Obscenity, Internet, Free Press and Free Speech: Constitutions of India and the United States

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All major constitutional democracies recognize the important role of free speech in preserving democratic values. In countries with a strong tradition of judicial review, such as the United States and India, free speech is a constitutionally-protected right that is resolutely upheld by the supreme courts. In modern times regulating obscene speech on the internet has challenged this cherished democratic ideal. The decision makers, legislative and judicial, face delicate problems of balancing State interests in protecting minors from obscene speech while upholding the ideal of free speech. This article examines the experience of the United States Supreme Court and the Indian Supreme Court in this area. Although the core of the debate in regulating obscene speech in the United States has concentrated on pornographic or otherwise similar speech, the debate in India has not reached that level. However, the facts of one recent Indian case suggest that the debate is moving in the same direction as America. Obscene speech doctrine in the United States and India remains an open debate, even though the American doctrines are more developed because numerically more and factually diverse cases have been considered by the United States Supreme Court on this issue. This article argues that the Indian obscene speech doctrine, as articulated by the Indian Supreme Court, is moving closer to the American doctrine, although it has not completely adopted the American rules when regulating obscene speech in India. The Indian Supreme Court has cited with approval many leading United States Supreme Court decisions on the point. The existing test for judging obscene speech in India has benefitted from the American doctrine. This article identifies patterns of judicial reasoning, especially two 2006 Indian Supreme Court decisions that suggest that the Indian obscene speech doctrine might be headed in the direction of American doctrine.

The United States Constitution protects the freedom of speech and that of the press.[1]

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[1] Amendment I, United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

So does the Constitution of India,[2] subject to certain limitations mentioned in the text of the Indian Constitution itself.[3] These limitations must be *reasonable* and can only be imposed, by law, in the interests of national security, foreign relations, public order, and so on.[4] Any limitation imposed on this right beyond that authorized by the Indian Constitution can be judicially reviewed by the Indian Supreme Court[5] and can be deemed to be void.[6] The Indian Supreme Court has interpreted the Indian free-speech clause as including freedom of the press[7] and determined that the imposition of pre-censorship on the press violates the freedom of the press.[8] The press therefore is constitutionally protected against pre-censorship or prior-restraints in India.

Political speech on the internet has been regularly subjected to censorship in authoritarian regimes with the obvious objective of silencing political dissent.[9] The leading democratic States where freedom of the press is resolutely upheld seem to be agreed that content on the internet needs to be regulated. The question therefore is not whether internet content should be regulated but how it should be regulated.[10] Democratic nations have started resorting to the same technological means as authoritarian States in order to control activities defined by law as illegal on the internet.[11] The technique used for this online censoring is called "filtering".[12] By "filtering out" certain prohibited content, speech may be regulated on the internet.[13] While most countries agree on principle that content on the internet must be regulated,[14] the divergence of views is reflected in two points – the content that is subject to regulation and the extent of such regulation.[15] This has clear implications for the right of a free press.

The free-speech debate on the internet is challenging the traditional understanding of the idea of freedom of speech and freedom of the press. In the United States, for example, it

[2] Article 19, § 1, cl. (a), Constitution of India: "All citizens shall have the right to freedom of speech and expression".

[3] Article 19, § 2: "Nothing in [Article 19, § 1, cl. (a)] shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence". Ibid.

[4] Ibid.

[5] Article 32, § 1: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed". Ibid.

[6] Article 13, § 2: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void". Ibid.

[7] Romesh Thapar v. State of Madras, AIR 1950 SC 124 (India) at 126-127.

[8] Brij Bhushan v. State of Delhi, AIR 1950 SC 129 (India) at 134 (Sastri, J for the Court, "There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Art. 19(1)(a)").

[9] Renee Keen, "Untangling the Web: Exploring Internet Regulation Schemes in Western Democracies", *San Diego International Law Journal*, XIII (2011), pp. 351-352 (2011); Elaine M. Chen, "Global Internet Freedom: ‚Can Censorship and Freedom Coexist?", *DePaul-LCA Journal of Art & Entertainment Law*, XIII (2003), pp. 229, 237, 247-248 (Chen surveys Cuba, Burma, Syria, Saudi Arabia, Tunisia, Vietnam, Yemen, and China).

[10] See, for example, Derek E. Bambauer, "Filtering in Oz: Australia's foray into Internet Censorship", *University of Pennsylvania Journal of International Law*, XXXI (2009), p. 530. Bambauer makes a similar point in the Australian context. It should be noted that unlike the Indian and the United States constitutions, the Australian Constitution does not have a bill of rights that gives constitutional protection to the rights of the press.

[11] Ibid.

[12] Derek E. Bambauer, "Cybersieves", *Duke Law Journal*, LIX (2009), pp. 382-383.

[13] Keen, note 9 above, p. 358

[14] Ibid., p. 379

[15] Ibid.

has been argued that the First Amendment should protect *everyone's right to use the internet as a technology*.[16] The argument contends that the right to speak is protected by the First Amendment. The internet is a means to exercise that right and therefore should receive full First Amendment protections. This argument supports the right to speak irrespective of the identity of the speaker. Others have suggested that the press, being an important democratic institution, must be given special institutional First Amendment rights.[17] If this be true, then websites of newspapers would have a heightened level of protection on the internet in comparison with a blogger who might effectively be doing the same thing. Furthermore, if a journalist writes an article on her blog, she might not receive the same level of First Amendment protections as she would have if her article were published on the newspaper web-site. Others have argued that the First Amendment does not protect technology or institutions; it only protects speech[18] and should continue to protect speech neutral to the identity of the speaker.[19]

Evidence from the framing era, however, does not support the conclusion that freedom of the press was protected as an institutional right.[20] In the early 1800s *freedom of the press* continued to mean everyone's freedom to use the press as a technology,[21] which remained a widely accepted model until the mid-1800s.[22] Press was seen as a technology that everyone has a right to use.[23] The United States Supreme Court adopted the *press as a technology* model in 1931.[24] After 1970 however, three views seem to have emerged.[25] One view treats all speakers as equal, the second treats those speakers that use the press as special, and the third treats the institutional press as special.[26] It is important to note that with the passage of time the meaning of the phrase *freedom of speech* has come to mean *freedom of expression* and covers all means of communication, including the internet.[27] The long standing view of the *press as technology* is one that protects everyone's right to use the press in order to freely express one's ideas. This view, however, does not seem to encompass the internet as a technology.

