15. Internet censorship in India: the law and beyond

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I. INTRODUCTION

In 1643, the English Parliament passed a restrictive order requiring authors to secure a government licence prior to publishing their works.[1] In opposition to the order, the poet John Milton wrote 'Areopagitica', one of the earliest and most famous defences of free speech.[2] 'Areopagitica' was named after and inspired by 'Areopagitikos', the title of a speech by the ancient Greek rhetorician Isocrates.[3] Using florid rhetoric himself, Milton advanced various philosophical, moral and historical arguments against censorship.[4] However, at its core, Milton's approach was arguably legalistic and

[1] The order referred to the need to prohibit the printing of 'false, forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and Government'. *See* An Ordinance for the Regulating of Printing, June 14, 1643, http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/> pp 184–6> accessed 17 August 2016.

[2] Milton had attempted to publish a book titled *The Doctrine and Discipline of Divorce*. In the book, Milton had expressed views supportive of divorce – a taboo subject at the time. Milton was denied permission to publish the book under the order. This is speculated to be one of the main reasons that motivated Milton to write. See Vincent Blasi, 'Milton's Areopagitica and the Modern First Amendment', Yale Law School Occasional Papers, Paper 4-6 (1995) <http://digitalcommons.law.yale.edu/ylsop_papers/6/> accessed 17 August 2016.

[3] See Arlene W Saxonhouse, *Free Speech and Democracy in Ancient Athens* (CUP, 2006) 20–21.

[4] Milton argued that God had endowed every person with 'reason' and 'freedom to choose', and argued in favour of the 'liberty to know, to utter, and to argue freely according to conscience, above all liberties'. Personifying truth, he argued, 'Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter'. From a historical perspective, Milton pointed out that in Athens '[b]ooks and Wits were ever busier then in any other part of Greece'. In contrast, licensing was introduced during the 'tyrannous' Catholic inquisition, and a genius like Galileo was persecuted 'for thinking in Astronomy otherwise then the Franciscan and Dominican licencers thought'. See John Milton, Areopagitica

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functionalist. Milton framed his arguments with reference to the licensing order. He claimed that the order 'conduce[d] nothing to the end for which it was fram'd', was 'fruitlesse and defective', and was 'a step-dame to Truth'.[5] He pointed out that someone who ought to decide what the public could read should be a 'studious, learned, and judicious' person.[6] But since the task of reading piles of random books and pamphlets was 'tedious and unpleasing', those likely to become licensors under the order would probably be lesser minds who would be 'either ignorant, imperious, and remisse, or basely pecuniary'.[7] In this respect, Milton's approach was a precursor to approaches adopted by courts in modern cases.[8]

The fact that 'Areopagitica' methodically linked free speech with legislation is perhaps one reason why the work is given importance by legal academicians. A well-known media law textbook has claimed that 'free speech is an English invention', rooted in 'a philosophy powerfully articulated by John Milton and updated by John Stuart Mill.[9] Another leading textbook has similarly not looked earlier than Milton while discussing the underpinnings of free speech.[10] However, broader views of free speech have located its origins in age-old conflicts between orthodoxy and heresy, in places like ancient Greece[11] – a view that Milton himself seems

(1644) <https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.shtml> accessed 17 August 2016.

[5] ibid.

[6] ibid.

[7] ibid.

[8] For example, the US Supreme Court once held that a provision of the Michigan Penal Code, which barred literature 'tending to the corruption of the morals of youth', was unconstitutional (*Butler v Michigan* 352 U.S. 380 (1957)). Frankfurter J observed that the enactment was trying to 'burn the house to roast the pig' (ibid at 383). He stated, 'We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children' (ibid). More recently, the European Court of Human Rights held that a Turkish government order blocking access to an entire online platform (sites.google.com) was a violation of the right to freedom of expression. A judge observed that Turkey had 'a duty to amend the legislation' under which the order had been passed (*Yildirim v Turkey* [2012] ECHR 2074, Albuquerque J).

[9] Geoffrey Robertson and Andrew Nicol, *Media Law* (Sweet & Maxwell, 5th edn, 2007) viii.

[10] Eric Barendt, *Freedom of Speech* (OUP, 2nd edn, 2005) 7.

[11] See Keith Werhan, 'The Classical Athenian Ancestry of American Freedom of Speech' (2008) Supreme Court Review 293–347; Murray Dry, 'Free Speech in Political Philosophy and Its Relation to American Constitutional Law: A Consideration of Mill, Meiklejohn, and Plato' (1994) 11 Constitutional Commentary 81–100.

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to have accepted. The broader view was well articulated in a nineteenth-century legal text on freedom of speech, authored by a British barrister named James Paterson. Paterson – whose book was described at the time as the first known treatise on the subject of free speech[12] – observed that 'Governments in all stages of barbarism have feared and prohibited speech, because it is the vehicle of combination and resistance'.[13] Paterson traced the concept of free speech to the concept of religious tolerance. He argued that the typical ancient 'governor' usually believed 'that there was only one true form of religious worship' and that the governor should 'torture, or in some way to punish the body of any citizen who was suspected to entertain, even in his secret thoughts, the slightest hesitation about believing and obeying' the doctrine concerned.[14] From this perspective, the historical narrative surrounding free speech and its suppression can even be framed with reference to non-Western societies, including ancient and medieval India.[15]

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[12] 'The Liberty of the Press, Speech, and Public Worship: Being Commentaries on the Liberty of the Subject and the Laws of England' (1880) 72 British Quarterly Review 480.

