

RIGHT TO FREE SPEECH AND CENSORSHIP: A JURISPRUDENTIAL ANALYSIS

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Abstract

The paper analyses the theoretical basis of the international human right to freedom of speech and expression, and the restrictions imposed thereon in the form of censorship. In between the two competing ends of absolute freedom and absolute stringency (both formal or non-formal), the paper seeks to explore means and modes by which the intrinsic values that free speech brings to civilization can be preserved, albeit not at the cost of societal disintegration. Towards this end, it analyzes different sociological theories on liberty and how these theories would at times conflictingly respond to contemporary controversies where the use or non-use of censorship as a means of regulation would become pertinent. It also does a comparative and historical analysis of the censorship models of different parts of the world, addressing inevitable questions of power and hegemony in the process.

I Introduction

FREE SPEECH is one of the constitutional guarantees of a liberal democracy – a right recognized by all international human rights documents. It is an amalgamation of the right to freedom of conscience. Censorship, on the other hand, is the process of imposing checks, direct or indirect, governmental or otherwise, on the exercise of one’s right to free speech. Apparently, this phenomenon can be perceived as a unnecessary curb on one’s basic right to liberty, but on a closer examination, it can be looked at in the form of a *necessary evil* – a limitation on one’s human rights in order to uphold the community’s human rights. The *broad social purposes* of censorship can be laid down as to ensure that ordinary members of the community are not affronted by the display of material to which a *majority of reasonable adults* would object, to maintain a level of public decency, and to avoid the undesirable social effects which may flow from the “normalisation”, by its use in entertainment or other dissemination, of undesirable material.¹

This paper aims to look at the interconnected nature of the two, keeping in mind the inherent diversities in different socio-political systems, and varied constructions of the two phenomena – ultimately leading to the unmistakable impressions about the questions of democracy, politics and power.

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1 *Hutchins v. The State of Western Australia* [2006] WASCA 258 at para 4.

In course of this paper, the author has accepted as a foundational hypothesis the fact that throughout history and across jurisdictions, it has been noted that censorship has been more often than not used to suppress counter-opinions – be it political or religious; this practice has been conferred political and legal legitimacy in jurisdictions alike, be it the most authoritarian or the most democratic of regimes. Suffice to say that more often than not, censorship has been used as a sword rather than as a shield. However, this does not take away the intrinsic value of the check. Indeed, the need for censorship is evident from the divergent nature of the social mores, albeit differently in different jurisdictions – trying to evolve a universalistic practice would thus disregard these inherent diversities, and would be more of a farcical legitimization of super power hegemonies.

II Censorship – A definitional conundrum

The word ‘Censorship’ is derived from the Latin word ‘*censere*’ which means “*to estimate, rate, assess, to be of opinion*”.² However, the intrinsic value-neutrality that this definition offers is misleading. The ‘assessment’ is preceded by an active consideration of the canons of the rights and the wrongs, the dos and the don’ts, and based on such largely majoritarian and hegemonic constructions, an act of ultimate exclusion. Sometimes, this act of exclusion takes place at an individualistic level, sometimes it is performed at the level of the society, but the more well-documented and well-known form of censorship is the traditional form, where it is carried out by formal means. This diversity between different types of censorship often leads to confusions when one tries to construct a definition of the process in terms the organic structures operating behind it.

The Webster Dictionary defines censorship as “*act of suppressing speech or writing that is considered subversive of the common good*”.³ According to the Oxford Dictionary, the word ‘Censor’ denotes “*an official who examines books, films, news etc. that are about to be published and suppresses any parts that are considered obscene, politically unacceptable, or a threat to security*”.⁴ If one closely looks at these two definitions, one fact immediately strikes attention – the fact that censorship necessarily requires a formal act of suppressing the speech that is morally or ethically untenable. Quite naturally, this ‘formal’ act requires the existence of a ‘formal’ agent to carry it about. This is where the ‘official’

2 David Tribe, *Questions of Censorship* 36 (George Allen & Unwin, California, 1973).

3 See Censorship, available at: <http://www.merriam-webster.com/dictionary/censorship>. (last visited on July 1, 2014).

4 ‘Censor’ available at: <http://www.oxforddictionaries.com/definition/english/censor> (last visited on July 1, 2014).

in the Oxford definition steps in, clearly indicating the centrality of the state as a guardian of the social mores in the whole censorship process. Thus, Kathleen Sullivan defines censorship as “*the restriction of speech by the government.*”⁵ Eric Barendt further confines this definition to include only the state-imposed prior legal restraints on speech.⁶ Harold Laswell’s definition of censorship also flows from the same notions, but is more broad-based:⁷

[T]he policy of restricting the public expression of ideas, opinions, conceptions and impulses which have or are believed to have the capacity to undermine the governing authority or the social and moral order which that authority considers itself bound to protect.

Thus, this definition encompasses the two broad areas of operation of censorship – political censorship and moral censorship.⁸ Whereas political censorship is primarily concerned with “discussions of the nature of governmental policies and personnel”,⁹ moral censorship would deal with creation of social and moral taboos, manifested through creation and interpretations of acceptable norms of social conduct and the notion of obscenity.

