

## THE POWER OF ANONYMITY: IS SILENCE THE NEW SPEECH?

### REDEFINING THE BOUNDARIES OF FREEDOM OF SPEECH AND EXPRESSION IN INDIA

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#### ABSTRACT

As the popularity of the social networking websites grows, so does the idea of public discourse. This new era, where a person is known more by his internet user identification than his real name, has opened a floodgate of interpretations of classic legal doctrines. Freedom of speech and expression is an ideal illustration of this emerging interface between law and technology. This public domain apart from looking at through speech can be looked at through silence as well. Such logical extension of freedom of speech to freedom of silence poses the contingency of it being further extended to incorporate freedom of anonymous speech. Thus the question – Is there a constitutional right to anonymous speech? In India, this question gains relevance in the background of Article 19(1)(a) of the Constitution of India. Examining the aspects of anonymity in social networking websites, this critical note asks the question, how powerful *is* a virtually anonymous speaker?

#### I. INTRODUCTION

“Moderation is a fatal thing. Nothing succeeds like excess”<sup>2</sup>

An up and coming journalist posts a message on his Twitter account, a social networking website, “The Mayor of my city lacks the backbone to lead.” This message somehow reaches the Mayor who moves the court for the journalist’s arrest invoking the cyber laws of that country. The journalist gets arrested, his message is deleted by the Twitter moderators and his number of followers hits hundreds overnight.<sup>3</sup> Consider this example in a different light. Could this situation turn out differently had the journalist posted this message online in complete and absolute anonymity? This plausibility of anonymity pushes the

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<sup>2</sup> OSCAR WILDE, THE PLAYS OF OSCAR WILDE 259 (2000).

<sup>3</sup> The example can be drawn parallel to the incident in England where the local official government authorities of Tyneside brought an action against an anonymous Twitter account for libel in U.S. The superior court of California ordered Twitter to reveal the identity of the accounts’ user’s details. See <http://www.guardian.co.uk/technology/2011/may/29/twitter-anonymous-user-legal-battle> (accessed 21/06/2014). On the other hand, Twitter directors support anonymity on its website regarding it as a “fundamental value”. See <http://www.irishtimes.com/news/twitter-keen-to-protect-anonymity-1.1319772> (accessed 21/06/2014). However, Facebook follows no such policy.

general understanding of freedom of speech and expression further to a question: is there a constitutional right to anonymity in India? More importantly, does anonymity stem out of speech or expression?<sup>4</sup> The reality of anonymity as a constitutional right as seen in a progression of cases<sup>5</sup> in the United States of America and at the same time denying the absoluteness of that right<sup>6</sup> ignites the possibility of looking at it through the lens of social networking websites. Examining these very questions, the aspect of freedom of speech and expression which is thought to be the mother of all liberties,<sup>7</sup> attains paramount importance in this discussion. However, Article 19(1)(a)<sup>8</sup> which provides for the freedom of speech and expression must not be confused as the “guardian of unlimited talkativeness.”<sup>9</sup> In today’s era of social networking websites, this unlimited talkativeness has indeed reached a new high. ‘Speech and expression’, envisaged as being inclusive of propagation of one’s views through print media or through any communication channel<sup>10</sup>, finds itself in the spotlight when it arrives at the platform of these websites, particularly to the realm of anonymity.

Anonymity is referred to a person’s failure to “sign” his/her speech or action with the intent of not revealing the identity as the conventional method demands.<sup>11</sup> In an anonymous

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<sup>4</sup> One cannot argue that the freedom of speech and freedom of expression are two disjoint rights. The freedom of speech and expression are conjoint and appear together in various instruments, and the freedom of speech under Article 19(1)(a) is the right of a person to express his views regarding any issue through any medium, subject to the restrictions under Article 19(2). See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1079 (2010).

