CONFERENCE REPORT

FREEDOM OF EXPRESSION IN A DIGITAL AGE

EFFECTIVE RESEARCH, POLICY FORMATION & THE DEVELOPMENT OF REGULATORY FRAMEWORKS IN SOUTH ASIA

THE CENTRE FOR INTERNET & SOCIETY

&

THE OBSERVER RESEARCH FOUNDATION

with

THE INTERNET POLICY OBSERVATORY,
THE CENTRE FOR GLOBAL COMMUNICATION STUDIES

&

THE ANNENBERG SCHOOL FOR COMMUNICATION, UNIVERSITY OF PENNSYLVANIA

APRIL 21, 2015

NEW DELHI, INDIA

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FREEDOM OF EXPRESSION IN A DIGITAL AGE

Effective research, policy formulation, and the development of regulatory frameworks in South Asia

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BACKGROUND TO THE CONFERENCE

As the Internet expands and provides greater access and enables critical rights such as freedom of expression and privacy, it also places censorship and surveillance capabilities in the hands of states and corporations. It is therefore crucial that there exist strong protections for the right to freedom of expression that balance state powers and citizen rights. While the Internet has thrown up its own set of challenges such as extremist/hate speech, the verbal online abuse of women, and the use of the Internet to spread rumours of violence, the regulation of content is a question that is far from being settled and needs urgent attention. These are compounded by contextual challenges. What role can and should the law play? When is it justified for the government to intervene? What can be expected from intermediaries, such as social networks and Internet Service Providers (ISPs)? And what can users do to protect the right to free speech - their own and that of others?

Balancing freedom of expression with other rights is further complicated by the challenges of fast paced and changing technologies and the need for adaptable and evolving regulatory frameworks. By highlighting these challenges and questioning the application of existing frameworks we aim to contribute to further promoting and strengthening the right to freedom of expression across South Asia.
THE ORGANIZERS

CENTRE FOR INTERNET AND SOCIETY
Established in 2008, the Centre for Internet and Society (CIS) is a non-profit research organization that works on policy issues relating to freedom of expression, privacy, accessibility for persons with disabilities, access to knowledge and intellectual property rights, and openness (including open standards and open government data). CIS also engages in scholarly research on the budding disciplines of digital natives and digital humanities. CIS has offices in Bangalore and New Delhi.

OBSERVER RESEARCH FOUNDATION
ORF, established in 1990, is India’s premier independent public policy think tank and is engaged in developing and discussing policy alternatives on a wide range of issues of national and international significance. The fundamental objective of ORF is to influence the formulation of policies for building a strong and prosperous India in a globalised world. It hosts India’s largest annual cyber conference – CyFy: the India Conference on Cyber Security and Internet Governance

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The Centre for Internet & Society

in collaboration with
The Observer Research Foundation in association with the Internet Policy Observatory (IPO) of the Center for Global Communication Studies at the Annenberg School for Communication, at the University of Pennsylvania.

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**‘Freedom of Expression in a Digital Age’**

**Effective Research, Policy Formation, & the Development of Regulatory Frameworks in South Asia**

**April 21st, 2015 - 11 AM to 6 PM**

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Phone: +91 11 43520000, 43520020

**About the Conference**
The conference will be a discussion highlighting the challenges in promoting and strengthening online freedom of expression and evaluating the application of existing regulatory frameworks in South Asia.

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WELCOME ADDRESS

Ms. Mahima Kaul, Head (Cyber & Media Initiative), Observer Research Foundation (ORF), introduced the conference and its context and format, as well as the organisers. In three sessions, the Conference aimed to explore historical lessons, current realities and future strategies with regard to freedom of expression on the Internet in India and South Asia.

Mr. Manoj Joshi, Distinguished Fellow, ORF, provided the welcome address. Mr. Joshi highlighted the complexities and distinctions between print and electronic media, drawing on examples from history. He stated that freedom of expression is most often conceived as a positive right in the context of print media, as restrictions to the right are strictly within the bounds of the Constitution. For instance, during the riots in Punjab in the 1980s, when hate speech was prevalent, constitutionally protected restrictions were placed on the print media. When efforts were made to crack down on journalists with the introduction of the Defamation Bill in the 1980s, journalists were lucky that the Bill also included proprietors as those liable for defamation. This created solidarity between journalists and proprietors of newspapers to fight the Bill, and it was shelved.

Freedom of expression is necessary in a democratic society, Mr. Joshi stated, but it is necessary that this freedom be balanced with other rights such as privacy of individuals and the protection against hate speech. In the absence of such balance, speech becomes one-sided, leaving no recourse to those affected by violative speech.

In the digital age, however, things become complex, Mr. Joshi said. The freedom available to speech is enhanced, but so is the misuse of that freedom. The digital space has been used to foment riots, commit cybercrime, etc. Online, in India the restrictions placed on freedom of speech have become draconian. Section 66A and the incidents of arrests under it are an example of this. It is, therefore, important to consider the kind of restrictions that should be placed on free speech online. There is also the question of self-regulation by online content-creators, but this is rendered complex by the fact that no one owns the
Internet. This conference, Mr. Joshi said, will help develop an understanding of what works and what frameworks we will need going forward.

Mr. Pranesh Prakash, **Policy Director, Centre for Internet & Society (CIS)**, introduced the speakers for the first session. Mr. Vibodh Parthasarathi, **Associate Professor, Centre for Culture, Media and Governance, Jamia Millia Islamia University**, would first share his views and experience regarding the various ways of curtailing freedom of expression by the State, markets and civil society. Ms. Smarika Kumar of the **Alternative Law Forum (ALF)** would then expand on structural violations of freedom of expression. Mr. Bhairav Acharya, **Advocate with the Delhi Bar and Consultant for CIS**, would throw light on the development of free speech jurisprudence and policy in India from the colonial era, while Prof. Ambikesh Mahapatra, **Professor of Chemistry, Jadavpur University**, was to speak about his arrest and charges under Section 66A of the Information Technology Act, 2000 (am. 2008), providing insight into the way Section 66A was misused by police and the West Bengal government.

**Vibodh Parthasarathi**
*Associate Professor, Centre for Culture, Media and Governance (CCMG), Jamia Millia Islamia University*

Mr. Parthasarathi began his talk with an anecdote, narrating an incident when he received a call from a print journalist, who said “TV people can get away with anything, but we can’t, and we need to do something about it.” The notion of news institutions getting away with non-kosher actions is not new – and has been a perception since the 19th century. He stressed that there have always been tensions between Freedom of Expression, access, and other rights. Curtailment happens not just by the state, but by private parties as well – market and civil society. Indeed, a large number of non-state actors are involved in curtailing FoE. Subsequently a tension between individual FoE and commercial speech freedom is emerging. This is not a new phenomenon. Jurisprudence relating to free speech makes a distinction between the persons in whom the right inheres: individuals on the one hand (including journalists and bloggers), and proprietors and commercial entities on the other.
In India, freedom of speech cases – from 1947 – relate primarily to the rights of proprietors. These cases form the legal and constitutional basis for issues of access, transmission and distribution, but are not necessarily favourable to the rights of individual journalists or newsreaders. At the individual level, the freedom to receive information is equally important, and needs to be explored further. For entities, it is crucial to consider the impact of curtailment of speech (or threats of curtailment) on entities of different sizes and kinds.

