



Right to Bail  
by Prof Upendra Baxi

Kathua Rape:  
Crackdown by the court

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November 11, 2019

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## Judicious Balancing Act

In a landmark ruling, the Delhi High Court ordered social media giants to remove on a global basis content defamatory to Ramdev, thereby balancing the right to defend oneself with that of free speech

# A DELICATE BALANCE

**R**ARELY does the Supreme Court of India attract international scrutiny but last week witnessed one such occasion with the United Nations High Commissioner for Human Rights issuing a statement that was critical of the apex court's adjudication on petitions relating to human rights in Kashmir. "The Supreme Court of India has been slow to deal with petitions concerning *habeas corpus*, freedom of movement and media restrictions," stated the spokesperson for the UN body. The statement also added: "We have also received reports of armed groups operating in Kashmir threatening residents trying to carry out their normal business or attend school, as well as several allegations of violence against people who have not complied with the armed groups' demands."

While attempting to strike a balance, the statement shows that in a volatile situation like the one in Kashmir, global scrutiny is increasingly focused on India, and by extension, the Supreme Court. There is an old adage that the "wheels of justice turn slowly but grind exceedingly fine," but in the case of Kashmir, thanks to Pakistan, China, Turkey, Malaysia and the United Nations Secretary-General, the crackdown in the Valley is now under global watch.

In fact, the centre's decision to invite a group of Members of the European Parliament to Srinagar last week has further internationalised the Kashmir issue. How the apex court dealt with the clutch of petitions it had admitted relating to the issue and clubbed together was inevitably going to be scrutinised more vigorously than others. A petition usually takes three to seven days to be listed for hearings. If a matter requires urgent bearing, the chief justice can intervene, provided the petition has cleared the technical parameters fixed by the Court's registry.

In this case, it was close to a month before the Supreme Court finally took up the matter. In fact, when one of the petitioners requested an urgent hearing on the plea that Pakistan was going to bring up the Kashmir issue before the United Nations, the bench refused the request, saying: "If they go to the United Nations, can the UN stay the Constitutional amendment of India?" adding that it saw no urgency in the matter.

The delay was perhaps inevitable. The fact that it is an internal issue of India with parliamentary approval may have been one reason, but the five-judge bench of the apex court must have deliberated long and hard to take a stand which involves national security and terrorism from across the border, and an issue which also required taking the centre's view on the points raised in the petitions. When it did act, it did so with resolve.

The bench that was hearing petitions on the abrogation of Article 370 and other issues in Kashmir gave the centre four weeks' time to reply to all pleas challenging the move. The petitions on Kashmir will again be heard on November 14. The delay has, however, proved costly if taken in the context of "justice delayed is justice denied".

What is reassuring is the string of media interviews given by the incoming chief justice of India, SA Bobde. He, naturally, refused to comment on the UN statement or on Kashmir, but asserted that the focus of his tenure will be on upholding the rule of law. In a lecture in 2018, he had stated: "The rule of law enables the weak to prevail over the strong. The final arbiter is the Supreme Court of India." He also made it clear that freedom of speech for an individual has to be weighed against its impact on the rest of society and added a significant rider: that relations between judges is much better than before and the Supreme Court now functions as one.

He will, however, have to accept the new reality: that India's rise as an economic and diplomatic power means the country and its democratic pillars are increasingly in global focus. Indeed, it was not so long ago that the United Nations lauded the Supreme Court for its landmark ruling striking down a key component of Section 377 of the Indian Penal Code relating to the LGBT community. Justice Bobde has till April 23, 2021, the day he retires, to ensure that the Supreme Court maintains its independence and credibility and that the rule of law, so badly mangled in recent times, is given the priority it deserves—so that the weak can prevail over the strong.

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# A Balancing Act

In a landmark ruling, the Delhi High Court ordered social media giants to remove on a global basis content defamatory to Ramdev, thereby balancing the right to defend oneself with that of free speech

By Na Vijayashankar

In a bold and innovative judgment, the Delhi High Court has opened up new jurisprudential thought on some aspects of the Information Technology Act, 2000 (ITA-2000) which may have far-reaching consequences.

On October 23, in the *Baba Ramdev Vs Facebook/Google/Twitter* case, the High Court judgment delivered by the single-judge bench of Justice Prathiba M Singh attracted global attention. It said that its take-down order in respect to defamatory content against yoga guru Baba Ramdev should be applied worldwide and that it would not be sufficient if the intermediaries only blocked visitors accessing the content from India.

While Facebook was directed to ensure that links of a video containing allegations against Ramdev be removed, the Court said that Google and YouTube had removed the video from their platforms. The judgment said: "The video clearly is violative of the guidelines which Google and YouTube have prescribed for themselves. The video is also not just offensive against the plaintiffs (Patanjali Ayurved Ltd and Ramdev) but could border on threats constituting violations of law." It added, "In view of the stand taken by Google and YouTube, since the video itself has now stated to have been taken down not just on the India domain but from all the international platforms of Google and YouTube, no further orders are required to be passed in the present suit," and disposed

of the suit.

However, on October 31, the Delhi High Court admitted an appeal by Facebook against Justice Singh's order. A bench of Justices S Muralidhar and Talwnt Singh said that it hoped that the arguments would conclude on December 7 and that it would not be passing any interim order.

The decision of Justice Singh is at variance with the September 2019 EU Court decision in the case of *CNIL Vs Google*. Here, it was held that the French Court order to remove objectionable content need not be extended to search results in countries other than the country of residence of the data subject.

Observers may recall that in 2006, in the celebrated case of *Yahoo Inc vs French Government* regarding the removal



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of Nazi memorabilia from the Yahoo auction website, American courts had agreed to the French court's jurisdictional extension to the US domain. The original order, which was for removal of content from the "French Language website" and disabling access to French citizens from within France, was, therefore, extended to the English website of Yahoo hosted from outside France.

