

# India's Universal Periodic Review: Third cycle

Stakeholder Report by the Internet Democracy Project



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Status report on  
freedom of expression,  
freedom of peaceful assembly and association,  
right to privacy  
in India  
as they relate to the Internet

This report is submitted by the Internet Democracy Project, a not-for-profit initiative working for an Internet that supports freedom of expression, democracy and social justice through research, advocacy and debate in India and beyond. It was set up in 2011 as an arm of Point of View, Mumbai. Our priorities and areas of interest in the UPR are freedom of speech and expression, freedom of association and assembly, and the right to privacy in the context of the Internet as well as barriers to Internet access.

## **Follow up from the Previous Review**

1. As Internet rights are a relatively new concern for the Human Rights Council, only Sweden made a relevant recommendation in the previous review, requesting India to ensure ‘*that measures limiting freedom of expression on the Internet are based on clearly defined criteria in accordance with international human rights standards*’.<sup>1</sup>
2. India merely noted this recommendation at the time. The executive or legislature have not taken any steps in the direction of making restrictions to freedom of expression on the Internet conform with international human rights standards since then.
3. However, in *Shreya Singhal v. Union of India*, a landmark judgment in 2015, the Supreme Court of India struck down Section 66A of the Information Technology Act, 2000, (IT Act) which sought to punish the sending of ‘*grossly offensive*’ messages and messages known to cause ‘*inconvenience*’ and ‘*annoyance*’ among other categories<sup>2</sup>, for creating offences that were vague and overbroad, thereby restricting freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India.
4. The Supreme Court also read down Section 79(3)(b) of the IT Act, on intermediary liability, and Rule 3(4) of Information Technology (Intermediary Guidelines) Rules 2011 passed under Section 79, for similar reasons.

## **Positive changes beyond previous recommendations**

5. The Telecom Regulatory Authority of India (TRAI) passed a regulation<sup>3</sup> against differential pricing of data services by Internet service providers, after an open public consultation. This is a positive step that is affirming a commitment to an open, free and secure Internet, enhancing freedom of expression, assembly and association on the Internet. However, this step was led by the telecom regulator, which is a semi-independent body from the reading of the TRAI Act.

## **Areas of Concern**

### **A. Criminal laws curbing freedom of expression**

#### Content blocking, punishment and intimidation under Section 67 and Section 67A of the IT Act

6. Section 67 of the IT Act<sup>4</sup> deals with obscenity. Due to the vague wording of the section, it is frequently used to censor all kinds of subject matter – including, but not limited to, sexual content.
7. For example, section 67 has been used to harass and intimidate a journalist working in a remote, conflict-ridden area. Prabhat Singh, a journalist in the Bastar region was arrested under the section (as well as section 292 of the IPC) in March 2016 for sending a Whatsapp message<sup>5</sup>, after the police found his message ‘*offensive*’.

8. Section 67A of the IT Act deals with punishment for '*publishing or transmitting of material containing a sexually explicit act in electronic form*'. The section does not distinguish between consensually uploaded sexual expression and non-consensual sexual material. The section provides an exception when the publication can be '*justified as being for the public good*'- a phrase that is undefined.
9. Due to the vagueness of the section, it has been misused in several instances, including for booking cases of defamation by a politician, for sharing pictures of him on a yacht.<sup>6</sup>

#### Content blocking under Section 69A of the IT Act

10. The government has powers to block content under Section 69A of the IT Act, for a fairly restricted number of reasons.<sup>7</sup> It has increasingly exercised this power, with a total of 492 URLs blocked under this section in the first 11 months of 2015 alone.<sup>8</sup> Compared to 13 URLs blocked in 2013 and 10 in 2014, the government is using the section more and more.
11. Orders passed under this section are secretive and do not lend themselves to scrutiny. The procedural safeguard of a hearing is available to the originator of the content under the section, but in practice, it is mostly never carried out.<sup>9</sup>
12. In June 2016, the section was used by the Department of Telecommunications (DoT), upon advice from the Department of Electronics and Information Technology (DEITY), to order the blocking of around 240 URLs offering escort websites.<sup>10</sup> This mass blocking is questionable<sup>11</sup> as prostitution is not an offence under the Immoral Traffic Prevention Act, 1956 (ITPA); only soliciting in a public place punishable.<sup>12</sup>
13. Although it is section 69A of the IT Act that explicitly empowers the government to block certain content on the Internet, the government frequently prefers to use section 67 and 79 of the IT Act to justify its blocking orders.