Mr. Parthasarathi further explained that online, freedom of expression depends on similar structural conditions and stressed that scholarship must study these as well. For example, intermediaries in the TV industry and online intermediaries will soon come together to provide services, but scholarship does not link them yet. The law is similarly disjointed. For instance, ‘broadcasting’ falls in the Union List under Schedule VII of the Constitution, and is centrally regulated. However, distribution is geographically bounded, and States regulate distribution. In order to have a cohesive broadcast regulation, he raised the point that the placement of ‘broadcasting’ in the Union List may need to be re-thought.

According to Mr. Parthasarathi, the underlying conceptual basis – for the interlinked scholarship and regulation of intermediaries (online and broadcast), of commercial speech and individual access to information, and censorship (State and private, direct and structural) – lies in Article 19(1)(a). He noted that there is a need to rethink the nature of this freedom. For whom do we protect freedom of speech? For individuals alone, or also for all private entities? From what are we protecting this freedom? For Mr. Parthasarathi, freedom of speech needs to be protected from the State, the market, civil society and those with entrenched political interests. Additionally, Mr. Parthasarathi raised the question of whether or not in the online context freedom of the enterprise becomes antithetical to universal access.

Mr. Parthasarathi also highlighted that it is important to remember that freedom of expression is not an end in itself; it is a facilitator – the ‘road’– to achieve crucial goals such
as diversity of speech. But if diversity is what freedom of expression should enable, it is important to ask whether institutional exercise of freedom has led to enhanced diversity of speech. Do media freedom and media diversity go together? For Mr. Parthasarathi, media freedom and media diversity do not always go together. The most vivid example of this is the broadcast environment in India, following the deregulation of broadcast media beginning from the mid 1990s – much of which was done through executive orders on an ad hoc basis.

This led to infrastructural censorship, in addition to the ex-post curtailment of content. Increasingly the conditions on which content is produced are mediated i.e. which entities are eligible to obtain licenses, what type of capital is encouraged or discouraged, how is market dominance measured, accumulation of interests across content and carriage, or various carriage platforms? Mediating the conditions of producing speech, or infra censorship, is primarily operationalised through regulatory silences, as illustrated in the absence of any coherent or systematic anti-competitive measures.

Indian courts are champions in protecting the freedom of expression of ‘outlets’ – of proprietors and entities. But this has not led to diversity of speech and media. Perhaps there is a need to rethink and reformulate ideas of freedom. He pointed out that it is not enough merely to look at ex post curtailment of speech (i.e., the traditional idea of censorship). Instead the conditions in which speech is made and censored need to be explored; only then can our understanding expand. Mr Parthasarathi ended his talk by stressing that a proactive understanding of freedom of expression can highlight architectural curtailment of speech through the grant of licenses, competition and antitrust laws, media ownership and concentration across carriage and content, etc. This is essential in a digital age, where intermediaries play a crucial, growing role in facilitating freedom of speech.

Smarika Kumar
Alternative Law Forum

Beginning where Mr. Parthasarathi left off, the focus of Ms. Kumar’s presentation was the curtailment of speech and the conditions under which speech is produced. At the outset,
she sought from the audience a sense of the persons for whom freedom of speech is protected: for government-controlled media, the markets and commercial entities, or for civil society and citizens? Ms. Kumar aimed to derive ideas and conceptual bases to understand freedom of speech in the digital space by studying judicial interpretations of Article 19(1)(a) and its limitations. Towards this end, she highlighted some Indian cases that clarify the above issues.

Ms. Kumar began with *Sakal Papers v. Union of India* [AIR 1962 SC 305]. In *Sakal Papers*, the issue concerned the State’s regulation of speech by regulation of the number of permitted pages in a newspaper. This regulation was challenged as being in violation of Article 19(1)(a) of the Constitution. The rationale for such regulation, the State argued, was that newsprint, being imported, was a scarce commodity, and therefore needed to be equitably distributed amongst different newspapers – big or small. Further, the State defended the regulation citing its necessity for ensuring equal diversity and freedom of expression amongst all newspapers. The petitioners in the case argued that such a regulation would negatively impact the newspapers’ right to circulation by reducing the space for advertisements, and thus forcing the newspaper to increase selling prices. Readers of the newspaper additionally argued that such increase in prices would affect their right to access newspapers by making them less affordable, and hence such regulation was against the readers’ interests. Ultimately, the Supreme Court struck down the regulation. The Constitution Bench noted that if the number of pages of a newspaper were to be limited and regulated, the space available for advertisements would reduce. Were advertisements to reduce, the cost of newspapers would increase, affecting affordability and access to information for the citizens. Ultimately, newspaper circulation would suffer; i.e., the State’s regulation affected the newspapers’ right of circulation which would amount to a violation of freedom of expression as the right extends to the matter of speech as well as the ability to circulate such speech.

Apart from the number of pages, the Indian government has sought to regulate newsprint in the past. In *Bennett Coleman and Co. & Ors. v. Union of India* [AIR 1973...
a Constitution Bench of the Supreme Court considered whether regulation of the number of pages permitted in a newspaper constituted an unreasonable restriction on freedom of expression. Towards this, the Government of India set forth a Newsprint Policy in 1972, under the terms of which the number of pages of all papers were to be limited to ten; where there were small newspapers that did not achieve the ten-page limit, a 20% increase was permitted; and finally, new newspapers could not be started by common ownership units. The Newsprint Order aimed to regulate a scarce resource (newsprint), while the Newsprint Policy sought to promote small newspapers, encourage equal diversity among newspapers and prevent monopolies. The Supreme Court upheld the Newsprint Order, stating that newsprint was indeed a scarce resource, and that the matter of import and distribution of newsprint was a matter of government policy. The Court would not interfere unless there was evidence of *mala fides*. However, the Court struck down the Newsprint Policy for reasons similar to *Sakal Papers*; that the rights afforded to newspapers under Article 19(1)(a) – including circulation – could not be abridged for reasons of protecting against monopolies.

In his dissenting opinion, Justice Mathew stated that in conceiving freedom of expression, it is important to also consider the hearer (the reader). For Justice Mathew, Meiklejohn’s view the “*what is essential is not that everyone shall speak, but that everything worth saying shall be said*” cannot be affected if, because of concentration of media ownership, media are not available for most speakers. In such a situation, “*the hearers [cannot] be reached effectively*”. However, the imperative is to maximise diversity of speech. For this, we need to balance the rights of citizens against those of the press; i.e., the rights of the *reader* against those of the *speaker*.

Ms. Kumar pointed out that this was the first case to consider the right of readers to access a diversity of speech. Justice Mathew distinguished curtailment of speech by the state, and by the market – and that this is crucial in the digital age, where information is predominantly accessible through and because of intermediaries. Ms. Kumar further stressed that especially in an age where ‘walled gardens’ are a real possibility (in the absence of net
neutrality regulation, for instance), Justice Mathew’s insistence on the rights of readers and listeners to a diversity of speech is extremely important.