<sup>5</sup> Talley v. California, 362 U.S. 60 (1960), where the U.S. Supreme Court declared unconstitutional a ban on anonymous handbills. A contrary view came up in Buckley v. Valeo, 424 U.S. 1 (1976), which upheld an identification requirement of certain contributors despite its impact on anonymous speech; McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995), where the court held unconstitutional an Ohio statute that prohibited the distribution of any material which was designed to influence the voters in an election unless it had any form of publication in a conspicuous place or contained within statement carrying the name and residence or business address of the chairman, treasurer, or secretary of the organization or the person; Dendrite International, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) where the Court refused appellant’s contention of revealing the identity of anonymous speakers who posted messages on Yahoo! Message board saying that doing so might have “chilling effect” on anonymous speakers.

<sup>6</sup> INTERNATIONAL COMMUNICATION ASSOCIATION, THE CONSTITUTIONAL RIGHT TO ANONYMOUS ASSOCIATION IN CYBERSPACE 16 (53rd Annual Conference, 2003).

<sup>7</sup> Second Press Commission Report 34-35 (Vol. 1), in M. P. JAIN, INDIAN CONSTITUTIONAL LAW 1414 (6th ed. 2010).

<sup>8</sup> INDIA CONST. Art. 19(1)(a) :

*Protection of certain rights regarding freedom of speech, etc.—*

*(1) All citizens shall have the right—*

*(a) to freedom of speech and expression;*

...

<sup>9</sup> Bennett Coleman & Co. and Ors. v. Union of India and Ors., A.I.R. 1973 S.C. 106, 127 (K. K. Mathew J.). Likewise, this right has been said to be established not to assure men the unrestricted pleasure of hearing their own voices. See Morris L. Ernst & Arthur Joel Katz, *Speech: Public and Private*, 53(5) COLUM. L. REV. 620, 623 (1953).

<sup>10</sup> State of Karnataka v. Praveen Bhai Thogadia, A.I.R. 2004 S.C. 2081.

<sup>11</sup> Lee Tien, *Who’s afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 159 (1996).

speech, the burden clearly shifts from the speaker to the listener.<sup>12</sup> Silence, in anonymity, carries more sound. The internet through networking websites provides a public sphere (also referred to as “marketplace of ideas”) and the speech on this boulevard of communication can be spoken not just in terms of ‘speech’ but in silence as well.<sup>13</sup> Though silence helps in shaping this public sphere yet it is viewed as a dubious mode of communication. This silence in India, as opposed to the conception of anonymity in U.S., tries to find itself in various sources, for example, in the right against self-incrimination under Article 20(3)<sup>14</sup> of the Constitution of India. Furthermore, the right to silence has been seen in *Nandini Satpathy v. P.L. Dani and Another*<sup>15</sup> to include the right of the accused from being compelled to be a witness against himself/herself. The right to anonymity has been seen as a crucial means of witness protection in grave criminal cases<sup>16</sup> and in cases such as, voting during elections<sup>17</sup>, Right to Information Act<sup>18</sup> and whistle blowers.<sup>19</sup> Evidently, this right’s nexus is not drawn either with freedom of speech or expression. In American legal jurisprudence the right to anonymity is seen to be an affirmative exercise of right to express oneself.<sup>20</sup> Therefore, 19(1)(a) ends up being the starting point of this question.

The restrictions to this freedom are clearly provided in Article 19(2).<sup>21</sup> Assuming that there is a right to anonymity in India, these restrictions would keep a check on it and anything

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<sup>12</sup> A fundamental right can be seen as the protection of the right to the listener to receive expression rather than the right of the people to speak. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 243 (1960).

<sup>13</sup> Danielle Allen, *Anonymous: On Silence and the Public Sphere*, in AUSTIN SARAT, SPEECH AND SILENCE IN AMERICAN LAW 108 (2010).

<sup>14</sup> INDIA CONST. Art. 20(3) :  
*Protection in respect of conviction for offences.—*

...  
(3) *No person accused of any offence shall be compelled to be a witness against himself.*

<sup>15</sup> A.I.R. 1978 S.C. 1025.

<sup>16</sup> People’s Union for Civil Liberties and Anr. v. Union of India, A.I.R. 2004 S.C. 456.

<sup>17</sup> Representation of People Act of 1951 § 128, which lays down “Maintenance of secrecy of voting”. See V. S. RAMA DEVI & S. K. MENDIRATTA, HOW INDIA VOTES ELECTION LAWS, PRACTICE AND PROCEDURE 648 (2000).