[13] James Paterson, *The Liberty of the Press, Speech, and Public Worship: Being Commentaries on the Liberty of the Subject and the Laws of England* (Macmillan, 1880) 3.

[14] ibid vi–vii.

[15] For example, in ancient India, the Hindu scripture the *Manu Smriti*, called on Brahmins to 'avoid atheism' or showing 'contempt of the gods' (G Bühler (tr), *The Laws of Manu* 154, para 163 (Clarendon, Oxford, 1886)). The *Manu Smriti* also asked kings to 'instantly banish' anyone belonging to a 'heretical sect' (ibid 381, para 225). In Paterson's view, such passages are analogous with experiences in ancient Greece, where rulers 'were unsparing in their malignity towards heretics' (Paterson (n 13) 516). In contrast lies an edict calling for religious tolerance, by King Ashoka, the emperor of the Maurya Dynasty, who ruled most of the Indian subcontinent from c. 268 to 232 BCE. The edict stated: '[I]t is better to honour other religions . . . By so doing, one's own religion benefits, and so do other religions . . . Whoever praises his own religion, due to excessive devotion, and condemns others with the thought "Let me glorify my own religion", only harms his own religion. Therefore, contact (between religions) is good. One should listen to and respect the doctrines professed by others.' See Ven S Dhammika, 'The Edicts of King Ashoka' (1993) <http://www.cs.colostate.edu/~malaiya/ashoka.html> accessed 17 August 2016. See also Amartya Sen, *The Argumentative Indian* (OUP, 2005) 15–16 (discussing the edict). Also instructive is a decree by a medieval Hindu king who granted asylum to Zoroastrians fleeing Islamic persecution in Persia, and awarded them the freedom to practise their religion and build a house of worship. See Jayanta Kumar Ray and Kingshuk Chatterjee, 'Immigrant Communities' in Jayanta Kumar Ray (ed.), *Aspects of India's International Relations, 1700 to 2000: South Asia and the World* (Pearson Longman, 2007) 59, 67–9. See also Alan Williams, *The Zoroastrian Myth of Migration from Iran and Settlement in the*

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Another striking feature of Paterson's conception of free speech is his Orwellian references to using 'torture' and preventing even 'secret thoughts' of dissent. This suggests how the use of intimidation, whether physical or psychological, lawful or unlawful, can be used to curb free speech. And while Paterson uses the positivistic term 'governor', it is arguable that citizens themselves impose curbs on speech through collective moral codes – that it is ultimately the people of a state who determine how tolerant or intolerant the state is. Here, even those regarded as vanguards of free speech can be faulted for some amount of intolerance. For example, Milton was a staunch Puritan, and was not in favour of tolerating 'popery', 'open superstition' and 'impious' thoughts.[16] Contemporary scholars have thus critiqued 'Areopagitica' for its 'anti-Catholic sentiments' and 'a smug, unacknowledged intolerance at the root'.[17] A similar critique can be made of Mill's *On Liberty*, which is regarded as a 'secular reformulation' of Milton's arguments.[18] Mill's 'harm principle' is widely accepted by liberals as a justification for curbs on free speech.[19] However, Mill has been criticized for holding certain colonialist prejudices, possibly influenced by his father.[20]

Indian Diaspora (Brill, 2009) 175–6 (discussion regarding the correct name and identity of the king).

[16] Milton (n 4).

[17] Blasi (n 2) 6.

[18] ibid 10. Mill, relying on utilitarian logic rather than religious rhetoric, argued that truth was likely to emerge in societies that allowed the free exchange of ideas (John Stuart Mill, *On Liberty* (John W Parker and Son, 1859) 33–4). Mill viewed truth as a product of 'the reconciling and combining' of conflicting arguments (ibid 86). Mill believed that the 'prevailing opinion on any subject is rarely or never the whole truth', and that it is 'only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied' (ibid 95). Using the example of the Reformation, Mill contended that vast improvements 'in the human mind or in institutions' had occurred because of fierce debate (ibid 63) and that even erroneous opinions should not be suppressed (ibid 94–5).

[19] Mill felt that a person's liberties could only be curbed in order to 'prevent harm to others' (ibid 21–2).

[20] Mill argued that '[d]espotism is a legitimate form of government in dealing with barbarians' (ibid 24). He claimed that liberty should not apply to 'those backward states of society where the race itself may be considered as in its nonage', and that such societies should adhere to 'an implicit obedience to an Akbar or a Charlemagne' (ibid). Elsewhere, Mill had defended British rule in India by arguing that the people of India were 'not ripe' for 'representative government'. See Michael Levin, *JS Mill on Civilization and Barbarism* (Routledge, 2004) 46 (quoting Mill's remarks before a House of Lords Committee). It has also been said that Mill was a 'faithful follower of his father', the historian James Mill (Lynn Zastoupil, *John Stuart Mill and India* (Stanford University Press, 1994) 28–50).