Ms. Kumar went on to explain that though judges in the Supreme Court recognised the rights of readers/listeners (us, the citizens) for the purposes of news and print media, a similar right is denied to us in the case of TV. In *Secretary, Ministry of Broadcasting v. Cricket Association of Bengal* [AIR 1995 SC 1236], the issue surrounded private operators’ right to use airwaves to broadcast. The Supreme Court considered whether government agencies and Doordarshan, the government broadcaster, “have a monopoly of creating terrestrial signals and of telecasting them or refusing to telecast them”, and whether Doordarshan could claim to be the single host broadcaster for all events, including those produced or organised by the company or by anybody else in the country or abroad. The Supreme Court held that the TV viewer has a right to a diversity of views and information under Article 19(1)(a), and also that the viewer must be protected against the market. The Court reasoned that “airwaves being public property, it is the duty of the state to see that airwaves are so utilised as to advance the free speech right of the citizens, which is served by ensuring plurality and diversity of views, opinions and ideas”.

If every citizen were afforded the right to use airwaves at his own choosing, “powerful economic, commercial and political interests” would dominate the media. Therefore, instead of affirming a distinct right of listeners, the Court conflated the interests of government-controlled media with those of the listeners, on the ground that government media fall under public and parliamentary scrutiny. According to Ms. Kumar this is a regressive position that formulates State interest as citizen interest. Ms. Kumar argued that in order to ensure freedom of speech there is a need to frame citizens’ interests as distinct from those of the market and the government.

*Bhairav Acharya*  
*Advocate, Supreme Court and Delhi High Court & Consultant, CIS*
Mr. Acharya’s presentation focused on the divergence between the jurisprudence and policy surrounding freedom of expression in India. According to him, the policies of successive governments in India – from the colonial period and thereafter – have developed at odds with case-law relating to freedom of expression. Indeed, it is possible to discern from the government’s actions over the last two centuries a relatively consistent narrative of governance which seeks to bend the individual’s right to speech to its will. The defining characteristics of this narrative – the government’s free speech policy – emerge from a study of executive and legislative decisions chiefly in relation to the press, that continue to shape policy regarding the freedom of expression on the Internet. Thus, there has been consistent tension between the individual and the community, as well as the role of the government in enforcing the expectations of the community when thwarted by law.

Today, free speech scholarship (including digital speech) fails to take into account this consistent divergence between jurisprudence and policy. Mr. Acharya pointed out that we think of digital speech issues as new, whereas there is an immense amount of insight to gain by studying the history of free speech and policy in India.

Towards this, Mr. Acharya highlighted that to understand dichotomy between modern and native law and free speech policy, it is useful to go back to the early colonial period in India, when Governor-General Warren Hastings established a system of courts in Bengal’s hinterland to begin the long process of displacing traditional law to create a modern legal system. J. Duncan M. Derrett notes that the colonial expropriation of Indian law was marked by a significant tension caused by the repeatedly-stated objective of preserving some fields of native law to create a dichotomous legal structure. These efforts were assisted by orientalist jurists such as Henry Thomas Colebrooke whose interpretation of the dharmaśastras heralded a new stage in the evolution of Hindu law. By the mid-nineteenth century, this dual system came under strain in the face of increasing colonial pressure to rationalise the legal system to ensure more effective governance, and native protest at the perceived insensitivity of the colonial government to local customs.
Mr. Acharya explained that this myopia in Indian policy research is similar social censorship (i.e., social custom as creating limits to free speech). Law and society scholars have long studied the social censorship phenomenon, but policy research rejects this as a purely academic pursuit. But the truth is that free speech has been regulated by a dual policy of law and social custom in India since colonial times. The then-Chief Justice of the Calcutta High Court Elijah Impey required officers to respect local customs, and this extended to free speech as well. But as colonial courts did not interpret Hindu law correctly; interpretations of freedom of speech suffered as well.

Mr. Acharya noted that the restrictions on freedom of speech introduced by the British continue to affect individuals in India today. Prior to British amendments, India had drawn laws from multiple sources – indeed customs and laws were tailored for communities and contexts, and not all were blessed with the consistency and precedent so familiar to common law. Since the British were unable to make sense of India’s law and customs, they codified the principles of English customary law.

The Indian Penal Code (IPC) saw the codification of English criminal law (the public offences of riots, affray, unlawful assembly, etc., and private offences such as criminal intimidation). In Macaulay’s initial drafts, the IPC did not contain sedition and offences of hurting religious sentiments, etc. Sections 124A (“Sedition”) and 295A (“Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs”) were added to the IPC in 1860, and changes were made to the Code of Criminal Procedure as well. Today, these sections are used to restrict and criminalise digital speech.

The Right to Offend

Mr. Acharya then considered the history of the “right to offend”, in light of the controversies surrounding Section 66A, IT Act. Before the insertion and strengthening of Section 295A, citizens in India had a right to offend others within the bounds of free speech. He clarified that in 1925 a pamphlet “Rangila Rasool” was published by Lahore-based Mahashe Rajpal (the name(s) of the author(s) were never revealed). The pamphlet concerned
the marriages and sex life of the Prophet Mohammed, and created a public outcry. Though the publisher was acquitted of all charges and the pamphlet was upheld, the publisher was ambushed and stabbed when he walked out of jail. Under pressure from the Muslim community, the British enacted Section 295A, IPC. The government was seeking to placate and be sensitive to public feeling, entrenching the idea that the government may sacrifice free speech in the face of riots, etc. The death of India’s “right to offend” begins here, said Mr. Acharya.

A prior restraint regime was created and strengthened in 1835, then in 1838, etc. At this time, the press in India was largely British. Following the growth of Indian press after the 1860s, the British made their first statutory attempt at censorship in 1867: a prior sanction was required for publication, and contravention attracted heavy penalties such as deportation and exile. Forfeiture of property, search and seizures and press-inspections were also permitted by the government under these draconian laws. Mr. Acharya noted that it is interesting that many leaders of India’s national movement were jailed under the press laws.

Independence and After:

Mr. Bhairav further explained that the framers of the Constitution deliberately omitted “freedom of the press” from the text of Article 19(1)(a). Mr. Acharya stated that Jawaharlal Nehru did not think the press ought to be afforded such a right. This is despite a report of the Law Commission of India (1984), which recommended that corporations be provided an Article 19 right. But why distrust the press, though citizens are granted the freedom of speech and expression under Article 19(1)(a)? In Mr. Acharya’s eyes, this is evidence of the government’s divergent approach towards free speech policy; and today, we experience this as a mistrust of the press, publications and of online speech.

Statutory restrictions on free speech grew at odds with judicial interpretation in the 1950s. Taking the examples of *Romesh Thapar v. the State of Madras* [AIR 1950 SC 124] and *Brij Bhushan v. the State of Delhi* [(1950) Supp. SCR 245], Mr. Acharya showed how the judiciary interpreted Article 19 favourably. Despite the government’s
arguments about a public order danger, the Supreme Court refused to strike down left wing or right wing speech (Romesh Thapar concerned a left wing publication; Brij Bhushan concerned right wing views), as “public order” was not a ground for restricting speech in the Constitution. The government reacted to the Supreme Court’s judgment by enacting the First Amendment to the Constitution: Article 19(2) was amended to insert “public order” as a ground to restrict free speech. Thus, it is possible to see the divergence between free speech jurisprudence and policy right from Independence. Nehru and Sardar Vallabhbhai Patel had supported the amendment, while B.R. Ambedkar supported Romesh Thapar and Brij Bhushan. On the other hand, then-President Rajendra Prasad sought Constitutional protection for the press.

Why Study Free Speech History?