<sup>18</sup> J.N. BAROWALIA, COMMENTARY ON THE RIGHT TO INFORMATION ACT 134 (2006).

<sup>19</sup> Frederick A. Elliston, *Anonymity and Whistleblowing*, 1(3) J. BUS. ETHICS 167, 169 (1982).

<sup>20</sup> SARAT, *supra* note 12, at 154; Frank G. Reeder, *Constitutional Law: Freedom of Speech and Press: Prohibitions on the Publication or Distribution of Anonymous Campaign Literature*, 60(4) MICH. L. REV. 506, 507 (1962).

<sup>21</sup> INDIA CONST. Art. 19(2) :  
*Protection of certain rights regarding freedom of speech, etc*

...  
(2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

said or done under the mask of anonymity would squarely fall under this restriction. Keeping this induction in mind, a simple and basic dilemma arises – Are we asking a question to which we already have an answer? This is where this critical note fundamentally finds itself. After this segment, many facets of anonymity are explained followed by questioning the very existence of anonymity. The note reaches its finality by throwing some light on accountability in anonymity and concludes by summarising the whole issue and briefly discussing the impact of these issues in India.

## II. THE GOOD, THE BAD AND THE ANONYMOUS

Is anonymous representation a boon or a bane? Anonymity and silence are not new found concepts which took birth within the Internet. There is a plethora of evidence to suggest that anonymity has always been in existence. Ancient Greek law-givers Zaleucus and Charondas followed strict code of political speech<sup>22</sup> and the drastic measures adopted inspired the people to be anonymous in their representation to the institution for recommending changes. In England and British Indian era, pamphlets critical of the political affairs were published anonymously.<sup>23</sup> The famous Federalist papers in the United States of America at the time when the first amendment was adopted were published anonymously under the name “Publius.”<sup>24</sup> In ancient India, the Puranas and Vedas were generally authored anonymously.<sup>25</sup>

Historically, the framework of anonymity is seen in terms of public political discourse but in the modern era, this anonymity can be materialized in terms of horizontal social relations between persons.<sup>26</sup> Giving space to every kind of speech has been seen by some scholars to result in public being overwhelmed by “inexhaustible supply of freshly minted, often very seductive, false ideas.”<sup>27</sup> But supply of ideas is the very essence of marketplace of ideas. The utopian idea of public sphere views every enunciation as useful and plainly (if trivially) truthful.<sup>28</sup> This idea, of course, has changed in today’s context.<sup>29</sup> Not every word

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<sup>22</sup> Gertrude Smith, *Early Greek Codes*, 17(3) CLASSICAL PHILOLOGY 187, 189 (1922).

<sup>23</sup> See WILLIAM PRIDEAUX COURTNEY, *THE SECRETS OF OUR NATIONAL LITERATURE* 151-77 (1908).

<sup>24</sup> See CHARLES AUSTIN BEARD, *THE ENDURING FEDERALIST*, at vi (1948).

<sup>25</sup> See UPINDER SINGH, *A HISTORY OF ANCIENT AND EARLY MEDIEVAL INDIA, FROM THE STONE AGE TO THE 12TH CENTURY* 22 (2009).

<sup>26</sup> Tien, *supra* note 10, at 123.

<sup>27</sup> Harry Wellington, *On Freedom of Expression*, 88(6) YALE L.J. 1105, 1109 (1979).

<sup>28</sup> SARAT, *supra* note 12, at 110.

<sup>29</sup> A comedic reference was made in the movie *Easy A* when the protagonist’s Professor of English sarcastically comments, “I don’t know what your generation’s fascination is with documenting your every thought! But I can assure you, they are not all diamonds”.

said in the public sphere is true and not only useful voices are the relevant ones.<sup>30</sup>Garth Taylor observes that in this ever-expanding public sphere, when the so-called truthful and genuine views go un-vocalised, the people tend to assume that the others agree with them, the result of which is creation of mutilation of the actual spread of public opinion.<sup>31</sup>

For social networking websites who harbour public discourse, it becomes pertinent to look at the institution through which this discourse is done i.e. the concept of marketplace of ideas.<sup>32</sup> Its classic definition recognizes the search for truth as the primary goal of free speech.<sup>33</sup>The theory of marketplace of ideas finds itself being laboured as one of the reasons<sup>34</sup> to protect the fundamental right to speech.<sup>35</sup>Thus, this theory becomes very important in the context of freedom of speech and expression.<sup>36</sup> The impression of this recognition of finding the ‘truth’ becomes precarious. For instance, if truth was to become the standard of review for everything said on Facebook, then uncountable users would find their entries removed or deleted! Can then justifications for 19(1)(a) be used for anonymous speeches as well?