#### Section 79 of the IT Act

14. In an order dated 31<sup>st</sup> July 2015, DEITY directed the DoT to notify Internet Service Providers (ISP) to block a list of 857 websites under Section 79(3)(b) of the IT Act. According to the leaked order that was kept confidential, the blocking was done as '*content hosted on these websites relate to morality, decency given in Article 19(2) of the Constitution*'.<sup>13</sup> Under section 69A of the IT Act, this would not have been a valid ground for the government to block content.
15. In April 2016, District Magistrate of Kupwara in Jammu and Kashmir passed an order that all admins of Whatsapp groups have to register themselves in the District Magistrate's office.<sup>14</sup> The Department of Information and Public Relations issued a press release requiring '*proper permission from the concerned Deputy Commissioners*' for '*posting news on social media news groups along with sources*'. As the court order and the press release make group admins responsible for content shared by members of the group, the orders turned them into intermediaries under Section 2(w) of the Act. In arrests made, liability under Section 153A of the Indian Penal Code was assigned to Whatsapp group admins, disregarding that section 79(1) of the IT Act protects an intermediary from any liability under any law in force if the intermediary fulfils conditions laid down therein.

#### Shutdown of Internet services

16. In his report as the United Nations Special Rapporteur for freedom of opinion and expression in 2011, Frank La Rue notes that Internet shutdowns violate freedom of speech.<sup>15</sup>
17. Internet shutdowns in India are imposed<sup>16</sup>, not with reference to section 69A of the IT Act and its attendant rules, but through Section 144 of the Criminal Procedure Code. It means that ISPs are instructed to suspend 2G, 3G, GPRS, lease line and/or broadband services in the specified regions. No checks and balances are in place to ensure that such shutdowns are indeed legitimate.
18. By September 2016, there have been Internet shutdowns in Jharkhand<sup>17</sup>, Jammu & Kashmir<sup>18</sup> and Gujarat<sup>19</sup> this year alone. In 2015, Internet services were shutdown in Nagaland<sup>20</sup>, Gujarat, Manipur<sup>21</sup>, Kashmir<sup>22</sup>, Rajasthan<sup>23</sup>. In 2013 and 2014, Internet services were temporarily banned in Kashmir<sup>24</sup> and Gujarat<sup>25</sup> - sometimes for reasons as frivolous as preventing cheating in an examination.

### Criminal defamation

19. The UNHRC-appointed Special Rapporteurs on Freedom of Opinion and Expression for many years in succession have called on States to repeal criminal defamation laws in favour of civil defamation laws.
20. In a judgment delivered in May 2016, the Supreme Court of India upheld the validity of Sections 499 and 500 of the Indian Penal Code, providing for criminal defamation.<sup>26</sup> Currently, a petition in the Supreme Court challenges corporations' claim that its Right to Life can be violated in the context of defamation suits.<sup>27</sup>
21. The criminal defamation provisions have been used to silence speech on the Internet of a diverse range of actors, including journalists, politicians<sup>28,29</sup> and media personalities<sup>30</sup>, by harassing them with punitive laws that could result in imprisonment upto two years and/or fines in case of conviction.

### Sedition

22. Section 124A of the Indian Penal Code deals with sedition. The provision prohibits any signs, visible representations, or words, spoken or written, that can cause '*hatred or contempt, or excite or attempt to excite disaffection*' towards the government. As the language of the provision is overly broad, the section has been misused and misapplied to curb freedom of expression and opinion on the Internet, exercised by a large number of people including activists and students.<sup>31</sup>
23. The Supreme Court in multiple cases has read down the provision on sedition, stating clearly, for example, that criticism of the government cannot constitute sedition<sup>32</sup> and requiring an additional condition of incitement to violence<sup>33</sup> or incitement to imminent lawless action<sup>34</sup> to be present to incur liability. Despite such qualifications, multiple cases continue to be booked by law enforcement where these conditions have not been met.<sup>35</sup> The language of the law remains unchanged.

