

EDITORIAL NOTE

I. INTRODUCTION

Derived from Latin roots, the term ‘censorship’ means “to estimate, rate, assess, to be of opinion”.¹ It has historically been justified on grounds such as the protection of children from exposure to sexual or violent content, the preservation of culture, and maintenance of social stability.² Given the expanse of the Internet, such drastic measures derive justification from the needs of national interest, the protection of intellectual property, curbing child pornography, and preventing cyber-espionage.³ In practice, however, it has been criticised as being unfair, and often acting as a hindrance to progress.⁴ Today, a majority of the global population is affected by state censorship, especially in countries such as North Korea, China, Bahrain, Belarus, Turkmenistan, Iran, Vietnam, Saudi Arabia, Burma, Cuba, Syria and Uzbekistan.⁵ Similarly, India has also witnessed an increase in various forms of censorship; in a report published by Reporters without Borders, India’s Press Freedom Index rank dropped to a miserable 140 in 2013 from a previous rank of 131 in 2012, indicating an increase in incidents of censorship by the State.⁶

Prior restraint is one means of censoring content. It is imposed on a person’s speech and other forms of expression “in advance of actual

¹ DAVID TRIBE, QUESTIONS OF CENSORSHIP 36 (1973), as cited in Helen Freshwater, *Towards a Redefinition of Censorship*, available at <http://www.clas.ufl.edu/users/burt/%20%20%20%20%20%20Burt%20spp/%20%20%20%20%20%20%20SPP%20APP%202011-12/citations%20of%20my%20work/censorship%20%20citations/Censorship.pdf> (Last visited on November 11, 2014).

² GILC, *What is Censorship?*, available at <http://gilc.org/speech/osistudy/censorship/> (Last visited on November 11, 2014) (It is also argued that censorship suppresses free speech under the guise of protecting three institutions: “the family, the church, and the state”).

³ John R. Quai, *Big Brother? US Linked to New Wave of Censorship, Surveillance on Web*, February 27, 2013, available at www.foxnews.com/tech/2013/02/27/special-report-surveillance-and-censorship-america/ (Last visited on November 11, 2014).

⁴ CAMLA, *The Qin Dynasty*, available at http://polaris.gseis.ucla.edu/yanlu/ECC_HISTORY_QIN%20DYNASTY.htm (Last visited on November 11, 2014) (For instance, the Chinese Emperor, Qin Shi Huang, ordered destruction of all books, particularly of those propagating philosophies of Confucius, or those relating to poetry and history in 213 BC. Only the books regarding medicine or agriculture were preserved and allowed to be disseminated).

⁵ Asia-Pacific Economics Blog, *Pros and Cons of Censorship*, available at <http://apecsec.org/pros-and-cons-of-censorship/> (Last visited on November 11, 2014).

⁶ Reporters Without Borders, *2013 Press Freedom Index: Dashed Hopes After Spring*, available at <http://en.rsf.org/press-freedom-index-2013,1054.html> (Last visited on November 11, 2014) (This has been the lowest rank India has attained since 2002).

publication”⁷, which prevents the communication from occurring at all. Courts in India have upheld the constitutionality of prior restraint only in specific circumstances.⁸ Now, given the expansive reach of the Internet, there have been demands for the pre-censorship of this medium as well. Moreover, censorship is not limited solely to state-sponsored censorship on the Internet. Another growing concern in India is the increasing power that private actors exert over authors, publishers and consumers of such content. There have been repeated instances of non-state actors attempting to suppress political criticism or perceived insults to a religion. This has led to the censorship of films, music and literature, as is evident from Wendy Doniger’s book ‘The Hindus: An Alternative History’ being taken off the shelves after protestors claimed that it was an affront to the religion.⁹ This form of subterranean censorship, where non-state actors dictate the contours of censorship, also demands academic attention.

Surveillance is another problem that plagues several democracies. In fact, recent global surveillance disclosures such as the PRISM program have led many to believe that seemingly liberal governments are unacceptably intrusive as they conduct mass surveillance of their own citizens. Many fear that this will lead to the creation of a “mass surveillance society”, bereft of political and personal freedoms.¹⁰ Even in India, the establishment of data collection agencies and mass surveillance agencies (as will be explained in Part III), has been a cause of concern, as there exist no substantial safeguards against such snooping. Further, there is still a lack of awareness about the use of such tools which may lead to rampant violations of citizens’ rights.¹¹ Some of those who voluntarily or inadvertently disclose private details about themselves over information and communication platforms continue to be unaware about the collection and use of this data.¹² Violations of one’s right to privacy then becomes another major concern, with acts such as identity theft having wide ranging ramifications.¹³ In light of such concerns, it is useful to look at surveillance measures and the existing privacy law framework in India.

⁷ Thomas I. Emerson, *The Doctrine of Prior Restraint* 648-671 (Faculty Scholarship Series, Paper 2804, 1955).

⁸ See K.A. Abbas v. Union of India, (1970) 2 SCC 780.

⁹ Time, *Liberal India Feels Under Threat After Publisher Pledges to Pulp “The Hindus”*, February 13, 2014, available at <http://time.com/6988/wendy-doniger-hindus-recall-threatens-india-liberals/> (Last visited on November 11, 2014) (This also recollects the other instances where similar actions have been taken and how it represents a larger problem occurring in this region).

¹⁰ Time, *The Surveillance Society*, August 1, 2013, available at <http://nation.time.com/2013/08/01/the-surveillance-society> (Last visited on November 11, 2014).