Of all the popular culture references, Alan Moore’s work, *V for Vendetta* explicitly thematizes the power of anonymity.<sup>37</sup> Fighting against a totalitarian government, ‘V’ under his mask of anonymity (literally) creates a revolution among the people of London to stand up against every wrong being done by the government. The relevance of this piece of literature in a constitutional question is groping with far reaching consequences of anonymity. *Vendetta* captures every word of ‘V’ and never is his face shown throughout the story line. One often wonders that the impact of his dialogues wouldn’t have been the same if he wasn’t wearing a mask. A powerful moment in *Vendetta* is when ‘V’ says to the government official after being shot at repeatedly, “Beneath this mask, there is more than flesh. Beneath this mask, there is an idea. And ideas are bulletproof.” Anonymity has been acknowledged to be a

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<sup>30</sup> The court rightly observed in *Simon & Schuster, Inc. v. Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991) that *what* is said is more important than *who* said it (emphasis added).

<sup>31</sup> D. Garth Taylor, *Pluralistic Ignorance and the Spiral of Silence: A Formal Analysis*, 46(3) PUB.OPINION Q. 311, 335 (1982).

<sup>32</sup> This concept was introduced in the American legal jurisprudence by Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>33</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984(1) DUKE L.J.1, 8 (1984).

<sup>34</sup> The other reasons being furtherance of self-governance, promoting autonomy and fostering tolerance.

<sup>35</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 896 (2002).

<sup>36</sup> The theory of marketplace of ideas besides its importance has been criticized severely as well. Many dismissing this theory say that some people in this public sphere have access to resources more than the others, who in turn might have a larger influence, then would that communication be likely to promote truth. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 352 (1989) and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (2d ed. 1988).

<sup>37</sup> KELLER JAMES R. AIA, *V FOR VENDETTA AS CULTURAL PASTICHE: A CRITICAL STUDY OF THE GRAPHIC NOVEL AND FILM* 3 (2008); Hereinafter the literary work ‘V for Vendetta’ is referred as ‘Vendetta’.

powerful form of manipulation of human behaviour.<sup>38</sup> The relevance of an anonymous speech often has invited scrutiny of the category of author for understanding certain structures of power.<sup>39</sup> Therefore, there is no wonder that speech has been seen as a “checking value of the government.”<sup>40</sup> Even ‘V’ proudly claims that “people shouldn’t be afraid of the government, the government should be afraid of the people.”<sup>41</sup> Does this help the cause of anonymity or incentivize the government to further curb it? Can the government force the anonymous person to reveal identity? Before addressing this question, the need for anonymity is necessary to canvass.

### III. QUESTIONING THE EXISTENCE OF ‘V’

“When the great lord passes, the wise peasant bows deeply and silently farts”<sup>42</sup>

Let us recapitulate the journalist’s message on Twitter again. Given a situation where a person who publicly disparages someone believing it to be within the protection of freedom of speech and expression gets arrested, what would the first response of an Internet user be? Delete his/her public messages which can be construed to fall under restriction or challenge the authority by which that arrest is made or hide his/her identity. Various researches suggest that a result of outright opposition could be physical violence which explains the need for a resort to anonymity.<sup>43</sup> The design of anonymity in this reference would be to avoid the speaker’s willingness to contribute fully and frankly to the public discourse without fear of retribution either from the government or private power centres.<sup>44</sup>

Yet violence is not the only reason.<sup>45</sup> In the Mid-Victorian era, signature by author was seen as a moral evil carrying “petty vanities of authorship.”<sup>46</sup> A document simply because of

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<sup>38</sup> Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104(7) YALE L.J. 1639, 1677 (1995).