## **B. Right to Privacy**

### Lack of legislative protections of the Right to Privacy

24. Although there is no explicit '*right to privacy*' in the Constitution of India, Courts have read this right into Article 21, the right to life and liberty, subject to some restrictions.<sup>36</sup> Moreover, Courts have also ruled that the right may be curtailed only through procedure established by law, where

the procedure is fair, just and reasonable.<sup>37</sup> Legislative guidance on this issue remains, however, absent.

25. This interpretation of the right to privacy under Article 21 has now been challenged by the government in a writ petition.<sup>38</sup> The Attorney General of India argued in the Supreme Court that the right to privacy cannot be read into the Indian constitution.<sup>39</sup>
26. This is at odds with India's submission to the United Nations Commission on Science and Technology for Development (UN CSTD) Working Group on Enhanced Cooperation<sup>40</sup>, where it mentions the freedom of expression and privacy as crucial Internet issues that deserve attention.

#### Expanding surveillance in the name of intelligence gathering

27. The Indian State's surveillance powers are expanding, and several new intelligence gathering bodies have been formed in the last four years,<sup>41</sup> leading to increasing citizen data collection in the name of eliminating threats to national security, without concomitant privacy protections.
28. There is also no statutory redressal mechanism in case of illegal interception and monitoring of information and communications by the State.
29. Intelligence agencies are exempt from disclosing information about themselves under section 8 of the Right To Information Act, 2005, and operate without judicial or legislative oversight. In addition, the intelligence community has been pushing for exemption under privacy bills that have been under deliberation.<sup>42</sup>
30. The Central Monitoring System (CMS) is a telecommunications interception system that enables agencies of the government to intercept communications without requiring court orders or needing to liaise with the telecom service providers.<sup>43</sup> No information has been made available about whose data will be collected, how the collected will be used, or how long the data will be retained.
31. The National Intelligence Grid (NATGRID) centralises 21 databases, including information from banks, credit card, Internet, cell phones, immigration, motor vehicle departments, railways, National Crime Records Bureau, Securities and Exchange Board of India and Income Tax Department, with the aim of giving a full profile of persons to security agencies who seek it.<sup>44</sup> There are no known checks and balances in place, nor is there information available about effective oversight of its functioning or about where responsibility resides in case of overreach.
32. Surveillance programs such as the CMS and the NATGRID arguably do not conform with any of the 'International Principles on the Application of Human Rights to Communications Surveillance'.<sup>45</sup> These principles were drafted with the intention of providing a framework for ensuring that laws, policies and practices of communications surveillance adhere to international human rights standards, and result in the protection of the right to privacy and freedom of expression.

#### Encryption

33. According to ISP license agreement terms, ISPs have to ensure that the permitted upper limit for encryption strength of 40-bit key length in symmetric algorithms is not exceeded by individuals, groups and organisations.<sup>46</sup> This is an extremely weak standard. For a higher standard, prior permission is required from the DoT, along with submission of private keys for decryption. The

upper limit of 40 bits is not specified for ISP authorisation under Unified Access Service license agreement. Bulk encryption by ISPs is also not permitted under the license agreements.

34. Under Section 84A of the IT Act, the government released ‘National Draft Encryption Policy’<sup>47</sup> in September 2015, which applied to the use of encryption technologies for storage and communication of information held with the central and state governments, businesses and citizens.
35. Under the draft policy, C2C (Citizen-to-Citizen) category of users were required to store plain text of all encrypted communications for 90 days from date of transaction and provide verifiable plain text to law enforcement agencies as and when required, according to laws in place. The draft policy endangered the privacy of users and defied the very utility of encryption by asking users to retain communications insecurely.
36. It also required vendors of encryption technologies to register with the government, and service providers using encryption to enter into agreements with the government and turn in decrypted data on demand. These provisions were not counter-balanced by any consideration of the right to privacy or potential governmental overreach. By specifying key lengths to be used by different categories of users, the government could also restrict how secure users can choose to make their communications. The policy was rolled back after severe public pressure.
37. A new draft of the encryption policy was released selectively only to the private sector in 2016.