Mr. Acharya noted how the changes in free speech policy continue to affect us, including in the case of content restrictions online. In the 1950s, then-Prime Minister Nehru appointed the First Press Commission, and the newspaper National Herald was established to promote certain (left wing) developmental and social goals. Chalapati Rao was the editor of the National Herald, and a member of the First Press Commission.

At that time, the Commission rejected vertical monopolies of the press. However, today, horizontal monopolies characterize India’s press. The First Press Commission also opposed ‘yellow journalism’ (i.e., sensational journalism and the tabloid press), but this continues today. Decades later, Prime Minister Indira Gandhi called for a “committed bureaucracy, judiciary and press”, taking decisive steps to ensure the first two. For instance, Justice Mathew (one of the judges in the Bennett Coleman case) was an admirer of Indira Gandhi. As Kerala’s Advocate General, he wanted the Press Registrar to have investigative powers similar to those given in colonial times; he also wanted the attacks on government personalities to be criminalized. The latter move was also supported by M.V. Gadgil, who introduced a Bill in Parliament that sought to criminalise attacks on public figures on the grounds of privacy. Mr. Acharya noted that though Indira Gandhi’s moves and motives with
regard to a “committed press” are unclear, the fact remains that India’s regional and vernacular press was more active in criticizing the Emergency than national press.

Today, in a move reminiscent of Romesh Thapar and Brij Bhushan, the government has created a task force to move ahead of Section 66A. Following the striking down of 66A in *Shreya Singhal & Ors. v. Union of India* (Supreme Court, March 24, 2015), elements in the government have stated their wish to introduce and enact a new Section 66A. Mr. Acharya explained that it is possible that this repressive, mistrustful history of press policy to carry forward. This can be concluded from a study of colonial and post-Independence press history as it can give one more than a suspicion of the government’s designs on press policy. Indeed, it is very plausible that the government will retain and enhance its powers to monitor content, possibly introduce investigative powers for the registrar or regulator, indirectly seek support for the government’s policies and economic ideals, etc. Greater awareness of history and context may allow for civil society, academia, and the public at large to predict and prepare for press policy changes.

Ambikesh Mahapatra  
*Professor of Chemistry, Jadavpur University*

Prof. Mahapatra introduced himself as a victim of the West Bengal administration and ruling party. He stated that though India’s citizens have been granted the protection of fundamental rights after Independence, these rights are not fully protected; his experience with the West Bengal ruling party and its abuse of powers under the Information Technology Act, 2000 (am. 2008) (“IT Act”) highlights this.

On March 23, 2012, Prof. Mahapatra had forwarded a cartoon to his friends by email. The cartoon poked fun at West Bengal Chief Minister Mamata Banerjee and her ruling party. On the night of April 12, 2012, individuals not residing in the Professor’s housing colony confronted him, dragging him to the colony building and assaulting him. These individuals forced Prof. Mahapatra to write a confession about his forwarding of the cartoon and his political affiliations. Though the police arrived at the scene, they did not interfere with the
hooligans. Moreover, when the leader of the hooligans brought the Professor to the police and asked that he be arrested, they did so even though they did not have an arrest warrant. At the police station, the hooligans filed a complaint against him. The Professor was asked to sign a memo mentioning the charges against him (Sections 114 and 500, Indian Penal Code, 1860 & Section 66A, IT Act). Prof. Mahapatra noted that the police complaint had been filed by an individual who was neither the receiver nor the sender of the email, but was a local committee member with the Trinamool Congress (the West Bengal ruling party).

The arrest sparked a series of indignant responses across the country. The West Bengal Human Rights Commission took *suo motu* cognizance of the arrest, and recommended action against the high-handedness of the police. Fifty six intellectuals appealed to the Prime Minister of India to withdraw the arrest; the former Supreme Court judge Markandey Katju was among those who appealed. Thirty cartoonists’ organisations from across the world also appealed to the President and the Prime Minister to withdraw the case.

The West Bengal government paid no heed to the protests, and Chief Minister Mamata Banerjee publicly supported the actions of the police - making public statements against Justice Katju and A.K. Ganguly, former judge of the Supreme Court and head of the West Bengal Human Rights Commission respectively. A charge sheet was framed against Prof. Mahapatra and others, with Section 66A as one of the charges.

The case has been going on for over two years. Recently, on March 10, 2015, the Calcutta High Court upheld the recommendations of the West Bengal Human Rights Commission, and directed the government to implement them. The West Bengal government has preferred an appeal before a division bench, and the case will continue. This is despite the fact that Section 66A has been struck down (by the Supreme Court in *Shreya Singhal & Ors. v. Union of India*).

Though noting that he was not an expert, Prof. Mahapatra put forward that it seemed that the freedom of expression of the common man depends on the whims of the ruling
parties and the State/Central governments. It is of utmost importance, according to him, to protect the common man’s freedom of speech, for his recourse against the government and powerful entities is pitifully limited.

QUESTIONS & COMMENTS

Q. A participant stated that the core trouble appears to lie in the power struggle of political parties. Political parties wish to retain power and gather support for their views. Despite progressive laws, it is the Executive that implements the laws. So perhaps what is truly required is police and procedural reforms rather than legislative changes.

A. Members of the panel agreed that there is a need for more sensitivity and awareness amongst the law enforcement agencies and this might be long overdue and much needed step in protecting the rights of citizens.

Q. A participant was interested in understanding how it might be possible to correct the dichotomy between FoE policy and doctrine? The participant also wanted the panel to comment on progressive policy making if any.

A. Members of the panel stated that there is no easy way of correcting this dichotomy between custom and law. Scholars have also argued that the relationship between custom and pernicious social censorship is ambiguous. Towards this, more studies are required to come to a conclusion.

Q. A participant requested clarity on what rights can be created to ensure and support a robust right to freedom of expression, and how this might affect the debates surrounding net neutrality?

A. Members of the panel noted that the Internet allows citizens and corporations to regulate speech on their own (private censorship), and this is problematic. Members of the panel also responded that the existing free speech right does not enable diversity of speech. Social and local customs permit social censorship, and this network effect is clearly visible online; individuals experience a chilling effect. Finally, in the context of net neutrality, the interests of content-producers (OTTs, for instance) are different from those of users. They may benefit economically from walled gardens or from non-interference with traffic-routing, but users may not.
Therefore, there is a need for greater clarity before coming to a conclusion about potential net neutrality regulation.

SESSION 2: CURRENT REALITIES

Dr. Cherian George
Associate Professor, Hong Kong Baptist University

Dr. George began his talk by highlighting how there is no issue as contentious as offensive speech and how it should be dealt with. The debate around free speech is often framed as a battle between those who support democracy and those who oppose it. Yet, this is also a tension within democracy. Citizens should not be unjustly excluded from participating in democracy (companion rights in Article 19 and 20, ICCPR). Relevant UN institutions and Article 19 have come up with reports and ideals that should be universally adopted - norms that apply to many areas including speech. These norms are different from traditional approaches. For example:

<table>
<thead>
<tr>
<th>Human Rights Norms</th>
<th>Traditional Approach</th>
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<tbody>
<tr>
<td>Regulate incitement of violence (discrimination, hate, etc.)</td>
<td>Law protects people’s feelings from speech that offends</td>
</tr>
<tr>
<td>Protect minorities as they are more vulnerable to exploitation and uprooting of their values</td>
<td>Law sides with the majority, to protect mainstream values over minority values</td>
</tr>
<tr>
<td>Allow robust criticism of ideas, religions, and beliefs</td>
<td>Law protects religion, beliefs, and ideas from criticism</td>
</tr>
<tr>
<td>Strive for balance between liberty and equality</td>
<td>Aims for order and maintenance of status quo</td>
</tr>
<tr>
<td>Promote harmony through the media</td>
<td>Enforces harmony by the state</td>
</tr>
</tbody>
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Commenting on the traditional approach, Dr. George noted that if the state protects feelings of offence against speech, it allows groups to use such protection as a political weapon: “hate spin”, which is the giving or taking of offence as a political strategy. Hate spin is normally framed as a “visceral, spontaneous reaction” to a video, writing, or speech, etc. Yet, the spontaneous reaction of indignation to speech or content can consistently be revealed to result from conscious manipulation by middlemen for political purposes.