<sup>39</sup> Antonio Calcagno, *Foucault and Derrida: The Question of Empowering and Disempowering the Author*, 32 HUM. STUD. 33, 36 (2009).

<sup>40</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977(3) AM. B. FOUND. RES. J. 521, 523 (1977).

<sup>41</sup> A similar thought process can be seen in the case of *American Communications Association v. Douds*, 339 U.S. 382, 442-443 (1950), where the court said that “It is not the function of our government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error”.

<sup>42</sup> An Ethiopian proverb indicating the fact that when the people are reluctant to come to the public space knowing that is going to be dominated by the elite, often don’t say anything for the fear of public prosecution, jail etc. See Nina Eliasoph, *Making a Fragile Public: A Talk-Centered Study of Citizenship and Power*, 14(3) SOC. THEORY 268 (1996).

<sup>43</sup> Notes and Comments, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70(7) YALE L.J. 1084, 1107 (1961).

<sup>44</sup> SARAT, *supra* note 12, at 144.

<sup>45</sup> Violence has been recognized as one the five faces by oppression by Iris Young. See IRIS MARION YOUNG, *Five Faces of Oppression*, in JUSTICE AND THE POLITICS OF DIFFERENCE 39, 53-55 (1990).

its anonymity was said to raise its credibility for being away from selfishness and egotism.<sup>47</sup> Cheyne Brady endorsed that anonymity is a kindly help to a young penman who would have blushed to write the little monosyllable 'I'.<sup>48</sup> Nan D. Hunter while discussing gay and lesbian movement in the U.S. recognizes the need for secrecy among advocates of these rights because of the social stigma.<sup>49</sup> On a philosophical standing, anonymity's existence is explained as knowledge being part of the soul which exists in a divine world outside the body before it becomes human.<sup>50</sup> The conventional social identifiers such as gender, race, ethnicity and sexual orientation introduce complex considerations than a name or an address. Anonymity empowers a person to resist such socially imposed identities.<sup>51</sup>

Unmistakably, this seemingly unchained power of anonymity becomes a problem too. Where anonymity has been seen as tool to keep a check on the government, it has been accused of facilitating corruption as well.<sup>52</sup> Accessing a full spectrum of views in a vigorous and uninhibited manner has been seen as "paramount" right of listeners<sup>53</sup> which questions the very fundamentals of anonymity. A signed speech helps a listener/reader deduce the speech better because authorship reflects the idea behind the speech made. The garb of anonymity puts the consumer in the marketplace of ideas in a losing position because the true value of the product is concealed from him/her.<sup>54</sup> Moreover, not knowing the author's identity might lead the reader to overestimate or underestimate the statement's truth.<sup>55</sup> Another major problem anonymity poses is hate speech (blatant expressions of hate, racism and bigotry). Hate speech seeks to intimidate and silence members of traditionally disadvantaged groups and discriminates against their freedom of speech in the same way that fanatic policies have

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<sup>46</sup> Dallas Liddle, *Salesmen, Sportsmen, Mentors: Anonymity and Mid-Victorian Theories of Journalism*, 41 VICTORIAN STUD.41, 43 (1997).

<sup>47</sup> E.S. Dallas, *Popular Literature: The Periodical Press*, BLACKWOOD'S, no. 85, 1859, at 96.

<sup>48</sup> CheyneBrady, *Anon, Anon, Sir!*, DUBLIN UNIVERSITY MAGAZINE, no. 57, 1861, at 284.

<sup>49</sup> Nan. D. Hunter, *Identity, Speech and Equality*, 79(7) VA. L. REV. 1695, 1697 (1993).

<sup>50</sup> Paul Plass, *Philosophical Anonymity and Irony in the Platonic Dialogues*, 85(3) AM. J. PHILOLOGY 254, 270 (1964).

<sup>51</sup> On the other hand, transgressing these identities anonymously pose problems too. In 'The Strange Case of the Electronic Lover', a male psychiatrist posing as a disabled female created a group exclusively for females where they chatted openly about their sexuality, humour etc. When the identity of that anonymous disabled female was revealed, a huge sense of outrage and betrayal emerged from the group users. See COMPUTERIZATION AND CONTROVERSY, VALUE CONFLICTS AND SOCIAL CHOICES 533 (Robert Kling ed., 2nd ed. 1996).

