOCIETY (Aug. 22, 2012), available at: <http://cis-india.org/Internet-governance/blog/analysing-blocked-sites-riots-communalism> (last visited Nov. 16, 2015).

¹¹⁸ Sunil Abraham, *To Regulate Net Intermediaries or Not is the Question*, DECCAN HERALD (Aug. 26, 2012), available at <http://www.deccanherald.com/content/274218/to-regulate-net-intermediaries-not.html> (last visited August 7, 2015).

¹¹⁹ Marta Cooper, *Web 2.0: Don't Shoot the Messenger*, XINDEX (Aug. 24, 2012), available at <https://www.indexonensorship.org/2012/08/Internet-intermediary-liability/> (last visited Aug. 7, 2015).

¹²⁰ R. Jai Krishna, *Google, Facebook Working on India Request to Remove Content*, WALL STREET JOURNAL (Aug. 21, 2012) available at: <http://www.wsj.com/articles/SB10000872396390443855804577602801691185244> (last visited Aug. 7, 2015).

¹²¹ *Id.*

¹²² TNN, *Assam Violence: Government Sets 12-Hour Deadline for Twitter to Remove Hate Pages*, ECONOMIC TIMES (Aug. 23, 2012), available at <http://economictimes.indiatimes.com/news/politics-and-nation/assam-violence-government-sets-12-hour-deadline-for-twitter-to-remove-hate-pages/articleshow/15610393.cms> (last visited Aug. 7, 2015).

¹²³ *Id.*

¹²⁴ Rama Lakshmi, *India Blocks More Than 250 Websites for Inciting Hate, Panic*, WASHINGTON POST (Aug. 20, 2012), available at https://www.washingtonpost.com/world/india-blocks-more-than-250-web-sites-for-inciting-hate-panic/2012/08/20/aee0b846-eadf-11e1-866f-60a00f604425_story.html (last visited Aug. 9, 2015).

acts of violence against North-Easterners as a justification for blocking the websites, even as the U.S. urged India to not infringe upon Internet freedom.¹²⁵

A similar impact was felt after the 2013 Muzaffarnagar communal riots, which were caused when a fake lynching video was uploaded and disseminated.¹²⁶ This led to the spread of additional inflammatory material, such as morphed headlines that read “Muslims continue to slaughter Hindus.”¹²⁷ Dealing with hate speech published online became a challenge for law enforcement authorities, since the images and videos being circulated played a significant role in the propagation of the violence.¹²⁸ Private individuals also filed FIRs seeking blocks against the Twitter accounts of political leaders whose tweets were promoting enmity and hatred between communities.¹²⁹

In peaceful times, the number of blocked websites is lower but still alarming. Between July and December, 2014, Facebook blocked access to 5,832 pieces of content, including anti-religious matter and hate speech against orders of the Indian government, which was the highest number by any country.¹³⁰ Countries such as Turkey, Russia, and Pakistan made fewer such requests to websites.¹³¹ Websites such as Google have also been quick to ban content that has led to controversy. The video “Innocence of Muslims,” an allegedly offensive film that led to Muslim protestors attacking the U.S. Consulate in Chennai, was blocked in India by Google because it violated India’s domestic laws.¹³²

¹²⁵ Margherita Stancati & Tom Wright, *U.S. Calls on India to Respect Internet Freedom*, WALL STREET JOURNAL (Aug. 22, 2012), available at <http://blogs.wsj.com/indiarealtime/2012/08/22/u-s-calls-on-india-to-respect-Internet-freedom/> (last visited Aug. 11, 2015).

¹²⁶ Saurav Datta, *India: Communal Violence in Times of Social Media*, AL JAZEERA (June 26, 2014), available at <http://www.aljazeera.com/indepth/opinion/2014/06/india-communal-violence-times--2014625124642228270.html> (last visited Aug. 11, 2015).

¹²⁷ Omar Rashid, *Social Media Strife with Inflammatory Material in Muzaffarnagar*, THE HINDU (Sept. 9, 2013), available at <http://www.thehindu.com/news/national/other-states/social-media-rife-with-inflammatory-material-in-muzaffarnagar/article5110034.ece?ref=relatedNews> (last visited Aug. 11, 2015).

