

Article 19(1)(a), Third-Party Apps, and the “Right to Truth” post Kaushal Kishore: A Constitutional Analysis

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Abstract

This constitutional analysis examines the impact of the Apex Court decision in Kaushal Kishore v. State of Uttar Pradesh on India’s fundamental rights framework, particularly freedom of speech & expression. Fundamental rights in India have typically operated under a vertical paradigm, being wholly enforced against actions by the State & its instruments with private entities remaining largely immune from enforceability mechanisms being utilised against their actions. The judgement in Kaushal Kishore fundamentally altered this notion by allowing enforceability of certain fundamental rights, particularly Art 19(1)(a) and Article 21 against non-state actors particularly in their performance of duties that were historically a fiefdom of the State. This ruling had fundamental implications for our digital landscape, allowing horizontal application of rights recognising the enormous control and oversight social media and the larger mediascape had on public discourse which effectively allowed them to function in a quasi-state capacity mandating constitutional oversight.

While the decision is a step in the right direction, significant gaps in further interpretation by the Courts remain, allowing caveats under the guise of procedural mechanisms for pursuing any claim against a non-state actor while simultaneously creating a threshold for interpretation of when such a platform can be construed to act in public function. The analysis further delves into the interpretative gaps between the newly established accountability framework vis-à-vis principle of editorial freedom, particularly under Section 79 of the Information Technology Act. It further attempts to delineate the distinction between state mandated censorship and matters of private platform content moderation based on internal policies.

The paper also sheds light on the constitutional protection afforded to “truthful dissent”, utilising the Raj Narain (1975) judgement under the challenges against the Government for its fact checking initiatives. Conclusively, the analysis states the role of Kaushal Kishore in reinforcing constitutional protections for free public discourse and establishing new frameworks for accountability in digital spaces, allowing neither the Government nor private platforms unilateral powers to stifle dissent outside of the narrow scope under Article 19(2).

Keywords

Article 19; Fundamental Rights; Freedom of speech; Social media; Digital Landscape

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Introduction

India’s framework of fundamental rights has traditionally adhered to a vertical paradigm, which fundamentally limits the enforcement of constitutional guarantees to instances involving “the State” as defined in Article 12 of the Indian Constitution. [i] A vertical model infers that private entities are not directly accountable for breach of fundamental rights. Newspapers, television broadcasters, and today’s extensive social media platforms are all included under the head of private entities. Specifically focusing on the social media platforms, there is an involvement of third-party intermediaries, which highlights the shortcomings of the long-upheld vertical paradigm. To elaborate the consequence, one can take an example of a situation where a private platform opts to delete a user’s post or suspend a user’s account.

Under vertical application model, that individual would have no direct legal recourse for protection of their right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. Instead, the appropriate remedial avenue would be to contest the statutory or executive directive that necessitated such action. Adding layers to this complex landscape, Section 79 of the Information Technology Act, 2000 (‘IT Act’) provides such intermediaries with a safe harbour immunity. This is because the provision stipulates that these platforms would not be held liable for user-generated content as long as they adhere to due diligence requirements and comply with lawful blocking orders issued by the government. [ii] This has twofold consequences: first, in normal circumstance, this could lead to unchecked misuse of such platforms by users and second, under circumstances whenever faced with government directives or regulatory guidelines, the platforms would lean towards an excessive removal of content. These are two squarely opposite consequences, both equally concerning. However, the authors, in this paper, focus on the second situation, which places such users in a precarious position with minimal protective measures against the potential suppression of legitimate speech resulting from private over-compliance.

Kaushal Kishore: Trotting towards horizontal paradigm

This entrenched distinction between state action and private conduct was significantly altered by the Supreme Court’s Constitution Bench ruling in Kaushal Kishore v. State of Uttar Pradesh. The Court asserted that certain fundamental rights, particularly the freedom of speech under Article 19(1)(a) and the right to life and personal liberty under Article 21 of the Indian Constitution, are now enforceable against non-state actors when those actors exert powers historically associated with the State. [iii] The factual background of the case involved a cabinet minister making a controversial statement labelling an alleged gang rape of mother-daughter duo as a “political conspiracy”. The victims alleged that though these remarks were made by the minister in their personal capacity, it violated their right to life and personal liberty under Article 21 of the Indian Constitution. This case was clubbed with another case where derogatory remarks against women were made by a cabinet minister in Kerala.