<sup>52</sup> Saul Levmore, *The Anonymity Tool*, 144(5) U. PA. L. REV. 2191, 2217 (1996).

<sup>53</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2(3) AM. B. FOUND.RES. J. 521, 618 (1977).

<sup>54</sup> Liddle, *supra* note 45, at 47.

<sup>55</sup> Lyrissa B. Lidsky & Thomas F. Cotter, *Authorship, Audiences and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1561 (2007).

in other, more corporeal ways.<sup>56</sup> A person who shies away from derogating someone in public might do so in safety of online anonymity as it creates an impression that a person can use its mechanism and techniques to escape responsibility for negligent or abusive posting.<sup>57</sup> The harm caused as a result of this hate speech is thought to outweigh free speech consideration.<sup>58</sup> This form of speech causes unspeakable pain to individuals and operates as a form of “spirit-murder.”<sup>59</sup> These side-effects of anonymity lead the free speech jurisprudence to the question of liability.

#### IV. UNMASKING THE MASKED

The standard of reasonable restrictions under Article 19(2) in India is cautioned not to publicize intolerance as “intolerance is as much dangerous to democracy as to the person himself.”<sup>60</sup> The issue of absolute online anonymity along with accountability finds itself untouched with reference to these restrictions. Who is accountable and how should that accountability actualize?

The question of when does a citizen overstep his/her liberties and threaten the public order, decency and morality was debated in the Constitutional Assembly Debates and was put forward by Mahboob Ali Bahadur. He opined that it should solely be the responsibility of the judiciary to answer such questions.<sup>61</sup> What then should be the approach of the judiciary? Should every silence, valuable or invaluable get eradicated? Are our actions being judged today by the standards set in a different era? Obscurities in answering these questions are many. The dominion of networking websites opens up the question of what should be the extent of regulation over virtually anonymous faceless individuals.

In regulation, data retention policies have been suggested to make the Internet more transparent making it easier in linking the act with actors, therefore promoting accountability.<sup>62</sup> But these policies can also be seen as harassment in the form of massive

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<sup>56</sup> Alice K. Ma, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83(2) CALIF. L. REV. 693, 696 (1995).

<sup>57</sup> Branscomb, *supra* note 37, at 1642.

<sup>58</sup> Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84(6) CALIF. L. REV. 1499, 1502 (1996).

<sup>59</sup> Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

<sup>60</sup> *S. Rangarajan v. P. Jagjivan Ram & others*, (1989) 2 S.C.C. 574.

<sup>61</sup> CONSTITUTIONAL ASSEMBLY DEBATES 728 (vol. 7, no. 2, 1948).

<sup>62</sup> Catherine Crump, *Data Retention: Privacy, Anonymity, and Accountability Online*, 56 STAN. L. REV. 191, 294 (2003).

government surveillance.<sup>63</sup> In determination of this question of the government's correctness in its capacity to 'search' the appellant in tapping his phone conversation, the court in U.S. set the rule that the surveillance employed by government would depend on how a reasonable person would have been justified in assuming privacy.<sup>64</sup> Can this test be applied to anonymous speech on the internet since it is very much known to the users that privacy cannot be reasonably be expected because it is surveyed by the Internet Service Providers(ISPs)? The regulation on the internet needs to be looked at both as a function of law and the architectures of the internet.<sup>65</sup> With publishers as intermediaries on the internet there is less danger of vile dialogues<sup>66</sup> but some propound that the very act of censorship insults the censored and denies them their rationality and treats them as means rather than ends in themselves.<sup>67</sup> But, accountability has been achieved successfully in many cases. In New York, to tackle cyber bullying and hate speeches, its legislature proposed the Internet Protection Act to make it mandatory for online postings to have a signature.<sup>68</sup> Intermediaries in India under section 67C of the Information Technology Act, 2000<sup>69</sup> are required to preserve and retain information from the internet or if need be intercept or monitor any information through any computer source under Section 69 of the same act.<sup>70</sup> Therefore, accountability does find merit in anonymity cases.