If one looks at the structural patterns operating behind the act of censorship, one would find that this traditional model is descriptive of just the tip of the iceberg. This model presupposes the existence of the ‘free’ mind and censorship coming in as an external repression on this free mind in the form of silencing it, when this mind decides to turn deviant.¹⁰ The roots of censorship have however been traced to much deeper beneath the surface.¹¹

While looking at the merits of censorship, Annette Kuhn decries the notion that censorship is all about the institutional prohibition, noting that this approach tends to reify the censored object, often placing it in a state of inert passivity, where it is

5 Catherine Sullivan, “The First Amendment Wars” 207 *New Republic* 35, 38 (1992).

6 Eric Barendt, *Freedom of Speech* 151-153 (OUP, New York, 2005).

7 Harold D. Laswell, “Censorship” in III *Encyclopedia of the Social Sciences* 290 (MacMillan, New York, 1930).

8 See generally, Robert Justin Goldstein, *Political Censorship* vii-viii (Fitzroy Dearborn Publishers, London, 2001).

9 *Ibid.*

10 Helen Freshwater, “Towards a Redefinition of Censorship” in Beate Muller (ed.), *Censorship and Cultural Regulation in the Modern Age* 225-245 (Rodopi, New York, 2004).

11 Richard Burt (ed.), *The Administration of Aesthetics: Censorship, Political Criticism and the Public Sphere* (University of Minnesota Press, Minneapolis, 1994); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997); Annette Kuhn, *Cinema, Censorship and Sexuality, 1909-1925* (Routledge, New York, 1988); Michael Holquist, “Corrupt Originals: The Paradox of Censorship” 109.1 *PMLA* 14-25 (1994).

subordinated to institutional practices. According to her, censorship is not always about repression, it is a result of a productive process rather than a forced silence.¹²

In her seminal book on this subject, Sue Curry Jansen puts forward an alternative definition of censorship that encompasses both the formal structures and the societal forces behind censorship. According to her, “my definition of the term encompasses all socially structured proscriptions or prescriptions which inhibit or prohibit dissemination of ideas, information, images, and other messages through a society’s channels of communication whether these obstructions are secured by political, economic, religious, or other systems of authority. It includes both overt and covert proscriptions and prescriptions”.¹³ She draws attention to the *constitutive* rather than the *regulative* structures of censorship, and underlines the importance of the psychic and social forces, manifested through taboos and mores. She opines that we put more emphasis on these implicit, subterranean structures rather than the obvious operations of communicational or cultural control.

This notion of a constitutive censorship also forms the foreground of Michael Holquist’s study. According to him, it is farcical to try and grapple over the populist perception of ‘whether censorship’. He looks at a stereotyping of censorship as an act of repressive intervention by the state which in fact is a carefully articulated agenda by those who loathe cultural activism, because such convictions lead to assumptions that censorship can never go unnoticed, and therefore a lot of its more obscure and subversive operations go unnoticed in the process.¹⁴

Richard Burt claims that censorship was always present among “a variety of regulatory agents and practices; it was productive as well as prohibitive; it involved cultural legitimation as well as delegitimation. Censorship was more than one thing, occurred at more than one place and at more than one time.” He observes that this approach connects “those terms that the more traditional model wishes to oppose: repression and diversity; production and consumption; censoring and uncensoring; and public and private.”¹⁵

This constitutive force of censorship is also highlighted by Michel Foucault in his famous work *Discipline and Punish*.¹⁶ Here, Foucault looks at the enlightened institution of Jeremy Bentham’s *Panopticon*, where internal codes of control replace external methods of control and surveillance. According to Foucault, these codes are there to

12 Kuhn, *id.* at 4, 127.

13 Sue Curry Jansen, *Censorship: The Knot That Binds Power and Knowledge* 221 (OUP, New York, 1991).

14 Holquist, *supra* note 11 at 16.

15 Burt, *supra* note 11 at 17-18.

16 Michel Foucault (Allan Sheridan transl.), *Discipline and Punish: The Birth of the Prison* 199 (Penguin, New York, 1977) .

measure, supervise and correct the ‘abnormal’. He observes that “all the authorities exercising individual control function according to a double mode; that of binary division and branding (mad/sane; dangerous/harmless; normal/abnormal) [...] to which every individual is subjected.”¹⁷ Thus, Foucault looks at a systematic process of societal stigmatisation of the purported ‘other’, where the societal mores, acting through stringent self-censorship norms, can stifle and mutate the alternative voice by such ‘binary division and branding’.

In his monograph curiously titled ‘There’s No Such Thing as Free Speech’, Stanley Fish builds upon this Foucauldian analysis and goes towards finding a linguistic nexus to questions of censorship and free speech. Fish proposes that every statement’s coherence lies firmly within the “interpretative community” that receives it. He suggests that free speech “*has never been general and has always been understood against the background of an ordinary exclusion that gives it meaning.*”¹⁸

This ‘exclusion’ takes the shape of ‘repression’ in Freud’s psychoanalytic model, where he opines that the shadowy and mysterious area of the subconscious functions as an internal censorship mechanism, where distressing areas of thought, memory and experience are forcibly repressed. A societal amalgamation of this internal repression mechanism results in the ultimate exclusion of the ‘different’ voices.¹⁹

However, as much as critical theorists express their concerns at the trend of homogenisation through exclusion and repression, one also has to take note of the fact that very often, the failure of censorship is marked by the eloquent silences, which the repression creates, which possess an infinite potential. In the words of Pierre Macherey, “the book [...] circles about the absence of that which it cannot say, haunted by the absence of certain repressed words which make their return. [...] It] bears in its material substance the imprint of a determinate absence which is also the principle of its identity.”²⁰

Very often, these silences are looked at as significant cultural milestones. Eve Kosofsky Sedgwick, while tracing the evolution of the literary heritage of homosexuality, looks at this phenomenon of ‘closeting’ as a phenomenon inherently important to the gay culture.²¹ To articulate the importance of these forced silences, she refers to Foucault thus: “There is no binary division to be made between what

17 *Ibid.*

18 Stanley Fish, *There’s No Such Thing As Free Speech* (OUP New York, 1994).

19 Peter Gay (ed.), *The Freud Reader* 569 (WW Norton & Co, London, 1995). See also, Jacques Derrida (Alan Bass Transl.), *Writing and Difference* 196 (Routledge & Kegan Paul, London, 1978).