[16] Eugene Volokh, "Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today", *University of Pennsylvania. Law Review*, CLX (2012), p. 462; Chen, note 9 above.

[17] Ibid. at p. 462; see also, for example, Frederick Schauer, "Towards an Institutional First Amendment", *Minnesota Law Review*, LXXXIX (2005), p. 1256

[18] See, for example, Dale Carpenter, "The Value of Institutions and the Value of Free Speech", *Minnesota Law Review*, LXXXIX (2005), pp. 1407, 1409

[19] Ibid., pp. 1409-1410 (Carpenter argues that free speech jurisprudence is "agnostic about message" and "this agnosticism has extended to speaker identity". Thus he argues that "The First Amendment is agnostic about speakers, demanding that they be neither restricted nor given special privileges based on their identity").

[20] Volokh, note 16 above, p. 469

[21] Ibid. at 484

[22] Ibid. at 496

[23] Ibid. at 497-98 (Volokh finds that the reasoning of the decided court cases of that era "... suggests that the press was indeed seen as a technology that 'every citizen' had a right to use, and not as an industry whose members alone had a right to publish").

[24] Ibid. at 505. See also Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931)

[25] Volokh, note 16 above, p. 505

[26] Ibid. (Volokh argues that the "all-speakers-equal view" gives the same protection to all speakers' right to speak, write and print. The "mass-communication-more-protected view" gives special protections to all speakers who use the press as a technology. The "press-as-industry-specially-protected view" gives special protections to the institutional press).

[27] Ibid., p. 477; Chen, note 10 above, p. 237 (Chen argues that the internet is a powerful tool for democratization and a forum for free exchange of ideas); see also Article 19, § 1, cl. (a), Constitution of India, note 2 above (The text of the free-speech clause of the Indian Constitution gives broader protection to *freedom of speech and expression*, which the Indian Supreme Court subsequently interpreted as inclusive of the freedom of press).

Different methods have been used by various countries to regulate content on the internet. The Australians have used a statutory classification system[28] but they encountered the problem of *transparency*.[29] The people had no say in the decision making process under which the Government deemed certain websites prohibited; they were initially tolerant of governments, but eventually grew suspicious.[30] The United States passed the Communications Decency Act of 1996 (CDA) prohibiting internet content material that was patently offensive to minors;[31] in 1997 the CDA was declared unconstitutional by the United States Supreme Court as being contrary to the First Amendment free speech protections.[32] The British took a different approach by setting up a non-governmental body to ensure citizen participation.[33] Britain did not adopt a special law, as had the United States, or put in place a classification system as the Australians[34] had done, but allowed the people to self regulate.[35] The British have, so far, been the most successful of the three,[36] perhaps because of active public participation.[37] India, being a constitutional democracy with a strong tradition of judicial review, can learn important lessons from these experiences in regulating content on the internet.

The experience of the United States is particularly useful for India. Freedom of speech is a cherished constitutional freedom in both countries. Their constitutions and supreme courts are committed to protecting the freedom of speech and have regularly struck down laws that violated freedom of speech. The United States Supreme Court has decided several cases concerned with regulating speech on the internet, whereas the Indian Supreme Court has yet to do so. It is instructive therefore for Indians to examine the experience of the United States in order to better understand how to address the problem of regulating obscene speech on the internet.

[28] Volokh, note 16 above, p. 477 (The Australian Communications and Media Authority (ACMA), which is a governmental regulatory body, can require content to be removed from the internet if such content qualifies as "prohibited" based on the classification system developed by the Australian Government. A rating system has been developed for this purpose).

[29] Ibid. at p. 360; see also Bambauer, note 12 above, p. 386 (Bambauer proposes "The Framework" to evaluate the legitimacy of internet filtering. The Framework asks four questions, viz: (1) is the country *open* about internet censorship; that is, does the government tell the people *that* they are censoring the internet and *why* they are censoring the internet; (2) is the State *transparent* about what is being censored on the internet; (3) is the filtering *narrow*; that is, is the filtering over-inclusive or under-inclusive; and (4) the degree of *citizen participation* in order to hold the censors *responsible*?).

[30] Keen, note 9 above, pp. 359-60; for a detailed analysis of internet censorship in Australia, see Bambauer, note 1 above.

[31] Ibid., p. 363

[32] Ibid., p. 364; see also Reno v. ACLU, 521 U.S. 844 (1997)

[33] Ibid., p. 366

[34] Ibid.

[35] Ibid., p. 368 (Keen records that in there is no internet specific regulation in the United Kingdom. The people are allowed to self regulate the content on the internet. The government does take an active role in the operation of the Internet Watch Foundation (IWF), the non-governmental body put in place to regulate content on the internet).

[36] Ibid., p. 369

[37] Ibid., p. 371

OBSCENE SPEECH, THE FIRST AMENDMENT, AND THE UNITED STATES SUPREME COURT

It is useful to discuss *Miller v. California*[38] (hereinafter "*Miller*") at the outset because this case is central to a comparative analysis of Indian and American doctrines on free speech and obscenity. Two basic questions, common to both jurisdictions, may be posed: first, whether or not obscene speech is constitutionally protected and second, what exactly is obscene speech? Both questions were answered by the United States Supreme Court in *Miller*. This case involved the conviction of the appellant under a State criminal statue for selling sexually explicit materials.[39] In *Miller* the Court recognized that the State had a legitimate interest in prohibiting the dissemination or exhibition of obscene material[40] and held that obscene speech does not enjoy First Amendment protection.[41] But the Court was struggling to find a suitable standard that could be used to decide just what obscene speech is.[42] Conscious of this problem, the Court scaled back the scope of this holding by adding a qualification: regulating any form of expression has inherent dangers,[43] and thus laws regulating obscene materials must be carefully limited.[44] The Court then laid down a three prong test (hereinafter: "the Miller Test") to decide what amounts to obscene speech:[45]

(i) whether the average person applying *contemporary community standards* would find that the work, *taken as a whole*, appeals to the prurient interest[46];

(ii) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law[47];

(iii) whether the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value[48] (emphasis added).

Two key phrases that appear in *Miller* should be noted – *taken as a whole* and *contemporary community standard*. "*Taken as a whole*" appears in the Miller Test twice and appears at several other key places in the *Miller* decision.[49] The Court, in *Miller*, rejected the idea of a *uniform national standard* to decide what appeals to prurient interests or is patently offensive.[50]

[38] 413 U.S. 15 (1973).