¹¹ See Niharika Sachdeva & Ponnurangam Kumaraguru, *Privacy in India: Attitudes and Awareness*, available at, precog.iiitd.edu.in/research/privacyindia/PI_2012_Complete_Report.pdf (Last visited on November 11, 2014).

¹² *Id.*

¹³ *Id.*

II. CENSORSHIP

Democracy has come to be the most acceptable form of governance, largely because it allows its citizens to voice informed dissent without the fear of victimisation.¹⁴ Unfortunately, state agencies of the world's largest democracy have recently been accused of becoming a coercive force, intolerant of criticism or dissent. With an increase in the use of social networking tools to voice and propagate dissent, arguably, social media now appears to be the most dangerous platform for voicing dissent, especially if the criticism is directed towards public figures.¹⁵

It is undeniable that technology, especially the advent of the Internet, has been the game changer of this generation.¹⁶ It has enabled greater public participation for ordinary citizens.¹⁷ It has, thus, led to an expansion of the 'public sphere'.¹⁸ Moreover, if previously an individual was shielded, today, the same individual is more vulnerable to the implications of what he or she chooses to say or not say, willingly or unwillingly, over a social platform.¹⁹ Thus, the freedom of speech as enshrined in Article 19(1)(a) of the Constitution has recently been invoked not only by newspapers, academics and other social activists, but also by ordinary citizens.²⁰

¹⁴ The Hindu, *The Importance of Dissent in Democracy*, June 18, 2014, available at <http://www.thehindu.com/todays-paper/tp-opinion/the-importance-of-dissent-in-democracy/article6124674.ece> (Last visited on November 11, 2014).

¹⁵ For instance, criticism centred around select leaders such as Bal Thakrey or Narendra Modi, has attracted attention from State agencies; See The Centre for Internet and Society, *Arbitrary Arrests for Comment on Bal Thackeray's Death*, November 19, 2012, available at <http://cis-india.org/internet-governance/blog/bal-thackeray-comment-arbitrary-arrest-295A-66A> (Last visited on November 11, 2014); See The Times of India, *Online Posts Against Narendra Modi Spell Trouble*, June 16, 2014, available at <http://timesofindia.indiatimes.com/india/Online-posts-against-Narendra-Modi-spell-trouble/articleshow/36635876.cms> (Last visited on November 11, 2014).

¹⁶ MADHAVI GORADIA DIWAN, FACETS OF MEDIA LAW 22 (2006) (Internet, often endorsed as a communication revolution, has arguably facilitated free speech and expression like no other medium).

¹⁷ Madhavi Goradia Diwan, Author and Lawyer, Address at the NUJS Law Review and FICCI Symposium: Free Speech, Privacy and Technology (September, 2013).

¹⁸ Douglas Kellner, *Habermas, The Public Sphere, and Democracy: A Critical Intervention*, available at pages.gseis.ucla.edu/faculty/kellner/papers/habermas.htm (Last visited on November 11, 2014) (Jurgen Habermas coined the term "public sphere". According to him, public sphere is the arena where individuals gathered and carried rational discussions on various matters of public concerns. In this regard, he suggested that such discussions occurred in places such as British coffee houses, French salons and German table societies. While questioning some of the assumptions underlying this theory propounded by Habermas, Kellner has also argued that cyberspace is a further expansion of the public sphere. Though it is not in a concrete form where individuals have to be present physically (under the theory propounded by Habermas), it provides individuals from all backgrounds to access the platform and have discussions on matters of public importance).

¹⁹ Diwan, *supra* note 17.

²⁰ *Id.*

The reach of the Internet transcends territorial and geographical boundaries. This entails that the damage it can potentially cause is incalculable, as compared to other traditional forms of communication such as newspapers and television.²¹ The Internet, being amenable to misuse in the form of rampant piracy, and for the propagation of hate speech, defamatory statements and terrorist indoctrination, arguably requires regulation. Regulation has existed in the form of censorship by the government and other state agencies. In India, inter alia, the Information Technology Act, 2000, ('IT Act') regulates communication over the Internet.²² Unfortunately, the IT Act has slowly been sinking into a quicksand of negative public opinion. The most notorious of the provisions of the IT Act, the infamous §66A, was initially introduced as a measure to tackle the problem of spamming and phishing. However, it was being misused as a tool of censorship and subduing criticism of state actions on social media.²³ Thus, it was declared ultra vires Article 19(1)(a) of the Constitution in the recent judgment in *Shreya Singhal v. Union of India*²⁴ ('Shreya Singhal'). However, there are various other means through which state and non-state actors impose censorship, directly or indirectly impinging upon the constitutionally guaranteed right to free speech. Two such means – prior restraint and subterranean censorship, are discussed below.

A. PRIOR RESTRAINT

Prior restraint is a government action that prohibits certain forms of speech and expressions from being published or disseminated.²⁵ This can be by way of judicial intervention or by mandating that one must obtain necessary approvals from state agencies before publication or performance.²⁶ Prior restraint has been an object of criticism, as it also imposes criminal punishment or civil damage "in advance"²⁷. In jurisdictions with relatively liberal free speech laws such as the United States of America ('USA'), though there is no absolute rule against prior restraint, the judicial approach towards this doctrine

²¹ *Id.*

²² Along with the IT Act, the infamous Information Technology (Intermediaries Guidelines) Rules, 2011 also regulates the activities over this forum.