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Hence, the historical discourse surrounding free speech is rife with contradictions. This holds relevance even in modern times, where notions of free speech are frequently linked to issues concerning blackletter law. The problem with such reasoning was brought out by Alexander Meiklejohn during the McCarthy era. During the infamous trial of the 'Hollywood Ten',[21] Meiklejohn submitted an *amicus* brief where he argued that although 'no laws have been passed which would challenge the right of a free press' in the US, '[l]aws are not needed to limit the right of free speech; speech is just as "free" as people feel free to speak'.[22] Meiklejohn thus argued that there had dawned a 'new censorship', effected through 'coercion, bribery, and persuasion'.[23]

Meiklejohn's remarks highlight a divide that exists among legal academicians on what exactly constitutes censorship. A narrow view defines

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The senior Mill had written a notoriously racist book on India, a land he never actually visited (see Sen (n 15) 78–79, 147–148 (criticizing James Mill's book)). He condemned its people as uncivilized, denied well-established evidence of mathematics and science in ancient India, and even suggested that Indian cuisine was like the food of primitive folk. He concluded, 'In truth, the Hindu, like the Eunuch, excels in the qualities of a slave' (James Mill, *The History of British India*, vol 1 (Baldwin Cradock and Joy, 1817) 646). Piecing together these facts, it had been argued that the younger Mill was only selectively liberal, and not willing to support liberty, at least in the context of India (Vinay Lal, 'Organic Conservatism, Administrative Realism, and the Imperialist Ethos in the "Indian Career" of John Stuart Mill' (Jan–Feb 1998) 54 New Quest <http://www.sscnet.ucla.edu/southasia/History/British/jsmill.html> accessed 17 August 2016).

[21] The 'Hollywood Ten' was the nickname given to a group of ten artists who had refused to answer questions about their political affiliations before the House Committee on Un-American Activities. The ten artists were convicted under contempt laws. Martin Redish and Christopher McFadden, 'HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association' (2001) 85 Minnesota Law Review 1669, 1669–70.

[22] Brief for Alexander Meiklejohn et al. as Amici Curiae Supporting Petitioner, *Lawson v United States* 339 U.S. 934 (1950) (No 248) 26–7.

[23] ibid. Meiklejohn gave the example of how a writer could be a victim of the new censorship: '[D]o not bother to burn his books (a book-burning might call attention to the encroachment on civil rights); simply blacklist him with editors and publishers. Make it difficult for him to communicate with his audience and dangerous for his audience to communicate with him. Convey to him by a thousand suggestions, often subtle, always brutal, an awareness of the fact that certain themes are regarded as "subversive". Dangle rich prizes for conformity before his eyes and rely upon enlightened self-interest to police his thoughts. Make it impossible for him to earn a livelihood by his craft if he fails to conform. Destroy his self-confidence. Create such an atmosphere of hostility toward him that even his children will be shunned by the children of conformists.'

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censorship as 'the restriction of speech by the government',[24] with some even confining the use of the term to legal restraints on speech imposed by states prior to its dissemination.[25] In contrast, a broad view holds that censorship can emanate from non-state actors and is not necessarily limited to prior legal restraints. The broad view holds that there can be censorship through unlawful intimidation, and that even 'self-censorship' is a possibility.[26]

The advantage of employing the narrow view is that it is perhaps more practicable. One can accurately pinpoint when and how censorship occurs (for example, by identifying a legal provision X invoked by a government to prohibit a book from being sold). One can also clearly scrutinize the legality of censorship (for example, by examining judicial guidelines and other sources on the application of X) and suggest precise reform measures (for example, by amending or revoking X). As Richard Posner has observed, '[s]cholarly hostility to censorship is so great that no one tries to explore ways of improving the machinery of censorship'.[27] Here, an approach focusing solely on blackletter law and reform has much to contribute. However, the narrow view is grossly inadequate in countries like India, where the rule of law is weak.[28]

India has a chequered record on the subject of free speech. On the

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[24] See Kathleen Sullivan, 'The First Amendment Wars' (28 September 1992) 207 New Republic 35, 38.

[25] See Barendt (n 10) 151–3.

[26] See Paul O'Higgins, *Censorship in Britain* (Nelson, 1972) 11–13. O'Higgins lists six possible methods of censorship: (1) autonomous censorship (which is self-censorship, conscious or unconscious), (2) social censorship (which emanates from social disapproval), (3) legal censorship, (4) extra-legal censorship, (5) voluntary censorship (which emanates from institutional codes that are not legally binding) and (6) subterranean censorship (where actors use powers unrelated to regulating speech to impose censorship). Arguably, only two of O'Higgins' methods – legal censorship and extra-legal censorship – involve close reference to questions of law. According to O'Higgins, legal censorship is imposed through means strictly authorized by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions). Extra-legal censorship refers to the suppression of information through means not strictly authorized by law, such as 'bluff and bluster'. Therefore, in O'Higgins' scheme of things, prior legal restraints simply comprise 'pre-censorship', which is one of many kinds of censorship. See also Stuart Hampshire and Louis Blom-Cooper, 'Censorship?' (1977) 6 Index on Censorship 55 (following a similar definition).

[27] Richard Posner, 'Free Speech in an Economic Perspective' (1986) 20 Suffolk University Law Review 1, 10.