¹²⁸ Mohammad Ali, *A Lab to Monitor Hate Speech on Social Media*, THE HINDU (Mar. 4, 2015), available at <http://www.thehindu.com/todays-paper/tp-national/a-lab-to-monitor-hate-speech-on-social-media/article6956739.ece> (last visited Aug. 11, 2015).

¹²⁹ Tehelka Bureau, *Muzaffarnagar Riots: Complaint Lodged Against Inflammatory Content on Social Media*, TEHELKA (Sept. 9, 2013), available at <http://www.tehelka.com/2013/09/muzaffarnagar-riots-complaint-lodged-against-inflammatory-content-on-social-media/> (last visited Aug. 11, 2015).

¹³⁰ *India Tops List of Requests for Blocking Content on Facebook in the Second Half of 2014*, CNN IBN (Mar. 16, 2015), available at <http://www.ibnlive.com/news/tech/india-tops-list-of-requests-for-blocking-content-on-facebook-in-the-second-half-of-2014-973590.html> (last visited Aug. 13, 2015).

¹³¹ *Id.*

¹³² Daniel George, *US Consulate Targeted in Chennai Over Anti-Prophet Muhammad Film*, TIMES OF INDIA (Sept. 14, 2012), available at <http://timesofindia.indiatimes.com/city/chennai/US-consulate-targeted-in-Chennai-over-anti-Prophet-Muhammad-film/articleshow/16397437.cms?referral=PM> (last visited Aug. 13, 2015); Claire Miller, *Google Has No Plans to Rethink Video Status*, NEW YORK TIMES (Sept. 14, 2012),

Google's Transparency Report helps draw multiple conclusions about the manner in which content removal is sought from different Google platforms:¹³³

- Most content removal requests originate from the Executive and the police. Court orders are rarely obtained. For instance, in the period from January to June, 2013, only four out of forty total removal requests were made through the court regarding defamatory items to be removed on the web search. In the same period, there were no requests via court order for removal relating to adult content (8 items), obscenity (10 items) and religious offence (13 items). This lack of removal requests via court order is even more emphasized in requests for removal of content on YouTube. In all instances of removal requests made to YouTube (adult content, bullying/harassment, defamation, hate speech, etc.), none were made through court orders. Instead, one request out of 157 for removal of hate speech on YouTube was made by the Executive/Police, whereas 16 removal requests out of 146 for religious offenses were made by the Executive/Police.¹³⁴

Thus, in most cases, Google would have to judge the legality of the challenged content itself when determining if it should comply with the request. The problem remains despite the *Shreya Singhal* decision, since the Executive is still not required to obtain court orders for seeking removal of content. Further, since the government often imposes sanctions for non-compliance (as was done with Twitter during the 2012 Assamese violence), intermediaries are pressured into complying with the requests made by the Executive or police.¹³⁵

- The number of removal requests based on religious offenses varies sharply during times of unrest in the country. Hate speech often falls within the larger umbrella of religious offenses, since if a hate speech targets people of a specific religion it could be classified as a "religious offense" without losing its characterization of being hate speech.¹³⁶ Between January and June, 2012, a total of 75 items were sought to be removed from Blogger (44), Orkut (1), web search (6) and YouTube (24) as religious offenses. A significant rise in the number of requests is observed between July to

available at <http://www.nytimes.com/2012/09/15/world/middleeast/google-wont-rethink-anti-islam-videos-status.html> (last visited Aug. 13, 2015).

¹³³ Google Government-Detailed Removal Requests, available at https://docs.google.com/spreadsheets/d/1_Lkc0G-zne_tooYLTxiwvjbC15iivNbZKqtFbo0K_k/edit#gid=1778688380 (last visited Aug. 13, 2015).

¹³⁴ *Id.*

¹³⁵ *Assam Violence*, *supra* note 122.

¹³⁶ For instance, Sections 153A and 295A both criminalize insulting religious beliefs.

December, wherein a total of 2,338 items were sought to be removed (Blogger (4), Google Images (1), Google+ (4), web search (1), YouTube (2,328)).