Importantly, the Court articulated that in the contemporary digital ecosystem where social media platforms enjoy a near-monopolistic control over public discourse, there is an outreaching requirement constitutional oversight. As an inference, a user whose online expression is unjustifiably restricted by a platform could seek constitutional redress directly against that platform under the horizontal paradigm. This ruling, therefore, has immense potential in reshaping the legal landscape regarding the accountability of private entities in matters of free speech. Furthermore, Kaushal Kishore highlighted the State’s positive obligation to safeguard individuals from infringements of their rights by private entities. This presents a dual responsibility of the government, where they have to both refrain from encroaching upon free speech and also shield citizens from the undue suppression that can be perpetrated by powerful private intermediaries. Even though the Court refrained from stipulating a specific procedural mechanism for addressing these issues, the underlying principle remains clear. Private platforms and their content moderation policies must now be scrutinised against constitutional standards, compelling them to justify content removals based on the same reasonableness and proportionality standards that constrain the State.

In practical terms, this signifies that any social media company contemplating the removal of politically charged commentary, whistleblower disclosures, or investigative journalism must rigorously assess whether the contested content falls within the constitutionally permissible categories of restriction laid out by Article 19(2). [iv] Should the platform cite a government directive as justification for its actions, it opens itself to judicial scrutiny regarding both the validity of such directives and potential overreach beyond the limits imposed by Article 19, alongside an evaluation of the intermediary’s independent judgment in implementing the order.

Prior to the Kaushal Kishore ruling, users were limited to challenging actions by the State in court; however, this landmark decision allows for the inclusion of platforms in the legal discourse. This is expected to foster a gradual development of case law that treats private digital spaces as quasi-public forums wherein essential free speech norms must be upheld, while still recognising the legitimate autonomy and property rights of the platform. However, while Kaushal Kishore did throw the door open for Article 19(1)(a) and right to life and personal liberty to be enforceable against non-state actors, particularly in our case digital and social media platforms, there are various facets that have been left open to further judicial interpretation, particularly due to Indian jurisprudence consistently maintaining the application of fundamental rights as enforceable against the State and its instruments, with PD Shamdasani v Central Bank of India [v] and Zee Telefilms v Union of India [vi] reaffirming this position.

The fundamental rights for the most part are vertically applied, i.e. against the State and its intermediaries/instruments. The Courts have also highlighted that application of fundamental rights against private platforms stands only when they perform functions of a “certain public character”. For instance, in Sanchit Gupta v. Union of India & X Corp, the Delhi High Court held that X Corp (formerly Twitter Inc.) does not perform public functions and is not amenable to writ jurisdiction. [vii] On the contrary, the same court in Centre for Policy Research v. Brahma Chellaney had found the Centre for Policy Research to be subject to writ jurisdiction due to its public duties. [viii]

More recently, in S. Shobha v. Muthoot Finance Ltd., the Supreme Court ruled that regulatory oversight alone does not make a private entity liable under Article 226. [ix] These cases affirm that writs apply to private entities only when they perform functions of a public character. This caveat fundamentally throws open the door for procedural and jurisdictional interpretation. Importantly, the aggrieved party itself must demonstrate that the platform was performing a constitutionally valid public function, without the same, the platform’s actions would still fall outside the scope of Art 19 and squarely under the realm of private law. Moreover, the Supreme Court in Sakal Papers [x] and Bennett Coleman [xi] itself laid down the “editorial freedom” principle, mandating discretion of private platforms as constitutionally protected under 19(1)(a).

By extension, private platforms can argue against hosting specific content on their platform, citing interference in their own freedom of speech and overreach of judicial authority. Additionally, if we look at the evolving interpretation under Article 19(2), while intermediaries are bound to act on lawful takedown orders issued by the requisite State authority, its own independent content & moderation policies are simply contractual, between the host (the platform) and the user, thereby falling wide of constitutional ambit. [xii] The only way judicial scrutiny applies here is if a particular takedown is due to Government directive, but if it is purely internal policy, it can potentially be deemed lawful and outside of judicial purview.

Section 79 of the IT Act further reinforces this stance by distinguishing between “active” and “passive” intermediaries, i.e. those that publish vis-à-vis those that host, providing the latter safe harbor immunity if they follow mandated due diligence guidelines. Outside of fulfilling their obligations under Section 79, moderation choices remain a matter of platform autonomy.

Should there be a Right to Truth?

Truthful dissent is fundamentally essential to the protection afforded by the Constitution. Indian jurisprudence has a long-standing precedent of recognising truth as a defence in defamation cases and, following amendments, in contempt proceedings as well, provided the information is disseminated in good faith for the public interest. This principle has been propounded in the celebrated case of State of U.P. v. Raj Narain, where the Apex Court observed that “right to know” is inherently derived from Article 19(1)(a) of the Constitution. [xiii] This is because it is important for citizens to have an unfettered access to reliable and accurate information regarding public affairs in order to engage in active discourse and exchange of opinions, or to even form an opinion at the first place. This laid the foundation for the Right to Information Act, 2005, an important legislation that empowers citizens to demand state transparency in critical issues such as criminal records, public policy deliberations, electoral integrity etc. Therefore, a deliberate suppression of truthful information contradicts the overarching principles of democracy, namely, transparency and accountability. However, in recent times, there have been concerning initiatives by the executive to regulate the dissemination of truth. This is particularly marked by the proposal for a fact-check unit with the authority to mandate the removal of content identified as false. However, these efforts have faced significant legal challenges. For instance, the Bombay High Court has ruled that the Constitution does not endow the State with a sweeping authority to eliminate “false” speech and that any form of censorship must be strictly aligned with the limitations outlined in Article 19(2). [xiv] Importantly, the Court cautioned that a grant of such sweeping powers would inadvertently stifle legitimate discourse, empowering the executive with a tool to silence dissent under the pretext of fighting misinformation.