[28] See Surya Deva, 'The Rule of Law in India: The Chasm between Paper and Practice' in Guigio Wang and Fan Yang (eds), *The Rule of Law: A Comparative Perspective* (City University of Hong Kong Press, 2013) 27; World Justice Project,

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one hand, Article 19(1)(a) of the Constitution of India guarantees all citizens the right to 'freedom of speech and expression'. Article 19(2) of the Constitution permits the state to make laws imposing 'reasonable restrictions' on that right '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'. Notwithstanding the existence of Article 19(2), Indian courts have laid down a large body of case law granting citizens the right to freely criticize the state and public figures, peppering their decisions with references to the likes of Mill and Meiklejohn.[29]

However, on the ground, the overt and covert harassment of individuals, by both non-state and state actors, is common. Thus, despite acknowledging that India has 'a legal framework that is largely favourable to press freedom' and that 'Indian journalists take pride in their freedom',[30] Reporters Without Borders ranks India a poor 133 out of 180 countries in its global Press Freedom Index.[31] The organization has observed that India's 'press freedom is under threat from politicians, religious groups and criminal gangs',[32] whose 'level of impunity is disgraceful'.[33] In the context of the internet, the same dichotomy holds true. The think tank Freedom House rates India only as 'partly free' with respect to internet freedom, claiming that while online speech operates in a 'diverse and lively' environment, '[s]ome institutions and individual writers self-censor due to fear of reprisal from political organisations'.[34]

On this very cynical note, I will study the issue of internet censorship

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Rule of Law Index 99 (2015) <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf> (ranking India 59 out of 102 countries in a Rule of Law Index).

[29] See, e.g., *In re Mulgaokar* (1978) 3 SCR 162, para 1; *Rangarajan v Jagjevan* (1989) 2 SCR 204, paras 39–42; *Khushwant Singh v Maneka Gandhi* (2002) AIR (Del) 58, para 59; *Bhadra v State of West Bengal* (2005) 4 CHN 601, para 12.8; *Rajagopal v Jayalalitha* (2006) AIR Mad 312, para 27; *Shah Rukh Khan v State of Rajasthan* (2008) 1 RLW (Raj) 809, para 62.

[30] Reporters Without Borders, India – World Report (2009) <http://archives.rsf.org/print.php3?id_article=30988> accessed 17 August 2016.

[31] Reporters Without Borders, Press Freedom Index (2016), <https://rsf.org/en/ranking> accessed 17 August 2016.

[32] Reporters Without Borders, India – World Report (2009) <http://archives.rsf.org/print.php3?id_article=30988> accessed 17 August 2016.

[33] Reporters Without Borders, Hostile Climate for Environmental Journalists (2015) 12 <https://www.internews.org/sites/default/files/resources/RSF_rapport_environnement_en2015-12.pdf> accessed 17 August,2016.

[34] Freedom House, Freedom on the Net (2015) 401 <https://freedomhouse.org/sites/default/files/FOTN%202015%20Full%20Report.pdf> accessed 17 August 2016.

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(in the broad sense of the term) in India. In Section II I will discuss the enforcement of section 66A of India's Information Technology Act 2000 ('IT Act'),[35] a controversial section that has been the subject of much attention. In Section III, I will comment on a recent, celebrated decision of the Supreme Court of India, *Shreya Singhal v Union of India*.[36] In *Singhal*, the court held section 66A to be unconstitutional. I will argue that the case's impact on free speech will only be limited, as various forms of censorship through extra-legal and other means can still occur. I will discuss how state and political actors have frequently harassed critics and muzzled free expression, in the online and offline world. I will argue that the Supreme Court's ruling in *Singhal* will thus have a limited impact due to various systemic problems.

II. THE SECTION 66A CONTROVERSY

The IT Act came into force in the year 2000. The purported aims of the statute were to, *inter alia*, 'provide legal recognition' for e-commerce transactions and 'facilitate electronic filing of documents', in keeping with the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law (UNCITRAL).[37] The Act also included a provision introducing hacking as a criminal offence.[38] Reading between the lines, the IT Act did cover some issues concerning online speech, with one provision criminalizing the dissemination of 'information which is obscene in electronic form'.[39] However, in 2009, the IT Act was amended[40] to include a controversial provision, section 66A. The section stated the following:

> Any person who sends, by means of a computer resource or a communication device
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> (a) any information that is grossly offensive or has menacing character; or
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> (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult,

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[35] Information Technology Act, 2000 (9 June 2000) <http://www.dot.gov.in/sites/default/files/itbill2000_0.pdf> (original unamended version).

[36] (2015) AIR SC 1523 ('*Singhal*').

[37] IT Act Preamble.

[38] IT Act s 66.

[39] IT Act s 67.

[40] Information Technology (Amendment) Act, 2008 (5 February 2009) <http://www.eprocurement.gov.in/news/Act2008.pdf> 9–10.

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injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

In India, interference by the executive in the functioning of the police is rampant, with transfers and postings of police officials often being determined by the whims of political leaders.[41] Thus, at the time of the amendment, the broad wording of the section attracted strong criticism, with many fearing that words like ‘annoyance’ or ‘grossly offensive’ could be misconstrued by the state to intimidate its critics, using pliant police officials.[42] The broad wording also seemed to contradict judgments by the Indian Supreme Court laying down that criminal legislation cannot use vague words, as that would encourage arbitrary police action.[43] The fears about the misuse of section 66A came true when a host of arbitrary, politically motivated arrests were made under section 66A. Shockingly, as many as 2,402 arrests were made in 2014 alone.[44] A few egregious examples are mentioned below.