[39] Ibid., p. 18.

[40] Ibid. (Burger, CJ for the Court, "This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material").

[41] Ibid., p. 23 (Burger, CJ for the Court, "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Ibid., p. 36.

[42] Ibid. (Burger, CJ discusses precedents of the Court and concludes that the Court has never been able to agree on a standard that can be used to determine what constitutes obscene speech and what does not).

[43] Ibid., pp. 23-24 (Burger, CJ for the Court, "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited"). Ibid., p. 36.

[44] Ibid., at 24.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Ibid., p. 24 ("A state offence must also be limited to works which, **taken as a whole**, appeal to prurient interest in sex, which portray sexual conduct in a patently offence way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value") (emphasis added); Ibid., p. 34 ("The First Amendment protects works which, **taken as a whole**, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represents") (emphasis added).

[50] Ibid., p. 30 (Burger, CJ for the Court: "Under a National Constitution, fundamental First Amendment

The Court was conscious of the vastness of the nation and diversity of moral norms of different communities[51] and thus approved of the *contemporary community standard* rule to determine whether the speech as a whole is considered appealing to prurient interests.[52]

Miller was decided in 1973. Two decades later, in 1996, the CDA[53] was enacted in order to specifically regulate content deemed unsuitable for minors on the internet. The *indecent transmission* provision and the *patently offensive display* provision are important for this discussion. The first provision criminalized knowingly transmitting obscene or indecent message to any recipient under 18 years of age,[54] and the other prohibited knowingly sending or displaying a patently offensive message in a manner that is available to a person under 18 years of age.[55] The *patent offensiveness* of a message was to be measured by *contemporary community standards*.[56] *Miller* held that using *contemporary community standards* to judge the obscenity of speech was acceptable. But *Miller* was decided in context of content being distributed in print. The CDA extended the standard to the internet. In *Reno v. ACLU*[57] (hereinafter "*Reno*") the United States Supreme Court had the occasion to examine the use of the extension of the *contemporary community standard* rule from print to the internet.[58] The Court recognized that internet as a technology is different from other forms of communications.[59] The chances of minors accidentally encountering obscene content on the internet were minimal.[60] In *Reno* the Court found that the challenged provisions of the CDA amounted to content-based blanket restrictions on speech[61] and that the terms *indecent* and *contemporary community standards* were vague.[62] This vagueness together with the criminal sanctions in the statue would result in a chilling effect on speech.[63] Accordingly, the provisions were declared unconstitutional,[64] less restrictive

limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interests' or is 'patently offensive'").

[51] Ibid., p. 32 (Burger, CJ for the Court: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the public depiction of conduct found tolerable in Las Vegas, or New York City").

[52] Ibid., p. 37 (Burger, CJ summarized the holding of the case and held: "... that obscenity is to be determined by applying 'contemporary community standards'").

[53] Communications Decency Act (CDA) of 1996, 47 U.S.C. § 223. Jack E. Brown, "New Law for the Internet", *Arizona State Law Journal*, XXVIII (1996), p. 1246. Brown comments that the CDA was an emotionally-charged expression of parental concern regarding the ability of children to access obscene material on the Internet.

[54] 47 U.S.C. § 223(a).

[55] 47 U.S.C. § 223 (d).

[56] Ibid.

[57] 521 U.S. 844 (1997).

[58] Ibid., p. 849 (Justice Stevens speaking for the Court).

[59] Ibid., p. 854 (Unlike communications received by radio or televisions, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial").

[60] Ibid.

[61] See note 57 above, p. 868 (holding that, "... the CDA applies broadly to the entire universe of cyberspace ... the CDA is a content-based blanket restriction on speech ...").

[62] Ibid., p. 871 (holding that "Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean") (internal citations omitted).

[63] Ibid., p. 872 (holding that "The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images").

[64] Ibid., p. 874 (holding that "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. *That burden on adult speech is unacceptable if less restrictive alternatives would*

means to regulate such speech being available, and the impugned law was *overbroad*.[65] However, in *Reno* the Miller Test was affirmed by the Court as the controlling test for judging obscenity of the speech.[66] The problem was with the application of the Miller Test. Thus, it was held that the CDA presented a greater threat of censoring speech that in fact falls outside the scope of the statue.[67]

Note that the United States Supreme Court was acutely aware that technology had changed and the challenges of interpreting First Amendment had changed along with it. Because the Miller Test provided time-tested guidance in the Court's obscenity jurisprudence and no other alternative test was articulated, the Court decided to continue applying the test but to adjust the test to future needs. This awareness of changing technology and consequent challenges in interpreting the First Amendment were manifest in the *United States v. Playboy Entertainment Group, Inc.*[68] (hereinafter: "*Playboy*").

In this case the *scrambling provision* of the Telecommunications Act of 1996[69] was challenged as an unnecessary content-based restriction that violated the First Amendment.[70] The challenged legal provision was enacted to address the problem of *signal bleed*.[71] In *Playboy* the Court affirmed the legitimate state concern about regulating content that was admittedly pornographic into homes where children might see or hear it against the wishes of their parents.[72] Because the impugned law in this case singled out a specific speaker to suppress communication between a speaker and willing adult listeners[73] that enjoyed First Amendment protections,[74] that law was declared unconstitutional not because the speech in question was constitutionally protected, but because the law regulating the speech was not narrowly tailored.[75] The Court observed that one day perhaps digital technology would solve the problem of *signal bleed*.[76] One notable point in *Playboy* was the Court's

be at least as effective in achieving the legitimate purpose that the statute was enacted to serve") (emphasis added); see also Ibid., p. 880, where the government's argument to uphold the CDA was analogized to the argument that the State could ban leaflets as long as individuals are free to publish books.

65 Ibid.

66 Ibid., p. 872.

67 Ibid., p. 874 (holding that "In contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, calls outside the statue's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection"); Chen, note 16 above, p. 255, criticizes the Court's approach in *Reno* as a "medium-specific approach in analyzing a new form of communication".

68 529 U.S. 803 (2000).

69 47 U.S.C. § 561 (this provision required cable television operators who provide channels primarily dedicated to sexually oriented programming to either fully scramble or fully block such channels or to limit the availability of such channels to hours when children are unlikely to be viewing); note 61 above, p. 806.