South Asia is similar to West Asia – as the legal frameworks provide immunity for dangerous speech. In practice, this allows for the incitement of discrimination, hostility, and violence. At the same time, the legal frameworks allow for excessive sympathy for wounded feelings, and often the taking of offence turns into a political strategy. Power enters the equation here. The law allows the powerful to take offence and use hate speech against those not in powerful positions.

Dr. George highlighted a number of legal quandaries surrounding freedom of expression including:

1. **Enforcement gaps**: There is a lack of enforcement of existing laws against incitement.
2. **Non-regulated zones**: Socio-political research demonstrates that many problems cannot be regulated, and yet the law can only deal with what can be regulated. Hate speech is one of these as hate speech is not in the speech itself, but in the meaning that is produced in the mind of those saying/listening.
3. **Verdict-proof opportunities**: Political entrepreneurs can use legislative and judicial processes to mainstream hateful views, regardless of how legislature and courts ultimately act. The religious right, for instance, can always pit themselves morally against “secular” decisions of apex authorities (SC, etc.). For example, in the context of the US and Islamophobia - the State legislature in Alabama introduced an anti-Shariah law. Yet, the law is against a non-existent threat and appears to be a ploy to normalize anti-Muslim sentiments, including in political rhetoric. While focusing on winning battles in courts or legislature, the intolerant groups do not need to win a legal court case to introduce and entrench language of intolerance in public discourse and discussion. This demonstrates that
there is a need to begin moving away from a purely legal analysis (interpretation or development) of the laws, and a need to begin studying these issues through a sociological lens.

Zakir Khan
Article 19, Bangladesh

Mr. Khan introduced ARTICLE 19 and its work in Bangladesh and the rest of South Asia. He noted that ARTICLE 19 is involved in documenting and analysing laws and regulations affecting freedom of expression, including in Bangladesh. Article 19 also campaigns for changes in law and policy, and responds from a policy perspective to particular instances of government overreach.

Mr. Khan explained that India has the Information Technology Act, 2000 (am. 2008) (“IT Act”), and in Bangladesh, the equivalent legislation is the Information and Communication Technology Act, 2006 (“ICT Act”). The ICT Act was enacted to bring Bangladeshi law in conformity with international law; i.e. in accordance with the UNCITRAL model law on e-commerce and online transactions. The ICT Act deals with hacking, crimes committed with the use of a computer system, breach of data, breach of computer system, and hardware.

Like the IT Act in India, Bangladesh’s ICT Act also criminalizes speech and expression online. For instance, Section 57, ICT Act, criminalizes the publication of “fake, obscene or defaming information in electronic form”. Similarly, bringing damage to “the state’s image” online is criminalized. In 2013, the Bangladesh Ministry of Law amended the ICT Act to increase penalties for online offences, and allow for the detention of suspected offenders, warrantless arrests and indefinite detention without bail. Bloggers and activists have been protesting these changes, and have been targeted for the same.

Mr. Khan noted that ARTICLE 19 has developed a tool to report violations online. Individuals who have experienced violations of their rights online can post this information
onto a forum, wherein ARTICLE 19 tracks and reports on them, as well as creating awareness about the violation. Any blogger or online activist can come and voice concerns and report their stories. Mr. Khan also highlighted that given the ICT Act and the current environment, online activists and bloggers are particularly threatened. ARTICLE 19 seeks to create a safe space for online bloggers and activists by creating anonymity tools, and by creating awareness about the distinctions between political agenda and personal ideology.

Chinmayi Arun
Research Director, Centre for Communication Governance (CCG), National Law University (Delhi)

Ms. Arun began by noting that usually conversations around freedom of expression look at the overlap between FoE and content i.e. the focus is on the speaker and the content. Yet, when one targets the mediator – it shifts the focus as it would be approaching the issue from the intermediary’s perspective. When structural violation of free speech happens, it either places the middleman in the position of carrying through the violation, or creates a structure through which speech violations are incentivized.

An example of this is the Bazee.com case. At the time of the case the law was structured in such a way that not only perpetrators of unlawful content were punished, but so were the bodies/persons that circulated illegal content. In regulatory terms this is known as “gatekeeper liability”. In the Bazee.com case, a private party put obscene content up for sale and Bazee.com could and did not verify all of the content that was for sale. In the case, the Delhi HC held Avnish Bajaj, the CEO of Bazee.com, liable on the precedent of strict liability for circulation of obscene content. The standard of strict liability was established under Ranjit Udeshi case. The standard of strict liability is still the norm for non-online content, but after Bazee.com, a Parliament Standing Committee created a safe harbour for online intermediaries under Section 79 of the IT Act. As per the provision, if content has been published online, but an intermediary has not edited or directly created the content, it is possible for them to seek immunity from liability for the content. The Parliament Standing Committee then stated that intermediaries ought to exercise due diligence. Thus, the Indian
legal regime provides online intermediaries with immunity only if content has not been published or edited by an intermediary and due diligence has been exercised as defined by Rules under the Act. While developing India’s legal regime for intermediary liability the Parliamentary Standing Committee did not focus on the impact of such regulation on online speech.

To a large extent, present research and analysis of Freedom of Expression is focused on the autonomy of the speaker/individual. An alternative formulation and way of understanding the right, and one that has been offered by Robert Post through his theory of democratic self governance, is that Freedom of Expression is more about the value of the speech rather than the autonomy of the speaker. In such a theory the object of Freedom of Expression is to ensure diversity of speech in the public sphere. The question to ask then is: “Is curtailment affecting democratic dialogue?” The Supreme Court of India has recognized that people have a right to know/listen/receive information in a variety of cases. Ms. Arun explained that if one accepts this theory of speech, the liability of online intermediaries will be seen differently.

Ms. Arun further explained that in Shreya Singhal, the notice-and-takedown regime under section 79 of the IT Act has been amended, but the blocking regime under section 69A has not. Thus, the government can still use intermediaries as proxies to take down legitimate content, and not provide individuals with the opportunity to challenge blocking orders. This is because as per the Act, blocking orders must be confidential. Though the blocking regime has not been amended, the Supreme Court has created an additional safeguard by including the requirement that the generator of content has to be contacted (to the extent possible) before the government can pass and act upon a blocking order. Mr. Arun noted that hopefully, when implemented, this will provide a means of recourse for individuals and counter, to some extent, the mandated secrecy of content blocking orders.

