

Freedom of Expression vs. Regulation of Cyberspace

By

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The world of Internet is a charming place. With no virtual boundaries of geographies, culture and class - anybody - who can afford to pay - can access and use internet to his/her benefit. Internet enables people to exercise one of the basic rights – freedom of expression; - which includes freedom of speech as well as other forms of expression like uploading painting, photographs, videos etc on the Internet. In this season of Indian election, we have all been a witness to how the premier political parties (e.g. Congress, BJP, BSP); and independent candidates like Mallika Sarabhai have used the Internet to their benefit to showcase their ideologies, agendas and arguments to wider public notice. For such power of dissemination, Internet has been called by the popular activist Richard K. Moore - a sleeping political giant.¹ Thus, Internet can act as a prompt facilitator of democratic rights by providing groups or individuals a platform to express their ideas, thoughts, agendas etc. However, contents are heavily regulated over cyber space by the Internet Service Providers and the State; either directly or indirectly. Hence, one wonders how democratic the cyber domain can actually be if it, after all, is a subject to prolific censorship vis- a- vis freedom of expression?

Freedom of speech and expression is one of the fundamental rights facilitated under article 19 (1) (a) in the Constitution of India. It is one of the fundamental human rights largely recognized worldwide. According to the 1791 amendment of US constitution, freedom of speech has been guaranteed. Some other major international treaties too advocate freedom of speech and expression. Universal Declaration of Rights provides freedom of expression in its Article 19, the International Covenant on Civil and Political Rights (Article 19), the American Convention of Human Rights (Article 13), the African Charter on Human and People's Rights (Article 9), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10). Hence, when the governments decide to put a curb on this fundamental right; - ideally, they must have adequate backing of the constitution against the constitutional right to freedom of expression.

There are various reasons behind a state's decision of censoring freedom of expression. On various occasions, it has been seen that the country's sovereignty and security might be compromised because of publication of certain content in the internet. In 1999, during the Kargil War between India and Pakistan, the website of the Pakistan based Dawn newspaper was blocked by the government of India.ⁱⁱ Though, the ban was lifted soon after.

Internet is often used by rogues as a mean to defame others. The targets may be celebrities as well as the commoners. Repeated cases of suicide of the celebrities in South Korea had woken up its police system to the chilling consequences of internet defamation that plagued the now dead celebrities for some timeⁱⁱⁱ and caused them go through bouts of acute depression and fear when alive. Such incidents were enough to prompt the government put a curb on materials published over the Internet. So, any content that carries defamatory materials will naturally attract censorship leading to its own peril.

In India, defamatory materials are dealt with adequate sternness as these are thought to be directly conflicting with a person's right to privacy - another tacit yet fundamental human right facilitated in the Constitution of India. It is imperative to mention that right to

privacy signifies a person's right to maintaining the image he/she portrays to the society, right to "be let alone" and right to dignity and life. The last aspect of right to privacy particularly negatively portrays the internet contents. Contents containing formidable (hateful/defamatory/threatening material) elements may cause hurt to one's dignity and/or threaten the safety of a person.

Furthermore, contents that seek to generate hatred over race, nation, class, caste also face censure. For example, in the social networking site www.orkut.com various e-communities that contain hate materials against India as a nation or any other country, gay communities or any person - are put under a provision to be banned if a majority of people vote against it.

At times, the censorship is country specific, as the rationale behind the censorship is largely determined by the cultural and social make up of the land. For example, nudity that is considered "inoffensive"^{iv} in majority of European countries is judged with public disdain in United States of America.

It is not easy to put right to freedom of expression to context against various reasons of surveillance of the Internet. Because, like privacy, right to freedom of expression, too puts both positive and negative obligation over the state. While the positive obligation is that the state will ensure that every citizen has a right to freedom of expression, the negative obligation compels the state to make sure that community or society at large are not threatening the same right, and if so happens, secure the citizen's or an agency's (print media, audio – visual media etc.) right to freedom of expression in the best feasible way. It needs to be noted, that the "feasibility" factor is solely dependent on a constitutionally legitimised balance between the individual's right to freedom of expression – and - the sovereignty of the State and its citizens' right to privacy. The State may always employ direct or indirect influence to secure these two rights.

However, one can never guarantee if this balance will always be maintained by the State. For example, the government of Somaliland has been alleged as trying to curb broadcast

media's freedom of expression.^v In July 11, 2001, Chinese President Jiang Zemin condemned the spread of information on the web as "pernicious information"^{vi} and tightened censorship of internet content. It needs mention here that "Between 1994 and the present [July 2001], China's rules and regulations on the Internet became progressively more comprehensive, moving from efforts to regulate Internet business to restrictions on news sites and chat rooms. These regulations give the government wide discretion to arrest and punish any form of expression. For example, "topics that damage the reputation of the State" are banned, but an Internet user has no way of knowing what topics might be considered injurious."^{vii} Such are the examples of direct State interventions.

