

An Essay on the Expanding Trends and New Challenges to Freedom of Expression in India

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ABSTRACT: *India presents a mix picture of laws and events on freedom of expression. On the one hand some laws restrict freedom of expression and on the other hand certain recent events and laws are making freedom of expression more liberal than it was ever before. Whereas a number of new challenges emerged globally on the topic of freedom of expression and number of measures have been taken to overcome those challenges but India's position with regard to those challenges is in near-total absence. In such a situation India should settle its position with regard to freedom of expression in the areas of internet, privacy and copyright.*

KEYWORDS: *Copyright, Freedom of expression, Internet, Privacy.*

I. INTRODUCTION

To a great extent, a person is what he thinks. The creation of ideas begins with thinking. If thought is limited, ideas also will be limited, and eventually expression will be inhibited. Thoughts remain secret and have no power to influence others until they are shared.¹ It leads to the creation of new ideas and knowledge, finding of truth, building of tolerance and is essential for self-rule. Through expression the bare requirement of communication is fulfilled and is therefore can be regarded as a basic human right. Liberty to express opinions and ideas without hindrance plays a significant role in the development of a state. Freedom of expression constitutes one of the essential foundations of a democratic society, a basic condition for its progress. Traditionally, the freedom of expression was deemed to guarantee effective political and social debate essential for the proper operation of any democratic system.²

In law, access to the internet is a fast developing area. It is well established that access to the means of communication is vital to the exercise of right to freedom of expression. The internet, both publishing and communication tool, has become a key instrument for the exercise of the right to freedom of expression. The interactive nature of the internet combines within one medium both the right to receive as well as the right to express and disseminate information, ideas and opinions. The laws envisaged for regulating the internet have not kept pace with the changes in the medium and that is a cause for worry as these laws have proven to be either unconstitutional or obsolete.

Next is the issue of privacy which come into focus with the growth of e-governance and information technology. Print media was seen to be invading privacy of influential persons in the last century are challenged once again with the way the internet is transforming the idea of publishing, communicating and reaching out to masses. Print media has become liberal in content, contents that may be not allowed a decade ago broadcasted by the television channel after the revolution of satellite television.

Copyright law, the next challenge, strikes its own balance between an author's right to property and the public's right to information, but copyright by its nature an interference with the right to freedom of expression.³ To enforce copyright laws is to prevent people from making peaceful use of similar ideas and information they may possess. An attempt to prevent free use of ideas restricts the unhindered use of ideas by people who already possess them. The fundamental value that our society places on freedom of expression creates a difficulty for justification of intellectual property. Private intellectual property rights restrict the methods of acquiring ideas, the use of ideas and the expression of ideas.

The fundamental assumptions of the previous era are being challenged and changed by the digital order. Will nations have to become more tolerant of expression than their individual Constitutions allow? Will notions of extra-territoriality, jurisdiction and sovereignty have to be re-imagined? How do we reconcile sovereign constitutional position on issues such as freedom of expression, free speech, political jurisdiction and state capacity and intervention to arrive at a formulation that works across a medium that is not restricted by

¹ Robert Trager and Donna L. Dickerson, *Freedom of Expression in the 21st century* 14 (Pine Forge Press, Inc., New Delhi, 1999).

² John Stuart Mill, *On Liberty and Considerations of Representative Government* 14 (1st ed. 1946).

³ *Ashby Donald and others v. France* (Appl. Nr. 36769/08).

territoriality and borders? These are bringing into question the traditional laws, norms, means of communication and modes of trade and commerce. Now the challenge will be to ascertain how a nation can apply its own rules of law without diminishing the freedoms available to citizens of other countries.

II. THE LAWS THAT RESTRICT FREEDOM OF EXPRESSION

India presents a picture with much secrecy legislation still in place restricting the free flow of information. No doubt, the freedom of speech and expression, like any other fundamental rights, is not absolute and can be reasonably restricted but the only restriction which may be imposed under Article 19 (1) (a) are those which Article 19(2) permits and no other. However, a number of Indian laws have a wide range of content that is objectionable and invite punitive action.

2.1 The Official Secrets Act

The Official Secrets Act, 1923⁴, prohibits the disclosure of official information indiscriminately. Section 3 of the Act provides penalty for spying, disclosure of official information for any purpose prejudice to the safety or interest of the State. Section 4 deals with evidence of communication with foreign agents being relevant in the proceedings for prosecution of a person for the offence under section 3. Both the sections can be justified in the name of national security and foreign enemy. Section 5 prohibits the disclosure of any information which government considers being confidential. The section makes both the maker and taker of the information liable. The word 'secret' has not been defined by the Act. Liability under the Act does arise even if information is received for public good. This Act carries the legacy of the British Monarchy into the democratic and sovereign republic.⁵

2.2 The Indian Evidence Act

The Indian Evidence Act, 1872 would still provide opportunity for a modern court to decide the scope of the public's right to inspect. Non-disclosure of information is being protected under the Indian Evidence Act, 1872. Section 123 provides that no one shall be permitted to give evidence from unpublished official records relating to any affairs of State, except with the permission of Head of the Department who shall give or withhold such permission as he thinks fit. Section 124 extends the same privilege to the confidential official communication. It gives unlimited powers to the administration and not to disclose information even in the interest of justice and fair play.