Raman Jit Singh Chima
Asia Consultant, Access Now
Mr. Chima began his presentation by noting that the Internet is plagued by a few founding myths. Tim Goldsmith and Jack Wu (in *Who Controls the Internet: Illusions of a Borderless World*) name one: that no laws apply to the Internet; that, because of the borderless nature of the Internet – data flows through cables without regard for State borders – and thus countries’ laws do not affect the Internet. These cyber-anarchists, amongst whom John Perry Barlow of the Electronic Frontier Foundation (EFF) is inspiring, also argue that regulation has no role for the Internet.

Mr. Chima countered these 'myths', arguing that the law affects the Internet in many ways. The US military and Science departments funded the invention of the Internet. So the government was instrumental in the founding of the Internet, and the US Department of Commerce has agreements with ICANN (Internet Corporation for Assigned Names and Numbers) to govern the Domain Names System. So the law, contracts and regulation already apply to the Internet.

Mr. Chima further explained that today organisations like EFF and civil society in India argue for, and seek to influence, the creation of regulation for the protection of journalists against unfair and wrongful targeting by the government. This includes moves to protect whistleblowers, to ensure the openness of the Internet and its protection from illegitimate and violative acts against freedom of expression, access and other rights. Some governments, like India, also place conditions in the licenses granted to Internet Service Providers (ISPs) to ensure that they bring access to the rural, unconnected areas. Such law and regulation are not only common, but they are also good; they help the population against virtual wrongdoing.

Mr. Chima pointed out that when States contemplate policy-making for the Internet, they look to a variety of sources. Governments draw upon existing laws and standards (like India with the virtual obscenity offence provision Section, 67 and 67A, IT Act, which is drawn from the real-world penal provision Section 292, IPC) and executive action (regulation, by-laws, changes to procedural law) to create law for the Internet. Additionally, if a government repeats a set of government actions consistently over time, such actions may
take on the force of law. Mr. Chima also spoke of web-developers and standards-developers (the technical community), who operate by rules that have the force of law, such as the ‘rough consensus and running code’ of the IETF (Internet Engineering Task Force). Governments also prescribe conditions (“terms of use”) that companies must maintain, permitting or proscribing certain kinds of content on websites and platforms.

Finally, Mr. Chima highlighted international legal and policy standards that play a role in determining the Internet’s law and regulation. ICANN, the administrator of the Internet Assigned Numbers Authority (IANA) functions and governing body for the Domain Names System, functions by a set of rules that operate as law, and in the creation of which, the international legal community (governments, companies, civil society and non-commercial users, and the technical community) play a role. The ITU (International Telecommunications Union) and organisations like INTERPOL also play a role.

Mr. Chima explained that when one wants to focus on issues concerning freedom of expression, multiple laws also apply. Different States set different standards. For instance, in the US, the main standards for the Internet came from issues relating to access to certain types of online content. In *Reno v. ACLU* (1997), the US Supreme Court considered what standards should be created to access obscene and indecent content on the Internet. The judges held that the Internet, as a medium of unprecedented dynamism, deserved the higher protection from governmental overreach.

In Asia, the main legal standards for the Internet came from Internet commerce: the UNCITRAL model law, which prescribed provisions best suited to the smoother commercial utilization of a fast and growing medium, became the foundation for Internet-related law in Asian states. Predictably, this did not offer the strongest rights protections, but rather, focused on putting in place the most effective penalties. But when Asian states drew from the European UNCITRAL law, many forgot that European states are already bound by the European Convention for Human Rights, the interpretation of which has granted robust protections to Internet-related rights.
Mr. Chima provided the example of Pakistan’s new Cybercrime Bill. The Bill has troubling provisions for freedom of expression, and minimal to no due process protections. While drafting the law, Pakistan has drawn largely from model cybercrime laws from the Council of Europe, which are based on the Budapest Convention. In Europe and the US, States have strong parallel protections for rights, but States in Asia and Africa do not.

Mr. Chima concluded that when one talks of freedom of expression online, it is important to also remember the roles of intermediaries and companies. The ISPs can be made liable for content that flows through their wires, through legal mechanisms such as license provisions. ISPs can also be made to take further control over the networks, or to make some websites harder to access (like the Internet Watch Foundation’s blacklist). When policy organisations consider this, it is critical that they ask whether industry bodies should be permitted to do this without public discussion, on the basis of government pressure.

QUESTIONS & COMMENTS

Q. Participants asked for panel members to talk about the context in which bloggers find themselves in danger in Bangladesh.

A. Panel members stated that the courts are not fair to bloggers as often they side with government. It was added that courts have labelled bloggers as atheist, and subsequently all bloggers are being associated with the label. Further, it was added that most people who are outraged, do not even know what blogging is, and people associate blogging with blasphemy and as opposing religious beliefs. It was also noted that in Bangladesh, while you see violations of FoE from the State, you see more violations of blogger rights from non-state actors.

Q. Participants asked if there is anything specific about the Internet that alters how we should consider hate speech online and their affective/visceral impact.
A. Panel members noted that they are still grappling with the question of what difference the Internet makes, but noted that it has indeed complicated an already complex issue as there is always the question about political entrepreneurs using convenient content to foment fires.

Q. Participants questioned panel members about how the right to offend is protected in jurisdictions across Asia where there is still tension between classical liberalism and communitarian ideologies, and where the individuated nature of rights is not clearly established or entrenched.

A. Panel members responded by stating that when one compares the US, Indonesia and India, the US seems to be able to strike a balance between free speech and other competing interests as they are committed to free speech and committed to religious tolerance and plurality of competing interests. Panel members also added that the fabric of civil society also has an impact. For example, Indonesian civil society is simultaneously religious and secular and pro-democracy. In India, there seems to be a tension between secular and religious groups. In Indonesia, people are moving to religion for comfort, while still seeking a world that is religious and secular.

Q. Participants asked for clarification on ways to approach regulation of hate speech given that hate speech is not just about a particular kind of threatening speech, but encompasses rumours and innuendos.

A. Panel members acknowledged that more research needs to be done in this area and added that applying the socio-cultural lens on such issues would be beneficial.

Q. Participants asked if panel members had a framework for a regulating the content practices of private actors, who are sometimes more powerful than the state and also enforcing censorship.

A. Panel members responded that private censorship is an important issue that needs to be reflected upon in some depth, though a framework is far from being developed even as research is ongoing in the space.
SESSION 3: LOOKING AHEAD

The third and final session of the conference aimed to find principles and methods to achieve beneficial and effective regulation of the Internet. One of the core aims was the search for the right balance between the dangers of the Internet (and its unprecedented powers of dissemination) and the citizens’ interest in a robust right to freedom of expression. Mr. Sutirtho Patranobis, Assistant Editor with the Hindustan Times (Sri Lanka desk, previously China correspondent), shared his experience with governmental regulation of online free speech in China and Sri Lanka. Ms. Karuna Nandy, Advocate, Supreme Court of India, analysed the Indian Supreme Court’s decision in *Shreya Singhal v. Union of India* (March 24, 2015), and sought to draw lessons for the current debate on net neutrality in India. Ms. Geeta Seshu, founder and editor of the online magazine *The Hoot*, offered an expanded definition of freedom of speech, focusing on universal access as the imperative. Finally, Mr. Pranesh Prakash, Policy Director, Centre for Internet & Society, offered his views on net neutrality and the issue of zero-rating, as well as arguing for an increased, cooperative role of civil society in creating awareness on issues relating to the Internet.