#### Aadhaar or Universal Identification (UID)

38. Aadhaar seeks to provide identification to residents of India by linking a 12-digit number to biometric and demographic information of residents. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 is riddled with issues of exclusion and privacy concerns.
39. The Act does not perform well, measured against a globally accepted set of principles by which standards of privacy may be gleaned.<sup>48</sup> These principles are Notice, Choice and Consent, Collection Limitation, Purpose Limitation, Disclosure of Information, Access and Corrections, Security, Openness and Accountability.
40. The Supreme Court passed an order that Aadhaar should be voluntary, and cannot be made mandatory for availing government services or benefits.<sup>49</sup> Since the Act and the regulations under it were passed, the UIDAI has sent out a circular to all government bodies to issue specific notifications making Aadhaar mandatory for social schemes and government processes.<sup>50</sup>
41. Even as Aadhaar authentication failures are being reported in several states, the government is requiring the public distribution system, subsidised liquefied petroleum gas, government scholarships and other benefits to be linked to Aadhaar, leading to exclusion of many from availing basic needs.<sup>51</sup>

### **C. Reducing barriers to access**

#### Restrictions on access to mobile phones for women and girls

42. *Khap panchayats* (local community bodies) in villages of Uttar Pradesh,<sup>52</sup> Rajasthan<sup>53</sup> and Gujarat<sup>54</sup> have imposed a ban on the usage of social media and mobile phones for women in the

areas, especially young and unmarried women. The lack of disavowal of and strong action against *khap panchayats* who are banning the use of mobile phones among women, is disconcerting.

## **Recommendations**

### A. Criminal laws curbing freedom of expression

30. Amend the rules under Section 69A of the IT Act to remove secrecy of the orders.
31. Ensure blocking orders by the government are passed only under Section 69A of the IT Act, and the reasons fall strictly within the limits provided in the section. Require court orders for all other blocking orders.
32. Bring an immediate end to the use of section 144 IPC to justify network shutdowns in the name of law and order.
33. Amend the Indian Penal Code to strike down provisions on criminal defamation, in compliance with international human rights standards. The aggrieved party is free to pursue civil remedy.
34. Amend the Indian Penal Code provisions on sedition in line with the Supreme Court's guidelines.

### B. Right to Privacy

35. Pass a law providing strong protections of the right to privacy.
36. Proscribe clear limits on government surveillance and discontinue bulk collection of citizen data, in compliance with international human rights standards
37. Comply with the order passed by the Courts to not make Aadhaar mandatory for delivery of welfare services. Place strong penalties and create redressal mechanisms for breach of data either by sub-contractors or government agencies.
38. Require the use of strong encryption in business and government communications as well as individual communications. The government should not require manufacturers of software and hardware to insert backdoors, or deposit private keys with the government, creating security vulnerabilities.

### C. Reducing barriers to access

39. Take strong measures against and issue guidelines for community bodies imposing restrictions on the use of mobile phones by women.

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<sup>1</sup> See (UPR 2- 138.126)

<sup>2</sup> 66-A. Punishment for sending offensive messages through communication service, etc.—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 by making use of such computer resource or a communication device; or

(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 three years and with fine.

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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.

3 Telecom Regulatory Authority of India Notification (2016), ‘Prohibition of Discriminatory Tariffs for Data Services Regulations’, (No. 2 of 2016). February 8 2016. Available at: [http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation\\_Data\\_Service.pdf](http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf)

4 Section 67. Punishment for publishing or transmitting obscene material in electronic form:

Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

5 NL Interviews With Prabhat Singh: Reporting from the media black hole of Bastar. *News Laundry*. August 2 2016. Available at: <http://www.newslaundry.com/2016/08/02/nl-interviews-with-prabhat-singh-reporting-from-the-media-black-hole-of-bastar/>.