²³ Olina Banerjee, *§66-A and Free Speech in India: The Debate Continues*, available at <https://blogs.lse.ac.uk/indiaatlse/2013/01/30/§-66a-and-free-speech-in-india> (Last visited on November 11, 2014); See also Pranesh Prakash, *The "Unconstitutional" §66-A*, available at www.outlookindia.com/article/The-Unconstitutional-§-66A/283149 (Last visited on November 11, 2014).

²⁴ *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

²⁵ Legal Information Institute, *Prior Restraint*, available at http://www.law.cornell.edu/wex/prior_restraint (Last visited on November 11, 2014).

²⁶ *Id.*

²⁷ Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981-1982).

has been extremely cautious.²⁸ The courts have recognised its necessity, albeit in exceptional cases.²⁹

Even in the Indian context, the judiciary has not declared prior restraint unconstitutional per se. Though the Court has declared prior restraint *ultra vires* the Constitution in certain instances,³⁰ hence there appears to be no blanket ban on it. An instance where the judiciary justified prior restraint was in *K.A. Abbas v. Union of India*³¹ ('K.A. Abbas'). Here, the petitioner challenged the act of prior restraint exercised by the Central Board of Film Certification over motion films, thus questioning the validity of according differential treatment to motion films as compared to traditional print media. The Supreme Court reasoned that films warrant such a differential treatment when compared to other forms of media, in the interest of the public.³² While doing so, the Court made the following observation:

“[...] the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vista vision and three-dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative article. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. [...] It is also for this reason that motion picture must be regarded differently from other forms of speech and expression. A person

²⁸ *Near v. Minnesota*, 75 L Ed 1357 : 283 US 697 (The Court stated that prior restraint could be allowed only in exceptional circumstances. This would include circumstances such as those where statements had the potential to disturb peace or overthrow a Government and where the country was at war); *Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr.*, (2012) 10 SCC 603).

²⁹ *Id.*

³⁰ *Virendra v. State of Punjab*, AIR 1957 SC 896 : 1958 SCR 308 (One provision of the Punjab Special Powers (Press) Act, 1956 was upheld. However, another provision imposing pre-censorship, which did not provide the right to represent against imposition of such censorship or any time-frame for which it would operate, was declared *ultra vires*).

³¹ *K.A. Abbas v. Union of India*, (1970) 2 SCC 780.

³² *Id.*, ¶19 (The Bench also observed that there exists negligible difference between censorship and pre-censorship, when it comes to motion films: “Pre-censorship is but an aspect of censorship and bears the same relationship in quality to the material as censorship after the motion picture has had a run. The only difference is one of the stage at which the State interposes its regulations between the individual and his freedom. Beyond this there is no vital difference”).

reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture".³³

In 2011, former Union Minister for Communications and Information Technology, Kapil Sibal, called for the pre-filtering (by intermediaries) of content uploaded on social media.³⁴ Several concerns surrounding intermediary liability, enforcement mechanisms and associated costs for host sites were raised.³⁵ In light of severe criticism, the Minister later called off the move.³⁶ However, one may continue to further examine the viability of according differential treatment to Internet in light of the observation made by the court in *K.A. Abbas*. Thus, arises the question: will the Internet be amenable to pre-censorship as per this test?

The Internet has become a medium accessible to more than two billion people in the world; as of January, 2014, India had a total broadband subscription of 56.90 million and this number is only expected to increase as the Internet gradually becomes more accessible.³⁷ In fact, unlike motion films where the audience is limited to the confines of a theatre, the users of Internet span across the globe. The 'intended audience' is a thing of the past; the entire world is a single theatre for the Internet.³⁸ Given its reach and accessibility, the impact it can potentially have is incalculable. Furthermore, there have been a plethora of instances where this medium has been used to inspire and emulate unlawful activities. For instance, the Boston Marathon bombings were carried out by two brothers who learnt the technique of making bombs from Internet sources.³⁹ They even derived inspiration from the speeches of a Yemini cleric, which were freely disseminated over the Internet.⁴⁰ Thus, the Internet is a vast

³³ *Id.*, ¶20.

³⁴ Pranesh Prakash, *Online Pre-Censorship is Harmful and Impractical*, December 7, 2011, available at <https://cis-india.org/internet-governance/online-pre-censorship-harmful-impractical> (Last visited on November 11, 2014).

³⁵ *Id.*

³⁶ BBC, *India Minister Sibal Says No Censorship of Social Media*, February 14, 2012, available at www.bbc.com/news/world-asia-india-17024957 (Last visited on November 11, 2014).

³⁷ Press Release, TELECOM REGULATORY AUTHORITY OF INDIA, *Highlights on Telecom Subscription Data as on 31st January, 2014* (March 12, 2014) at <http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Press%20Release%20on%20Telecom%20Subscription%20Data%20as%20on%2031st%20January,%202014.pdf> (Last visited on November 11, 2014).

³⁸ Diwan, *supra* note 17 (Also, for instance, the "likely audience test" is the parameter usually relied upon by the courts to determine questions of obscenity. As per this test, the court examines the content on the basis of the impact it would have on the particular class of persons who are likely to view or come in contact with such content. However, application of such test may be rendered almost futile, given easy accessibility to such content over the Internet).