1. In April 2012, in Calcutta, Ambikesh Mahapatra, a professor of chemistry, found himself being arrested under section 66A for circulating a cartoon of Mamata Banerjee, the powerful Chief Minister of West

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[41] See Ajay Mehra, ‘Police Reforms in India’ in Ajay K Mehra and René Lévy (eds), *The Police, State, and Society: Perspectives from India and France* (Pearson, 2011) 263; Commonwealth Human Rights Initiative, ‘Police Reform Debates in India’ 7–8 (2001) <http://www.humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf> accessed 17 August 2016.

[42] See, e.g., Pranesh Prakash, ‘Short note on IT Amendment Act, 2008’, Centre for Internet & Society <http://cis-india.org/internet-governance/publications/it-act/short-note-on-amendment-act-2008> accessed 17 August 2016; Binu Karunakaran, ‘India Sleepwalks to Total Surveillance’ (*Counter Currents*, 2 January 2009) <http://www.countercurrents.org/karun020109.htm> accessed 17 August 2016.

[43] See e.g., *Kartar Singh v State of Punjab* (1994) 3 SCC 569, para 130 (stating: ‘It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application’).

[44] Aloke Tikku, ‘Stats from 2014 reveal horror of scrapped section 66A of IT Act’ *Hindustan Times* (New Delhi, 20 August 2015) <http://www.hindustantimes.com/tech/stats-from-2014-reveal-horror-of-scrapped-section-66a-of-it-act/story-G2xCoELsNbxpl5dXvl0aFJ.html> accessed 17 August 2016.

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Bengal (the state in which Calcutta is situated). The cartoon referred to an incident where Banerjee had dismissed a minister who had displeased her. The cartoon, based on a plot in a detective film by the well-known director Satyajit Ray, suggested that Banerjee disliked dissidents within her party and made them 'vanish'.[45] Mahapatra was arrested after a complaint filed by a supporter of Banerjee's. Mahapatra was also assaulted by a group of Banerjee's supporters after being released on bail.

2. In September 2012 a practically unknown cartoonist, Aseem Trivedi, published a series of cartoons online, under the caption 'Cartoons Against Corruption'. The cartoons included one showing 'Mother India' being raped by (unnamed) politicians and bureaucrats, and one depicting the Parliament building of India as a toilet commode.[46] Trivedi was arrested by the police in Bombay after a complaint filed by a lawyer.

3. In October 2012, in Pondicherry, a businessman and anti-corruption protestor, Ravi Srinivasan, was arrested for a tweet against Karti Chidambaram, the son of the then Home Minister of India. Srinivasan's tweet alleged that Chidambaram had amassed illicit wealth.[47]

4. In November 2012, in the state of Maharashtra, two young women, Shaheen Dhada and Renu Srinivasan, were arrested for comments on Facebook following the death of Bal Thackeray, the powerful founder of the Shiv Sena, a right-wing political party in Maharashtra. Dhada had questioned a virtual shutdown in Bombay for Thackeray's funeral, saying that the city had shut down 'more out of fear [of the Shiv Sena] than respect'. Srinivasan had merely 'liked' the comment. Both Dhada and Srinivasan were arrested under section 66A, following a complaint by the president of a local Shiv Sena unit. Meanwhile, a hospital owned by Dhada's uncle was vandalized by a mob.[48]

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[45] 'Professor arrested for poking fun at Mamata', *Hindustan Times* (New Delhi, 14 April 2012) <http://www.hindustantimes.com/india/professor-arrested-for-poking-fun-at-mamata/story-OmV4FhEop4XaRP13gZdI1H.html> accessed 17 August 2016.

[46] See Prashant Naidu, 'Cartoonist Aseem Trivedi Arrested: A Mockery of Democracy' (*Lighthouse Insights*, 10 September 2012) <http://lighthouseinsights.in/cartoonist-aseem-trivedi-arrested-a-mockery-of-democracy.html> accessed 17 August 2016.

[47] Priscilla Jebaraj, 'IAC volunteer tweets himself into trouble, faces three years in jail', *The Hindu* (New Delhi, 1 November 2012) <http://www.thehindu.com/news/national/iac-volunteer-tweets-himself-into-trouble-faces-three-years-in-jail/article4051769.ece> accessed 17 August 2016.

[48] Rajini Vaidyanathan, 'India Facebook arrests: Shaheen and Renu speak out', *BBC News* (26 November 2012) <http://www.bbc.com/news/world-asia-india-20490823> accessed 17 August 2016.

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5. In August 2013, in the state of Uttar Pradesh, a writer, Kanwal Bharti was arrested for posting a message on Facebook criticizing the government of the state for suspending an official. The official had allegedly ordered the demolition of a wall of a mosque which had been illegally constructed. In his post, Bharti stated that the official had been suspended because of the 'will and wish' of the urban development minister Azam Khan, a minister with a controversial reputation. A member of Khan's office filed a complaint against Bharti, who was arrested by the Uttar Pradesh police.[49]

6. In August 2014 Rajeesh Kumar, a young worker of India's largest communist party, was arrested in the state of Kerala. Kumar had allegedly posted material on Facebook critical of the Prime Minister of India, Narendra Modi including an image of Modi with a shoe imprinted on his face.[50] A supporter of Modi's filed a complaint against Kumar.