The communal violence that led to the mass exodus of the North-Easterners took place in July and August, 2012.¹³⁷ It was in light of this conflict that the government made requests to block harmful content on websites. Therefore, there is an observable difference in the government's stance towards intermediaries during normal times and during times of unrest. In case of the latter, the government attempts to ensure that intermediaries are not used to propagate hatred, leading to a strict crackdown on hate speech content on the Internet.

- With regards to hate speech, YouTube receives the most removal requests. From January to June, 2011, six hate speech-related items were sought to be removed from YouTube, as opposed to two on Orkut and none on Blogger or web search. Between July and December, 24 items allegedly containing hate speech were requested to be removed from YouTube, while only one item on Orkut and none on web search was asked to be removed. In the first six months of 2014, five items were requested to be removed from YouTube, in contrast to none from Orkut, Google+, or web search. This pattern holds true for religious offenses as well. Removal requests were made for 69 items on YouTube, whereas ten such requests were made for web search and none were made for Orkut or Google+. A simple "hate speech India" search on YouTube provides videos of several instances of hate speech that have been delivered around the country. Most of them have over several thousand views.¹³⁸ For instance, a video of a speech delivered by Akbaruddin Owaisi, wherein he threatens to massacre Hindus in India, has garnered over 224,424 views.¹³⁹ This demonstrates the ability of YouTube videos to promulgate hate speeches – which seems to be the rationale behind the government issuing several requests to block content on the website.

Although there have been discussions about using intermediaries to counter hate speech with comfort speech (content promoting acceptance, tolerance and equality), the current approach

¹³⁷ Amy Kazmin, *Exodus Shows Alienation of India's Northeast*, WASHINGTON POST (Aug. 17, 2012), available at https://www.washingtonpost.com/world/asia_pacific/exodus-shows-alienation-of-indias-northeast/2012/08/17/63bae21e-e88d-11e1-a3d2-2a05679928ef_story.html (last visited Nov. 16, 2015).

¹³⁸ See, e.g., https://www.youtube.com/results?search_query=hate+speech+india (last visited Aug. 13, 2015).

¹³⁹ See, e.g., <https://www.youtube.com/watch?v=7ukTXuzXb2o> (last visited Aug. 13, 2015); total views as of August 22, 2015.

to regulate hate speech content remains the same.¹⁴⁰ It is ironic that politicians who make such speeches are rarely held liable for their actions, but intermediaries are expected to stringently comply with removal requests. In February 2015, Twitter was reviewing five times as many user reports as it had previously and had tripled the number of employees handling such requests due to it having imposed bans on hate speech on its platform.¹⁴¹ Intermediaries may be still held liable for hate speech-related content that is posted on their platforms, and so far they have been willing to comply with removal requests.

V. INTERMEDIARY LIABILITY REGIME POST-*SHREYA SINGHAL* CASE

The Supreme Court's decision in *Shreya Singhal v. Union of India* was instrumental in introducing two major changes in the context of freedom of speech and expression.¹⁴² Primarily, the judgment struck down the draconian section 66A¹⁴³ of the IT Act for being vague and unconstitutional.¹⁴⁴ Section 66A, *inter alia*, provided for punishment of imprisonment up to three years and a fine for sending information that is grossly offensive or that the sender knows to be false but still sends it for the purpose of causing enmity, hatred or ill will.¹⁴⁵ The Section was misused on several instances, including a class 11 student being jailed for making offensive remarks against political leaders and two girls being arrested for criticizing the shutting down of Mumbai after the death of Shiv Sena leader Bal

¹⁴⁰ Shalini Singh, *Government Should Use Internet, Social Media to Counter Hate Speech*, THE HINDU (Sept. 5, 2012), available at <http://www.thehindu.com/news/national/government-should-use-Internet-social-media-to-counter-hate-speech/article3859742.ece> (last visited Aug. 16, 2015).

¹⁴¹ *Twitter Bans Hate Speech, Abusive Language*, ZEE NEWS (Feb. 27 2015), available at http://zeenews.india.com/news/sci-tech/twitter-bans-hate-speeches-abusive-language_1553532.html (last visited Aug. 16, 2015).

¹⁴² *Shreya Singhal*, *supra* note 32.