³⁹ The Huffington Post, *Boston Bombing Suspect Was Influenced by Internet: Indictment*, June 28, 2013, available at http://www.huffingtonpost.com/2013/06/28/dzohkhar-tsarnaev-internet-indictment_n_3515432.html (Last visited on November 11, 2014); CNN, *The Man Who Inspired the Boston Bombings*, April 11, 2014, available at <http://edition.cnn.com/2014/04/11/opinion/bergen-boston-bombing-awlaki-jihadists/> (Last visited on November 11, 2014).

⁴⁰ *Id.*

melting pot of myriad forms of dissemination; as a whole, it is a heady concoction of videos, blogs, articles and editorials, all of which can influence, impact and even generate opinions. Therefore, the Internet today has transcended the geographical boundaries of information dissemination and is arguably equally, if not more impressionable than motion films. If one were to rely on the reasoning of the court in *K.A. Abbas*, even the Internet would be amenable to the conformities of pre-censorship. Thus, one's right to speech over a forum meant for exchange of ideas may be rendered futile, if the idea is not even allowed to be introduced in the first place. This line of reasoning was accepted by the Supreme Court in *Shreya Singhal*, when it rejected the specific challenge to the constitutionality of §66A of the IT Act on the grounds of violating Article 14 of the Constitution. It explained that given the peculiar nature of the Internet, there was an intelligible differentia between speech on the internet and on other traditional platforms.⁴¹ However, the challenge to the provision on the grounds of violating Article 19(1)(a),⁴² overbreadth⁴³ and vagueness⁴⁴ was accepted by the Court.

B. SUBTERRANEAN CENSORSHIP

Paul O'Higgins has identified six different forms of censorship, one of which is subterranean censorship.⁴⁵ According to him, subterranean censorship is used to describe a situation where "open intervention by government or other public authority is avoided, but either a public authority, or sometimes even a private person, uses its power to affect censorship".⁴⁶ To explain this, he relies on the example of a bookseller who refuses to stock a particular book that is considered objectionable by other members of the society.⁴⁷ In the Indian context, this form of censorship was witnessed in the recent incident where the publishing house, Penguin Books (India), withdrew American Indologist Wendy Doniger's book 'The Hindus: An Alternative History' from the Indian market. Penguin justified its action by relying on §295A of the Indian Penal Code, 1860, ('IPC') which penalises the act of maliciously insulting any religion or any class, within India.⁴⁸

⁴¹ *Shreya Singhal v. Union of India*, (2013) 12 SCC 73, ¶2.

⁴² *Id.*, ¶2.

⁴³ *Id.*, ¶2.

⁴⁴ *Id.*, ¶2.

⁴⁵ PAUL O'HIGGINS, CENSORSHIP IN BRITAIN 13 (1972).

⁴⁶ *Id.*, See also *Goldsmith v. Perrings Ltd.*, (1977) 1 WLR 478 : (1977) 2 All ER 566 (CA). (In this case, the plaintiff filed a suit alleging defamation against the publishers who came out with the book, "Public Eye". Later, it became evident that the main intention of the plaintiff was not to safeguard his reputation, but the collateral purpose of destroying the said book by cutting off its distribution networks).

⁴⁷ *Id.*

⁴⁸ *The Hindu, No Country for Free Speech, Says Penguin*, February 15, 2014, available at www.thehindu.com/news/national/no-country-for-free-speech-says-penguin/article5688586.ece (Last visited on November 11, 2014); Penguin India, *Penguin India's Statement on "The Hindus" by Wendy Doniger*, February, 2014, available at <http://www.penguinbooksindia.com>.

One could argue that the mere existence of such a provision supervenes the taste of Indian readers and therefore its imprudence is manifest. Though the vagueness of the law remains the main antagonist, religious extremists also add fuel to the fire.⁴⁹ Even though it is undeniable that the existence and subsequent operation of §295A of the IPC inhibits creativity, but if misused by religious extremists, it arguably raises further grave concerns.⁵⁰ It was due to the fear of facing backlash from religious fanatics, coupled with state inaction, that Penguin withdrew the book, even though it is hard to argue that either Penguin or Doniger could have had the ‘malicious intent’ of hurting the religious sentiments of Hindus as a religious community, as required under §295A of the IPC.⁵¹

There are various other instances in India where non-state actors, religious groups and even individuals have outgrown the role of armchair critics and assumed the responsibility of self-appointed censors.⁵² Large scale protests against films over matters ranging from obscenity, morality and religious sanctity may be called manifestations of subterranean censorship.⁵³ At times, these self-acclaimed censors rely on the existing legal framework to ban or censor the content. On other occasions, the mere threat of attracting hostility from religious fundamentalists and consequent vociferous protests against an author’s work is sufficient. Even instances where the films focus on pertinent socio-political issues, like ‘Parzania’ and ‘Black Friday’, the authors of such works are usually at the receiving end of political controversies surrounding the subject matter of such films.⁵⁴ At such junctures, the State should not permit the chauvinistic views of some to become the policy for all, for this runs against the very notion of freedom of speech and expression.⁵⁵

com/en/content/penguin-india%E2%80%99s-statement-%E2%80%98hindus%E2%80%99-wendy-doniger (Last visited on November 11, 2014).

⁴⁹ Wendy Doniger, *India: Censorship by the Batra Brigade*, available at <http://www.nybooks.com/articles/archives/2014/may/08/india-censorship-batra-brigade/> (Last visited on November 11, 2014).

⁵⁰ *Id.*

⁵¹ At that time Penguin was facing a suit filed by Shiksha Bachao Andolan Samiti, under §295A IPC.