2.3 The Indian Penal Code

Various restrictions have been imposed on the right to freedom of speech and expression by the IPC. Section 124A IPC deals with law of sedition. The extensive Constitutional amendments carried out in 1972 replaced section 153 IPC with sections 153A and 153B. These newly added sections is so extensive that today "the right to freedom of speech and expression" has almost been nullified. Section 153A IPC penalises for "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc." and committing acts "prejudicial to maintenance of harmony". Section 153B IPC deals with imputations, assertions prejudicial to national integration. Sections 292 to 294 provide instances of restrictions on the freedom of speech and expression in the interest of decency and morality. These sections prohibit the sale, distribution or exhibition of obscene words etc. in public places but the IPC does not lay down any test to determine obscenity. Sections 295, 295A and 298 IPC deal exclusively with "religious harmony".

2.4 The Constitution of India

The Constitution (First Amendment) Act, 1951 added three more grounds of restrictions to Article 19(2) viz. - "Public order"⁶, "friendly relations with foreign states" and "incitement to an offence"⁷. It added the word 'reasonable' before the word 'restriction' and thus made restrictions a justifiable issue. While the First Amendment to the US Constitution enacted the landmark prohibition against imposing restrictions on free

⁴ The Official Secrets Act, 1923 is a clone of Britain's 1911 Act, but unlike the latter remains unrevised despite decades of efforts. The 5th Pay Commission in its report in 1997 advocated the amendment of the Official Secrets Act, 1923 to ensure transparency in government functioning.

⁵ In *State of Punjab v. Sodhi Sukdhev*, AIR 1961 SC 493, Subba Rao J., in his dissenting opinion observed that if non-disclosure of a particular state document was in public interest then impartial and uneven dispensation of the justice by court was also in public interest. Thus, the final authority to allow or disallow the disclosure of the document lies with the court after the inspection of the document.

⁶ The term "Public order" covers a small riot, an affray, breach of peace or an act disturbing public tranquility. "Public order" is something more than ordinary maintenance of law and order. Reasonable restriction on the exercise of right to freedom of speech and expression "in the interest of public order" is much wider than "for the maintenance of public order". Such an interpretation could give the government a vast reservoir of preventive and others powers. Virtually everything could be deemed to be "in the interest of public order".

⁷ The scope of the restriction on the ground of "incitement to an offence" is very wide. As per the General Clauses Act, 1897, 'offence' means an act or omission made punishable by law. The legislature may feel free to create an offence and make incitement thereto punishable.

speech⁸, the First Amendment to the Indian Constitution amended Article 19(2) and expanded the restrictions on free speech. Laws imposing reasonable restrictions on freedom of speech are permitted by the Constitution and whether any such law is Constitutional is only a matter of construction. No doubt a Court must decide whether such restrictions are reasonable or not, but the law imposing these restrictions will *prima facie* be presumed constitutional. The burden therefore is not on the transgressor (as in the US), but the individual challenging the law.

The Constitution of India protects certain types of communication among high-level Constitutional functionaries. Article 74(2) provides that advice tendered by Ministers to the President shall not be enquired into by any court. Article 163(3) contains the similar provisions in the States.

2.5 Lack of Codification of Parliamentary Privileges

The concept of parliamentary and legislative privileges in an age of information seems to be outdated as it conflicts with the structure of democracy and defeat the concept of transparency. There is a need for codification of the privileges of the Members of the Parliament and legislatures and appropriate amendments to the Official Secrets Act to enable the press to function properly and effectively.⁹

The Constitution of India has granted by Article 105 (1), (2), and (3) some privileges to the Members of the Parliament and those similar privileges are also to be enjoyed by the State legislators under Article 194 (1), (2) and (3). Clause (1) of these Articles guarantees, subjects to the rules of procedure, standing orders and other provisions of the Constitution, freedom of speech to the Members of the Parliament and all assemblies. Then under clause (2) of both Articles 105 and 194, they can enjoy freedom of casting their votes in the House and also the freedom from arrest for the expression of a view contained in any paper or journal published on behalf of the respective House. In order to keep their privileges under Articles 105 and 194 perpetually above the fundamental rights under Article 19, the Parliament has not yet codified their privileges to avoid the touchstone of Article 13(2) which has stipulated that if an 'order' or 'law' contravenes a fundamental right, it would be *ultra vires* and void.