6 Nappinai, S (2015). A Gross Misuse of the IT Act by Mumbai Police. *The Wire*. July 14. Available at: <http://thewire.in/6390/mumbai-polices-gross-misuse-of-the-it-act/>

7 These are: ‘in the interest of the 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.’

8 492 social media URLs blocked in 2015 under Sec 69A; Only 10 in 2014. *Indian Express*. December 11 2015. Available at: <http://indianexpress.com/article/technology/tech-news-technology/492-social-media-urls-blocked-in-2015-under-sec-69a-only-10-in-2014/>.

9 Gupta, Apar (2015). But what about Section 69A?. *Indian Express*. March 7. Available at: <http://indianexpress.com/article/opinion/columns/but-what-about-section-69a/>

10 Govt bans 240 websites offering escort services. *Business Standard*. June 14, 2016. Available at: [http://www.business-standard.com/article/current-affairs/govt-bans-240-websites-offering-escort-services-116061400561\\_1.html](http://www.business-standard.com/article/current-affairs/govt-bans-240-websites-offering-escort-services-116061400561_1.html)

11 Datta, Bishakha (2016). Sex work isn't illegal. So why has the Indian government blocked 240 escort websites?. *Scroll*. June 16. Available at: <http://scroll.in/article/810019/sex-work-is-legal-so-why-has-the-indian-government-blocked-escort-websites>

12 Section 8: Seducing or soliciting for purpose of prostitution.—Whoever, in any public place or within sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or house or not—

(a) by words, gestures, wilful exposure of his person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of, any person for the purpose of prostitution; or

(b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency, for the purpose of prostitution, shall be punishable on first conviction with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year, and also with fine which may extend to five hundred rupees: [Provided that where an offence under this section is committed by a man, he shall be punishable with imprisonment for a period of not less than seven days but which may extend to three months.]

13 DOT Order Blocking 857 Websites on Grounds of Decency and Morality. *Centre for Internet and Society*. Available at: <http://cis-india.org/internet-governance/resources/dot-morality-block-order-2015-07-31/view>.

14 Yusuf, Shabir Ibn (2016). Have a Whatsapp Group? Report to District Magistrate. *Greater Kashmir*. April 26. Available at: <http://www.greaterkashmir.com/news/kashmir/story/215783.html>

15 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)



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- 20 Internet Blackout In Nagaland As Gruesome Video Of Lynching Surfaces; 22 Arrested. *Huffington Post*. July 15 2016. Available at: [http://www.huffingtonpost.in/2015/03/09/nagaland-lynching\\_n\\_6828442.html](http://www.huffingtonpost.in/2015/03/09/nagaland-lynching_n_6828442.html).
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- 23 Shashidhar K J. (2015) Rajasthan blocks Internet services in some districts indefinitely. *Medianama*. December 21. Available at: <http://www.medianama.com/2015/12/223-rajasthan-internet-block/>.
- 24 Afzal Guru hanged: Mobile internet services snapped in Kashmir. *Times of India*. February 9 2013. Available at: <http://timesofindia.indiatimes.com/india/Afzal-Guru-hanged-Mobile-internet-services-snapped-in-Kashmir/articleshow/18415453.cms>.
- 25 Supra n. 15.
- 26 See *Subramanian Swamy and others vs. Union of India* (2016) 2 MLJ (CrI) 542 (SC).
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- 34 See *Indra Das v. State of Assam* 2011 4 SCR 289.

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- 37 *Maneka Gandhi v. Union of India* (1978) 2 SCR 621.
- 38 *Justice K.S Puttaswamy & Another vs. Union of India and Others* (2014) 6 SCC 433.
- 39 Right to Privacy not a fundamental right, cannot be invoked to scrap Aadhar: Centre tells Supreme Court. *Economic Times*. July 23 2015. Available at: [http://articles.economictimes.indiatimes.com/2015-07-23/news/64773078\\_1\\_fundamental-right-attorney-general-mukul-rohatgi-privacy](http://articles.economictimes.indiatimes.com/2015-07-23/news/64773078_1_fundamental-right-attorney-general-mukul-rohatgi-privacy).
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- 45 Necessary and Proportionate, International Principles on the Application of Human Rights to Communications Surveillance. Available at: <https://necessaryandproportionate.org/principles>.
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