⁵² See generally Indian Constitutional Law and Philosophy, *Free Speech Watch* available at <https://indconlawphil.wordpress.com/free-speech-watch/> (Last visited on May 26, 2015).

⁵³ For instance, Deepa Mehta’s movies such as “Water”, “Earth” and “Fire” have all attracted controversies in the past, largely because they dealt with sensitive matters that the Hindu fundamentalists did not agree with.

⁵⁴ The Economic Times, *With Movies Like Aakarshan, Black Friday, Parzania, Bollywood is at Receiving End of Political Drama*, August 2, 2011, available at <http://m.economictimes.com/With-movies-like-Aakarshan-Black-Friday-Parzania-bollywood-is-at-receiving-end-of-political-drama/PDAET/articleshow/9452200.cms> (Last visited on November 11, 2014).

⁵⁵ Doniger, *supra* note 49.

C. THE MARKETPLACE OF IDEAS

Both prior restraint and subterranean censorship are typical of occasions where “all freedom of sentiment [is vulnerable] to the prejudices of one man”,⁵⁶ thereby making one man (or one group of individuals) “the arbitrary and infallible judge of all controverted points in learning, religion, and government”.⁵⁷ The unfathomable risk it imposes in any developed society is that it prevents an idea from being communicated in the marketplace. While prior restraint is the official restriction that prevents an idea from even being floated in the marketplace, several instances of subterranean censorship also prevent the effective communication of ideas from taking place.⁵⁸

Marketplace of ideas was a theory first introduced in legal jurisprudence on free speech by Holmes (Jr.), J. in *Abrams v. United States*⁵⁹ (dissenting opinion). Although he did not coin the phrase, he observed that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”.⁶⁰ This theory finds its origin in Milton’s ‘*Areopagitica*’ and John Stuart Mill’s discussion in ‘*On Liberty*’, where it is justified on consequentialist grounds.⁶¹ Arguably, this framework creates a competitive environment where bad ideas fail and good ideas flourish, akin to a competitive economic structure where the free flow of goods and services is driven by market forces. Proponents of this theory advocate that the communication of all opinions is necessary to discover truth and foster better participation in a democracy.⁶² Other arguments supporting it derive justification on the basis of diversity, tolerance and the protection of individual autonomy.⁶³

Holmes’s *laissez-faire* marketplace theory also has certain misgivings, especially when applied to the Indian scenario. First, the basic premise of this theory (i.e., the importance given to individual autonomy) is dependent

⁵⁶ WILLIAM BLACKSTONE, *ABRIDGMENT OF BLACKSTONE’S COMMENTARIES* 427, 428 (1895) (The author, however, made a specific reference to prior restraint).

⁵⁷ *Id.*

⁵⁸ A hypothetical instance could be when a particular community of sensitive individuals starts protesting against an allegedly “objectionable” (say, obscene) scene from film that is not yet released. Then, the director or the producer of the movie might succumb to the pressure from this community fearing a complete halt on the screening of the film and thereby remove such content, just to ensure that the film releases on the slated date. In this instance, the removed content of the film would not have entered the marketplace, for it never got screened.

⁵⁹ *Abrams v. United States*, 63 L Ed 1173 : 250 US 616 (1919).

⁶⁰ *Id.*, ¶630.

⁶¹ Steven P. Lee, *Hate Speech in the Marketplace of Ideas* in *FREEDOM OF EXPRESSION IN A DIVERSE WORLD* 13, 14 (2010).

⁶² Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

⁶³ See generally Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 (2) *ETHICS* 312-39 (1998) (The autonomy defence of free speech explains why hate speech should be protected).

on the trust it places on human rationality.⁶⁴ This is to say that it assumes that every individual has the ability to exercise independent rationality to arrive at reasoned judgments.⁶⁵ This concept would arguably apply to both the speaker (or author) and the receiver of the information. It fails to take into consideration the existence of radical literature. It ignores the likelihood of literature that could glorify acts of terrorism or incite religious hatred (through hate speech) or even abet criminal activities, especially given the expanse of modern forms of communication such as the Internet. For instance, if this theory allowed unfettered exercise of one's right to speech, the likes of Akbaruddin Owaisi and Tapas Pal would go scot-free.⁶⁶ Second, certain real world conditions interfere with the effective operation of this doctrine. The "arguable non-existence of objective truth"⁶⁷ or "access limitations"⁶⁸ are few of these conditions which necessitate a certain degree of state intervention in the marketplace. Furthermore, if this theory is extended to commercial speech, the seller who engages in practices such as divulging incorrect information about the product intended to be sold, will be freely allowed to do so. In this regard, a paradoxical result is achieved where the main intention behind propagating this theory was to achieve truth as a consequence. However, what has been achieved is an unfettered propagation of false information. Thus, the assumption that individuals compete for mutual benefit is rendered untrue. Among other issues, it also fails to account for the existence of the problem of asymmetry of information, which is another reason why this theory fails in practice.⁶⁹

⁶⁴ See Ingber, *supra* note 62, 31 (The ability to be rational, underlying the ability to separate truth from falsehood, has been criticised as an unverifiable assumption).

⁶⁵ Sarah Sorial, *Free Speech, Autonomy, and the Marketplace of Ideas*, 44 (2) JOURNAL OF VALUE INQUIRY 167, 170 (2010).

⁶⁶ Lee, *supra* note 61.

