TECHNOLOGY AS A CHALLENGER AND AN ALLY TO CONSTITUTIONALISM*

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It was not so long ago that Internet access was still being rationed, even for the most privileged. Connection handshakes were forged over noisy modems in select boroughs of metropolitan Indian cities. Bandwidth and access were limited. This economy crept into chat rooms where the use of acronyms became denominators of modernity. A favourite of programmers was, 'AFK'. Expanded to 'Away from Keyboard', it conveyed that the user behind the screen was physically absent from the computer terminal. To some, this was a form of etiquette, denoting a delay in response to other chat participants. However, to those who had accepted the centrality of digitisation, it meant that they were merely taking a break from the computer. The keyboard was the principal determinant of their environment. Some even argued that there was no marked division between the virtual world and the real world. It all collapsed into one seamless web—it did, didn't it?

Today, there is no need to type in 'AFK'; we are connected, everywhere, at all points. What is even more remarkable is the increasing physicality of the intangible bits of data which determine basic human functions—the way people commute, talk and form personal relationships, transact commerce, consume and create media. Not restricted to the privileged, algorithms—curiously no longer referred to as computer programmes—determine vast swathes of life for the millions who negotiate their lives around the indices of deprivation. For instance, a software matches the level of accuracy of a saved fingerprint in its database with one scanned on a point-of-service device to determine the identity of a person. This system is today widely used in the dispersal of state subsidies.

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Already there are policy documents, and even implementations, in India of what are termed as 'smart cities', where with a mix of software and sophisticated surveillance technologies may offer benefits of better civic services. Their architecture, design and availability create an ecology of perpetual technological interaction. It is not without reason that many smartphone handsets do not offer any option for battery removal. After all, we are expected to be connected all the time. Many things about smartphones seem disturbing, but we continue to embrace them and receive benefits—they undeniably improve the quality of our lives. More than four of 10 Indians are connected to the Internet, and this number continues to grow. Such technological change in Indian society narrates several stories. The one this article would like to tell is of hope.

In the seeming backlash against technology, optimism on its social impact is in a more tenuous area of analysis. It focuses on the seemingly obvious friction between technology and law, evident in the start-up incubators of Koramangala in south Bengaluru, to the courtrooms on Tilak Marg in central Delhi. There is a sense of mutual discomfort—if not hubris, fear and distrust. While some technologists prioritise source code over legal code, the legal fraternity fears a change to the status quo or a 'rule of law' society. Engineers are pessimistic about the inefficiency of state institutions and seek an opportunity to 'leapfrog', 'innovate' and 'disrupt'. Lawyers and judges, to their credit, often extend throttling regulation from legacy legal frameworks of telegraphs to the Internet. This is a somewhat simplistic generalisation, but dominance in social design is a frequent contest between this binary. Is it possible that such friction may lead to victories of constitutional norms in doctrine and application, where the stasis of legal precedent is renewed, and even remedied, by the rapid changes of a digital society?

Using two recent examples in this article, it is argued that opportunities exist to replenish, reinforce, and even improve, the foundations of fundamental rights. While such a reading may be faulted for optimism, the examples used are that of pre-eminent national debates, which have not only captured public attention, but have also led to state responses in the improvement of the fundamental right to speech and expression online. The first of these is the constitutional challenge to Section 66A, in which the Supreme Court safeguards freedom of thought and expression

with renewed vigour. Thereafter, the Telecom Regulatory Authority of India (TRAI) adopted the principles of Network Neutrality in an order that is premised on the public ownership of spectrum to ensure media diversity. It will be argued that such institutional responses collectively pose that—beyond individual results, winners and losers—the substantive content of law is attempting to fulfil ideals of justice, liberty, equality and fraternity as it matches pace with technology.

CAN THERE BE A DIFFERENT STANDARD FOR FREE SPEECH FOR THE INTERNET?

Great constitutional cases are birthed by greater controversies. But there was something seemingly ordinary when, in August 2012, Jagdish Patil, head over heels in love, availed of the services of 'Ribbons and Balloons', a local pastry shop located in Ulhasnagar, Maharashtra. It offered a novel service which would help him secure the affections of his prospective partner by preparing a birthday cake with the lady's image on it. The pastry shop serviced his order by printing her Facebook profile picture—literally—as the cake's icing. The birthday cake was received not by the girl, who had just turned 20, but by her father. He filed a police complaint, which was registered under Section 66A of the Information Technology (IT) Act, 2000, in December 2015 (Bhardwaj, 2015)—yes, for there was never a tale of more woe than of this Juliet and her Jagdish. But then, this story is only one of many.