There are other indirect ways in which freedom of expression can be controlled by limiting one's accessibility to the Internet. Apparently North Korea and Afghanistan still do not provide Internet to the common users, - being among the last countries in the world to not have a link to the global internet.^{viii} Apart from this, there remain clear cases of prohibition of access. Countries like Iraq asks all the internet users to register with the government and get a license even to be able to use a modem or publish contents over the internet from home.^{ix} In Burma, the Internet use is seemingly limited to the "government elite".^x

On various occasions the Internet Service Providers (ISPs) have stepped in to censoring web contents either compelled by the laws or, on their own accord. In China for example, ISPs are forced to monitor the users and report right away to the government in case any "misuse" of the internet takes place. While public authorities in many countries do not divulge into such censorship directly, they put in tacit pressure on the ISPs. The establishment of the Internet Watch Foundation (IWF) in UK, caused by implicit pressure from the Metropolitan Police is an apt example of such implicit pressure.^{xi} In Sweden, though, the ISPs have proactively taken initiatives to control access to certain websites.^{xii}

While such practices by the ISPs remain a matter of serious concern in regard with their capability in deciding which content is offensive, and hence, would require censorship; -

the role of the State in various countries vis-à-vis regulating cyberspace too need to be thoroughly analysed.

The rationale behind regulating cyberspace seems to spring from a phobia that too much information provided and facilitated by the Internet creates a “dangerous democracy”. But how far is this apprehension justified?

Can cyberspace promote democracy as well as freedom of expression? Must we see the informational openness of the cyber space and the individual’s or group’s [institution/government] need to control the flow of data as “zero-sum alternatives”^{xiii} that may or may not be balanced?

It needs to be stated that freedom of expression and democracy do not exist at the expense of each other, rather they facilitate themselves. While the State is obligated to protect its sovereignty and its citizens from harmful or defamatory materials on the web, it is equally duty – bound to facilitate discussion of non – populist yet valid issues. As freedom of print media is being secured by governments across the world - even at times of dissidence among factions of its people; - internet should as well be empowered following the same democratic principle. Finally, the process of democracy and freedom of expression cannot happen in separate compartments, because each is an important condition of the other.

ⁱ Moore, Richard K. , “Democracy and Cyberspace”, presented at International Conference on Discourse and Decision Making in the Information Age, December 24, 1997, accessed electronically at <http://cyberjournal.org/rkm/TS/sep97cyberspace.shtml> , as on May 14, 2009.

ⁱⁱ Tripathi, Salil. , “Staring Back”, *The Wall Street Journal*, Asia, New York, accessed electronically at http://www.fofg.org/news/news_story.php?doc_id=595 , as on May 16, 2009.

ⁱⁱⁱ Woei Wan, Foong. , “Cyber Abuse Drives Suicides” Tue, October 07, 2008, *The Sunday Times*, U.K., accessed electronically at

<http://www.asiaone.com/Just%2BWoman/News/Celebrities/Story/A1Story20081006-91959.html> , as on May 16, 2009.

^{iv} Engel, Christoph. , “Organizing Co-Existence in Cyberspace: Content Regulation and Privacy Compared” , accessed electronically at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325360#

^v Omar, Rakiya. , "Curbing Freedom of Expression in Somaliland," *Sultan Hurre Human Rights Focus*, accessed electronically at <http://www.suldanhurre.org/CurbingFreedom.htm> , as on May 16, 2009.

^{vi} “Freedom of Expression And The Internet In China: A Human Rights Watch Backgrounder”, *Human Rights Watch*, New York, accessed electronically at <http://www.hrw.org> , as on May 16, 2009.

^{vii} *Ibid.*

^{viii} Background Paper on “Freedom of Expression and Internet Regulation”, for the International Seminar on Promoting Freedom of Expression with the Three Specialised International Mandates, London, United Kingdom, 19 – 20 November 2001.

^{ix} *Ibid.*

^x *Ibid.*

^{xi} *Ibid.*, referring to <http://www.cyber-rights.org/documents/themet.htm> , and <http://www.cyber-rights.org/reports/governan.htm>

^{xii} ISPs in Sweden have refused access to the website Flashback as it facilitates discussion over controversial subjects like Hell’s Angel, Nazism, Paedophilia etc. , discussed in “Internet and Freedom of Expression”, Rikke Frank Jorgensen, LL.M thesis (unpublished), Raoul Wallenberg Institute, as referred in Background Paper on “Freedom of Expression and Internet Regulation”, for the International Seminar on Promoting Freedom of Expression with the Three Specialised International Mandates, London, United Kingdom, 19 – 20 November 2001.

^{xiii} Raab, Charles D., in Loader, Brian, *The Governance of Cyber Space: Politics, Technology and Global Restructuring*, Chapter 10, Routledge, New York, 1997, p. 155.