

Principles for Regulatory Design in a Digital Age: Focusing on the Citizen¹

India has a rich and complex legal tradition of freedom of speech and expression. What can a regulatory framework for speech on digital platforms learn from this legacy? In the present article, I argue that the most important lesson which can be drawn for the digital age from the development of our jurisprudence, is the need to frame a position for citizens' stake in freedom of speech and expression, which can stand independent of other actors.

Conflating Citizens' Interest with Market Players

In the past, while framing governance frameworks for speech in the country, courts unfortunately have often made the lapse of conflating the interest of citizens in free speech, with that of market players. This is most visible in a line of cases from the 1960s to the 1980s which have come to be known as "The Newspaper Cases", and are celebrated today as landmark judgments protecting freedom of speech.

The earliest of these cases is *Sakal Newspapers v. Union of India*² in 1961, where a government regulation under the Newspaper (Price and Page) Act, 1956 that regulated the price of newspapers according to the number of pages a newspaper could have, was challenged as being in violation of Article 19(1)(a) of the Constitution.³ The rationale for such regulation, the State argued, was that newsprint, being imported, was a scarce commodity, and therefore needed to be equitably distributed amongst different newspapers—big, or small. The petitioners—the big newspaper Sakal, and a couple of its readers argued that such a regulation would directly hit the newspapers' right to circulation by reducing the space for advertisements, and thus forcing them to increase their selling prices. The readers additionally argued that such increase in prices would affect their right to access newspapers by making them less affordable, and hence such regulation was also against the readers' interests.

The Supreme Court agreed with the petitioners' arguments, and upheld that the right to freedom of speech and expression under Article 19(1)(a)

1 Written by Smarika Kumar. Submitted as part of a Conference Outcome document to the conference organisers. (May 2015)

2 *Sakal Newspapers v. Union of India* AIR1962 SC305

3 Article 19(1)(a) "All citizens shall have the right to freedom of speech and expression." Constitution of India, 1949

of the Constitution also included the right to circulation of one's speech. However in light of scarce newsprint, the implications of this went further—so in effect, what the Court upheld was that Article 19(1)(a) included not just the right to circulate speech, but the right to circulate an unlimited volume of speech. This obviously benefitted newspapers with an established business who could afford to pay for larger amount of pages and newsprint, over less established newspapers that could not. Since it led to lower newspaper pricing, the citizens/readers' interests were seen inherent in this right of newspapers to circulate unlimited volumes of speech. Citizens' interests in freedom of speech were thus seen rooted entirely in the market players', viz. newspapers' interest in circulation of speech.

Such reasoning was reinforced by the Court in its judgments in *Bennett Coleman and Others v. Union of India*⁴ in 1972, and in *Indian Express Newspapers v. Union of India*⁵ in 1984, both of which dealt with similar impugned regulations.

Framing Citizens' Interests Independently of State and Market Players

A departure from such reasoning was made in Justice Mathew's dissent in the Bennett Coleman judgment, where he recognised that citizens' interest in speech included not just affordable access to media, but also access to a diversity of opinions and sources of opinions in the media. In his dissent, he states, "*Protection against government is not enough to guarantee that a man who has something to say will have a chance to say it. The owners and managers of the press determine which persons, which facts, which version of facts, which ideas shall reach the public.*"⁶

This distinct articulation of citizens' interests recognises that their interests in protecting freedom of speech do not always exactly coincide with the interests of market players in media. It also recognises that freedom of speech of citizens may not always be threatened just by the State, but also by players in an unregulated market. In this manner Justice Mathew's dissent manages to carve a distinct position of interest for citizens—which recognises their interest in having diversity of information

4 *Bennett Coleman and Others v. Union of India* AIR1973 SC106

5 *Indian Express Newspapers v. Union of India* AIR1986 SC515

6 ¶72, *Bennett Coleman and Others v. Union of India* AIR1973 SC106

from the media, as part of their Right to Information under Article 19(1) (a).

Missing the Mark: Conflating Citizens' Interests with the State

In taking this reasoning forward however, the Supreme Court has also moved to the other extreme to conflate citizens' interests in speech governance with the State. This tendency is most apparent in *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*.⁷ In its judgment in this matter, the Court stated, "*Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters who would be and who are bound to be actuated by profit motive. There is a far greater likelihood of these private broadcasters indulging in misinformation, disinformation and manipulation of news and views than the government-controlled media, which is at least subject to public and parliamentary scrutiny.*"⁸ In pronouncing this, the Court while emphasising on the threat to freedom of speech of the citizen from the market, ignores the threat to freedom of speech of the citizen from the State.

Independent Position for Citizens to Design Governance Architecture for the Digital Age

Both the approaches of judgment in *Sakal Newspapers* and in *Cricket Association of Bengal* suffer from the problem of failing to establish a strong, independent stake for the citizen in speech governance. In both these approaches, citizens' interests are represented as either the interests of the State or as the interests of free market players, viz. big media. There is thus a lack of recognition that while citizens may possess some interests in common with the market, and some other interests with the State, as a whole, their interests transcends both. In order to design an effective governance mechanism for speech with citizens at the centre, it is citizens' interests as a whole which need to be identified and worked towards as governance principles. When this recognition itself is lacking, when there is no clear conception of which principles one needs to achieve and preserve in a governance framework, there can be no hope for the effectiveness of any regulatory mechanism.

⁷ *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*

⁸ ¶198, *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*

In light of this, it is extremely important that governance of speech in the digital age bases itself on a clear and independent third position outlining citizen interests, which is separate from the interest positions of either the State or the market in the governance of speech on the internet or other digital platforms.

Therefore in framing a governance framework for net neutrality for instance, the interest of citizens needs to be separated from the interest of the State in regulating speech on the internet. But it also needs to be independent of the interests of any market players—be it either Over-the-Top Service Providers, or the Telecom or Internet Service Providers. Internet does need a governance and regulatory framework, but that framework needs to be designed around the principles protecting freedom of speech for citizens—diversity of information, access to internet, and lack of censorship. This is an important lesson to carry forward in construction of the governance architecture for the digital age.