About the same time, two young girls in Pahlgarh, Maharashtra, were arrested under the same law for questioning a 'bandh' in Maharashtra on their Facebook profiles (Nair, 2012). Barely in their 20s, one Muslim and the other Hindu, their alleged crime was political criticism—they had merely stated that a statewide curfew had been imposed because of fear of violence rather than any respect owed to Bal Thackeray on his death. These details were mentioned not only in the complaint filed by a Shiv Sena activist, but also in an FIR at the local police station. This case captured media attention, and soon several reports emerged on the abuse of Section 66A. These included the arrest of a cartoonist; a retired professor who used a meme from a Satyajit Ray film to mock a chief minister; a young girl who complained against police extortion; and a young businessman who had criticised the son of a

cabinet minister for corruption. All of them lived in different parts of India, shared different social groups, and quite possibly held different political worldviews. What united them was their use of the Internet for airing their opinions, and their subsequent prosecution under Section 66A of the IT Act. Many Indians feared they could be next.

Several legal experts and commentators have long held that Section 66A was a bad law. This was based on the legal analysis of the text of the provision, and also by researching law reports where its use was noticed in a wide range of cases. Many of these prosecutions contained distinct facts which did not tie in with any unitary or coherent articulation of a specific crime. Such vagueness is likely to be the death of Section 66A; but before we anticipate that eventuality, it is important to consider the reasons for which this provision was made, and the subsequent justification for its existence in the Supreme Court. The IT Act, 2000, is the principal law which governs online activities (Carr, 2000), and was originally intended for regulating online commerce. Principally, it was intended to provide legal recognition to online contracts. However, as time went by, people were using the Internet in the search for human connections. This was especially true in India, where the spread of mobile telecom networks compensated for decades of rationing of landline telecom services. For the first time, large numbers of Indians were able to both receive knowledge and broadcast their thoughts. This two-way channel opened up and democratised the media to a large extent with the novelty of ease, speed and spread. It is not without reason that Frank La Rue, UN's Special Rapporteur on Freedom of Expression, termed the Internet 'one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies' (2011).

With increased connectivity, there was closer scrutiny on online communication. Although digitally facilitated speech still fell within the legal purview of antiquated content restrictions—such as the offences of obscenity, criminal defamation and sedition under the Indian Penal Code, 1860—arguments were made that a new, special category of offences was required. This was partly in response to moral panic that Internet access was causing social anarchy and

undermining 'Indian values', and partly as a result of the very nature of online discourse where, for the first time, individuals could talk freely to large audiences. To some, this was liberating; to others, frightening. This was partly sought to be addressed by an expert committee report that was subsequently referred to a Standing Committee of Parliament where, for the first time, Section 66A made an appearance.[1] Its intended purpose was to prevent unwanted and unsolicited e-mails which caused annoyance to users. These 'spam e-mails' provided miracle remedies, preying on human insecurities of body and mind more often posed towards markers of masculinity, such as alopecia or impotence. Section 66A sought to criminalise the writers of such e-mails.

As Section 66A was slowly navigating the labyrinth of legislative corridors, a horrific terrorist attack in Mumbai in November 2008 accelerated the pace of this proposal. This was to have unfortunate consequences. With press reports on the use of digital technologies by the terrorists, the IT Act was amended without debate in a special session of Parliament (Chhibber and Chowdhury, 2015), and fashioned as National Security Law. This prevented legislative scrutiny not only on Section 66A, but also on several other problematic provisions on surveillance and interception, which were added on later. The language of Section 66A that finally became law was changed from the text initially proposed. This becomes important when one compares the original proposal, where it was limited, to that eventually adopted into law. Hence, no one quite knew the offence Section 66A was meant to prevent, or how it catered to a social need. This vagueness and over breadth became important in the Supreme Court's eventual decision to strike down the provision as unconstitutional.

Shortly after the arrest of the two girls in Pahlgarh, and the continuing outrage as details unfolded on prime-time TV news broadcasts, Shreya Singhal, a law student, filed a public interest petition (PIL) challenging the constitutionality of the law. Her petition argued that Section 66A was vague and lacked the specificity necessary whenever a speaker's fundamental right to freedom of speech and expression was abridged by legislation. On the first day, when the case came up for hearing before the Supreme Court, to the amusement of several young lawyers in the gallery, the Senior Counsel appearing on her behalf explained with a physical

gesture—popping up his thumb—that one of the two girls arrested in Pahlgarh 'liked' the status message of the other. While the then Chief Justice of India, the late Justice Altamas Kabir, might not have understood how Facebook worked, he immediately sensed merit in the plea, stating, 'We were wondering why no one had approached the Court.' The Court immediately sensed merit and agreed to hear the challenge to Section 66A.