⁶⁷ Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) as cited in Ingber, *supra* note 62, 5 (Mills assumed that repression of "Truth" leads to authoritarian imposition of truth, which is plagued with the danger of error. However, certain scholars challenging this theory challenge this assumption itself. They allege that there is a non-existence of objective truth, which is in conflict with marketplace ideals. There could be potentially varied definitions and conceptions of truth. For instance, as the author argues, the only truth that self-governing individuals can rely on is the one "which they themselves devise" during the course of public discussions).

⁶⁸ *Id.* (Marketplace theory also assumes that all speakers have equal access to the market and all the listeners have equal access to the information. This ignores that both the players in the marketplace may, at times, have inequitable access. For instance, certain voices may be stifled before they reach the market and thus, State interference may become imperative in such cases).

⁶⁹ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1678 (1967) as cited in Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57(4) DUKE LAW JOURNAL 821 (2008).

(The author notes that "[w]ith the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the 20th century as the economic theory of perfect competition". Moreover, the attainment of objective truth works on the assumption that the parties in transaction have the same information relevant to the transaction and that neither party is concealing any information. On the other hand, the concept of asymmetry of information contemplates a situation where one party has superior information relevant to the transaction than the other party. Placed in

Despite its pitfalls, this theory assumes immense importance when seen in the context of scientific speech or academics where the primary aim of the enterprise is the attainment of truth and the dissemination of unbiased information. Nevertheless, in India, not only the State, but also, more importantly, non-state agencies have displayed venomous potency to severely obstruct the operation and application of this theory in areas where it is of immense significance. Conversely, the State has been equally ineffective in safeguarding an author's paramount right to the freedom of speech and expression.

III. SURVEILLANCE

Surveillance can be loosely defined as an exercise of closely observing the activities of an individual or a group without their knowledge and consent.⁷⁰ As per Black's Law Dictionary, the stated purpose of this activity is to "gather evidence of a crime or merely to accumulate intelligence about suspected criminal activity".⁷¹ However, often these intended objectives of surveillance may result in unintended consequences, such as the chilling of speech and impingement on one's right to privacy.⁷² The government relies on national security and the public interest at large as a justification for such measures. In the garb of these rationalisations, the Indian government has been initiating various programs that relate to the interception and collection of data, which arguably violate the citizen's right to privacy.

A. INTERCEPTION AND DATA COLLECTION

In India, the Information Technology (Amendment) Act, 2008, ('2008 Amendment Act') and the colonial Indian Telegraph Act, 1885,⁷³ ('Telegraph Act') are the two legislations that dictate the rules and regulations governing access to communication data and interception by government agencies. It is interesting to note that the colonial rulers incorporated far better privacy safeguards into the legislation than the subsequently formed democratic

the context of marketplace of ideas, existence of asymmetry of information proves to be an impediment in the attainment of ideas).

⁷⁰ The Sunday Guardian, *In Stasiland, Privacy, Identity, Surveillance*, November 22, 2014, available at <http://www.sunday-guardian.com/analysis/in-stasiland-privacy-identity-surveillance> (Last visited on November 11, 2014).

⁷¹ BLACK'S LAW DICTIONARY 1445 (6th edn., 1990).

⁷² Human Rights Watch, *India: New Monitoring System Threatens Rights*, June 7, 2013, available at www.hrw.org/news/2013/06/07/india-new-monitoring-system-threatens-rights (Last visited on November 11, 2014) (Cynthia Wong, a senior Internet researcher observes that "[t]he Indian Government's centralised monitoring [which is a mass surveillance tool] is chilling, given its reckless and irresponsible use of the sedition and Internet laws"); See also Josh Levy, *The Inevitable End of Surveillance is Self-Censorship*, August 26, 2013, available at www.freepress.net/blog/2013/08/26/inevitable-end-surveillance-self-censorship (Last visited on November 11, 2014) (It has also been argued that chilling of speech is not just a consequence of surveillance, but also the motive).

⁷³ The Telegraph Act, 1885, §5(2).

state did – under the Telegraph Act, interception was allowed only on grounds of ‘public emergency’ or ‘public safety’.⁷⁴ Even §26 of the India Post Office Act, 1898, permits the government to intercept postal articles for ‘public good’, only on the occurrence of “any public emergency, or in the interest of the public safety or tranquillity”.⁷⁵ While replicating most of these provisions from the Telegraph Act into the 2008 Amendment Act, the drafters did away with the preconditions of public emergency or public safety, thus lowering standards for accountability.⁷⁶ Further, these two co-existing laws are inconsistent and contain varying standards on the types of interception allowed, destruction and retention requirements of the material intercepted, permitted grounds of surveillance, degree and measures of assistance that authorised agencies can demand from the service providers.⁷⁷ The Group of Experts on Privacy, headed by A.P. Shah, J. concluded that such differences “created an unclear regulatory regime that is inconsistent, non-transparent, prone to misuse, and that does not provide remedy or compensation to aggrieved individuals”⁷⁸.

The rot, however, runs much deeper in this country. An example of an obscure government program that enables surveillance in India is the Centralised Monitoring System (‘CMS’) – dubbed the ‘Indian PRISM’.⁷⁹ This state instrument allegedly seeks to monitor 900 million mobile users and

⁷⁴ Pranesh Prakash, *How Surveillance Works in India*, July 10, 2013, available at http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/?_r=1 (Last visited on November 11, 2014) (In *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, the court observed that a “[p]ublic emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression ‘public safety’ means the state or condition of freedom from danger or risk for the people at large”. This case has been discussed subsequently).