20 Pierre Macherey (Geoffrey Wall Transl.), *A Theory of Literary Production* 80 (Routledge & Kegan Paul, London, 1978).

21 See generally, Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, California, 1990).

one says and what one does not say; we must try to determine the different ways of not saying such things. [...] There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.”²²

Thus, censorship is to many thinkers a safe and fashionable condemnation tool for the populace. Rather than meticulously introspecting the structures operating behind the process of censorship and thereby sifting the repressive from the necessary, one takes the safe refuge of branding everything censorious as anti-liberty and anti-human rights, and hence, necessarily evil. Jean Jacques Pauvert very appropriately highlights it thus:²³

Censorship is one of those convenient words which are widely used today because they allow people to seem, with a minimum of effort, decent and right-thinking, the same as everyone else these days. The Left, the Right and the Centre all agree that one should be anti-censorship, anti-war, anti-racism, pro-human rights or freedom of expression.

In this melee, therefore, academic disciplines lose sight of the different modes and methods through which censorship is practised, and discussions largely revolve round the commonsensical, the subjective ‘good’ and the ‘bad’. One loses sight of the scrupulousness with which the official censoring bodies of the present states, be it Western or Indian, avoid the use of the label ‘Censor’ and seek to redefine its role as that of licensing or classificatory authorities. This careful avoidance is pointed out by Sue Curry Jansen as the ‘Good Lie’,²⁴ where this process of disassociation and disavowal of the overtly coercive methods of social control and coercion in favour of the more constitutive forms, acts a deliberate ploy to camouflage censorship mechanisms in the garb of regulations, by the state and the society alike.

Thus, if one looks at the different types of censorships prevalent today, one finds that there are a number of different ways by which censorship mechanisms work, often parallel to each other. Paul O’ Higgins distinguishes censorship into the following types:²⁵

1. Autonomous – Self-censorship brought about by conscious or unconscious motives, which makes an individual wither to refrain from expressing his or her views or alter the same.

22 Michel Foucault, (Robert Hurley Transl.) *1 The History of Sexuality* 27 (Random House, New York, 1978).

23 Pauvert, *Nouveaux (Et Moins Nouveaux) Visages de la Censure* at 7 (Translation in Nicholas Harrison, *Circles of Censorship: Censorship and its Metaphors in French History, Literature and Theory* 1 (OUP, London, 1995)).

24 Jansen, *supra* note 13.

25 Paul O’ Higgins, *Censorship in Britain* 12-13 (Nelson, London 1972).

2. Social – Discouragement of the expression of certain ideas, either through socialization or sanctions, which lead to the emergence of taboos.
3. Legal – Enforcement of restraint by legal institutions such as the government, police and the courts. This can involve both prior censorship, where the material has to meet certain approved prior standards, or penal censorship, where no such approval is needed but punishment is at hand for violation of legal limits.
4. Extra-legal – Telephone Tapping, d-notices, limited release of information about defendant at trial.
5. Voluntary – When an individual or a company, with no legal power, imposes upon others limitations on what they might say or do without sanctions. This may be exercised by an institution like the Press Council, or by an employer, and is usually based on a shared code of beliefs.
6. Subterranean – When an individual or institution uses powers set aside for another purpose to impose censorship without direct government involvement – political censorship.

This classification therefore amply highlights the prevalence of the non-formal modes of censorship which co-exist with the formal modes, thereby highlighting the need for realigning the commonsensical definitions of censorship to include the hugely significant acts of exclusion and repression of the voices of dissidence and difference, often brought about by the market structures. If one looks at the classifications carefully, one can find the existence of two types of censorship – legal and extra-legal, that requires references to questions of law. Whereas legal censorship would include formal impositions of prior restraints and post-dissemination sanctions, extra-legal censorship would largely be practiced through means not strictly authorized by law, such as “*bluff and bluster*”.²⁶ Thus, Barendt’s definition of censorship as only the state-mandated pre-censorship would be seen as extremely narrow in the context of such an all-encompassive classification of censorship, capturing the formal and the non-formal alike.

But, realigning the definition of censorship can only be a partial panacea to the problem in hand, if one looks at censorship merely as an exercise of power, hegemony and zeal towards ensuring a homogeneity of beliefs. Very often, conscious or unconscious motives lead to a person wilfully shrinking his territories of expression. The fear of exclusion and repression can lead to a chilling effect where an individual gets intimidated into not expressing himself to the fullest. This kind of psychological self-censorship is more problematic because in the absence of a formal legal authority ordering such shrinkage of the expressional domain, the matter cannot even be judicially

26 *Id.* at 13.

reviewable at most times. Thus, very often, the *chilling effect* thus created leads to suppressions of creativity in an atmosphere of fear, without there being a tangible legal or social remedy out of it.²⁷

III Tracking censorship through world history – exploring an evolutionary trend

Freedom of speech being an absolute essential in a system of democratic governance, one can find the values of such freedom being exalted in the earliest organised democracy – the city state of Athens. During the meetings of the city’s governing assembly, about 50000 male citizens of the city could choose to participate, and share their thoughts without impediments. The famous ancient Greek playwright Euripedes famously articulates this phenomenon thus:²⁸

This is true liberty, when free-born men,
 Having to advise the public, may speak free,
 Which he who can, and will, deserves high praise;
 Who neither can, nor will, may hold his peace:
 What can be juster in a state than this?