As the case wound on, and final arguments closed over the next two-and-a-half years, the final arguments and the task of writing a judgement eventually fell to Justice Rohinton Nariman, along with Justice Jasti Chelameswar. For many lawyers who had appeared in this case, there was already a sense of victory, given that the Court, on repeated occasions, had passed orders noting the challenging nature of the provision. This included guidelines and advisories against its use, and arrest. But stranger things had happened in the past, and no one ventured a wager till the final judgement was read out in court.

The lawyers, for once, should have played a game of roulette for, on 24 March 2015, the Supreme Court of India struck down Section 66A as unconstitutional by its decision in *Shreya Singhal v. Union of India.*[2] The Court, to base its analysis, divided speech into three distinct categories—discussion, advocacy and incitement—holding that 'even advocacy of a particular cause howsoever unpopular is at the heart of [the fundamental right to freedom of speech and expression]'. Using the evocation of precedent from the case of *S. Rangarajan v. P. Jagjivan Ram,*[3] it reasoned that the immediacy of restriction on free expression to its intended purpose was a necessary requirement. The language of a provision ought to be specific and closely tied in with the intended objective, like a 'spark in a powder keg'. Any more flexibility in a statute would render it unconstitutional. As the Court stated, Section 66A was incredibly malleable and could take any shape to fit a legal prosecution. Hence, by its plain reading, it failed thresholds for legislation to restrict freedom of speech and met a constitutional death.

A core facet of the decision was its reasoning on the nature of the Internet. This became important, as was argued by Additional Solicitor General Tushar Mehta, that a 'relaxed standard of reasonableness of restriction should apply, regard being had to the fact that the medium of speech being the Internet differs

from other mediums on several grounds'. He went on to list several criteria, which, according to the government, would require the retention of a broad, catch-all law, such as Section 66A. This included better connectivity, greater reach and the reduction of friction in transmission. According to this submission, phrases in Section 66A such as, 'grossly harmful', 'annoyance', 'menacing', were a necessary subjectivity, given an unregulated and unrestricted Internet. Simply put, the very benefits of a revolutionary technology would also justify a greater restriction placed on it through law. The fallacy in this argument was rebutted with force by the Supreme Court, which stated that 'we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the Internet'. The Court cited a passage from the case of *Cricket Association of Bengal*:[4] 'The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies.' Section 66A was felled by the firm restatement of principle that 'the validity of [Section 66A] will have to be tested on the touchstone of the [constitutional] tests already indicated above'.

While this might seem like a fairly natural outcome, it was one of the finest hours of the Indian Supreme Court on the protection of free expression. Striking down a central statute is a rare event. For instance, constitutional challenges against offences, such as sedition and criminal defamation, have repeatedly failed. Within the reasoning of the Shreya Singhal judgement are clear articulations of constitutional doctrines on the fundamental right to freedom of speech and reasonable restrictions; the concept of over breadth and vagueness; and the acceptance of the harm of a 'chilling effect' by a vague law. With the passage of time, this judgement is often relied on not only for its ruling on Section 66A, but also for its comments on protecting online platforms which serve as conduits of information. One could expect no less from Justice Nariman who, beyond his tremendous legal acumen and authorship, also has a YouTube channel with a one-and-a-half hour lecture on Beethoven's Große Fuge Op. 133. Gradually, we all became speakers on the Internet—even judges of the Supreme Court.

WHO GETS TO BE A GATEKEEPER ON THE INTERNET?

As celebrations of the Shreya Singhal judgement were continuing, on 27 March 2015, TRAI released a consultation paper titled 'Consultation on Regulatory Framework for Over-the-top (OTT) Services/ Internet Services and Net Neutrality'. Verbose, complex and tucked away on a government website, it was noticed only by policy mavens and telecom companies. This was not without reason. As John Oliver inimitably put it, 'net neutrality' was the possibility, 'the only two words guaranteeing boredom in the English language besides "featuring Sting"'.[5] His video explained the issue of Net Neutrality on a similar consultation exercise carried out by the Federal Communications Commission in the United States. Both in India and abroad there lurked proposals by large telecom companies to undermine the egalitarian potential of the Internet, for equal and complete Internet access for every citizen. It would permit Internet service providers—the backbone of networks—to become the gatekeepers. They could slow down or speed up access to a particular website, block it, or even charge or discount (beyond the monthly payment made by users) for access. In effect, they could shape not only Internet traffic—the future of online businesses—but also the fundamental right of individuals to receive information and, in turn, express it. This was the power over users that telecom companies were seeking to appropriate for profit.