Sutirtho Patranobis
Assistant Editor, Hindustan Times

During his career, Mr. Patranobis was the China correspondent for the *Hindustan Times*. Mr. Patranobis began his presentation by sharing his experiences in China. In China, multiple online platforms have become sources of news for citizens. Chinese citizens, especially the urban young, spend increasing amounts of time on their mobile phones and the Internet, as these are the major sources of news and entertainment in the country.

The Chinese government's attitude towards freedom of expression has been characterized by increasing control over these online platforms. The includes control over global companies like Google and Facebook, which have negotiated with the Chinese government to find mutually acceptable operating rules (acceptable to the government and the company, but in most cases unfavourable to the citizens) or have faced being blocked or
filtered from the country. Mr. Patranobis noted that free speech regulation in China has evolved into a sophisticated mechanism for control and oppression, and the suppression of dissent. Not only China, but Sri Lanka has also adopted similar approaches to dealing with freedom of expression.

In China, free speech regulations have evolved with an aim to curtail collective action and dissent. China’s censorship programmes work towards silencing expression that can represent, reinforce or spur social mobilisation. Mr. Patranobis explained that these programmes aim to put an end to all collective activities (current or future) that may be at odds with government policies. Therefore, any online activity that exposes government action as repressive, corrupted or draconian is meted out harsh treatment. Indeed it is possible to see that there are sharp increases in online censorship and crackdowns when the government implements controversial policies offline.

Mr. Patranobis went on to discuss the nature of objectionable content, and the manner in which different jurisdictions deal with the same. Social and cultural context, governmental ideologies, and political choices dictate the nature of objectionable content in States such as China and Sri Lanka. On the flipside, media literacy, which plays a big role in ensuring an informed and aware public, is extremely low in Sri Lanka, as well as in many other States in South Asia.

Mr. Patranobis raised the question of how the Internet can be regulated while retaining freedom of expression – noting that the way forward is uncertain. In Sri Lanka, for instance, research by UNESCO shows that the conflicting policy objectives are unresolved; these first need to be balanced before robust freedom of expression can be sustained. The Internet is a tool, after all; a tool that can connect people, that can facilitate the spread of knowledge and information, to lift people from the darkness of poverty. The Internet can also be a tool to spread hate and to divide societies and peoples. Finding the right balance, contextualised according to the needs of the citizens and the State, is key to good regulation.
Ms. Nandy focused her presentation on two issues currently raging in India’s free speech debates: the Supreme Court’s reasoning on Sections 66A and 69A, IT Act, in *Shreya Singhal & Ors. v. Union of India* (Supreme Court, March 24, 2015), and issues of access and innovation in the call for a net neutrality regulation. She stated that the doctrine of the “marketplace of ideas” endorsed by Justices Nariman and Chelameswar in *Shreya Singhal* speaks to the net neutrality debate.

Ms. Nandy held that a law can be challenged as unconstitutional if it prohibits acts that are legitimate and constitutional. Such an argument refers to the impugned law’s “overbroad impact”. For instance, the Supreme Court struck down Section 66A, IT Act, on the ground (among others) that the impugned section leads to the prohibition and criminalisation of legitimate and protected speech. Cases such as *Chintaman Rao v. State of Madhya Pradesh* [(1950) SCR 759] and *Kameshwar Prasad v. State of Bihar* [1962 Supp. (3) SCR 369] speak to this principle. They expand the principle of overbreadth to include the notion of “chilling effect” – i.e., situations where overbroad blocking leads to the prohibition of legitimate constitutional speech. In such situations, citizens are unsure what constitutes protected speech and what does not, leading to a chilling effect and self-censorship for fear of reprisals.

In *Shreya Singhal*, the Supreme Court also considered the “reasonable person” doctrine that has been developed under the law of obscenity. India had initially adopted the *Hicklin test*, under which the test to determine what is obscene depended on whether prurient minds (minds that have a tendency to be corrupted) would find the impugned material lascivious and corrupting. This test, laid down in *Ranjit Udeshi v. State of Maharashtra* [AIR 1965 SC 881] and altered/refined by decades of jurisprudence, was put to rest in *Aveek Sarkar v. State of West Bengal* [AIR 2014 SC 1495]. In *Aveek Sarkar*, the Supreme Court adopted the “community standards” test to determine obscene content. According to Ms. Nandy, the “community standards” test rests on the doctrine of reasonable persons. Ms. Nandy noted
that in effect there is a need for more police officers to protect those who produce legitimate content from hecklers.

Quoting from the U.S. decision of *Whitney v. California* [71 L. Ed. 1095], Ms. Nandy submitted that:

“It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.”

On the issue of website blocking and the Supreme Court’s reasoning on Section 69A, IT Act, in *Shreya Singhal*, Ms. Nandy explained that the Additional Solicitor General had conceded a number of points during the oral arguments. She further explained that website blocking can be applied when the Central Government is satisfied that there is a necessity for it. However, reasons must be recorded in writing. Also, according to the Supreme Court’s interpretation of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (“Blocking Rules”), both the intermediary and the originator of the communication (the content-creator) have to be given a chance to be heard.

Rule 16 of the Blocking Rules, which mandates confidentiality of all blocking requests and orders, was also discussed in *Shreya Singhal*. Though some confusion has arisen about the Rule’s interpretation, Ms. Nandy submitted that Rule 16 has been read down. There is no longer a strict, all-encompassing requirement of confidentiality. While the identity of the complainant and the exact nature of the complaint must be kept confidential, the blocking order and the reasoning behind the order are no longer bound by Rule 16. This is because in §109 of the judgment, the Supreme Court accepts that writ petitions can lie on the basis of blocking orders. In order for writs to lie, affected parties must first be aware of the existence and content of the blocking order. Therefore, Ms. Nandy explained, the effect of the
Supreme Court’s reasoning is that the confidentiality requirement in Rule 16 has been read down.

On net neutrality, Ms. Nandy argued that zero-rating is an efficient solution to providing universal access to the Internet. Services like Internet.org are not strictly market-driven. This is because there is not a large demand for Facebook or specific over-the-top (OTT) service providers. In speaking about the marketplace for ideas in Shreya Singhal, the Supreme Court did not indirectly outlaw services seeking to balance access with diversity of speech. Ms. Nandy held that price discrimination in the provision of telecom, broadband and mobile Internet services already exists. In light of this, the focus should the provision of these services on the basis of consumer choice.

Geeta Seshu

The Hoot

Ms. Seshu began her presentation by noting that one's perspective on online censorship cannot be the same as that on traditional censorship. Traditional censorship cuts off an individual's access to the censored material, but on the Internet, material that is censored in traditional media finds free and wide distribution. One's conceptualisation of freedom of expression and curtailment of this right must include access to the medium as a crucial part. To this end, it is important to not forget that access to the Internet is controlled by a limited number of Internet service and content providers. Thus, a large section of the population in India cannot exercise their right to free speech because they do not have access to the Internet.

In this context, it is important to understand the way in which the digital rollout is happening in India. Ms. Seshu explained that the rollout process lacks transparency, and noted the example of the 4G/LTE rollout plan in India. There is, of course, a diversity of content: those that have access to the Internet have the ability to exercise their right to free speech in diverse ways. However, introducing access into the free speech universe highlights
many inequalities that exist in the right; for instance, Dalit groups in India have limited access to the Internet, and some kinds of content receive limited airtime.