70 See note 57 above, p. 807.

71 Ibid., pp. 807-808 (Playboy Entertainment Group transmitted its adult content in scrambled form that could be descrambled by using a convertor to be provided by the operators upon subscription. But scrambling technology was not perfect. Therefore, one could be exposed, willingly or unwillingly, to audio and/or video that would *bleed* through the scrambled transmission which in turn caused Signal Bleed. To address this problem the impugned law was enacted that restricted the transmission to certain designated hours in the day).

72 Ibid., p. 811 ("... when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it ... The overriding justification for the regulation is concern for the effect of the subject matter on young viewers").

73 Ibid., p. 812.

74 Ibid.

75 Ibid., p.813.

76 Ibid., p. 808.

observation that shielding the sensibilities of listeners by a content-based ban on speech was completely against First Amendment jurisprudence even when no less restrictive alternative existed.[77] This particular observation is a common point in the obscenity jurisprudence of both the Indian and United States Supreme Courts, as we will see below.

In response to *Reno*[78] the Child Online Protection Act[79] (hereinafter: "COPA"), enacted in 1998, provided that: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both".[80] Material harmful to minors was to be judged *using contemporary community standards*.[81] In *Ashcroft v. ACLU*[82] (hereinafter: *"Ashcroft"*) the narrow question before the United States Supreme Court was whether this use of *contemporary community standards* in COPA was unconstitutional.[83] The history of the Miller Test was briefly discussed,[84] the *contemporary community standards* approach was affirmed, and the sensitive-person approach was rejected.[85] The Court distinguished between CDA and COPA and clarified its holding in *Reno*. In *Reno* the CDA was held overbroad in its language because the use of *contemporary community standards* magnified its impact.[86] COPA was not overbroad in its language and used a standard very similar to the Miller Test to define obscenity.[87] The presence of a *serious value* prong within COPA[88] proved to be decisive. COPA being sufficiently narrow (*serious value* prong plus *prurient interest* prong), its use of *contemporary community standards* was upheld.[89] Thus the Court held:

[77] Ibid.

[78] See note 82 below, p. 569; see also ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008) at 185.

[79] 47 U.S.C. § 231(deals with restriction of access by minors to materials commercially distributed by means of world wide web that are harmful to minors).

[80] 47 U.S.C. § 231(a)(1): "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minor shall be fined not more than $50,000, imprisoned not more than 6 months, or both".

[81] 47 U.S.C. § 231 (e)(6)(A): the term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that the average person, applying contemporary community standards, would find, **taking the material as a whole** and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest (emphasis added).

[82] 535 U.S. 564 (2002).

[83] Ibid., p. 566 (Justice Thomas for the Court).

[84] Ibid., p. 574 (in the nineteenth century the English test laid down in Queen v. Hicklin, [1868] L.R. 3 Q.B. 360, also called the Hicklin Test, was adopted by courts in the United States. This test was rejected in Roth v. United States, 354 U.S. 476, because it was unconstitutionally restrictive of the freedoms of speech and press).

[85] Ibid.

[86] Ibid., p. 578 ("The tremendous breath of the CDA magnified the impact caused by differences in community standards across the country, restricting Web publishers from openly displaying a significant amount of material that would have constituted protected speech in some communities").

[87] Ibid.

[88] 47 U.S.C. § 231 (e)(6)(C): The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that **taken as a whole** lacks serious literary, artistic, political, or scientific value for minors (emphasis added).

[89] See note 82 above, p. 580 ("When the scope of an obscenity statute's coverage is sufficiently narrowed by a "serious value" prong and a "prurient interest" prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment").

"We hold only that COPA's reliance on community standards to identify "material that is harmful to minors" does not *by itself* render the statute substantially overbroad for the purposes of the First Amendment"[90] (emphasis supplied).

Note that not the use of *contemporary community standards* but the breadth of the speech that the law covers is more important for the United States Supreme Court. The Court is primarily concerned with ensuring that the law regulating obscene speech is applicable only to the speech that is deemed harmful for minors. Any undue restriction on the adult right to access adult speech is rejected even though the Court consistently holds that adult speech does not have any First Amendment protection. If the speech to which the law is applicable is sufficiently narrowed, the Court permits the use of *contemporary community standards*. The presence of a *serious value* prong creates a slight paradox. It is unclear whether *contemporary community standards* are to be used to decide whether the speech is obscene or whether it is lacking any serious value:

[1]. If *contemporary community standards* are to be used to decide whether the speech appeals to prurient interests and the law is narrowed to apply only to speech that appeals to prurient interests, we have a self-fulfilling prophesy. *Contemporary community standards* could either be used a pre-legislative tool to identify the speech that appeals to prurient interests and then a law can be drafted, sufficiently narrow, prescribing means to regulate such speech. Or the legislature could decide that all speech that appeals to prurient interests is subject to regulation by law, put in place a mode of regulating such speech in the law, and provide *contemporary community standards* to identify such speech. *Contemporary community standards* is a tool to identify the speech to which the law should be applied. It is unclear how a law that permits the use of *contemporary community standards* as a tool to identify the speech that would be subject to regulation could be not be over-broad while the legislature has no means of predicting what would be breadth of the speech to which the enforcers of the law would actually end up applying the means provided in the law to regulate the speech.

[2]. If *contemporary community standards* are to be used to decide whether the speech is of *serious value* and the law is narrowed to apply only to speech that appeals to prurient interest, the speech appealing to the prurient interest can be regulated and the *serious value* prong is of no particular use, except perhaps as a defense. This defense is not, however, available under the law.[91]

[3]. If *contemporary community standards* are to be used to decide whether the speech appeals to a prurient interest, by virtue thereof the speech may be regulated and the *social value* prong again would be of no particular use.

[90] Ibid., p. 586; see also Ibid., p. 578, holding that "COPA, by contrast, does not appear to suffer from the same flaw because it applies to significantly less material than did the CDA and defines the harmful-to-minors material restricted by the statute in a manner parallel to the *Miller* definition of obscenity". Substantial reliance was placed on the *Miller* test articulated by the Court in *Miller v. California*, 413 U.S. 15 (1973) where a three part test to determining obscenity was laid down.

[91] 47 U.S.C. § 231 (c) (Affirmative Defenses); The Third Circuit Court of Appeals in ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008) held that: "... implementation of COPA's affirmative defenses by a Web publisher so as to avoid prosecution would involve high costs and also would deter users from visiting implicated Web sites. It is clear that these burdens would chill speech and thus that the affirmative defenses fail a strict scrutiny analysis".