However, this ardour for freedom of opinion is missing, when one looks at the freedom of opinion in the ordinary public discourses, amply highlighted by the life of the famous philosopher Socrates, who had to pay for his persistence for this freedom with his life in 399 BC on charges that he corrupted the youth and that he did not acknowledge the gods that the city did but acknowledged other new divinities of his own. One may see as well, in the *Republic* of Plato, an account of a system of censorship, particularly of the arts, that is comprehensive. Not only are various opinions (particularly misconceptions about the gods and about the supposed terrors of death) to be

27 One can refer to the controversy surrounding the book *The Hindus: An Alternative History* written by Wendy Doniger where certain right wing pressure groups forced the publishers Penguin India to withdraw all copies from India. The controversy was about the book purportedly distorting facts and portraying the Hindu gods and goddesses in a negative light. What is interesting to note here is that the pressure was created by means of filing civil and criminal cases in trial courts and online petitions for 3 years from 2010, but Penguin India finally decided to withdraw the copies only in 2013, a few months before the general elections. Coincidental that it may seem, the mood of the country those few months before the election was seen as largely favouring the right wing BJP. Thus, it would not be unwise to link this withdrawal to a pre-emption of the *chilling effect*. See generally an article, available at: <http://www.firstpost.com/living/penguin-to-withdraw-wendy-donigers-controversial-book-the-hindus-1383581.html> (last visited on July 7, 2014).

28 Ann N Michelini, “Political Themes in Euripedes’ Suppliants” 115(2) *Am. J. Phil.* 219.

discouraged, but various salutary opinions are to be encouraged and protected without having to be demonstrated to be true. Much of what is said in the *Republic* reflects the belief that the vital opinions of the community could be shaped by law and that men could be penalized for saying things that offended public sensibilities, undermined common morality, or subverted the institutions of the community.²⁹ In fact, Plato had, in *Republic*, advocated the strict censorship of literary materials for children, arguing that early exposure to fiction can cause children to overtly identify with fictional characters and subsequently emulate their worst characteristics. Thus, Plato contended that it was society's moral obligation to exercise control over everything children see, hear, or read.³⁰

In China, the emperor Qin Shi Huang ordered the burning of all books except those that dealt with agriculture, medicine, or prophecy in 213 B.C. in order to protect his newly united empire from the perceived dangers of poetry, history, and philosophy, and especially targeted the writings of Confucius for such destruction.³¹

In the ancient Roman Empire, censorship became an increasingly official duty, and it is there that the word "censor" was first introduced. The title of censor was given to a public official in the Roman government, and the office existed from 443 to 22 B.C. the chief job of the censor in Rome was to keep an accurate count, or census, of the citizens of Rome. Also listed with the censor's duties, however, was the regulation and supervision of public morality. In the duties of this office, Roman censors (also known as *castigatores* or chastisers) had the power to determine if the actions of an individual were cause for degradation in citizenship or rank, regardless of the legality of such actions.

Actions that could be punished by the censor included continuing to live in celibacy when marriage and reproduction were more in the interest of the state, neglect in caring for one's fields, and working in a disreputable trade or occupation (such as acting in the theatre).³² The censor could issue a variety of punishments depending on the transgression committed, and his power to censor and punish actions deemed immoral inspired both reverence and fear among the citizens of Rome.

As Christianity gained prominence, different normative codes outlining the righteous Christian behaviour and conduct, and castigating the dissident voice as heresy,

29 Available at: 94 <http://www.britannica.com/EBchecked/topic/101977/censorship/14927/Ancient-Greece-and-Rome> (last visited on July 2, 2014).

30 Marjorie Heins, *Not in Front of the Children: "Indecency", Censorship, and the Innocence of Youth* (Hill and Wang, New York, 2001).

31 Fernando Baez, *A Universal History of the Destruction of Books* (Atlas & Co., New York, 2008).

32 J. M. Coetzee, *Giving Offense: Essays on Censorship* (University of Chicago Press, Chicago, 1996).

also started finding their space. The Nicene Creed, promulgated in 325 A.D., was introduced to fend off such discrepant viewpoints and firmly embed the beliefs of Catholic Christianity. One can trace the origin of the *Index Librorum Prohibitorum* (a list of proscribed books) in its most primitive form back to the 5th century A.D.³³ This index started getting issued more and more after the advent of the printing press and the rise of the protestant reformation movements. One can trace the issue of this index 20 times in history, for the first time in 1559 and the last time in 1948, until it was finally abolished in 1966.³⁴

In 1563, Charles IX of France decreed that nothing could be printed without the special permission of the king. Soon other secular rulers of Europe followed suit. Consequently, European rulers used systems of governmental license to print and publish to control scientific and artistic expressions that they perceived potentially threatening to the moral and political order of society.³⁵

The dual system of censorship created through the close alliance between church and state in Catholic countries was also exported to the colonised territories in the Americas. Philip II of Spain reinstated the Inquisition in 1569 and established the Peruvian Inquisition in 1570 as part of a colonial policy designed to deal with the political and ideological crisis in the Peruvian viceroyalty, leading to controls on the import of books.³⁶ Similarly, one could witness the state imposing censorship both through means of prior restraint laws, and also through indirect measures like trade restrictions, curtailment of paper volume *etc.*

The age of enlightenment in Europe and the fight against pre-censorship is underlined by John Milton's famous speech *Areopagitica* (1644) to the Parliament of England, where he vehemently opposed imposition of pre-censorships of all kinds, while conceding the need for a *post facto* imposition of culpability, if the situation so demands. This impassionate defence of the freedom of expression and opinion became one of the main reasons responsible for the repealing of the Licensing Act in 1694, which had sanctioned the imposition of prior restraints on creativity.³⁷

The seventeenth and eighteenth centuries in Europe brought about a loosening in the laws that governed censorship as the rights, liberties, and dignities of the individual were brought into focus and freedom of expression became a rallying point for the

33 *Supra* note 29.

34 Lucien X Polastron, *Books on Fire: The Destruction of Libraries throughout History* (Inner Traditions, Rochester, 2007).