2.6 The Information Technology Act

A lot of controversies are going on with respect to the Information Technology Act, 2000 and the Rules framed there under. The Information Technology (Intermediaries Guidelines) Rules, 2011 of the Information Technology Act, 2000, provides for that intermediaries should take down infringing content vaguely defined as 'blasphemous', 'harassing', 'disparaging' or 'hateful'. This runs the risk of violating fundamental rights guaranteeing freedom of expression defined under Article 19 of the Constitution.¹⁰ There are various instances of online censorship---- the blocking of websites, contents and videos on social media and cases are filed under the Information Technology Act, 2000.¹¹

The authorities booked the social media users under the provisions of section 66A of the Information Technology Act, 2000 which punishes anyone for "sending false or offensive messages through communication services" and defines such messages as "grossly offensive or of menacing character." But the fact is that the words 'grossly offensive' or "menacing" could be subject to any interpretation not necessarily reasonable, clearly violates the reasonable restrictions imposed on freedom of speech and expression under Article 19(2) of the Constitution. In fact, the scope of the Act's provisions is so broadly defined that they run afoul of the fundamental right to freedom of speech and expression as they are too general and incapable of precise definition.¹²

2.7 The Contempt of Courts Act

For the maintenance of rule of law and to protect the independence of the courts, law of contempt of court has been framed. However, this does not mean that the decisions of the courts cannot be scrutinized. In India, the powers of contempt vests in the higher judiciary. Section 3 of the Contempt of Courts Act, 1971 restricts the freedom of speech and expression which includes freedom of the media, both print and electronic.

Scandalizing the courts' is an aspect of "criminal contempt" (where the accuser is also the judge); it has long since fallen into disuse in most of the civilised countries around the world, but not in India. There are no rules and no precise circumstances as to when it can be said that the administration of justice is brought into contempt. This part of the law of contempt--- although necessary in extreme cases--- constitutes a standing

⁸ The US First Amendment enacts an absolute prohibition against Congress making any laws that curb free speech, so that a heavy burden lies on anyone transgressing the right to justify such transgression. The clause itself contains no exception and the only restriction of this absolute right has had to be evolved by judicial decisions.

⁹ Jan M. Garon, "The Implications of Information on Data Policy", *IMLR* 61 (2010).

¹⁰ Editorials, "Regulating internet content" *XLVI* (53) 8 *EPW* (Dec.31, 2011).

¹¹ According to data from the second Government Requests Report by the California headquartered firm, India (4765) made the highest requests for restricting content, followed by Turkey (2014), Pakistan (162), Israel (113), Germany (84) and France (80).

¹² Editorials, "We Do Not 'like'" *XLVII* (49) 8 *EPW* (Dec. 8, 2012).

threat to a cherished fundamental right: the freedom of expression. It leaves too much to the predilections of the individual judge.¹³

III. THE EXPANDING AREAS OF FREEDOM OF EXPRESSION IN INDIA

The Supreme Court of India has placed freedom of speech and expression on a higher pedestal than the other freedoms in the matter of restrictions. The reason is because, according to the Supreme Court, freedom of speech and expression is the most precious of all the freedoms guaranteed by our Constitution. The freedom of expression, like the freedom to carry on trade or business cannot be restricted in the interest of the general public on the ground of conferring benefits upon the public in general or upon a section of the public.¹⁴ In recent times a number of Acts and measures expanded the scope of the freedom of expression in India.

3.1 The Constitution of India

The freedom of speech also includes the freedom not to speak. While the Constitution under Article 19(1) (a) guarantees right to freedom of speech¹⁵, the so-called right not to speak is given by Article 20(3), which says that “no person accused of any offence shall be compelled to be a witness against himself”. Here the right not to speak vested in an accused criminal is a jural opposite of the right to speak. But an accused has the liberty to speak, which means that if he speaks his speech can be used in evidence against him. Such liberty of the accused has a co-relative of no right on the part of the State to compel him to speak.¹⁶ The Constitution of India raises the rule against self-incrimination to the status of a Constitutional provision.¹⁷

3.2 The Right to Information Act

The right to information derives from the democratic framework established by the Constitution and rests on the basic premise that since the government is for the people, it should be open and accountable and should have nothing to conceal from the people it purports to represent. In *State of UP v. Raj Narain*¹⁸, Mathew J., had pointed out that “the people of this country have a right to know every public act, everything that is done in a public way by the public functionaries. They are entitled to know the particulars of every public transaction in all its bearing.” In *S P Gupta & others v. President of India & others*¹⁹, the Supreme Court observed that the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a) of the Constitution.