¹⁴³ IT Act, *supra* note 3, at Section 66A("Any person who sends, by means of a computer resource or a communication device –

a) any information that is grossly offensive or has menacing character; or

b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,

c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to two three years and with fine.

Explanation: For the purposes of this section, terms "Electronic mail" and "Electronic Mail Message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message").

¹⁴⁴ Jayant Sriram, *SC Strikes Down "Draconian" Section 66A*, THE HINDU (Mar. 25, 2015), available at <http://www.thehindu.com/news/national/supreme-court-strikes-down-section-66-a-of-the-it-act-finds-it-unconstitutional/article7027375.ece> (Aug. 16, 2015).

¹⁴⁵ IT Act, *supra* note 3, at §66A.

Thackeray.¹⁴⁶ The decision also fundamentally altered the possible liability of intermediaries for user-generated hate speech by shifting from a notice-and-takedown system to making it mandatory for such requests to be accompanied by a court order.¹⁴⁷

5.1. Eliminating the Chilling Effect

In *Shreya Singhal*, the petitioner challenged the constitutionality of the IT Act provisions pertaining to intermediary liability.¹⁴⁸ Section 73(3)(b) of the IT Act was challenged on the ground that it forced intermediaries to exercise their own judgment upon receiving actual knowledge that information was being used to commit unlawful acts.¹⁴⁹ Rules 3(2) and 3(4) of the IT Intermediary Guidelines were also challenged because they required intermediaries to exercise their own judgment when removing content.¹⁵⁰ Section 69A of the IT Act was challenged for not containing sufficient safeguards against blocks requested by the government.¹⁵¹

The petitioner argued that the presence of such provisions gave rise to a chilling effect on private speech.¹⁵² Under the existing system, a state-mandated private censorship regime was created in effect since online speech could be banned without obtaining an order from a court or the government.¹⁵³ As a consequence, risk-averse intermediaries often erred on the side of

¹⁴⁶ *Flashback: List of Cases Where Section 66A of IT Act Was Misused*, IBN LIVE (Mar. 24, 2015), available at <http://www.ibnlive.com/news/india/flashback-list-of-cases-where-section-66a-of-it-act-was-misused-977016.html> (August 16, 2015); *13 Infamous Cases in Which Section 66A was Misused*, INDIA TODAY (Mar. 24, 2015), available at <http://indiatoday.intoday.in/story/section-66a-cases-how-it-curbed/1/425567.html> (last visited Aug. 16, 2015); Nazar Abbas, *Class 11 Student Sent to Jail for Facebook Post Against UP Minister Azam Khan*, TIMES OF INDIA (Mar. 17, 2015), available at <http://timesofindia.indiatimes.com/city/bareilly/Class11-student-sent-to-jail-for-Facebook-post-against-UP-minister-Azam-Khan/articleshow/46600144.cms> (last visited Aug. 18, 2015); PTI, *Charges Dropped Against Girls Arrested for Facebook Post on Bal Thackeray*, NDTV (Dec. 18, 2012), available at <http://www.ndtv.com/india-news/charges-dropped-against-girls-arrested-for-facebook-post-on-bal-thackeray-507890> (last visited Aug. 19, 2015).

¹⁴⁷ Kartik Chawla, *Shreya Singhal and How Intermediaries are Simply Intermediaries Once Again – Striking Down the Chilling Effect*, TECH LAW FORUM (Mar. 30, 2015), available at <https://techlawforum.wordpress.com/2015/03/30/shreya-singhal-and-how-intermediaries-are-simply-intermediaries-once-again-striking-down-the-chilling-effect/> (last visited August 19, 2015).

¹⁴⁸ *Shreya Singhal*, *supra* note 32.

¹⁴⁹ *Id.* at para. 114.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Private Speech*, BLACK'S LAW DICTIONARY (9th ed. 2009) ([t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right to free speech)

¹⁵³ Sunil Abraham, *Shreya Singhal and 66A*, 1(15) ECONOMIC AND POLITICAL WEEKLY (Apr. 11, 2015), available at <http://cis-india.org/Internet-governance/blog/shreya-singhal-judgment.pdf> (Aug. 20, 2015).

caution by complying with private removal requests and taking down content.¹⁵⁴ Further, from a purely economic perspective, determining the legality of takedown notices and handling legal processes across various jurisdictions would have been costly for intermediaries.¹⁵⁵ High legal costs and significant risk would compel an intermediary to agree to the takedown notice.¹⁵⁶

Therefore, frivolous complaints could be used by private parties to suppress legitimate expression without fear of repercussions; in addition, in the absence of provisions for reinstatement of content, the harms to the creator could be irreversible.¹⁵⁷ As a consequence, legitimate speech was curtailed under the veil of preventing hate speech.