35 Baez, *supra* note 31.

36 *Ibid.*

37 *Supra* note 29.

libertarian thoughts. Publication laws that had been decreed in the previous centuries began to be attacked and removed, with Sweden being the first country to officially abolish censorship in 1766. The first amendment to the United States Constitution, ratified in 1790, guaranteed freedom of speech and the press to its citizens as two of humanity's most precious rights.³⁸

Around the same time, in England, one could witness the wave of change in the censorship laws, as evident from William Blackstone's commentaries on the liberty of the press:³⁹

The liberty of the press...consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

From this juncture, the wave of state-sponsored censorship in Europe and America began to gradually die down; to be replaced by a system of publicly led censorship, which ordained the banning of "inappropriate" books by public librarians, teachers, and other citizen action groups in order to supposedly protect the innocence of children.⁴⁰ Interestingly, one of the books that was deemed as such '*inappropriate literature*' is Mark Twain's classic, '*The Adventures of Huckleberry Finn*', ostensibly because of the author's portrayal of race relations and racial stereotypes.⁴¹

A parallel to the *Index* of the Catholic Church can be found in the system of Censorship in the erstwhile USSR where, but for a very brief period under the reign of Alexander II from 1855 to 1865, one could observe an extreme intolerance with the written words.⁴² From 1917 to early 1980s, Soviet followed a model of censorship called the *Glavlit* model,⁴³ which they extended to other extended territories as well,

38 Patrick M Garry, *An American Paradox: Censorship in a Nation of Free Speech* (Praeger, Westport, 1993).

39 William Blackstone, *4Commentaries on the Laws of England: A Fascimile of the First Edition of 1765-1769*, *supra* note 29.

40 Even in the 20th century, rulers have used the burning and destruction of libraries extensively as warnings to subversives and as a method of ethnic language purging, as was the case in Sarajevo and Kosovo. In 1991 the Serbian government banned Albanian as a language of instruction at all levels of education. During the period 1990-99, all libraries in Kosovo were subjected to the burning or destruction of the Albanian-language collections. *Available at*: http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475 (last visited on July 7, 2014).

41 *Ibid.*

42 Rebecca Knuth, *Libricide: The Regime-Sponsored Destruction of Books and Libraries in the Twentieth Century* (Praeger, Westport, 2003).

the sole purpose of which was to purge the society of all ideas and expressions that could be regarded as destructive to the new communist order and to prevent political dissidence by shutting down hostile newspapers and publications.⁴⁴

A similar trend of a totalitarian censorship regime can be located in the Nazi Germany from 1933 to 1945, where the Minister of Propaganda Joseph Goebbels primarily took charge of ensuring that all media, public events and even private communications were scrutinized and censored by the government. Once, while presiding over the public funeral of 20000 books, he had famously remarked, “From these ashes will rise the phoenix of the new spirit”.⁴⁵ In countries like Norway, reading of foreign newspapers or listening to foreign radio could be punishable with death. However, it is also interesting to note that it is also during this time that the illegal press majorly flourished in parts of the occupied territories, like Norway, Denmark and Poland,⁴⁶ representing both a firm stand against brainwashing and against the most devastating consequence of censorship - oblivion.

Apartheid censorship in South Africa from 1950 to 1994, where the apartheid regime imposed strict censorship on all materials supporting the African National Congress, also depicts the ruthlessness of the totalitarian regimes to contrarian views.⁴⁷

In modern times, although it is largely believed that Fascist totalitarianism is largely a thing of the past, one can still witness the existence of state-ordained censorship at many parts of the world, for example the regulations on the internet in China,⁴⁸ and

43 The *Glavlit* handled censorship matters arising from domestic writings of just about any kind — even beer and vodka labels. *Glavlit* censorship personnel were present in every large Soviet publishing house or newspaper; the agency employed some 70,000 censors to review information before it was disseminated by publishing houses, editorial offices, and broadcasting studios. No mass medium escaped *Glavlit*'s control. All press agencies and radio and television stations had *Glavlit* representatives on their editorial staffs. See Rocio Bolivier, “Stop Censorship”, available at: <http://www.sibila.com.br/index.php/politica/44-stop-censorship-paremos-la-censura> (last visited on July 3, 2014).

44 “This sort of control was justified as necessary for the protection of the state and the welfare of its citizenry. Some of the restrictions were designed to permit retention of information that was considered vital to national security; others were designed to keep citizens from being “misled,” especially since a proper understanding of dialectical materialism was said to be necessary to determine what is relevant and what contributes to the health of the community and the well-being and moral soundness of citizens” See *supra* note 40.

45 Knuth, *supra* note 42.

46 Blackstone, *supra* note 39.

47 See generally, Christopher Merrett, *A Culture of Censorship: Secrecy and Intellectual Suppression in South Africa* (University of Natal Press, Pietermaritzberg, 1994). See also, Peter McDonald, *The Literature Police: Apartheid Censorship and its Cultural Consequences* (OUP, Oxford, 2010).

48 See generally, BBC News, “Timeline: China and net Censorship”, available at: <http://news.bbc.co.uk/2/hi/8460129.stm> (last visited on July 3, 2014).

the infamous *Fatwa* issued by the Iranian supreme leader Ayatollah Khomeini on the famous author Salman Rushdie for writing the disputed book *Satanic Verses*.⁴⁹

Thus, it is seen that throughout history, the tool of censorship has been taken resort to in various ways, sometimes formally and sometimes through subterranean means, to stifle the voices of dissidence. But, what is more interesting to note is that while well-documented, formally imposed methods of censorship are gradually dwindling down to small pockets in the globe, censorship itself has not really disappeared. Rather, one can notice censorship, and the chilling effect associated with the fear of being censored has, at many instances in contemporary times, curtailed the fullest enjoyment of the expressional freedoms at many parts of the world. This apparent paradox is crucial to note, especially when one considers the establishment of a legal order that respects the human rights of every individual, unfettered by formalistic or non-formalistic constraints that bind his conscience and intellect, and the expressions consequent thereto.