Incidents like those above led to a wave of criticism against section 66A in the media and public discourse. The constitutionality of the section was eventually challenged through a petition filed before the Supreme Court by Shreya Singhal, a university student. Singhal's petition was argued by Soli Sorabjee, former attorney general of India and one of the country's most distinguished lawyers. Along with Singhal's petition, the court also heard a number of other petitions involving the same issue. The bench hearing the case comprised Justices Rohinton Nariman and Jasti Chelameswar, with the former authoring the judgment. Although Singhal and her co-petitioners also challenged certain other provisions of the IT Act, discussion of the case in this chapter will be confined to section 66A. The discussion around section 66A took up the majority of the court's judgment (which spanned over 120 pages) and was identified by the court as '[t]he immediate cause for concern'.[51]

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[49] 'Dalit scholar arrested for Facebook post on Durga's suspension', *Mint* (New Delhi, 6 August 2013) <http://www.livemint.com/Politics/Z6hk4cZmQeyuNoNO96BPOO/Dalit-scholar-arrested-for-Facebook-post-on-Durgas-suspensi.html> accessed 17 August 2016.

[50] Shaju Philips, 'Kerala youth arrested for posting abusive Facebook comments against Modi', *Indian Express* (New Delhi, 5 August 2014) <http://indianexpress.com/article/india/india-others/kerala-youth-arrested-for-posting-abusive-facebook-comments-against-modi> accessed 17 August 2016.

[51] *Singhal* AIR 2015 S.C. 1523, para 1.

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III. THE SIGNIFICANCE (AND INSIGNIFICANCE) OF *SINGHAL*

In *Singhal* the petitioners argued that section 66A of the IT Act suffered from 'the vice of vagueness'.[52] The petitioners argued that the section left it 'open to the authorities to be as arbitrary and whimsical as they like', and that 'a large number of innocent persons' had been arrested under the section.[53] The petitioners thus argued that section 66A was resulting in an 'insidious form of censorship which impairs a core value contained in Article 19(1)(a)' of the Indian Constitution.[54] In response, the Indian government supported the continuance of section 66A. The government conceded that '[l]oose language may have been used in' the section, but that the '[m]ere possibility of abuse of a provision cannot be a ground to declare a provision invalid'.[55]

The government also contended that speech on the internet differed significantly from other media, and thus the government should be able to interpret the reasonableness of a restriction in a 'relaxed' manner in such contexts.[56] The government argued, among other things, that the internet could be accessed by 'illiterate persons', that 'pre-censorship' of the internet was not possible as in the case of films (which occurs in India through a board of film censors), and that the internet could be used to spread rumours 'to trillions [*sic*] of people' and create disorder.[57] Here, the court did lean towards the government's contention somewhat. The court rejected an argument by the petitioners that there was no intelligible differentiation between online speech and other speech, and accepted that special laws to regulate online speech could be enacted.[58] However, the court still held section 66A to be unconstitutional, pointing out various flaws.

The court examined section 66A with reference to the permissible restrictions on speech laid down in Article 19(2). The court held that the section 'severely curtail[ed] information that may be sent on the internet' and was not directly related to the restrictions in Article 19(2).[59] For instance, on the subject of public order, the court noted that section 66A

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[52] ibid para 5.
[53] ibid.
[54] ibid. The wording of Article 19 is discussed in the preceding section.
[55] ibid.
[56] ibid para 27.
[57] ibid.
[58] ibid para 98.
[59] ibid para 44.

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lacked a connection between 'message and action'.[60] It made 'no distinction between mass dissemination and dissemination to one person', and nowhere required that a message 'should have a clear tendency to disrupt public order'.[61] On the subject of defamation, the court held that section 66A did not address the question of 'injury to reputation'.[62] The court observed that '[s]omething may be grossly offensive and may annoy or be inconvenient to somebody', but yet not affect the person's reputation.[63] The court concluded that 'none of the expressions' in section 66A were defined, and that 'every expression used' was 'nebulous in meaning'.[64] Thus, 'a prospective offender of [s]ection 66A and the authorities who are to enforce [s]ection 66A have absolutely no manageable standard by which to book a person for an offence under [s]ection 66A'.[65] As 'any serious opinion dissenting with the mores of the day would be caught within its net', the 'chilling effect on free speech would be total'.[66] The court also rejected an assurance from the government that the section would be 'administered in a reasonable manner', pointing out that the section 'ought to be judged on its own merits without any reference to how well it may be administered'.[67]

The court's decision was widely celebrated. Editorials of two leading newspapers described it as 'a major victory for activists and netizens in the country'[68] and 'a big blow for free speech'[69] respectively, while another newspaper hailed Singhal as the 'Girl Who Saved Free Speech'.[70] Within the Indian legal community, Sorabjee praised the decision as 'a glorious vindication of the right to freedom of expression'.[71] Harish Salve, another

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[60] ibid para 35.
[61] ibid.
[62] ibid para 43.
[63] ibid.
[64] ibid paras 75–6.
[65] ibid para 82.
[66] ibid para 83.
[67] ibid para 92.
[68] 'Victory for free speech', *The Hindu* (New Delhi, 26 March 2015) <http://www.thehindu.com/opinion/editorial/victory-for-free-speech/article7032653.ece> accessed 17 August 2016.
[69] 'Freeing speech', *Indian Express* (New Delhi, 25 March 2015) <http://www.financialexpress.com/article/fe-columnist/editorial-freeing-speech/57173> accessed 17 August 2016.
[70] R Balaji, 'Girl Who Saved Free Speech', *The Telegraph* (25 March 2015) <http://www.telegraphindia.com/1150325/jsp/frontpage/story_10719.jsp#.Vs8qFsfwzBI> accessed 17 August 2016.
[71] Dhananjay Mahapatra and Amit Choudhury, 'Net Gain: SC Hits 66A for a Six', *Times of India*, 25 March 2015 <http://epaperbeta.timesofindia.com/Article.