⁷⁵ The India Post Office Act, 1898, §26 (It reads as follows: “Power to intercept postal articles for public good.— (1) On the occurrence of any *public emergency* (emphasis supplied), or in the interest of the *public safety or tranquillity* (emphasis supplied), the Central Government, or a State Government, or any officer specially authorised in this behalf by the Central or the State Government may, by order in writing, direct that any postal article or class or description of postal articles in course of transmission by post shall be intercepted or detained, or shall be disposed of in such manner as the authority issuing the order may direct”).

⁷⁶ Prakash, *supra* note 74.

⁷⁷ Planning Commission, *Report of Group of Experts on Privacy*, October 16, 2012, available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf (Last visited on November 11, 2014).

⁷⁸ *Id.* (¶6.4 of the Report specifically makes this observation); See also Human Rights Watch, *Safeguards Needed to Protect Privacy, Free Speech*, June 27, 2013, available at www.hrw.org/news/2013/06/07/india-new-monitoring-system-threatens-rights (Last visited on November 11, 2014).

⁷⁹ The Hindu, *India’s Surveillance Project May Be as Lethal as PRISM*, June 21, 2013, available at <http://www.thehindu.com/news/national/indias-surveillance-project-may-be-as-lethal-as-prism/article4834619.ece> (Last visited on May 26, 2015) (In the pipeline since 2009, the CMS is capable of accessing all digital communication and telecommunication including, but not limited to e-mails, Short Message Services (SMS), Multimedia Message Services (MMS) and geographical locations of the individual, in real time. A surveillance project touted to rival PRISM, the CMS has been at the centre of the tussle between surveillance and privacy).

160 million Internet users, on a real time basis.⁸⁰ The Unique Identification Authority of India ('UIDAI') is another body that was established with the idea to help the poor get an identity, but has been argued to "provide a new ominous technological foundation for surveillance in India"⁸¹.

Several other agencies such as the National Intelligence Grid ('NATGRID') and the Crime and Criminal Tracking Network and Systems have been set up as well. They are usually implemented through information and communication technology platforms and collect wide-ranging data relating to an individual's travel, taxes, religion, marital status, disability, DNA, etc. This has raised grave concerns regarding the impact of such programs over a citizen's privacy. In light of the potential ramifications of these operations over an individual's privacy, it is necessary to briefly delve into the discourse surrounding the right to privacy in India.

B. THE RIGHT TO PRIVACY IN INDIA

The right to privacy is the lawful claim of a person to be let alone and to have the liberty to determine what information about himself he shares with others.⁸² Like several jurisdictions which do not provide for an explicit right to privacy, this nuanced right had to be carved out from the existing structure of the Constitution of India. The first landmark case to deliberate on this right was *Kharak Singh v. State of Uttar Pradesh*.⁸³ Even though the Court successfully traced a right to privacy, it noted that "the right of privacy is not a guaranteed right under our Constitution".⁸⁴ Another judgment dealing with physical surveillance is *Gobind v. State of Madhya Pradesh*.⁸⁵ Here, the Court

⁸⁰ What is more intriguing is that there is no statute that established this agency or gave it the powers that it exercises; CMS does not work within an established legal framework. Since Parliament had no role to play in its establishment, there has been no public discussion or debate over it, before its initiation.

⁸¹ The Sunday Guardian, *In Stasiland, Privacy, Identity, Surveillance*, November 22, 2014, available at <http://www.sunday-guardian.com/analysis/in-stasiland-privacy-identity-surveillance> (Last visited on November 11, 2014).

⁸² Legal Information Institute, *Privacy*, available at www.law.cornell.edu/wex/privacy (Last visited on November 11, 2014) ("Justice Louis Brandeis extolled a right to be left alone"); See also DWAN, *supra* note 16, 112 (She also relies on the definition propounded by AC Brekenridge: "The term 'privacy' has been described as the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over time, place and circumstances to communicate with others. It means his right to withdraw or participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession").

⁸³ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332.

⁸⁴ *Id.*, ¶17; C/f Praneesh Prakash, *Surveillance and the Indian Constitution- Part 1: Foundations*, January 13, 2014, available at <http://cis-india.org/internet-governance/blog/surveillance-and-the-indian-constitution-part-1> (Last visited on November 11, 2014) (The author here notes that though the judiciary effectively found a right to privacy in the Constitution, it merely declined to do expressly mention it).

⁸⁵ *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148.

concluded that certain fundamental rights can be said to be “contributing to the right to privacy”⁸⁶ subject to compelling state interest. The Indian judiciary directly located the right to privacy existing under the right to personal liberty, right to move freely and the freedom of speech and expression.⁸⁷ Finally, it was in *People’s Union for Civil Liberties v. Union of India*⁸⁸ (‘PUCL’) that the court recognised the right to privacy in the sphere of communication.

In PUCL, the petitioners challenged §5(2) of the Telegraph Act that allowed the interception of telephonic calls in cases of public emergency or in the interest of public safety. Since the government failed to lay down procedural safeguards under §7(2)(b) of the Telegraph Act, guiding government agencies’ interception of the messages, the Court found this to be in violation of the right to privacy implicit in the constitutional guaranteed right to life under Article 21 of the Constitution. The relevance of this case arises from its emphasis on the necessity of procedural safeguards in government intrusion in the realm of an individual’s private affairs.