IV Free speech as an international human right: international and regional conventions

Article 19, Universal Declaration of Human Rights, the *Magna Carta* of International Human Rights Law, states that:⁵⁰

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the International Covenant on Civil and Political Rights, which sets the globally acceptable normative pattern of civil and political rights, derives its basis from the UDHR, but brings in place a number of grounds that would authorize states to bring about prior restraints on expressional freedoms. It states that:⁵¹

49 The *fatwa* was issued in 1988, “calling on all good Muslims to kill Rushdie and his publishers”. Coincidentally or otherwise, Rushdie’s Japanese translator was stabbed to death in July 1991, and his Italian translator was seriously injured by stabbing the same month. His Norwegian publisher barely survived an attempted assassination in Oslo in Oct. 1993. The Turkish translator was also targeted in July 1993 in Sivas, Turkey, and 37 people died. The fatwa was eased in 1998. But, these unsavoury incidents raise serious doubts about the liberty of the independent thoughts even in today’s times. See *supra* note 40.

50 UN GAOR 217 (III) dated 10 Dec. 1948, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (last visited on July 8, 2014).

51 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of Dec. 16, 1966, entry into force Mar. 23, 1976, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited on July 8, 2014).

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

General Comment No. 34 to the ICCPR, the most contemporary international human rights law development on a global level, explains the paragraphs of article 19 as thus:⁵²

Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1... Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek,

52 It was adopted in the 102nd Session of the Human Rights Committee, Geneva, 11-29 July 2011. Available at: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> (last visited on July 8, 2014). It replaces General Comment No. 10 (29/06/1983) which explained art.19 as: Paragraph 1 requires protection of the “right to hold opinions without interference”. This is a right to which the Covenant permits no exception or restriction. Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to “impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”. Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole.

receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive... Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed... Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.

Article 10 of the European Convention on Human Rights largely follows the model of the ICCPR when it states that:⁵³

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

53 Signed at Rome, Nov. 4, 1950, entry into force Sep. 3, 1953, *available at*: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on July 8, 2014).

in confidence, or for maintaining the authority and impartiality of the judiciary.

The American Convention on Human Rights looks at the issue of prior restraints completely differently from the other human rights conventions. It speaks of a model where there is absolutely no prior restraint except in extreme cases such as to protect the children and the adolescents, and to prevent racial and other forms of hate speech. Article 13 of the ACHR states:⁵⁴

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

The Declaration of Principles on Freedom of Expression further goes on to state thus:⁵⁵

54 Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Nov.22, 1969, entry into force July 18,1978, *available at*: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (last visited on July 8, 2014).

55 Adopted by the IACHR at its 108th Regular Period of Sessions, held on Oct. 2–20, 2000. *Available at*: [https://www.cidh.oas.org/Basicos/English/Basic21.Principles%20 Freedom%20of%20Expression.htm](https://www.cidh.oas.org/Basicos/English/Basic21.Principles%20Freedom%20of%20Expression.htm) (last visited on July 8, 2014).

Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society... Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition... Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression... Prior conditioning of expressions, such as truthfulness, timeliness or impartiality, is incompatible with the right to freedom of expression recognized in international instruments.

The African Charter of Human and People's Rights, one of the latest regional human rights conventions, states in article 9(2):⁵⁶

Every individual shall have the right to express and disseminate his opinions within the law.

The Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, while explaining the scope and ambit of the article, extends it to sectors like telecommunications and broadcasting, both in the public and in the private sectors, and casts a very modernist, pragmatic look into the need for regulation of speech and expression in the contemporary Africa. It states:⁵⁷

Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy... No one shall be subject to arbitrary interference with his or her freedom of expression... Any restrictions on freedom of

56 Signed at Nairobi on June 28, 1981, entry into force Oct. 21, 1986, *available at* : http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (last visited on July 8, 2014).

57 Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, Banjul, Oct. 23, 2002, *available at* : http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf (last visited on July 8, 2014).

expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society... Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

These inherent variations in the level and nature of governmental control over freedom of expression – also accounted for in the national constitutions, statutes and judicial decisions – collectively constitute the subject-matter of an interesting study, especially in light of the fact that they are also partially indicative of the extent of democratization and totalitarianism inherent in these countries. For example, the first amendment to the US Constitution⁵⁸ and the once-prevalent *Glavlit* model⁵⁹ throw light on two different ends of the spectrum. Somewhere in the middle lies the Brit-ECHR system of giving a bag full of rights, and then putting sufficient, and very often, more than sufficient, restrictions on their enjoyment.

These variations, results of the distinctly different systems of governance and evolutionary processes of the jurisprudence of free speech and censorship, put up significant question marks upon all theories that try to prop up a *universalistic* nature of international human rights jurisprudence,⁶⁰ in favour of the more pragmatic *cultural relativism* theory⁶¹ that aims to look at the situational and circumstantial specificities of the different societies as forming the basis of the extent and nature of the operation of the human rights in that society.

V Locating the necessity of censorship in a democratic society: arguments for and against

As is evident, there is a wide gulf of divergent opinions about censorship and its need in a modern democratic society. While some thinkers look at censorship as an exercise in repression, there are others who firmly believe that censorship acts as a

58 Amendment 1 - Freedom of Religion, Press, Expression - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

59 *Supra* note 43.