It is important to keep in mind these problems attached to using *contemporary community standards* as a legal tool (as against a pre-legislative tool) to identify obscene speech that would be subject to regulation because the Indian Supreme Court cites approvingly the use of *contemporary community standards* for similar purposes. In fact, as we will see below, the Indian Supreme Court developed the *societal standard*, which is very similar to the *contemporary community standards*.

The case *U.S. v. American Library Ass'n, Inc.*[92] merits discussion because the law under challenge was the Children's Internet Protection Act,[93] which provided that a public library cannot receive federal funds to provide internet access unless it installs software to block images that constitute obscenity.[94] The law was upheld.[95] There were several points in this decision that are peculiar to American constitutional law and are not relevant for this discussion.[96] The Court's ruling on the *erroneous blocking* issue is pertinent.[97] The following passage is worth of reproduction in full:

> When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site ... and the Solicitor General stated at oral argument that a "library may ... eliminate the filtering with respect to specific sites... at the requires of a patron ... The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether," ... and further explained that a patron would not "have to explain ... why he was asking as site to be unblocked or the filtering to be disabled,"... The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them ... But the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment".[98]

As regards this erroneous-blocking issue, in *ACLU v. Mukasey*[99] (hereinafter: "*Mukasey*"), the Third Circuit has held that filters are better way of advancing the congressional interest for which COPA was enacted.[100] Filters are more effective because parents can tailor them to their own values and needs instead of using COPA's "one size fits all" approach.[101] The use of the *contemporary community standards* in COPA was held to be overbroad.[102]

92 539 U.S. 194 (2003).
93 Ibid., p. 199 (Chief Justice Rehnquist speaking for the Court).
94 Ibid.
95 Ibid.
96 See, for example, Ibid., p. 211 (on the point of the authority of the United States Congress to enforce federal law, policies and programs by making the availability of federal funds contingent on certain conditions as long as those conditions do not violate the United States Constitution, the Court held that: "Within broad limits, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."); and ibid., p. 206 (on the point of the "public forum" rule whereby the government cannot regulate speech on government property if it opens up the same for use as a public forum, the Court held that, "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak").
97 Ibid., pp. 208-209.
98 Ibid.
99 534 F.3d 181 (3d Cir. 2008).
100 Ibid., p. 203.
101 Ibid.
102 Ibid., p. 206 (Greenberg, Circuit Judge for the Court: "... COPA's application of 'community standards'

The doctrine of the United States Supreme Court insists, on one hand, that obscene speech has no First Amendment protection but believes that the law to regulate this must be narrowly tailored. The legislators thus face two challenges. They must examine the technology available and then ensure that all the constitutional requirements are met. Two distinct methods of censoring content on the internet in the United States have been identified – soft censorship and hard censorship.[103] The State can censor content on the internet directly,[104] use intermediaries, or create a system of incentives for private bodies to censor content on internet.[105] Hard censorship occurs when the State exercises direct control over the internet infrastructure or forces the internet intermediaries to do so by law.[106] Unless narrowly tailored, the United States Supreme Court will declare it unconstitutional.[107]

Soft censorship occurs when the State employs indirect methods to block or prevent access to internet content.[108] The State can create a financial or economic incentive for the private intermediary to regulate content on the internet,[109] or it could establish a false pretext whereby one type of content is professed to be regulated but in effect the breadth of the content actually regulated is wider than the pretext,[110] or the State could persuade the private intermediary by creating indirect pressure of the intermediary.[111] In the United States most of the internet infrastructure is privately owned.[112] Instead of acting directly, the State acts through the private parties that actually own the internet infrastructure to regulate content on internet.[113]

Because direct intervention by the state has been restricted by the courts on constitutional grounds, the only way the state can intervene, should it need to do so, is by indirect means.[114] Creating a system of incentives for private action to intervene

exacerbates these constitutional problems in that it further widens the spectrum of protected speech that COPA affects").

[103] Derek E. Bambauer, "Orwell's Armchair", *University of Chicago Law Review*, LXXIX (2012), p. 863.

[104] See, for example, Chen, note 16 above, pp. 247-248.

[105] Bambauer, note 103 above, p. 870. Bambauer lists five options that the State can use for internet censorship – direct control, deputizing intermediaries, pretext, payment, and persuasion.

[106] Ibid., p. 867.

[107] Ibid.

[108] Ibid.

[109] Ibid., p. 870.

[110] Ibid., pp. 870, 883-884 (in Kentucky, 141 domain names for gambling sites were sought to be transferred to the state's control. The Governor argued that unlicensed and unregulated internet gambling posed a tremendous threat to the citizens. **In reality, the state was worried that online gambling would undercut revenue from horse racing, and offline gambling**).

[111] Ibid.

[112] Ibid., p. 877 (this infrastructure contains network backbones, routers, access points, computers, and other related paraphernalia required to access the internet most of which is privately owned and controlled. While the United States Supreme Court has created considerable hurdles in the way of direct state action in order to regulate internet content, there is nothing to prevent the state from indirectly engaging with the parties that own this entire infrastructure in order to enforce state policy).

[113] See Bambauer, note 103 above, p. 878 (Alaska passed a law making the Internet Service Providers (ISPs) liable for the distribution of content considered harmful to minors, which was subsequently struck down as unconstitutional by the Alaska Supreme Court), and p. 880 (Pennsylvania required the ISPs to block sites designated by the State Attorney General as offering child pornography. Consequently, **1.1 million sites were prevented access to roughly 400 with unlawful material**. This was subsequently found unconstitutional by a federal court).

[114] Ibid., p. 943 (Bambauer argues: "The approach employed by the state has shifted from attempts to force intermediaries such as ISPs to act as agents in censorship to less direct and less visible methods such as payment, pretext, and persuasion through pressure").

has been found to be very effective.[115] Soft censorship presents legitimacy concerns for lack of transparency[116] that are exacerbated given the extremely effective nature of soft censorship.[117] It has been documented that actions by private parties are not *narrow*,[118] thus creating the problem of over-inclusiveness.[119] There is no judicial review.[120] Strong concerns have been expressed over the use of private parties by the state to regulate and/or censor content on the internet.[121]

The debate on using *contemporary community standards* in order to decide whether speech is obscene and thus subject to state regulation has been subject of a continuous debate in the United States. In *Miller* it was held to be an appropriate test, but then material being distributed was printed material. Subsequently this standard was extended to regulating content on the internet and it was found, in the internet context, to be vague and thus unconstitutional in *Reno*. The Congress remedied that problem by introducing a *serious value* prong which, when challenged, the United States Supreme Court in *Ashcroft* found to be constitutional but subsequently the Third Circuit in *Mukasey* found overbroad and thus unconstitutional.