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distinguished lawyer and former Solicitor General, who had also argued the case, commended the decision as 'superb'.[72] Yet, amidst the euphoria, there still exists good reason for scepticism.

To begin with, the arrests under section 66A were arguably the outcome of a desire to intimidate political dissenters. As one commentator has pointed out, the Indian government could always enact a new provision that may survive judicial scrutiny, but still be liable to misuse.[73] For example, the court, while striking down section 66A, had observed that the section 'would not pass muster' when tests like 'the clear and present danger test or the tendency to create public disorder' were applied.[74] This suggests that if the government enacts a new provision using terms such as 'clear and present danger', and provides clear definitions in the provision, the new provision may be held to be constitutional. Yet, the new provision could still be used to make wrongful arrests under political pressure, traumatizing innocent individuals and striking fear into others. For instance, in Dhada's case, the police released the accused on bail and decided not to pursue the case further.[75] A similar situation happened in many other cases. Is there any guarantee that this cannot happen under a new provision?

Another problem that *Singhal* fails to rectify is that a variety of other laws can be used to target individuals for online speech. For example, in Dhada's case, the accused were also arrested under two provisions of the Indian Penal Code of 1860 (IPC) – section 295A ('deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs') and section 505(2) ('statements creating or promoting enmity, hatred or ill-will between classes').[76] In Trivedi's case, he was also arrested under section 124A of the IPC (sedition)[77]

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aspx?eid=31808&articlexml=NET-GAIN-SC-HITS-66A-FOR-A-SIX-250320 15016007> accessed 17 August 2016.

[72] ibid.

[73] See Sunil Abraham, 'Shreya Singhal and 66A' (2015) 50 Economic and Political Weekly 12.

[74] *Singhal* (n 36) para 41.

[75] 'Palghar court closes case against girls arrested for Facebook comments' (*NDTV*, 1 February 2013) <http://www.ndtv.com/india-news/palghar-court-closes-case-against-girls-arrested-for-facebook-comments-512056> accessed 17 August 2016.

[76] Vaidyanathan (n 48).

[77] Shamik Ghosh, 'Outrage over cartoonist Aseem Trivedi's arrest on sedition charges for "mocking the Constitution"' (*NDTV*, 10 September 2012) <http://www.ndtv.com/india-news/outrage-over-cartoonist-aseem-trivedis-arrest-on-sedition-charges-for-mocking-the-constitution-498901> accessed 17 August 2016.

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notwithstanding Supreme Court guidelines permitting its application only in cases where violence is incited against the state.[78] The Bombay High Court later absolved Trivedi of the charge of sedition[79] but did not go further and hear yet another offence Trivedi had been charged with – insulting the Indian flag, under the State Emblem of India (Prohibition of Improper Use) Act of 2005. Similarly, Mahapatra had also been arrested under provisions of the IPC. The additional charges included section 500 (criminal defamation) and, bizarrely, section 509 ('word or gesture intended to insult the modesty of a woman'), which aims to prevent sexual harassment.[80]

Indeed, section 500 of the Indian Penal Code has been identified as a major obstacle to free speech. In May 2016 the Supreme Court upheld the constitutionality of the section.[81] While the petitioners cited *Singhal* and argued for the de-criminalization of defamation, Justice Dipak Misra, delivering the judgment, stated that *Singhal* concerned a 'different sphere' and context.[82] The judge stated that there was a need to balance competing rights.[83] The judge held that the 'existence of defamation as a criminal offence is not beyond the boundary of Article 19(2) of the Constitution, especially when the word "defamation" has been used in' Article 19(2).[84] The decision was heavily criticized, with concerns expressed about the provision being used as a tool of harassment.[85] And yet another issue

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[78] See *Kedar Nath Singh v State of Bihar* (1962) AIR SC 955, para 37 (stating 'A citizen has a right to say or write whatever he likes about the Government, or its measures . . . so long as he does not incite people to violence against the Government').

[79] *Sanskar Marathe v State of Maharashtra* (2015) Cri. LJ 3561, paras 15–16.

[80] *Mamata cartoon row: Defamation charges dropped against Professor Ambikesh Mahapatra* (*NDTV*, 12 October 2012) <http://www.ndtv.com/kolkata-news/mamata-cartoon-row-defamation-charges-dropped-against-professor-ambikesh-mahapatra-501631> accessed 17 August 2016.

[81] *Subramanian Swamy v Union of India*, Writ Petition (Criminal) No 184 of 2014, 13 May 2016, Supreme Court of India <http://supremecourtofindia.nic.in/FileServer/2016-05-13_1463126071.pdf>.

[82] ibid para 149.

[83] ibid para 183.

[84] ibid.