This issue would be settled by regulation, one way or the other. It is at this point that TRAI gained public prominence. As a regulator for the liberalised telecom sector, it enjoyed wide powers to safeguard public interest and ensure orderly growth. Telecom companies were licensees of the central government and permitted to offer voice, text and data services through a bundle of agreements made under the Telegraph Act. Beyond these agreements, for policy formation and the development of nuanced regulatory principles, TRAI became the go-to public office. It habitually released consultation papers for comments that were often dominated by telecom companies and industry bodies. There was transparency in TRAI's functioning, but little public participation.

This changed when, on 11 April 2015, the comedy group, 'All India Bakchod' (AIB), released a video explaining Net Neutrality. It called for viewers to send TRAI an e-mail.[6] This e-mail contained a simplified response of a larger expert paper, which drew its

theoretical grounding from the decision of the Supreme Court in *Cricket Association of Bengal*.[7] Here, it becomes important to offer an explanation since it marks the transition of constitutional principles, which are transposed from print to television broadcast, and then to the Internet. This judgement arose from the controversy created by a cricketing association that sought permission from the government to telecast a six-nation cricket tournament by uplinking its signal to a broadcaster named Trans-World International. Within this somewhat straightforward claim rested layers of constitutional determination to negotiate the power of a private body (which controlled media), the government (which asserted its ownership over the airwaves), and the fundamental rights available to every individual.

While the Shreya Singhal judgement drew from the *Cricket Association of Bengal* case to restate the constitutional protections for the Internet, irrespective of its medium, in the Net Neutrality debate it came to be used for the doctrine of airwaves being a shared public resource. While the Court recognised that the state had a controlling interest in regulating airwaves given 'scarcity, costs, and competition', these had to be in the service of larger public interest. These principles were drawn from the fundamental-right battles of newspapers, which had opposed government policies setting quotas on newsprint, advertising and circulation, notably in the cases of *Sakal Newspapers*,[8] *Indian Express Newspapers*,[9] and *Bennett & Coleman*.[10] These case citations were omitted from public answers, but formed the underlying reasoning of a 30-page document which was first prepared by the SaveTheInternet.in collective. Simplified and made available on a website, any person could now petition TRAI with two clicks. Within the first 24 hours of the AIB video broadcast, more than 100,000 e-mails had been sent, and within a week, more than a million. This was the largest online movement for digital rights in India.

But victory did not come easily, or immediately. There were further rounds of consultations as TRAI aimed for nuance and calibration, sensing massive public interest. The first issue it took up for individual determination was 'zero-rated services'. These were a bouquet of websites and applications to which access would be free, not incurring any data charges, irrespective of a user's telecom connection plan. But this was dependent on the website entering into a contract with the Internet service provider. SaveTheInternet.in

collective had argued that this amounted to 'shaping the experience' of a user, and allowed the telecom operator, or even Facebook's Internet.org programme (run through Reliance Telecom, and subsequently called Free Basics), picking winners and losers, that went beyond their core function of access providers. TRAI issued a consultation paper on 9 December 2015, and AIB uploaded another video on 24 December 2015. Again, comments from the public flooded in, and this time more experts participated. One important intervention was led by non-profit groups and experts. Through a joint letter they stressed that 'the open Internet is [a] public access good'. Using constitutional doctrine, they went on to argue for 'creating a diverse and universal Internet, which is open and freely accessible...gatekeeping the Internet or a section thereof needs to be strictly and categorically prohibited'.[11]

Shortly thereafter, on 8 February 2016, TRAI prohibited zero-rated services by issuing the Prohibition of Discriminatory Tariffs for Data Services Regulation. In an accompanying explanatory memorandum it cited the cases of *Cricket Association of Bengal* and *Indian Express Newspapers*, stating that 'the Authority is of the view that the use of the Internet should be in such a manner that it advances the free speech rights of the citizens, by ensuring plurality and diversity of views, opinions, and ideas'.[12] Within minutes of the regulations being made public, SaveTheInternet.in posted on Twitter: 'We won #SavedTheInternet.'