A study was conducted by Rishabh Dara with the Centre for Internet and Society to determine whether the IT Act and IT Intermediary Guidelines indeed caused a chilling effect on the freedom of speech and expression.¹⁵⁸ As a part of the study, seven prominent intermediaries were sent takedown notices containing obvious flaws in them, such as absence of a cause of action or failure to establish the author as an affected person. The study found that, despite the flaws, six out of the seven intermediaries over-complied with the notices. For instance, a takedown notice was issued to an intermediary news website that allowed user-generated comments to be published below articles.¹⁵⁹ The notice sought the removal of one user-generated comment published on an article relating to the Telengana movement.¹⁶⁰ The challenged comment:

- Condemned the violence in the Telengana agitation.
- Blamed the agitation’s leaders for being selfish.
- Supported the Telengana movement.

The notice alleged that the said comment was, *inter alia*, racially and ethnically objectionable, disparaging, and hateful, and therefore in violation of Rule 3(2)(b) of the IT Intermediary Guidelines. Words such as “objectionable” and “disparaging” have not been defined under Indian law.

¹⁵⁴ *Id.*

¹⁵⁵ Thelle, *et al.*, *supra* note 8, at 23.

¹⁵⁶ *Id.*

¹⁵⁷ Abraham, *supra* note 153, at 14.

¹⁵⁸ Dara, *supra* note 7, at 2.

¹⁵⁹ *Id.* at 13–14.

¹⁶⁰ *Id.*

Seventy-two hours after the notice was sent, the intermediary had removed all fifteen comments published below the article. The study draws several conclusions based on this reaction:

- The intermediary deleted all the comments under the article even though there were allegations of illegality only against one of the comments. Such over-compliance placed unlawful restrictions on the freedom of speech.
- There was a clear reluctance on the part of the intermediary to determine the legality of the claims made in the notice.
- No explanations or reasons were provided to the complainant or to the authors of the comments after the removal of comments.

The study reasoned that “the [IT Intermediary Guidelines] create uncertainty in the criteria and procedure for administering the takedown notices thereby inducing the intermediaries to err on the side of caution and over-comply with takedown notices in order to limit their liability and as a result suppress legitimate expressions.”¹⁶¹ The study further noted that there was an absence of meaningful safeguards to prevent misuse and abuse of the takedown procedure.¹⁶²

One of the recommendations made by the authors was that an objective test should replace the approach of requiring intermediaries to subjectively determine the legality of the challenged content.¹⁶³ The *Shreya Singhal* case mirrored this reasoning, and established that an objective determination must be made through court orders, thereby removing the concerns with regards to the chilling effect resulting from private parties misusing takedown procedures.¹⁶⁴ Such an interpretation of the Section shields intermediaries from liability unless they fail to comply with court orders directing them to remove illegal content.¹⁶⁵

¹⁶¹ *Id.* at 2.

¹⁶² *Id.*

¹⁶³ *Id.* at 30.

¹⁶⁴ *Shreya Singhal*, *supra* note 32.

¹⁶⁵ Giancarlo Frosio, *Landmark Intermediary Liability Decision From the Indian Supreme Court*, CENTRE FOR INTERNET AND SOCIETY STANFORD LAW SCHOOL (Mar. 27, 2015), available at <http://cyberlaw.stanford.edu/blog/2015/03/landmark-intermediary-liability-decision-indian-supreme-court> (last visited Aug. 20, 2015).

VI. CONCLUSION AND RECOMMENDATIONS

“The Internet is more important and disruptive than [its greatest advocates] have previously theorised.”