[85] See Soli Sorabjee, 'Between two rights, a wrong' (*India Today*, 19 May 2016) <http://indiatoday.intoday.in/story/between-two-rights-a-wrong/1/671629.html> accessed 17 August 2016; Prashant Reddy Thikkavarapu, 'Awful reasoning and tortuous verbosity' (*The Hoot*, 17 May 2016) <http://www.thehoot.org/free-speech/judgements/awful-reasoning-and-tortuous-verbosity-9367> accessed 17 August 2016; Gautam Bhatia, 'The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed' (*Indian Constitutional Law & Philosophy*, 13 May 2016) <https://

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which the decision in *Singhal* is powerless to address is the possibility of non-speech laws being used as a tool of political censorship. For example, critics of different regimes have found themselves being hurt financially through various means.[86]

In support of the above arguments, arbitrary and wrongful arrests for comments over the internet have continued even after the decision in *Singhal*. In Maharashtra, the police registered a complaint against a person who tweeted a photograph of the Chief Minister holidaying on a yacht with his family.[87] The complaint was registered under section 67A of the IT Act – a grossly incorrect application of the law, as the provision deals with content that is 'sexually explicit'. In Uttar Pradesh, a person was arrested under various IPC provisions for a Facebook post criticizing a political leader from the ruling Samajwadi Party.[88]

For victims of such harassment, an obvious option for seeking redress is filing a petition before courts. However, India's judicial system is notoriously slow and overburdened, and a judicial victory in such a case can often be a pyrrhic one. Another option that exists before such victims is to file a complaint before certain state human rights bodies. For example, in Dhada's case, the National Human Rights Commission directed the state government to pay INR 50,000 (roughly USD 725) each to Dhada and Srinivasan.[89] In Mahapatra's case, the West Bengal State Human Rights

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indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed> accessed 17 August 2016.

[86] See, e.g., Paranjoy Guha Thakurta, 'Building Trouble' (*India Today*, 31 May 1989) <http://indiatoday.intoday.in/story/the-statesman-another-media-government-tussle-begins/1/323478.html> accessed 17 August 2016 (discussing allegations that government officials were scuttling plans by the *Statesman* newspaper to construct a new office, after the paper accused a powerful politician of corruption); Madhu Trehan, *Tehelka as Metaphor: Prism Me a Lie Tell Me a Truth* (Roli Books, New Delhi, 2009) (discussing tax raids against the magazine *Tehelka*, which alleged corruption in defence deals).

[87] V Narayan, 'Man booked under IT Act for "defaming" CM Devendra Fadnavis in tweet', *Times of India* (New Delhi, 10 July 2015) <http://timesofindia.indiatimes.com/india/Man-booked-under-IT-Act-for-defaming-CM-Devendra-Fadnavis-in-tweet/articleshow/48011122.cms?from=mdr>.

[88] 'Youth Arrested for "Objectionable" Facebook Post Against SP Leader', *New Indian Express* (Chennai, 3 July 2015) <http://www.newindianexpress.com/nation/Youth-Arrested-for-Objectionable-Facebook-Post-Against-SP-Leader/2015/07/03/article2900364.ece> accessed 17 August 2016.

[89] 'NHRC orders state to pay two women held for FB post after Thackeray's death', *Indian Express* (New Delhi, 26 July 2014) <http://indianexpress.com/article/cities/mumbai/nhrc-orders-state-to-pay-two-women-held-for-fb-post-after-thackerays-death/#sthash.9NP5P3Bp.dpuf> accessed 17 August 2016.

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Commission heard the matter *suo moto* and similarly directed the state government to pay Mahapatra and a fellow arrestee INR 50,000 each. In its order, the Commission, then chaired by a former Supreme Court judge, observed, 'If this is allowed to continue then not only the human rights of the dissenters will perish, free speech which is the life blood of our democracy will be gagged. . . . [W]e will be heading towards a totalitarian regime in complete negation of democratic values in the largest democracy of the world.'[90]

Yet, arguably, the amounts awarded were puny compared to the harassment that the individuals had to undergo. Moreover, in Mahapatra's case, the West Bengal government initially reacted by refusing to compensate Mahapatra, and instead (unsuccessfully) contested the order of the Commission before the Calcutta High Court.[91] This demonstrates just how uphill a battle political dissenters face, and the ground-level realities that the ruling in *Singhal* is disconnected from. Therefore, at once, *Singhal* is both a significant and an insignificant decision.

IV. CONCLUSION

This chapter has argued that the idea of censorship is broader than its traditional legalistic conception. In countries like India, where the rule of law is weak, attention must be given to broader social and political factors that can stifle dissent. In this regard, there is a danger in focusing on black-letter law while reading the decision in *Singhal*. The decision is no doubt an important one, and could lead to police officials and political leaders thinking twice before harassing individuals. However, the unfortunate reality is that free speech on the internet is still in danger in India. Indeed, the impact of *Singhal* may well be to transform the nature of internet censorship, from the application of a (now non-functional) provision of the IT Act to the application of provisions in other laws, and the use of intimidation and threats, perhaps in more subtle ways.

[90] West Bengal Human Rights Commission, Case No 34/WBHRC/COM/2012-13, para 32 <http://wbhrc.nic.in/Recommendations/34-12-13.pdf> accessed 17 August 2016.

[91] *Ambikesh Mahapatra v State of West Bengal*, WP No 33241 of 2013, 10 March 2015.

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