Undoubtedly, in recent times, the RTI has brought about a radical transformation in the awareness about the rights of a citizen and manner of governance. A query about civil maladministration or negligence has generally had an immediate effect and in many cases the grievance raised has been re-addressed even before the query is answered. By far this is the most citizen-friendly legislation post-independence. The authorities have also become aware of the potency of such queries and have become more conscious of their responsibilities.

3.3 Election Commission on Social Media

When the reports came in media that the Election Commission (EC) is going to enforce the model code of conduct (MCC) on social media soon there is an assumption that the media will be gagged and the freedom of speech and expression is under threat. This is an unfounded fear. The EC is a protagonist of the people’s right to information and free expression. If it comes with any order on social media, it can only be (in the context of) with reference to political parties and candidates, and that too in the context of expenditure and objectionable content that violates the MCC. The EC does not, and will not, ever interfere with citizen’s right to free speech and expression.²⁰

The Election Commission (EC) has noted the increasing use of social media by political parties and candidates, and wondered about the cost of the media and the nature of its content. The law requires that every rupee spent on the campaign must be accounted for. This includes the expenditure on different media and if a candidate spends money on it, she is by law duty bound to show it in the mandatory expenditure statements. Again, though free speech is a legitimate concern, but so is the mischief that can be caused by the abuse of media. Some of the content is often so explosive that it can set the country afire. Peace and harmony can be

¹³ Fali S. Nariman, “Who Will Judge the Judges” *India Today*, (May 03, 2013) available at <http://indiatoday.intoday.in/story/fali-s-nariman-reviews-the-state-of-the-nation/1/269094.html> (Visited on May 10, 2014).

¹⁴ Soli, J. Sorabjee, “Trust me, the citizen” *The Indian Express*, Sep. 25, 2013.

¹⁵ “Freedom of speech and expression” is a composite expression which is different from “speech and expression”. Article 19(1) guarantees the right to the former and not to the latter. The difference between clause (a) and other clauses of Article 19(1) is notable in this regard. While other clauses grant the right to do something clause (a) grants the “right to freedom” to do something.

¹⁶ On the other hand, a person has a liability to speak when he is required to file his income tax returns. This is not liberty in the sense in which an accused has liberty to speak.

¹⁷ The guarantee under Article 20(3) in our Constitution is narrower than that in the American Constitution. In the US the protection of self-incrimination is not confined to the accused only it is also applicable to a witness. The position is the same in English law also.

¹⁸ AIR 1975 SC 865.

¹⁹ AIR 1982 SC 149.

²⁰ S. Y. Quraishi, “Difficulty of extending MCC to social media” *The Indian Express*, Oct. 25, 2013.

destroyed. The steps taken prevent these events certainly do not amount to interference with the freedom of expression.²¹

3.4 Ban on Opinion Polls

In a democracy, the right to cast a vote is as important as to get information so that the citizens can make an informed choice. It is because of the right to information that the candidates are bound to declare their assets; opinion polls can also help the citizens to make an informed choice.²² The professed justification for imposing a ban on opinion poll and exit polls is that they would adversely affect electoral prospects of some political parties or candidates or that they may have the effect of unduly influencing the minds of the electors be outside the reasonable restrictions under Article 19 (2).²³

In 1999, Election Commission had issued guidelines to ban publication and telecast of result of opinion polls and was withdrawn by the Election Commission after the decision was attacked by supporters of freedom of speech and expression.²⁴ The publication of opinion and exit polls though permissible to regulate not be banned. “The media, when disseminating results of opinion and exit polls can legitimately be directed to provide the public with sufficient information to enable it to make a judgement about the value of the polls.”²⁵

3.5 Media Trial

The tension between the courts and the media revolves around two general concerns. The first is that there should be no “trial by media”; and the second is that it is not for the press or anyone else to do ‘prejudge’ a case. Justice demands that people should be tried by courts of law and not be pilloried by the press.²⁶ Every effort should, therefore, be made by media to maintain the distinction between trial by media and information media.²⁷ Media is the only means for public to access the information about justice delivery. The US Supreme Court held that the “crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner.”²⁸

The Supreme Court has affirmed that freedom of expression is not restricted to expression of thoughts and ideas and includes the right to receive information and ideas of all kinds from different sources. The value of this restatement is at once qualified by the remark that “free speech (would have), in appropriate cases... to correlate with fair trial. It also follows that in appropriate case(s) one right (say freedom of expression) may have to yield to the other right like right to a fair trial.”²⁹

In *Naresh Sridhar Mirajkar & other V. State of Maharashtra & another*³⁰, the Supreme Court held that the open justice is the rule and in-camera proceedings the exception. The court proceeded to hold, however, that open justice is not an absolute rule and the court may, in exercise of its inherent powers, prohibit the publication of reports. That High Courts have the inherent power to restrain the press from reporting where administration of justice so demanded. Open justice ensured public confidence in the justice delivery system. Rule of law rests on free press.