60 According to Bhikhu Parekh, “Different societies throw up different systems of moral beliefs depending on such things as their history, traditions, geographical circumstances, and views of the world. We have no means of judging them for there are no objective and universal criteria available for the purpose, and even if there were, we would be too deeply conditioned by our own society to discover them”. See Bhikhu Parekh, “Non-ethnocentric Universalism” in T. Dunne, and N. J. Wheeler (eds.), *Human Rights: Global Politics* 128 (Cambridge University Press, Cambridge, 1999).

recourse to maintain societal harmony and tranquillity. The divergence becomes particularly interesting when looks at the positions taken by the conservative and liberal thinkers, and how they look at the need for censorship.⁶²

The conservative position

The conservative view on the issue of censorship is that free speech can be abused when it undermines traditional values and social stability, and censorship derives its justification from the preponderant social need to prevent such occurrences. The main arguments for this conservative position are:

Protecting children: This thought owes its origin to Plato and the necessity he attaches to censorship to save the children from moral degradation. The conservatives feel that censorship shelters children from ideas that may damage their moral development. When the free speech of others runs wild, this intrudes on parents' abilities to morally educate their children. Thus, the most intrusive and harmful expressions of others must justifiably be censored.⁶³

Governmental stability: Censorship helps stabilize society by preventing the erosion of governmental authority, and to ensure the maintenance of an orderly, peaceful society where peace, tranquillity and harmony is prevalent.

Traditional values and offense: The most offensive expressions are those that attack traditional values, and censorship protects those basic values and moral codes that regulate our personal and social conduct from ruthless attacks.

The liberal position

The liberal view on the issue of censorship is that free speech should be permitted even when it attacks traditional values, and censorship should be used only in exceptional cases. Their main arguments are as follows:

Democracy: Censorship is damaging to the democratic process it is most often used to suppress and oppress the voice of the minority and the underprivileged. Censorship thus culminates in being an act of intolerance towards those whose voices need to be heard the most. The result is oligarchy—rule by a small

61 “While human rights are universal in character, it is now generally acknowledged that their expression and implementation in the national context should remain the competence and responsibility of each government. This means that the complex variety of problems of different economic social and cultural realities and the unique value systems prevailing in each country should be taken into consideration”. See Peter R. Baehr, *Guide to Human Rights Practice* 14 (Transnational Publishers, New York, 1999).

62 See generally, *article available at:* <http://www.utm.edu/staff/jfieser/class/160/4-censorship.htm> (last visited on July 2,2014).

63 Heins, *supra* note 30.

elite group—and not democracy. For democracy to function properly, we need an environment in which the broadest range of ideas from myriad sources are freely expressed and debated.⁶⁴

Discovering truth: Censorship undermines the effort to discover new truths and ideas and, thus contribute in the overall societal development by expanding the society's knowledge base.

Personal autonomy: Censorship strikes at the very core of our human identity by restricting our natural inclination towards self-expression.

To censor or not to censor?

According to Rodney O. Smolla,⁶⁵ free speech serves five purposes in a democracy: (a) As a means of participation, (b) Serving the purpose of truth, (c) Facilitating majority rule, (d) Providing restraint on tyranny and corruption by keeping the government in check, and (e) ensuring stability by allowing minority voices to be heard.⁶⁶ This is a very pragmatic formulation of the positives and negatives of the phenomenon of censorship. In the forthcoming section, a few real-life cases have been discussed, where there are sound theoretical justifications in each situation put forward by eminent thinkers for and against censorship. The thoughts are descriptive of the real difficulty in making policy choices in different circumstances faced by the state and the society alike on whether or not to censor a particular exercise of an individual's freedom of speech and expression.

64 “Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey some value to my neighbour. In the free society to which our Constitution has committed us, it is for each to choose for himself”. See Stewart, J in *Ginzburg v. United States* 383 US 463 (1966). Although this was a dissenting opinion, the said observations are pertinent for being significantly critical of censorship, and seeks to reflect the liberalist arguments against censorship.

65 See generally, Rodney A. Smolla, “Free Speech is Essential for Democratic Self-Governance” in Bruno Leone (ed.), *Free Speech* 151 (Greenhaven Press, San Diego, 1994).

66 McLachlan J of the Canadian Supreme Court identified the following in *R. v. Keegstra* [(1990) 3 SCR 697]: (1) free speech promotes “The free flow of ideas essential to political democracy and democratic institutions” and limits the ability of the state to subvert other rights and freedoms; (2) it promotes a marketplace of ideas, which includes, but is not limited to, the search for truth; (3) it is intrinsically valuable as part of the self-actualisation of speakers and listeners; and (4) it is justified by the dangers for good government of allowing its suppression.

Political extremism and censorship

This is an issue that is very essential and relevant in the contemporary world – the question whether one should allow a platform for fundamentalist and extremist organizations like the *Al Qaida* to propagate freely their views through their private television – the *Al Jazeera* TV, or ought there be governmental curbs on such broadcasting. An interesting debate on this subject had been voiced in the May, 1994 issue of *The Guardian*,⁶⁷ where two noted columnists argued on a similar issue related to providing a platform to the extremist British Nationalist Party.

According to Seamus Milne, who advocated a curb on the BNP's right to free speech, the BNP necessarily violates the human rights of a large section of the population, and, by doing so, it has justified the abridgement of their right to freedom of speech. The 'oxygen of publicity', if given to them, would help the spread of racism.

On the other hand, Polly Toynbee argued that the banning of a particular group may set a precedent by which any group that does not conform to a norm is rendered prone to a similar ban. According to him, "Free Speech is not absolute – but we must be free to speak our political minds, and listen to political opinions of others, however nasty."⁶⁸ This statement of his has an uncanny resemblance to the *Marketplace of Ideas* theory, thereby highlighting its relevance in the contemporary world.

Use of 'offensive language' on college campuses

The issue was the imposition of a speech code – banning the use of 'offensive language' at Stanford University.