TECHNOLOGY POSES A CONTINUING CONSTITUTIONAL PROMISE

In retrospect, many fault the processes and outcomes in the Section 66A case and the Net Neutrality movement. This is with good reason as both instances have been driven by metropolitan concerns and lacked diversity. Even the outcomes they have achieved are disputed.

While the Shreya Singhal judgement ages well on its core holding, it also contains problematic observations on the process of website blocking. Today, an ever-increasing number continue to be blocked without any transparency or natural justice. Further, as media reports and research have shown, Section 66A continues to be used, despite its unconstitutionality, in prosecutions across India (Sekhri and Gupta, 2018). Even in cases before High Courts, the application of this dead law does not arouse the judges' curiosity. Meanwhile, researchers have inferred that other content offences,

principally obscenity, have stepped in to fill the vacuum with oppressive legal prosecution. New problems of Internet shutdowns, information floods, targeted abuse, increasing self-censorship on Internet platforms, and misinformation campaigns continue to stress our understanding of freedom of speech online. The question many ask today, and with legitimacy, is: 'What was achieved by the Shreya Singhal Judgement?'

The Net Neutrality movement is also not without its criticisms. For instance, a rigorous analysis pervades the scholarship of Smarika Kumar (2017), who states that the regulatory outcome lacked nuance and ignored the structural problems of media access. Revati Prasad (2018) makes a much more troubling assessment of the movement, linking its success with notions of nationalism, even Hindutva ideology. Meanwhile, through subsequent rounds of consultations, recommendations and license amendments, Network Neutrality is firmly entrenched as a legal rule; however, concerns remain about its enforcement. There are frequent reports of Internet service providers blocking access, and users quite often suspect that their bandwidth to specific web sites and services is throttled.

Such critique is necessary, and indicates not only the necessity of humility in victory, but also continuing engagement. At the same time, we must celebrate both Section 66A and Net Neutrality for two principal reasons. The first is that both are instances of public institutions in India positively engaging with pressing social concerns and contemporary debates on the fundamental right to freedom of speech and expression. The Supreme Court sensed this urgency and rose to protect those who were charged even during the course of hearings. It recognised that the Internet was increasingly being used as a medium for discussion and advocacy. Similarly, TRAI (a staid telecom regulator) was overwhelmed in a consultation exercise, but continued to welcome public participation. It engaged positively throughout the breadth of proceedings, observing gold standards of transparency. This, to a large extent, was made possible by the media ecology of the Internet which permitted civic engagement, and for individuals to voice their demands. The second is the ever greening of constitutional doctrine on free expression in its application to the Internet. Here, both the Supreme Court and TRAI have adopted principles from past precedent and extended them in a positive, rights-respecting framework. While such

extension may not be a natural outcome and contests of rights will result in defeats and failure, it is important to retain hope.

To conclude: victories are not without pauses, conditionalities, even setbacks. Today, the challenges posed by technology are visible in information privacy, labour protection, and the rights of minorities and women. Such issues are illustrative of a larger trend in which public institutions have an opportunity to build on legal doctrine with a view towards the future. Rapid social changes demand vibrant engagements to fulfil constitutional promises for Indians in their enjoyment of fundamental rights and technology.

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NOTES

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3. (1989) SCC (2) 574.
4. (1995) 2 SCC 161.
5. See John Oliver, 'Last Week Tonight with John Oliver: Net Neutrality', HBO, 1 June 2014. Available at https://www.youtube.com/watch?v=fpbOEoRrHyU&t=124s.
6. See All India Bakchod (AIB), 'Save The Internet', 11 April 2015. Available at https://www.youtube.com/watch?v=mfY1NKrzqi0.
7. (1995) 2 SCC 161.
8. [1962 SCR (3) 842].
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10. [1973 SCR (2) 757].
11. See Access Now, et al., Joint Letter and Counter-Comments on the TRAI's Consultation Paper on Differential Pricing for Data Services, 15 January 2016. Available at https://main.trai.gov.in/sites/default/tiles/20160118032704242093 8Access_Now_n_Ors.pdf.

12. See Telecom Regulatory Authority of India's Explanatory Memoranda to the Prohibition of Discriminatory Tariffs for Data Services Regulation, 8 February 2016. Available at Prohibition of Discriminatory Tariffs for Data Services Regulation.

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