THE INDIAN SUPREME COURT AND OBSCENE SPEECH

The doctrine of the Indian Supreme Court on the fundamental right of free speech and its conflict with regulating obscenity consistently refers to and cites approvingly the United States Supreme Court decisions but seems to stop short of adopting those standards.[122] Instead the Indian Supreme Court refers to the American constitutional standards and tries to see how far those standards are compatible with the text of the Indian free-speech provisions and Indian precedents. Two 2006 decisions are directly relevant to this discussion.

The case *Director General, Directorate General of Doordarshan v. Anand Patwardhan*[123] (hereinafter: "*Anand Patwardhan*") was decided in August 2006.[124] The dispute arose out of an award winning film that was given an adult certificate by the Film Censor Board.[125] The State-owned national television channel "Doordarshan" (hereinafter: "DD") issued a circular prohibiting the telecast of any film with an adult certificate on DD.[126]

[115] Ibid., pp. 880, 884, 888.
[116] Ibid., p. 868.
[117] Ibid., p. 867.
[118] Ibid., p. 903.
[119] Ibid., p. 904.
[120] One practitioner has commented that judicial rulings tailored to meet individual factual situations are a better solution as compared with blanket legislative declarations. See, Brown, note 53 above, p. 1258.
[121] Seth F. Kreimer, "Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link", *University of Pennsylvania Law Review*, CLV (2006), p. 11.
[122] One United States commentator argues that the Indian Supreme Court has been left out of the debate of freedom of speech on the internet, See Farzad Damania, "The Internet: Equalizer of Freedom of Speech? A Discussion on Freedom of Speech on the Internet in the United States and India", *Indiana International & Comparative Law Review*, XII (2002), p. 243. The present writer disagrees with Damania's conclusions, but to be fair Damania's piece was published in 2002 and the two most recent decisions on the issue came out in 2006.
[123] AIR 2006 SC 3346 (India).
[124] Ibid. at 3346.
[125] Ibid. at 3348.
[126] Ibid. at 3349.

The respondent film-maker approached the Bombay High Court[127] against this circular and eventually a select committee of DD opined that the film had a secular message but contained scenes and speeches that may influence negative passions.[128] The matter was referred to a larger committee that ultimately recommended the screening of the film on DD.[129] This recommendation was overruled by another government body on the ground that the film contained scenes that could promote violence.[130] The Bombay High Court directed that the film be exhibited on DD.[131] On appeal the Indian Supreme Court affirmed.

The question raised in appeal relevant to our discussion was whether this policy of DD not to telecast adult films was in violation of the free speech clause.[132] When discussing *Miller*, we asked two questions – first, whether or not obscene speech is constitutionally protected and, second, what exactly is obscene speech? Let us ask them again. As to the first question, the Indian Constitution is self-evident that freedom of speech as such is subject to reasonable restrictions in India. As for obscene speech, the Court recognized the *societal interest* in preventing harm from the free flow of obscene material and the need to balance this with the fundamental right of freedom of speech and expression.[133] Then the Court moved on to the second question – what is obscenity? [134] Note here that the Indian Supreme Court recognizes the *societal* interest. This will eventually lead the Court to articulate the *societal norms* standard, which is an Indian version of the *contemporary community standards*.

Obscenity necessarily depends on the outlook of the people in the *society*.[135] Giving the power to decide what is obscene to judges alone raises concerns of legitimacy. [136] As to the second question, the Indian Supreme Court recognized the limitations of the Hicklin Test,[137] examined the Miller Test,[138] but did not adopt the Miller Test completely. It accepted the *taken as a whole* strand of the Miller Test and adapted the *contemporary community standards* prong into *societal norms of decency*.[139] This *societal norms* standard has textual support in

[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid. at 3350.
[133] Ibid. at 3351 (Dr. Lakshmanan, J for the Court, "One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea"). Note that in *Miller, Reno, and Ashcroft*, the United States Supreme Court consistently recognizes this concern. A commentator in the United States observed that the extent to which the State is authorized to shield minors from *perceived* harmful effects of obscenity is a very complex question. See John H. Garvey, "Children and the First Amendment", *Texas Law Review*, LVII (1979), p. 375. Garvey's arguments question the practical utility of such measures. For example, he argues (p. 378) that: "Reading many of his peers engage in sexual activity may be enough to lead a teenager to question his own or his parent's position on whether doing so is right or wrong". These arguments raise interesting questions beyond the scope of this article.
[134] Ibid.
[135] Ibid.
[136] Ibid. at 3352 (Dr. Lakshmanan, J for the Court: "The point to worry about is the power given to the judge to decide what he/she thinks is obscene"). Note that the Australians ran into similar difficulty – the people were not involved in the process. In the Australian case it was government regulators, but the argument is applicable to restricting this decision making powers only to judges. The Indian Supreme Court is conscious of this pitfall.
[137] Ibid.; see also note 85 above on the Hicklin Test and its rejection in *Miller*.
[138] Ibid.
[139] Ibid.; note that the concept of *societal norms* as articulated by the Indian Supreme Court is conceptually similar to the *contemporary community standards* rule of the United States Supreme Court.

the Indian Constitution because *decency* is a permissible ground to impose reasonable restrictions on the freedom of speech and expression.[140] The application of the *societal norms* standard to the facts was readily accomplished. The film, a documentary, was being prohibited from being telecast on national television because it dealt with issues of gender and religious violence.[141] It was given the adult certificate for the same reason. There was no *obscenity* in the sense of any pornography or nudity involved.[142] The Court followed the *taken as a whole* plus the *societal norms of decency* approach,[143] chastised the national television channel for acting arbitrarily,[144] and counselled the channel to be responsive to changes in society and not to cling to conservative outlooks. [145]

The facts of *Anand Patwardhan* and the United States Supreme Court cases discussed above are different in that there was no obscenity in the sense of pornograpyhy or nudity involved in *Anand Patwardhan*. That does not make this comparison invalid. The adult certificate is also given to films that have nudity or pornography in them. Once a film is given an adult certificate, it falls into the category of a certain kind of film that is not deemed suitable for exhibition to minors. Public perception leads people to conclude that because the film has been given an adult certificate, it must contain nudity or sexually explicit material of a pornographic nature of some sort.