3.6 None of the Above (NOTA)

Recently, the Supreme Court has recognised the right to a negative vote (even though it will not affect the result) as a part of freedom of expression. The Supreme Court has asserted that just as people have the right to express their preference for a candidate, they also have a right to register a negative opinion. This can be exercised through an extra button on the EVM which says “None of the above” (NOTA). The apex court has directed the Election Commission to introduce the NOTA option on EVMs (and ballot papers).

It is significant that the Supreme Court has gone to the extent of rising negative voting to the status of a fundamental right. It says, “Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 of the Constitution, that is, the right to liberty. This decision was the result of writ petition filed by PUCL in 2004, under Article 32 of the Constitution, questioned the constitutional validity of the conduct of Election Rules 41 (2 & 3) and 49-O, as these violate the secrecy of a vote. It is also requested the court to direct the Election Commission to introduce the NOTA option on EVMs.”³¹

²¹ *Ibid.*

²² In the UK, there is no ban on the publication of opinion polls. Exit polls are carried out, with outcomes released as soon as the polls close. Rather than controlling opinion polls through legislation, there is a process of self-regulation through the British Polling Council’s Code of practice. An opinion poll in the US is protected by the First Amendment commitment to freedom of speech.

²³ *Supra* note 14.

²⁴ Maneesh Chhibber, “Law Ministry tells EC: Use your power to ban opinion polls” *The Indian Express*, Mar. 12, 2014.

²⁵ *Supra* note 14.

²⁶ Rajeev Dhavan, “Publish and be damned- Censorship and Intolerance in India” *The Hindu*, Jul. 14, 2011.

²⁷ *Sidhartha Vashisht (Manu Sharma) v. State (NCT of Delhi)*, AIR 2010 SC 2352.

²⁸ *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980).

²⁹ Sukumar Muralidharan, “A Judicial Doctrine of Postponement and the Demands of Open Justice” XLVII 38 *EPW* (Sep. 22, 2012).

³⁰ AIR 1967, 1 1966 *SCR* (3) 744.

³¹ S. Y. Quraishi, “Pressure of a button” *The Indian Express*, Oct. 12, 2013.

3.7 Prohibition on FM Radio to Telecast News

In 1993, government loosed its monopoly over FM radio by selling blocks of airtime for private programming but retained a monopoly over what matters---- news and current affairs. Until 2011, FM and community radio stations were not permitted to air any programming relating to these areas. The policy guidelines for phase III of the expansion plan for FM and community radio in 2011 allowed private operators to rerun news from All India Radio, but without any additions or changes.³²

In response to a Public Interest Litigation (PIL), the Supreme Court has asked the government to explain why it believes that private radios should not run their own news programming, though private television channels and print media can. The rules in force narrowly define what news is and what is not. The weather, traffic, counselling, coverage of cultural events, examinations, careers and such are defined as 'information', which is exempt from curbs. Indeed, community radios can be operated cheaply and if liberalised, they would proliferate, but the government need not see them as threats. Rather they can be partners in development, spreading education and news locally in ways that the government cannot do from up above and far away.³³

IV. NEW CHALLENGES TO FREEDOM OF EXPRESSION

4.1 Internet Regulation and Freedom of Expression

The internet is as diverse as human thought.³⁴ Internet communication crosses national territorial boundaries. Their global character is one of their principal characters, so much so that, in the view of some commentators, effective regulation by state authorities is impossible.³⁵ Attempts by one country to regulate the content of internet may affect the free speech rights of others, particularly the US where liberty of speech exists. The different decisions of courts of different countries may also cause conflict as the decision given by a court of one country is refused to enforce by another country.³⁶

A number of measures were taken by the government to regulate the content on internet. That the Indian government asked the US to ensure that India-specific objectionable content be removed from the social media sites. The government also wanted these service providers to set up servers in India in order to regulate the content locally. However, such attempts have failed because of failure to fix liability, jurisdictional issues, and clashes in public policies among different nations, anonymity on the web etc. For example, it is not easy to sue a foreign company with an address abroad in our courts; similarly the issue of lack of jurisdiction of Indian courts also arise when a suit is to be filed against a foreign website.