– Evgeny Morozov, *The Net Delusion*

India’s current approach toward imposing intermediary liability for user-generated hate speech creates a host of challenges for the future. Following the *Shreya Singhal* decision, it becomes important to reconsider the role of the courts, especially regarding governmental requests to block content under Section 69A of the IT Act. The government and courts need to work towards directly punishing individuals who engage in hate speech and set a strong precedent that would deter such speech in the future. While there is no doubt that hate speech has a strong negative impact on social stability, Internet restrictions seeking to promote such stability must be cautiously applied. The following recommendations seek to strike this balance between prohibiting hate speech and limiting Internet restrictions.

6.1. Increased Role of Courts

As per the *Shreya Singhal* case, the Executive branch of the government is able to issue blocking orders without requiring a court order, provided that the block is backed by valid reasons and falls within the ambit of reasonable restrictions allowed under Article 19(2) of the Constitution.¹⁶⁶ However, there are multiple reasons why courts need to be included in this process, just as they were for requests made by private parties.

When the government restricts content on intermediary platforms to prevent the incitement of public disturbances or riots, such blocks are justified by the presumption that riots and violence are propagated by the sharing of hateful content on intermediary platforms.¹⁶⁷ Even though this is a commonly-held belief, several studies have shown that this does not hold true. A study by The Guardian and the London School of Economics titled “*Reading the Riots: Investigating England’s Summer of Disorder*” argues that during the Tottenham riots,

¹⁶⁶ *Shreya Singhal*, *supra* note 32.

¹⁶⁷ See, *Indian Cyber Silence: Journalists Muted after Race Riots*, RT (Aug. 23, 2012), available at <https://www.rt.com/news/india-twitter-crackdown-riots-348/> (last visited Nov. 16, 2015) (“Authorities claim that these web pages, as well as those already blocked, were responsible for disseminating misinformation that triggered the deadly riots.”).

there was no chain of causation between the riots and the use of social media.¹⁶⁸ In fact, it concluded that social media played a positive role in the aftermath of the riots by assisting in clean-ups.¹⁶⁹

Historically too, several protests and riots – ranging from the Greensboro sit-ins to the Godhra carnage – have been furthered in the absence of social media. In addition, there has not been a study conclusively linking posting of hateful content on the Internet and the furtherance of protests. An Executive order for blocking hate speech on intermediary websites fails to address the larger question of whether there is a direct link between hateful posts and the furtherance of violence.

Also, the Executive and the courts may disagree with regard to whether a specific block would constitute a reasonable restriction under Article 19(2). This was exemplified in the *Shreya Singhal* case itself, wherein the Executive considered Section 66A to be a reasonable restriction under the Constitution but the provision was struck down by the Supreme Court for being unconstitutional.¹⁷⁰ Therefore, courts should be included in this framework to test whether a restriction issued by the Executive falls within the purview of Article 19(2). Unilateral Executive orders often run the risk of being over-protective and based on an unsubstantiated presumption of harm, thus harming free speech and the interests of intermediaries.

6.2. Direct Action against Hate Speech

The direct enforcement of the domestic Indian laws prohibiting hate speech has been less than adequate. Political leaders have given inflammatory speeches containing hate speech at rallies, yet have faced very little or no liability at all. The direct impact of hate speech is increased in this context because people are likely to get carried away in the heat of the moment. On the Internet, speech is diluted because its presentation through a virtual medium reduces any surrounding tension or anger.

¹⁶⁸ *Riots in Tottenham After Mark Duggan Shooting Protest*, BBC NEWS (Aug. 7, 2011), available at <http://www.bbc.com/news/uk-england-london-14434318> (last visited Aug. 23, 2015); *Reading the Riots: Investigating England's Summer of Disorder*, THE GUARDIAN & LONDON SCHOOL OF ECONOMICS (Dec. 14, 2011), available at [http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots\(published\).pdf](http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots(published).pdf) (last visited Aug. 23, 2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Shreya Singhal*, *supra* note 32.

Despite this, authorities have been lax when acting against individuals promulgating hate speech in real world situations. Very few such actors have been punished, thereby undermining the efficacy of the anti-hate speech laws of India. To reduce the epidemic of hate speech in India and its impact, a policy of stricter enforcement must be adopted. Failure to do so not only ignores the root cause of the problem, but also creates arbitrariness when intermediaries, who merely provide an unmonitored platform for such hateful content to be shared, are punished for the same.