## V. CONCLUSION

Is anonymity even a threat in India? No matter how much one argues for the ineffectualness of anonymity, it is indeed hard to ignore the capacities which this word has sheltered. Having established that anonymity is not an absolute right in U.S. and freedom of speech and expression is not as well in India, it seems plausible to say that anonymity

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<sup>63</sup> See RONALD J. KROTOSZYNSKI et al., *THE FIRST AMENDMENT: CASES AND THEORY* 301 (2008).

<sup>64</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967), where a two fold test was developed which was that (i) there is an actual (subjective) expectation of privacy and (ii) that expectation the society recognizes as 'reasonable'.

<sup>65</sup> "Architecture" means (a) the Internet's technical protocols (for example IP addresses), (b) its standards and standard applications (for example, browsers or a digital certificate standard), and (c) its entrenched structures of governance and social patterns of usage that themselves are not easily changed. See Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 397 (1999).

<sup>66</sup> This becomes important in networking websites which act as a publisher as intermediary. When one guest sees another steal from their host, the identification of the informer as a suspect by the chosen intermediary solely on the identification of I.P. address becomes problematic. See Levmore, *supra* note 51, at 2202.

<sup>67</sup> Joseph Raz, *Free Expression and Personal Identification*, 11(3) OXFORD J. LEGAL STUD. 303, 305 (1991).

<sup>68</sup> Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92, 97 (2012).

<sup>69</sup> Hereinafter IT Act.

<sup>70</sup> APAR GUPTA, COMMENTARY ON INFORMATION TECHNOLOGY ACT (2000), at 124 (2007).

culminating out of this freedom should not be absolute as well. The importance of this right in India is that whether this right can be envisioned as a part of the structure of our constitution or not when 19(1) is already considered to be a part and parcel of the basic structure of the constitution.<sup>71</sup>

A very vital element to be noted about anonymity is that anonymity in itself is not bad.<sup>72</sup> There are can be reasons galore for remaining anonymous or simply a desire to maintain privacy. This picture again invites further queries; the connection of anonymity with privacy. Anonymity can be seen as an inevitable limb of privacy but a celebrated idea remains that anonymity is nowhere same as privacy.<sup>73</sup> Rather, it is said to violate another's privacy. However, in India the principle of anonymity does encroach incidentally on privacy principle as well. Looking at accountability, the problem with intermediaries in India is that they are not obligated to modify the information which goes through them.<sup>74</sup> Therefore, websites like Twitter, Facebook, Tumblr, Flickr etc. are not required to monitor each and every post. This lack of knowledge means that a recipient cannot determine the legality of an exchange until after the exchange has occurred. This leads to the question of constitutionality of Section 66A, a penal provision of the IT Act which provides for punishment of sending offensive messages through any computer resource. 'Annoyance' and 'inconvenience' as used in the statute put the very grounds for reasonable restrictions to shame. Going by Mill's harm principle of exercising one's right of speech in such a manner so as not to violate another man's such right,<sup>75</sup> anonymity seems to blur the lines separating one's right over the other in the virtual world. This is where this principle finds itself disoriented in determining its boundaries. The question to be considered is does the harm caused by the anonymous speech greater than its inherent value as expression? Acknowledging the defamation, libel, pornography laws in India, anonymous speech does fall short of its absoluteness. The idea of anonymity in India becomes a pool of likelihoods which has been left unfenced by the principles underlying our constitution. This critical note, in agreement with 'V', points out that anonymity is indeed powerful and its silence, breaking away from social isolation, has a more profound impact than barefaced speech.

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<sup>71</sup> KeshavanandaBharati v. State of Kerala, A.I.R. 1973 S.C. 1461.

<sup>72</sup> Tien, *supra* note 10, at 126.

<sup>73</sup> Branscomb, *supra* note 37, at 1647.

<sup>74</sup> The IT Act of 2008 § 79.

<sup>75</sup> Secretary, Minster of Information & Broadcasting v. Cricket Association of Bengal, (1995) 2 S.C.C. 161, at ¶152.