Content screening is a near impossible task considering the nature and vastness of the internet---- but whether material that can be legally considered objectionable should be retained on websites. Existing libel and defamation laws along with the willingness of social networking sites to refer to these national laws to take down content after receiving a complaint are good enough to address the issue. Most popular networking social networking websites reserve the right to take down objectionable or unlawful content.³⁷

At IIGC in New Delhi on October 4, 2012, Kapil Sibal, Union Minister for Communications and Information Technology, re-emphasised that the government did not want to control the internet but sought a consensus from the forthcoming conference on issues of internet governance. R. Chandrasekhar, Secretary, Deptt. Of Telecommunications, admitted that while internationally countries had settled their views on internet governance, in India the process of consultation was just beginning.³⁸

Brazil's new internet law is a good one step in this context. The new law enshrines the principle of "net neutrality", which holds that network operators must treat all traffic equally. It also ensures that 100 million Brazilian internet users enjoy online privacy (by barring providers from rummaging through their idea) and freedom of expression (a court order is required to force the removal of contentious content). Dilma Rousseff, the President, sees the jurisdiction provision as a point of pride.³⁹

4.2 Right to Privacy and Freedom of Expression

The right to one's privacy should always be respected and must be restricted for reasonable cause. In India, there is no such national privacy policy and Indian laws on the subject are not adequate to protect citizens against snooping. Privacy is not explicitly listed as a fundamental right but is an essential component of Articles 19 and 21. Despite debates on an inadequate pending Privacy Bill, 2011, India does not have legislation

³² Editorials, *The Indian Express*, Oct. 19, 2013.

³³ *Ibid.*

³⁴ *ACLU v. Reno*, 521 U.S. 844 (1996).

³⁵ Nigel Warburton, *Free Speech: A very short Introduction* 85 (Oxford University Press, 1st ed., 2009).

³⁶ Dr. Sukanta K. Nanda, "Information Technology Act and applicability of intellectual property right with special reference to law of copyrights", 2 *SCJ* 44 (2002).

³⁷ *Supra* note 10.

³⁸ Subi Chaturvedi, "Keep the UN out of the Net" *The Indian Express*, Oct. 4, 2012.

³⁹ The net closes, *The Economist*, Mar. 29, 2014 available at: <http://www.economist.com/news/americas/21599781-brazils-magna-carta-web-net-closes> (Visited on May 10, 2014).

examining the right to privacy, particularly in electronic communications, though over time the Supreme Court has recognised a qualified right to privacy. The Indian Supreme Court gives constitutional protection to privacy by including it in Article 21 which says that no citizen can be denied his life and liberty except by law, and the right to privacy has been interpreted to be part of that. The overall legal framework has been criticised for affording to the State broad powers of censorship and allowing the use of modern technology for surveillance purposes.

India has a number of laws that offer a basis for the kinds of surveillance that exists in the country. The government's surveillance powers were created by the Indian Telegraph Act, 1885. The colonial legislation allows central and state governments to intercept messages if their content compromises public safety. Section 5 of the Act allows for legal wire tapping, and the guidelines state that only the Home Secretary, either of the Government of India or of a State Government, can give an order for lawful interception. Section 52(2) allows for interception of (telegraphic) messages for various reasons including "public emergency" and "public safety". It has not been created by, or answers to, the Parliament.

Section 7 of the Indian Wireless Telegraphy Act, 1993 gives power to any Officer especially empowered by the Central Government to search any building, vessel or place if there is reason to believe that there is any wireless telegraphy apparatus which has been used to commit an offence. Section 26 of the Indian Post Office Act, 1898 confers powers of interception of postal articles for the "public good". Section 80 of the Information Technology Act, 2000 gives police and senior Government Officials the power to enter any public place and search and arrest without warrant any person found therein who is reasonably suspected or having committed or about to commit an offence under this Act.

4.3 Copyright Law and Freedom of Expression

There are certain forms of possible conflict between freedoms of expression and copyright those have been previously overlooked. The reproduction of copyrighted work could be required for freedom of expression because of the importance copyrighted work has for citizens in a specific cultural space. Creators are uniquely able to express feelings, ideas and opinions. Their works might become part of a cultural space and become imbued with connotation and references that are difficult to convey otherwise. This would open the possibility for copyright to conflict with freedom of expression in a more widespread way than so far considered.