6.3. Challenge of Requests by Intermediaries

There is no doubt that intermediaries are business-driven entities who are averse to getting embroiled in legal battles when it does not further their financial interests. Since intermediaries operated under the constant fear of sanctions, it created a chilling effect on the freedom of speech and expression.¹⁷¹

There is a paucity of legal analysis and judicial pronouncements on the issue of private party removal requests. The impact of a single judgement (*Shreya Singhal*) has produced widespread repercussions because the present law has yet to evolve completely. In such a situation, especially when the importance of free speech on the Internet is gaining recognition in India, intermediaries should proactively protect their own and users' interests. In order to achieve this, intermediaries will have to challenge Executive requests that seem arbitrary or fall outside the scope of Article 19(2). This will lead to judicial discourse that will in turn set precedents crucial for reducing future ambiguity. Such action is necessary to create legal certainty, thereby leading to the creation of a safer environment for intermediaries.

6.4. Conclusion

There must be recognition that in modern times, online intermediaries have become integral to the average person's Internet use. Since restrictions placed on content curb a fundamental aspect of the Internet, they must be narrow, proven to be essential, and effective in reaching the necessary end. Liability of intermediaries must mirror this restricted scope. Without

¹⁷¹ Geetha Hariharan, *What 66A Judgment Means for Free Speech Online*, THE HUFFINGTON POST (Mar. 26, 2015), available at http://www.huffingtonpost.in/geetha-hariharan/what-66a-judgment-means-f_b_6938110.html (last visited Nov. 16, 2015).

expressly stating this proposition, the *Shreya Singhal* case furthered this liberal thought process. If the judgment is a reflection of the current judicial approach, a more relaxed liability regime can be expected in the future. There is also a pending petition in the Supreme Court that challenges the constitutional validity of hate speech-related provisions (Ss. 153, 153A, 153B, 295A, 298 and 505 of the IPC), filed by Subramaniam Swamy.¹⁷² In the event the Sections are struck down, the legal framework governing hate speech will undergo a drastic change.

Yet intermediaries operate in an uncertain environment since they still need to decide the legality of government requests to block content, which remains a problem. Uncertainty exists at the enforcement stage as well. Presently, there are several hate videos on YouTube and hateful comments on Facebook that violate India's anti-hate speech laws. No action has yet been taken against the uploaders or the hosting intermediaries. However, since requests for removal can be made at any time, intermediaries must remain constantly prepared to handle this unpredictability. If they fail to remove the material after a takedown request has been made, they may be held liable even though the material would have already been seen by a large number of people before the request was made.

The issue of intermediary liability and hate speech has not gained enough attention in India. There is an absence of practical and theoretical studies that clearly establish a link between online hate speech and physical manifestations of violence. Neither are there judicial judgments on the issue that explain this relationship. This has created a lack of knowledge which must be addressed in order to make the government reconsider its policy towards intermediaries. However, this problem is not unique to India; it is an issue that is still being debated around the world.

It is only when the government rethinks its preconceived notions about intermediary impact that the situation can change. Presently, intermediaries almost always comply with Executive orders to avoid being penalized. This has a negative impact on online freedom of speech and affects the independence with which intermediaries operate. Courts can introduce legitimacy into the process by defining concrete legal limits that confine governmental orders to proper

¹⁷² Amit Choudhary, *Subramaniam Swamy Challenges Hate Speech Law in SC*, TIMES OF INDIA (Jun. 23, 2015), available at <http://timesofindia.indiatimes.com/india/Subramaniam-Swamy-challenges-hate-speech-law-in-SC/articleshow/47776651.cms> (last visited Aug. 23, 2015).

reasons. Intermediaries can also facilitate change and create a better environment for themselves in the future by challenging questionable governmental orders to block content.

Ripples must be created in the existing system for it to become better-suited to a democracy as complex as India's. Such ripples can arise from free speech activists, academics, intermediaries, and the government itself. These stakeholders need to act against the inertia hindering the existing system to ensure that India's laws keep pace with the rapid growth of the Internet and intermediaries.