In December 2006 the Court decided *Ajay Goswami v. Union of India*[146] (hereinafter: "*Ajay Goswami*") and expanded on *Anand Patwardhan*. The facts of this case are closer to the United States Supreme Court cases because in this case the petitioner had a grievance that the freedom of speech and expression enjoyed by the newspapers was not in balance with the interest in protecting children against harmful and disturbing materials of a sexual nature[147] and accordingly sought the intervention of the Indian Supreme Court to ensure that minors are not exposed to sexually exploitative materials[148] and sought directions accordingly.[149] The Court once more stressed the need to balance the harm from the free flow of obscene material and the fundamental right of free speech.[150] *Anand Patwardhan* was affirmed;[151] *Butler v. Michigan*,[152] *Playboy*,[153] and the Miller Test were cited with approval.[154] As to the first question asked above, the Court held that freedom of speech and expression is not absolute under the Indian Constitution.[155] *On obscenity the Court observed that this is*

[140] Article 19, § 2, Constitution of India.
[141] Note 123 above, at 3348.
[142] Ibid. at 3349.
[143] Ibid. at 3353 (Dr. Lakshmanan, J for the Court, "Hence, in our view, the correct approach to be taken here is to **look at the documentary film as a whole and not in bits**, as any message that is purported to be conveyed by way of a film cannot be conveyed just by watching certain bits of the film. In the present situation the documentary film is seeking to portray certain evils prevalent in our society and is not seeking to cater to the prurient interests in any person") (emphasis added).
[144] Ibid. at 3354-3355.
[145] Ibid. at 3354.
[146] AIR 2007 SC 493 (India).
[147] Ibid., p. 494.
[148] Ibid.
[149] Ibid., p. 498.
[150] Ibid., p. 509.
[151] Ibid., p. 504.
[152] 352 U.S. 380, see Ibid., p. 506.
[153] Note 68 above, see Ibid., p. 506.
[154] Ibid.
[155] See note 146 above at 508 (Dr. Lakshmanan, J for the Court, "... the Constitution of India guarantees the right to freedom to speech and expression to every citizen. This right will encompass an individual's take on

a term that is most often used in a legal context to describe expressions that offend the prevalent sexual morality.[156] Note that as per the Indian Constitution *morality* is a permissible ground to impose reasonable restrictions on the freedom of speech and expression.[157] If a given speech or expression is *immensely gross* and *baldy violates* the *standards of morality of a society,* reasonable restrictions may be imposed on such free speech[158] but a complete ban cannot be imposed:

> "In our view, *any steps to ban publishing of certain news pieces or pictures would fetter the independence of free press* which is one of the hallmarks of our democratic setup"[159](emphasis added).

There are two common points in American and Indian jurisprudence that can be clearly identified. First, speech is to be judged *as a whole.* This *as a whole* test as articulated in United States cases has been accepted by the Indian Supreme Court. The second is that whereas the Indian Court does not accept the *contemporary community standard* rule as articulated in the United States, it uses an Indian equivalent of this rule – the *societal norms* standard. If the speech *taken as a whole* is obscene as judged by *societal norms* of decency and morality, as per the Indian obscenity doctrine, it would be obscene speech. Societal norms of decency and morality are not nationally similar. What would be considered socially acceptable in for example, New Delhi, Mumbai, and Bangalore might and probably would not be considered socially acceptable in smaller cities. This is a cultural factor that India and the United States share and both supreme courts are acutely aware of this.

Furthermore, there is another notable similarity in the doctrine of both Courts, especially between *Ajay Goswami* and *Playboy.* In *Playboy* it was observed that a content-based restriction on speech designed to shield the *sensibilities of listeners* would be unconstitutional even where a no less restrictive alternative exists.[160] *Ajay Goswami* makes a similar observation by calling for the inculcation of a responsible reading culture[161] and not allowing *hypersensitive* persons to dictate standards for protecting free speech.[162] It is true that the cases factually identical to the American cases are yet to be presented before the Indian Supreme Court. So far it stands to reason that there seems to be a certain leaning in favor of adopting a more liberal norm.

In the context of the above quoted ruling, another important point may be noted. *Brij Bhushan v. State of Delhi*[163] (hereinafter: *"Brij Bhushan"*), decided in 1954, was the

any issue. *However, this right is not absolute,* if such speech and expression is immensely gross and will badly violate the standards of morality of a society") (emphasis added).

156 Ibid.

157 Article 19, § 2, Constitution of India.

158 Note 146 above, p. 508.

159 Ibid., p. 509.

160 Note 68 above , p. 813 (Kennedy, J for the Court: "Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting our eyes") (internal citations omitted).

161 Note 146 above, p. 509 (Dr. Lakshmanan, J for the Court, "We are also of the view that a culture of responsible reading should be inculcated among the readers of any news article").

162 Ibid. (Dr. Lakshmanan, J for the Court, "... we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law ... Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person").

163 AIR 1950 SC 129 (India).

second free speech case decided by the Indian Supreme Court. The dispute arose out of the imposition of prior-restrains on a journal that was publishing content which the government of the day deemed to be politically sensitive. The law under challenge was section 7(1)(c)[164] of the East Punjab Public Safety Act of 1949.[165] Acting under the aforesaid law, the State Government issued a notification whereby the editor and the printer of an English weekly journal, *Organizer*, were required to submit to the Provincial Press Officer for pre-publication governmental scrutiny of all matter about Pakistan.[166] It was held that:

> "There can be little doubt that the *imposition of pre-censorship on a journal is a restriction on the liberty of the press* which is an essential part of the right to freedom of speech and expression declared by Art. 19(1)(a)"[167] (emphasis added).

Pre-censorship was declared unconstitutional in *Brij Bhushan* in the context of political speech and was applied in *Ajay Goswami* to obscenity. Even more remarkable is that in neither *Anand Patwardhan* nor *Ajay Goswami* did the Court cite *Brij Bhushan*. Pre-censorship of the media being unconstitutional under the free-speech doctrine of the Indian Supreme Court, any regulation of content on the internet has to be additionally careful of this.