Intellectual property rights protect application of ideas and information that are of commercial value. It may be argued that copyright is a fundamental right under Article 19 (1) of the Constitution. The law of copyright is the extension of right of freedom of speech and expression, which means that if an individual has freedom of speech and expression that person, will naturally get a right to protect that intellectual work as a property. The laws of copyright enhance the value of such speech and expression, because it given an effective protection to the creative speeches and expressions like poetry, criticism etc. from being reproduced without a license. Copyright laws cannot be viewed as a restriction on the freedom of expression, because the freedom is available to express his own views and views of others also, but not to express views of others as his own. Copyright is confined to the expression of ideas and does not extend to the ideas themselves.⁴⁰

Being a species of 'property' copyright has all the characteristic features of property. Copyright implies the existence of "bundle of rights" such as right to own, sue, transfer, translate or adopt the copyrighted work. Property covers a broad range of resources which are united by virtue of their being finite entities, prone to depletion and exhaustion. Depletion and exhaustion of natural resources, leading to scarcity was the motivation behind the allocational impulse of property rights. But, as a resource, information is different from all of these as it does not get depleted by use and bears the feature of non-exhaustion. This depletion does not affect intellectual property because an idea can exist forever and there is an infinite source of ideas. Use neither depletes nor exhausts an idea.⁴¹

Writing and thought do not happen in a vacuum. The creation of an idea has an unmistakable social and historical component. Ideas, knowledge and thought of a person are crucially dependent on ideas and thoughts of the preceding generation. Ideas are therefore fundamentally intergenerational and have a social and cultural constituency. To enforce copyright laws is to prevent people from making peaceful use of similar ideas and information they may possess.⁴²

4.4 International Measures Taken to Overcome the Challenges

Freedom of expression is guaranteed by international treaties, but countries differ significantly in their view of the meaning of "free expression" and how it should be protected. At the basic level, protection for free expression is given in a number of organic documents such as the United Nations' International Covenant on Civil and Political Rights (ICCPR)⁴³, the European Convention for Human Rights (ECHR)⁴⁴, the American

⁴⁰ Dr. Sreenivasulu N.S. and Somashekarappa "Freedom of Speech & Expression and the Issues of Intellectual Property and Copyright", *Manupatra* available at: <http://manupatra.com/roundup/370/Articles/Freedom%20of%20Speech.pdf> (Visited on May 10, 2014).

⁴¹ Rajshree Chandra, "Intellectual Property Rights: Excluding Other Rights of Other People" XLIV (31) *EPW* 87 (2009).

⁴² *Ibid.*

⁴³ Article 19 of the ICCPR provides,

Convention on Human Rights (ACHR)⁴⁵, and the African Charter on Human and Peoples' Rights (ACHPR)⁴⁶. The basic structure is that individuals are guaranteed the right to receive information and to freedom of expression through media of their choice. This right, however, is tempered by permissible restrictions to protect national security, individual privacy and reputation, the impartiality of courts, and the like.⁴⁷

Current internet governance is not democratic and inclusive as the framework of internet governance (IG) is imperfect, especially with the United State's strong influence and legal proximity to IG-related mechanisms. European Union has rightly pointed out that the Internet Corporation for Assigned Names and Numbers (ICANN) is a good place to start, decentralization and renegotiating ICANN's cosy relationship with the United States are some of the steps that need to be undertaken. While United Nations done excellent work in peacekeeping, developing friendly relations with among nations, it has severe limitations of expertise, speed and above all, transparency, when it comes to decisions related to internet policy.⁴⁸

Countries such as Russia and China, and some States in the Middle East, are attempting to increase the UN's power to regulate the internet through the ITU. Since much of these would be done through Treaties, they could overrun domestic laws and policies, making recourse virtually impossible for Indian citizens.⁴⁹ UN body makes policies and laws which take the form of Treaties and Conventions. Following this, national laws such as the Indian Telegraph Act, TRAI Act and Information Technology Act need to be amended and future legislation will need to ensure compliance. In India, a domestic law such as Information Technology Act and the Rules can be appealed, and courts will take cognizance.... to protect the individual rights of citizens, free speech and privacy. However, if an international Treaty allows for example, "blocking of content based on cultural sensitivity", then the bureaucracy can interpret it broadly as it wishes without any recourse for Indian citizens under the Indian legal system.⁵⁰ Listen to those affected by a policy is the primary requirement for a policy to become effective. Policies should never be allowed to become a Treaty that can beyond the provisions of local laws, disregard individual identities and not *ultra vires* the Constitution of a country.

Internationally, the starting point for an examination of the right to privacy is the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 12 of

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1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

⁴⁴ Article 10 of ECHR provides,

1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁴⁵ Article 13 of the ACHR provide,

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offences punishable by law.

⁴⁶ Article 9 of the ACHPR provides,

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express disseminate his opinions within the law.

⁴⁷ Kurt Wimmer, "Toward a World Rule of Law: Freedom of Expression" 603 *ANNALS, AAPSS* 203 (2006).

⁴⁸ Subi Chaturvedi, "For an unfettered Internet" *The Hindu*, (Feb. 18, 2014).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

UDHR and Article 17 of ICCPR stipulate that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Centrally, “everyone has the right to protection of the law against such interference or attacks”. Somewhat more expansive, Article 8 of the European Convention on Human Rights stipulates, (1) everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of the rights and freedoms of others.