The post-Kaushal Kishore judicial landscape reinforces the position that neither government entities nor corporate intermediaries possess the legal authority to silence speech solely on the basis of it being uncomfortable or critical. This also raises a question regarding the sufficiency of recognition of a “right to information” and the necessity of recognition of “right to truth”. Regulation of social media is a complex matter involving politics, law, and philosophy. The politicisation of truth, in which the facts are shaped and conditioned by ideological narratives, is having a degrading effect on the regulatory efforts. In Anuradha Bhasin v. Union of India, the Supreme Court underscored the freedom of speech and the right to information, particularly during instances of political unrest and agitation. [xv] Similarly, the notice-and-takedown regime of Twitter exhibits the thrust towards platform autonomy vis-à-vis state control. [xvi] Legally, the very absence of any standard framework to activate the enforcement of one’s right to truth complicates matters. Thus, often courts find themselves unable to settle on one standard, caught between legal, philosophical, and political interpretations of the truth. Legal truth is based on evidence and procedures; philosophical truth may seek a deeper meaning; and political truth is often geared toward an agenda. Social media further stretches these tensions in post-truth politics since the emotional appeal and virality of content outweigh the accuracy of information. These platforms are battlegrounds for mis- and dis-information, unnatural acts that mould public perception and democratic processes.

A regulatory framework for this digital landscape would need to work out subtle trade-offs between free expression and accountability while recognising an ever-changing concept of truth in the digital age. Against these considerations, it has been argued that private platforms deserve constitutional scrutiny as agents that infringe upon fundamental rights placed by Article 19(1), accentuating the affirmative duty of the State to protect citizens from unjust private censorship.

Article 19(2) acts as the last line of defence with respect to real or threatened public order, national security, or morality; that cannot be construed to include political criticism or revealing of factual information. Therefore, the Indian Constitution unequivocally embraces the principle of open, vigorous, and informed public debate, which deserves protection nutritionally in cases where individuals dare speak against the State. While independent observers could potentially point the needle towards underlying pressure by the Government or other State actors, those cannot be trusted to conclusively prove the same, with platforms more likely to comply under tacit coercion rather than bring the same up to the Courts.

Kaushal Kishore signals greater scrutiny of private actors exercising public functions, although a clear line of separation exists between state censorship, itself under Art 19(2) tests and private moderation, whose application and interpretation still largely remains with the platforms themselves and a matter of contractual freedom, under Art 19(2) as well as Section 79 of the IT Act. Unless it can be shown that the platform was acting at the behest or as an Instrument of the State, platforms are free to moderate content based on their own contractual obligations as well as internal policies.

Furthermore, Article 19(1)(a) guarantees extensive protections for free speech, Article 19(2) delineates eight specific grounds on which that freedom may be legitimately curtailed: the security of the State; the sovereignty and integrity of India; maintaining friendly relations with foreign nations; public order; decency or morality; contempt of court; defamation; and incitement to an offense. Judicial bodies have consistently reaffirmed that this list is exhaustive, and any restriction on speech must undergo a stringent proportionality test to be deemed lawful. Attempts to expand the scope of these restrictions to embrace concepts such as “political inconvenience” or to stifle criticism of governmental policy have been outright rejected by the courts.

The Supreme Court’s rulings on sensitive issues such as sedition, film censorship, and the recent MediaOne license case reinforce the notion that mere governmental embarrassment, without a demonstrable threat of violence or any of the specified harms in Article 19(2), fails to justify censorship. [xvii] Through these developments, the legal landscape around free speech is evolving, accentuating the need for accountability from both the State and private entities in upholding constitutional protections.

Conclusion

In post-Kaushal Kishore there has been a change in the Indian constitutional jurisprudence extending the concept of enforcement of the fundamental rights against non-state actors in digital spaces. While such a horizontal application provides greater protection to free speech, major issues are yet to be resolved concerning the autonomy of the platform and regarding the potential for recognition of “right to truth.” Therefore, courts should strive hard to balance the editorial freedom and constitutional accountability. Post-truth politics is a world perfect for misinformation to flourish; hence, we require a strong legal base allowing free democratic discourse. Just as the State must be held to constitutional standards, so should private platforms; only then can true dissent be guaranteed transparency, accountability, and protection.

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