In the past, when internet jurisdiction came up for discussion, some courts had held that it was the duty of courts to protect citizens within their jurisdiction and hence they have the right to extend their jurisdiction to entities outside their





Anthony Lawrence

The Court has rightly recognised that there is a distinct possibility that resistance to changing content by the platform might have been strongly influenced by the potential loss of advertising revenue.

India, it added.

An interesting point in the judgment is that a legal distinction has been made regarding content, depending on the location from where it was uploaded. This distinction was made by reading the requirements of Section 79(3) of ITA-2000 along with the definition of a "computer network" under Section 2(j).

The Court observed that when a piece of content is uploaded onto a platform like Facebook, it becomes instantly available across the globe. Hence, it can be presumed that the global network of the service provider is on a single "computer network".

The Court, therefore, considered it logical that when the content has to be removed as per Section 79(3), the term "resource" should apply to the global network. This Section states: "...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,... remove or disable access to that material on that resource".

Some courts, however, arguing for "freedom of expression", tried to voluntarily restrict their jurisdiction. In the process, courts introduced the principles of "minimum contact", "country code extension of the domain", "language of the content", and so on, as parameters to determine whether they should extend their jurisdiction to companies outside their physical jurisdiction. These principles are now under challenge.

The Delhi High Court passed its interim order in the Ramdev case on January 24, 2019, and said that online platforms should delete links to the offending material within 72 hours as

per a list of URLs which were part of the petition. The Court also decided to hear separately if the offending URLs had to be blocked globally. In subsequent hearings, the platforms agreed to remove the content for Indian audiences through "geo-blocking" but refused to do so globally.

After hearing the arguments on both sides and perusing the available documents, the Court came to the conclusion that the platforms should remove links to the offending content which were uploaded from India on a global basis. Content uploaded from outside India should be blocked for access by users in

This principle of "interconnectivity of networks being considered as a single network" brings clarity to the provisions of ITA-2000. Though, in this instance, the Court has relied on the observation that content posted from India becomes instantly visible across the globe, even if this "instantaneous" link is not obvious as in corporate networks, if two computer devices are connected in such a manner that they can exchange data, they will be considered as a single network in the eyes of law. This principle of "unification of computer devices through connectivity" has ▶

far-reaching application in other aspects of ITA-2000 as well as Section 65B of the Indian Evidence Act.

In the course of discussions, the Court appeared sceptical about the "intermediary" status of platforms Google, Facebook and YouTube, but did not deeply examine it because the respondents had all declared themselves to be "intermediaries" under ITA-2000. The thought that these platforms had abdicated the safe harbour provisions of Section 79 because they were no longer "intermediaries" as defined in the Act, appears to have prompted the Court to ask: "Can any video which is uploaded on YouTube be edited by YouTube?"

According to Section 79 (2), the protection from liabilities under Section 79 is restricted to cases where the intermediary does not initiate transmission, select the receiver of the transmission and select or modify the information contained in the transmission.

All the platforms serve their pages based on the profiling of the users. Hence, it is difficult to say that they do not "select the receiver". For example, if an intermediary is prepared to undertake "geo-blocking" (blocking the content based on location), it means that it has adopted a means to check the location of the user and then direct its servers, whether to serve a specific content or not. As they also add some search-related parameters to the metatags, it is difficult to say that they do not modify the content.

Hence, a deeper discussion on this aspect could have affected the intermediary status of these platforms. If the Court had come to such a conclusion, then the intermediaries would be directly liable for any offence and would not be getting the protection of Section 79.

There was yet another point which if discussed could have created some



The HC judgment, delivered by the single-judge bench of Justice Prathiba M Singh in *Baba Ramdev Vs Facebook/Google/Twitter*, attracted global attention because of the content being removed worldwide instead of just in India.

impediments to the judgment. It was whether "defamation" is an offence under ITA-2000 and if the cause of action is only IPC. One of the advocates for the defence did raise this issue but seems to have been unable to convince the Court of his views. Section 79 does not, however, seem to restrict its operation only to the offences under ITA-2000 as it only refers to the responsibility of the intermediary to "information or communication link or hosted content" and does not refer to any penal sections within the Act or outside.

While the Delhi High Court judgment relied heavily on the *Shreya Singhal* judgment, it tried to balance the rights of free speech with the rights of the victim of defamation.

The *Shreya Singhal* case, on the other hand, looked at only one side of the problem, namely, "possible removal

of content which could be part of free speech" and completely ignored the possibility that the same content could be an instrument of harassment to another person.

In the current instance, the platforms were guilty of abetting defamation and even after it was pointed out by a court of law, were reluctant to step aside. No right, including "fundamental rights", can be "absolute" and the exercise of free speech rights by one citizen which had a possible adverse impact on other citizens (causing defamation or affecting national security) cannot be ignored.

It is clear that in this case, the rights of free speech were not being exercised in "self-defence" and there was a strong commercial reason as to why the platforms

would like to retain controversial content. The Court has rightly recognised that there is a distinct possibility that resistance to changing content by the platform might have been strongly influenced by the potential loss of advertising revenue. Hence, the Court has considered that the right to "free speech" of a user who hides behind the anonymity of the internet and does not take responsibility for what he wants to say cannot be used as an excuse to let the offending content remain outside the country of residence of the victim.

The Court has, therefore, tried to balance the right to defend against defamation with the right of free speech. It has shown exemplary courage in going against the populist trend which could have supported the upholding of "free speech" rights of the tech giants and their unknown John Doe (Ashok Kumar) clients against the possible defamation of a Baba Ramdev.

Such a conviction is what makes a good judgment. ■

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