The revelations made by Edward Snowden about the US government snooping led to wide spread outrage about surveillance, and the recent Net Munal Conference in Brazil was convened as a direct consequence. A non-binding resolution there indicates that most stakeholders (nations, corporations and civil society organisations) would prefer a single multi-stakeholder body in charge. However, an influential minority, including Russia, China, Iran and India, wants “multi-lateral management” and therefore, refused to sign that resolution.⁵¹ The ICANN is the organisation that maintains the net’s domain name system. It is a non-profit organisation funded by the US Department of Commerce. The contract to run the system will end on September 30, 2015, which is when the US would like to hand over supervision. By then there will have to be some agreement on the successor system. A way around this impasse will have to be found within the deadline.⁵²

The recent *Donald Ashby*⁵³ decision of the European Court of Human Rights has revived interest in the relationship between copyright and freedom of expression. Article 10 of the European Convention on Human Rights protects freedom of expression as a qualified right. In *Ashby* the court explicitly held that the appellants’ activities fell within the exercise of the right of freedom of expression and that the conviction interfered with that. It was therefore necessary to consider whether the interference was justified. Copyright can engage freedom of expression more subtly. Depending on the scope of copyright and the nature of the remedies against infringers (or in some cases even against non-infringers), when applied to any particular set of facts there are many ways in which copyright can step over the line and disproportionately interfere with Article 10 rights.⁵⁴ It is difficult, perhaps impossible, to identify clear dividing lines between proportionate and disproportionate interference. This is partly because copyright is itself regarded, at least in European human rights law, as a property right that has to be weighed in a balancing exercise with other rights such as freedom of expression.⁵⁵

V. CONCLUSION

In democracies, it follows that citizens must guard against violation of their rights. Freedom of speech and expression is often regarded as an integral and universal concept in modern liberal democracies. The Supreme Court of India, in its decision regarding freedom of expression, has derived valuable assistance from the decisions of courts from other jurisdictions, especially those of the US, UK and Europe. It may be impossible for a world rule of law on free expression that goes beyond the floor established by the major human rights treaties binding on virtually all countries. The “age of information” is a ground reality today and a lot of power rises with the electronic media.

The internet is a zone exempt from an international legal framework or even common rules governing it. Before the emergence of the internet each country could set its own ceiling for the protection of expression without having an adverse impact on the other countries that might make a different choice. In India, the debate on net neutrality is noticeable in its near-total absence. Reportedly, Indian ISPs would also prefer to throw out the very concept. Brazil recently passed an exemplary internet governance regulation that enshrined net neutrality in law. India should do the same.

In the age of social media, reputations are more vulnerable than ever before. Laws dealing with protection of reputation vary from country to country. While the right to reputation, a facet of the right to life under Article 21 of the Constitution, must be protected, so must free speech be liberated from the constant threat of criminal law.⁵⁶ India needs national privacy policy to protect individual’s right in the information-communication age. The effect of the Human Rights Act and the ECHR is one of the challenges which will be furthered by the implementation of the EC Directives in the harmonization of copyright law and freedom of expression.

While the relationship of freedom of speech to copyright protection has increasingly attracted the attention of copyright lawyers, the topic has rarely been discussed by writers on freedom of speech. The courts, even in the US, have almost always rejected arguments that the scope of copyright is constraint by free speech considerations. Therefore it is suggested that stressed should be given on balancing copyright and free speech rights.

The legal machinery has tried to keep pace with the growing challenges faced by the ever expanding scope of the freedom of expression in the 21st century, but the present essay throws light on the fact that the legal framework is still inadequate to adapt itself with the abuse of this freedom in today’s era of information and communication technology.

⁵¹ The US insists on a “multi-stakeholder” oversight body, rather than one solely controlled by governments through the UN’s International Telecommunication Union (ITU) or some such.

⁵² Editorials, “The future of the internet” IV (32) *Sunday Business Standard* (May 04, 2014).

⁵³ *Ashby Donald and others v. France* (Appl. Nr. 36769/08).

⁵⁴ Graham Smith, Ten ways in which copyright engages freedom of expression, Part 1, Sliders one to five, Inforrm’s Blog, The International Forum for Responsible Media Blog available at: <http://inforrm.wordpress.com/2013/05/04/ten-ways-in-which-copyright-engages-freedom-of-expression-part-2-sliders-six-to-ten-graham-smith/> (Visited on May 10, 2014).

⁵⁵ *Ibid.*

⁵⁶ Madhavi Goradia Divan, “How to repair a reputation” *The Indian Express* (Oct. 5, 2012).