Briefly reviewing the legal framework for regulating internet content in India, this is controlled primarily by the Information Technology Act of 2000[168] (hereinafter: "the I.T. Act"), which makes online transmission of any material that is *lascivious* or appeals to *prurient interest* or has an effect of *depraving and corrupting* the persons exposed or likely to be exposed to such material a criminal offence punishable by five years of imprisonment for the first offence[169] and ten years for subsequent offence.[170] These standards for judging obscenity are similar to the COPA.[171] No prosecutions under this provision of law have been reported yet. The I.T. Act also authorizes the Controller,[172] who has the power to investigate violations of the I.T. Act,[173] and who has been given the power, to direct any agency of the Government to intercept any information on the internet if there is a

[164] East Punjab Public Safety Act, 1949, § 7(1)(c) is reproduced Ibid. at 134, ¶ 23. It provides that: "The Provincial Government or any authority authorized by it in his behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor **require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny**" (emphasis added).

[165] Note 163 at 134, ¶ 23.

[166] The entire text of the notification is reproduced Ibid at 133-34, ¶ 22.

[167] Ibid. at ¶ 25.

[168] Information Technology Act, 2000 (India).

[169] Ibid. § 67: "Publishing of information which is obscene in electronic form. – Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees".

[170] Ibid.

[171] Apar Gupta, *Commentary on Information Technology Act, 2000* (2007), p. 189.

[172] For the office of the Controller, the functions, and the powers vested in the office, see note 168 above, §§ 17-34.

[173] Note 168 above, § 28(1): "Power to investigate contraventions. – The Controller or any officer authorized by him in this behalf shall take up for investigation and contravention of the provisions of this Act rules or regulations made thereunder".

national security or public order situation is apprehended.[174] The agency can then call upon any subscriber or person in-charge of the computer[175] for assistance.[176] Failure of the intermediary to comply is punishable with a prison term of seven years.[177] It is clear that with respect to regulating content on the internet the Indian Parliament seems to be in agreement with other democratic legislatures;[178] that is, the content on the internet should be regulated though not controlled by the State.[179] As a means of regulating content, the legal framework seems to be in favor of using *intermediaries*.[180] Concerns of potential misuse and potential violations have been strongly expressed in this regard.[181] The constitutionality of these provisions has not been challenged before the Indian Supreme Court yet, is suspect, and it remains to be seen what the fate of these provisions should such a case ever reach the Indian Supreme Court.

CONCLUSION

The first certainty is that the internet being a different technology would not change the fact the pre-censorship of the press has been consistently held to be unconstitutional by the Indian Supreme Court. It can reasonably be predicted therefore that any law to regulate internet content, if the websites of journalistic concerns are subjected to pre-censorship or any such similar measure, such a law would be unconstitutional.

The other certainty is that obscene speech does not have any constitutional protection in India and the United States. On this both supreme courts are clear. The Indian Constitution provides that reasonable restrictions may be imposed on free-speech in the interests of morality and decency. What is moral and decent and what is reasonable is where the debate in Indian obscenity jurisprudence seems to be headed. In order to judge what is obscene, the Indian Supreme Court has articulated the *societal norms* standard. What would be a reasonable restriction on obscene speech remains to be seen because a relevant case has not come before the Indian Supreme Court.

The United States Supreme Court has decided some cases that the Indian jurists can look to in order to articulate some answers as to what might qualify as a reasonable restriction on obscene speech. The first important point to keep in mind is that even though the United States Supreme Court has consistently held that obscene speech is not protected by the First Amendment, it has consistently insisted that the law to regulate

[174] Ibid. § 69(1): "Directions of Controller to a subscriber to extend facilities to decrypt information. – If the Controller is satisfied that it is necessary or expedient so to do in the interest of sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence, for reasons to be recorded in writing, by order, direct any agency of the Government to intercept any information transmitted through any computer resource".

[175] Ibid. § 2(i) (the definition of a "computer" is wide and covers practically most everything from personal computers to servers); see also Gupta, note 171 above, p. 30.

[176] Ibid. § 69(2).

[177] Ibid. § 69(3).

[178] Geeta Seshu, "Poor Guarantee of Online Freedom in India", *Economic and Political Weekly*, 16 June 2012, p. 14.

[179] Ibid.

[180] Ibid.; see note 168 above, § 2(v), which defines an "intermediary" with respect to a particular electronic message as any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message. This definition has been criticised as indefinite. See Gupta, note 171 above, p. 38.

[181] Ibid., p. 15.

obscene speech must be narrowly tailored. The narrow tailoring requirement then engages the Strict Scrutiny Review. For all intents and purposes, obscene speech ends up getting the same level of constitutional protection as other speech. *Ajay Goswami* shows that the India Supreme Court is willing to move in the American direction. Meanwhile, *societal norms* of morality and decency might require regulation of what on the basis of those standards would come to be judged as obscene speech. Preventing consensual communication of adult speech might become an unreasonable restriction. This is so because the India Supreme Court, just as its American counterpart, has recognized a legitimate state interest only in shielding minors from exposure to adult speech of a sexually explicit nature. There is no blanket ban in India on the public exhibition of films with adult certificates. In fact, the existence of a special category of films with adult certificates clearly shows that consensual communication of that speech is not considered immoral or indecent provided the people engaged in such communication are of a certain age. In *Anand Patwardhan,* but most importantly in *Ajay Goswami,* the India Supreme Court counsels, in *dicta,* a liberal, more tolerant, approach when it comes to adult speech. These are nascent pointers to the evolution of liberal obscene speech jurisprudence.

On the other hand, the use of private internet intermediaries is clearly permitted by the Information Technology Act in India and non-compliance is criminally punishable. This amounts to soft-censorship of the internet, is highly effective, and the possibility of judicial review is minimal. There is serious lack of public participation and transparency. The extreme over-broadness of private actions in America has been painstakingly documented and adversely commented upon. The Indians would be well advised not to resort to soft censorship, for this is neither legitimate nor constitutional. They would also be well advised not to go so overbroad in their laws as the Information Technology Act does. First, the law might violate the existing doctrine of the India Supreme Court that is clear about prior-restraints and pre-censorship. Second, the very act of Parliament by being excessively broad might provoke the Court to respond in kind. This would have a negative effect on the delicate balance between freedom of speech and expression and the State interest in regulating obscene content on the internet, which the India Supreme Court has consistently recognized.