Importantly, Ms. Seshu argued that the government and other entities use technology to regulate content availability. Policymakers exploit the technology and architecture of the networks to monitor, surveil and censor content. For instance, one may see the UID scheme as an adaptation of technology to facilitate not only service-provision, but also as a move towards a Big Brother state. Civil society and citizens need to study and respond to the ways in which technology has been used against them. Unfortunately, the debates surrounding regulation do not afford space for Internet users to be part of the discussion. In order to turn this around, it is important that citizens’ and users’ rights are developed and introduced into the regulatory equation.

Pranesh Prakash
Policy Director, Centre for Internet & Society

Taking up where Ms. Seshu left off, Mr. Prakash wished to explore whether the Internet was merely an enabler of discussion – allowing, for instance, a ruckus to be raised around the consultation paper of the Telecom Regulatory Authority in India (TRAI) on Over-The-Top (OTT) services and net neutrality – or whether the Internet positively adds value. The Internet is, of course, a great enabler. The discussions surrounding OTTs and net neutrality are an example: in response to the TRAI consultation, a campaign titled “Save the Internet” resulted in over 9.5 lakh comments being submitted to the TRAI. It is inconceivable that such a widespread public discussion on so complex a topic (net neutrality) could take place without the Internet’s facilitation.

But, Mr. Prakash held, it is important to remember that the Internet is the tool, the platform, for such mobilisation. Campaigns and conversations such as those on net neutrality could not take place without the organisations and people involved in it. Civil society organisations have played prominent roles in this regard, creating awareness and well-informed discussions. For Mr. Prakash, civil society organisations play their role best when
they create such public awareness, and it is important, to play to a stakeholders strengths. Some organisations are effective campaigners, while others (such as CIS) are competent at research, analysis and dissemination.

According to Mr. Prakash, it is equally important to remember that successful discussions, campaigns or debates (such as the ongoing one on net neutrality) do not occur solely because of one organisation’s strengths, or indeed because of civil society alone. Networks are especially critical in successful campaigns and policy changes. As researchers, we may not always know where our work is read, but sometimes they reach unexpected venues. For instance, one of Mr. Prakash’s papers was used by the hacker collective Anonymous for a local campaign, and he was made aware of it only accidentally. Mr. Prakash noted that civil society has to also accept its failures, pointing to the controversy surrounding the Goondas Act in Karnataka. Where there are strong counter-stakeholders (such as the film lobby in south Indian states), civil society’s efforts alone may not lead to success.

On net neutrality, Mr. Prakash noted the example of a strategy employed by the Times of India newspaper, when it undercut its competitors by slashing its own prices. Such moves are not unknown in the market, and they have their benefits. Consumers benefit from the lowered prices. For instance, were a Whatsapp or Facebook pack to be introduced by a telecom operator, the consumers may choose to buy this cheap, limited data pack. This is beneficial for consumers, and also works to expand access to the Internet. At the same time, diversity of speech and consumer choice is severely restricted, as these companies and telecom operators can create ‘walled gardens’ of information and services. Mr. Prakash put forth that if we can facilitate competitive zero-rating, and ensure that anti-competitive cross-subsidization does not occur, then perhaps zero-rated products can achieve access without forcing a trade off between diversity and choice.

Finally, on the issue of website blocking and takedowns under Sections 69A and 79, IT Act, Mr. Prakash noted that the Shreya Singhal judgment does nothing to restrict the
judiciary’s powers to block websites. According to Mr. Prakash, at the moment, the *Shreya Singhal* judgment relieves intermediaries of the responsibility to take down content if they receive private complaints about content. After the judgment, intermediaries will lose their immunity under Section 79, IT Act, only if they refuse to comply with takedown requests from government agencies or judicial orders.

But, as Mr. Prakash explained, the judiciary is itself a rogue website-blocker. In the past few years, the judiciary has periodically ordered the blocking of hundreds of websites. Such orders have resulted in the blocking of a large number of legitimate websites (including, at one point, Google Drive and Github). To ensure that our freedom of expression online is effectively protected, Mr. Prakash argued that ways to stop the judiciary from going on such a rampage must be devised.

**QUESTIONS & COMMENTS**

C. Participants and panel members commented that researchers and commentators err by making analogies between the Internet and other media like newspapers, couriers, TV, satellite, cable, etc. The architecture of the Internet is very different even from cable. On the Internet, traffic flows both ways, whereas cable is not bi-directional. Moreover, pricing models for newspapers have nothing in common with those on the Internet. The comparisons in net neutrality debates stand the danger of incorrectness, and we must guard against that. Zero-rating and net neutrality issues in high-access countries are very different from the issues in low-access countries like India.

C. Participants and panel members commented that access and availability must play a predominant role in thinking about freedom of expression. In India, we are technologically far behind other states, though we have potential. The real end-goal of this is the convergence of services and information, with the user at the centre of the ecosystem. Our technological capabilities include satellite and spectrum; the best spectrum bands are lying vacant and can be re-framed. For this, the government must be educated.
C. Participants and panel members commented that in high-access states, the net neutrality issues surround competition and innovation (since there is no or very little ISP competition and switching costs are not low), while in India and France, where there is already competition amongst providers, access plays a crucial role. On the Internet, the networking or engineering aspects can disrupt the content carried over the network, so that is also a concern.

C. Participants and panel members commented that zero-rating is both a blessing and a curse. Zero-rating would not be detrimental in a market with perfect information and competition. But the reality is information asymmetry and imperfect competition. If today, we were to allow zero-rating, diversity would suffer and we would be left with ‘walled gardens’.

**Conclusion**

The conference addressed a range of issues characteristic of debates surrounding freedom of expression in India and South Asia. Beginning with the conceptual understanding of freedom of expression, panellists advocated an expanded definition, where the right to free speech is teleological. The panellists considered freedom of speech as a tool to ensure diversity of speech, both horizontally and vertically. Towards this end, panellists gave several suggestions:

*First,* policymakers and scholars must understand freedom of speech as a right of *both* the speaker and the listener/reader, and carve out a separate listeners’ right. Panellists expanded upon this to show the implications for the debate on net neutrality, cross-media ownership and website-blocking, for instance.

*Second,* there is a need for scholars to examine the historical dichotomy between the *policy* and *jurisprudence* of free speech in India and other contexts across South Asia. Such an approach to scholarship and policy research would help predict future government policy (such as in
the case of the Indian government’s stance towards Section 66A following the Supreme Court’s decision in *Shreya Singhal v. Union of India*) and strategize for the same.

*Third*, particularly with regard to the Internet, there is a need for policy advocates and policy makers to “bust” the founding myths of the Internet, and look to various domestic and international sources of law and regulation. Studies of regulation of freedom of speech on the Internet in different jurisdictions (Bangladesh, China, Sri Lanka) indicate differing government approaches, and provide examples to learn from. The interpretation and consequences of *Shreya Singhal* on website-blocking and intermediary liability in India provide another learning platform.

*Fourth*, panellists discussed the possibilities of cooperation and strategies among civil society and policy organisations in India. Taking the example of the *Save the Internet* campaign surrounding net neutrality in India, panellists speculated on the feasibility of using the Internet itself as a tool to campaign for governance and policy reform. Together with the audience, the panellists identified several areas that are ripe for research and advocacy, such as net neutrality and zero-rating, and citizens’ free speech right as being separate from governmental and corporate interests.