With revolutions in information and communication technology, foreign jurisdictions have realised the need to have specific statutes in place, which seek to protect individual privacy.⁸⁹ Developments, in this regard in India, however, display that the right to privacy has been “relegated to a penumbral status”⁹⁰. Recognising that there is indeed a need to have similar, specific statute(s) in place, the Indian government has made several attempts at drafting privacy Bills since 2010.⁹¹ The (leaked) Privacy Bill, 2014, (‘Privacy Bill’) is the latest addition to the two existing Bills.

The recent allegations against the government regarding illegal wire-tapping compelled the state to include surveillance and interception, along with data protection, under the Privacy Bill’s ambit.⁹² With reference to surveillance, the relevant additions to this are the provisions relating to ‘Interception

⁸⁶ *Id.*, ¶25.

⁸⁷ *Id.*, ¶28.

⁸⁸ *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301.

⁸⁹ DIWAN, *supra* note 16, 126.

⁹⁰ *Id.*

⁹¹ Elonnai Hickok, *Right to Privacy Bill, 2010-A Few Comments*, July 20, 2011, available at <http://cis-india.org/internet-governance/blog/privacy/privacy-bill-2010> (Last visited on November 11, 2014); *See also* The Centre for Internet and Society, *Draft Bill on Right to Privacy, 2011*, September 21, 2011, available at <http://cis-india.org/internet-governance/draft-bill-on-right-to-privacy> (Last visited on November 11, 2014); The Centre for Internet and Society, *High Level Summary and Critique to the Leaked Privacy Bill 2011*, available at <http://cis-india.org/internet-governance/high-level-summary-and-critique-to-the-leaked-right-to-privacy-bill-2011> (Last visited on November 11, 2014).

⁹² Business Standard, *New Privacy Bill More Refined and Has Wider Ambit*, April 2, 2014, available at http://www.business-standard.com/article/economy-policy/new-privacy-bill-more-refined-has-wider-ambit-say-experts-114040101013_1.html (Last visited on November 11, 2014).

of Communications’ (Chapter VI) and ‘Covert Surveillance’ (Chapter VII).⁹³ On the flipside, there are glaring problems in the Privacy Bill. Barring one exception (‘detection of crime’), it retains all the exceptions to the right to privacy that were present under the Privacy Bill, 2011: preventing incitement to the commission of any offence; protection of rights and freedoms of others; sovereignty, integrity and security of India, strategic, scientific or economic interest of the State; prevention of public disorder or the detection of crime; and in the interest of friendly relations with foreign state.⁹⁴ This list is not exhaustive, which is evident from the final clause which states that the right to privacy is subject to the exception of any other purpose specifically mentioned in the Privacy Bill.⁹⁵ Even though there is no denying that the Privacy Bill is a positive development in the field of law of privacy, in light of the wide powers granted to the government agencies, it has not done complete justice to the cause of protecting ordinary citizens from alleged illegal surveillance.

IV. CONCLUSION

The invention of the printing press in the 19th century was accompanied almost simultaneously by the censorship of press and media.⁹⁶ Censorship was used by the monarchy as a tool to suppress dissent.⁹⁷ Soon, censorship was relied upon to subdue political criticism and to quell religious heresy. Today, the operation of freedom of speech as a right in India presents a different situation, for the form of acceptable governance has changed and India is deemed to be the world’s largest democracy. Further, with an increase in access to the Internet, the activities of an ordinary individual on social media undeniably underpin one’s freedom of speech and expression. Thus, the constitutionally guaranteed right to express and voice one’s opinion is no longer a matter that solely affects the media, but one that has equal importance for the Indian citizenry. One would expect the freedom of speech in such a society to be stronger than before. However, censorship is still being used as a tool by both the democratic state and non-state agencies to keep a check on political, religious and cultural dissent.

With an increase in the pervasiveness of the Internet in all areas of human endeavour, it is natural for the State to feel duty-bound to protect

⁹³ Graham Greenleaf, *India’s Draft the Right to Privacy Bill 2014 – Will Modi’s BJP Enact it?*, 129 PRIVACY LAWS & BUSINESS INTERNATIONAL REPORT 21-24 (2014).

⁹⁴ Elonnai Hickok, *Leaked Privacy Bill 2014 v. 2011*, 31 March, 2014, available at <http://cis-india.org/internet-governance/blog/leaked-privacy-bill-2014-v-2011> (Last visited on November 11, 2014).

⁹⁵ *Id.* (However, unlike the 2011 Bill, “the 2014 Bill also qualifies that the application of each exception must be adequate, relevant, and not excessive to the objective it aims to achieve and must be imposed on the manner prescribed”).

⁹⁶ Mette Newth, *The Long History of Censorship*, 2010, available at www.beaconforfreedom.org/liste.html?tid=415&art_id=475 (Last visited on November 11, 2014).

⁹⁷ *Id.*

its citizens from the myriad harms of the Internet that manifest in the form of cyber terrorism or the incitement of religious hatred. However, when the State undertakes the responsibility to protect its citizens from the vulnerabilities arising from the Internet, it cannot use state security as a blanket excuse to infringe upon a citizen's freedom of speech and right to privacy. Misuse of the liberty and power to protect its citizens from the dangers of the Internet through amplified surveillance and rigorous censorship will only lead to the state attaining the status of the fictitious yet utterly terrifying Orwellian dictator, 'Big Brother'. In order to ensure that events of this nature do not transpire, it is essential that India enacts a strong privacy law that will help safeguard the citizens against the unlawful intrusions by the State.