According to Gerald Gunther:⁶⁹

Speech should not and cannot be banned simply because it is 'offensive' to substantial parts of, or a majority of, a community. The refusal to suppress offensive speech is one of the most difficult obligations the free speech principle imposes upon all of us; yet it is also one of the First Amendment's greatest glories – indeed, it is a central test of a community's commitment to free speech.

However, Charles Lawrence⁷⁰ opined that restrictions reflected genuine demands from students from minority ethnic groups, who had through harassment been denied

67 Seamus Milne and Polly Toynbee, "Fear in the Airing" *The Guardian* May 2, 1994, referred to in Darren O'Byrne, *Human Rights: An Introduction* 117 (Routledge, New York, 2013).

68 *Ibid.*

69 Gerald Gunther, "All Speech Should be Unrestricted on College Campuses" in Leone, *supra* note 65.

70 See generally, Charles Lawrence, "Racist Speech Should be Restricted on College Campuses" in Leone more, *supra* note 65.

the right to equality of education. Being a supporter of the Hobbesian principle of a right for a citizen to expect from the state security of person, Lawrence was thus advocating the same guarantee from a welfare state, be it at the cost of restricting the offensive operation of some others' unrestricted right.

Pornography, sexuality and obscenity – an analysis of the changing voices

This is an area where views and opinions have a range encompassing a whole spectrum. For some, pornography is a threat to a moral order, whereas for others, it is a mark of emancipation from bondages.

The libertarians seek to uphold individual freedoms and oppose state interference. According to them, state's authority to make laws is only pertaining to the public sphere – and not on the individual choices and preferences in the private sphere (the first amendment assertion has been illustrated by Thurgood Marshall J in *Stanley v. Georgia*⁷¹ where he says that if first amendment means anything at all, “it means that a state has no business telling a man, sitting alone in his own house, what books he must read or what films he must watch”). This liberal fundament was also supported by the Wolfendon Committee Report in the UK.⁷² Sexual repression is itself more damaging than sexual openness, according to the libertarian view.

However, according to conservatives, pornography is a threat to ‘moral order’ and stability, and the material itself is disgusting and unworthy of publicity. Moreover, the conservatives believe that state is empowered to pass laws controlling both public and private activities, as has been evident from Devlin's dissent to the findings of the Wolfendon Committee.⁷³

If one looks at the feminist movements and the jurisprudence emerging there from, history shows changes and evolutions at every stage. Traditionally, feminists have supported the liberal cause, celebrating the need to discover the body and sexuality as a tool of emancipation from bondages. In the 1970s, realist feminists stressed that pornography was not only damaging to women's status in society, but also dangerous to their safety. Thus, pornography not only provides the foundations *for*, but also *is*,

71 394 US 557 (1969).

72 *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247. H.M.S.O., London. 5s. This view was also supported by HLA Hart. See William Miller, “Conservatism and the Devlin-Hart Debate” 1 *Int. J. Pol. & Good Gov.* (2010), available at: <http://www.onlineresearchjournals.com/ijopagg/art/60.pdf> (last visited on July 5, 2014).

73 See generally, Patrick Devlin, *The Enforcement of Morals* (OUP, Oxford, 1965). See also, Gerald Dworkin, “Devlin Was Right: Law and the Enforcement of Morality” 40 *Wm. & Mary L. Rev.* 927 (1999); Lord Falconer, “Church, State and Civil Partners” 9 *Ecclesiastical Law Journal* 5-9 (2007).

violence against women.⁷⁴ Hence, according to the liberal feminists, pornography is not essentially a question of mere censorship, but a question of the women's human rights as a whole.⁷⁵ However, the 1990s have seen a shift in the trend. Avedon Carol⁷⁶ has claimed that women are suppressed not because of pornography but because of censorship. Wendy McElroy⁷⁷ has warned that anti-pornography legislations might result in a backlash against feminism. Jean Seaton⁷⁸ has suggested that the realist feminists run the risk of losing touch with the roots of feminism, in the civil liberties and emancipatory movements. Melissa Benn⁷⁹ argues that the problem is one of structural sexism, and censoring pornography would not solve the problem. Instead, anti-sexist laws need to be established.

The underlining philosophy behind the divergent philosophies is the fact that while one looks at the issue of censorship, one can look at it from two distinct planes – the *moralist* plane, identifying the evils contained in what needs or needs not to be censored; and a *causalist* plane,⁸⁰ which would need to look at the effects of the commission or omission of censorship. The decades of the feminist movement indicated drastic shifts in views, from the moralist to the causalist plane, and *vice versa* – thereby leading to the wide divergence in opinions.

VI Contextualizing censorship in light of the free speech discourse: an analysis of the liberal theories of free speech

If one looks at the aforementioned thoughts revolving around the need for and utility of censorship in a liberal democratic society, the divergence in views would be suitably illustrated. Now, if one is to posit these views in the context of the classical theories on free speech and democracy, the outcome would be immensely intriguing and thought-provoking.

Western liberal theorists have primarily taken resort to two primary schools of thought in their approach towards issues concerning free speech and censorship – the *deontological liberal approach* and the *functionalist liberal approach*.⁸¹ The deontologists like

74 Andrea Dworkin, “Pornography debases women and should be Censored” in Leone, *supra* note 65.

75 *Ibid.*

76 Alisson Assiter and Avedon Carol, “Bad Girls and Dirty Pictures: The Challenge to Reclaim Feminism” *The Challenge to Reclaim Feminism* (Pluto Press, London, 1993).

77 Wendy McElroy, “Censoring Pornography Endangers Feminism” in Leone, *supra* note 65.

78 Jean, Seaton, “Pornography Annoys” in James Curran *et al.* (eds.), *Bending Reality: The State of the Media*, (Pluto Press, London, 1986).

79 Melissa Benn, “Campaigning Against Pornography” in James Curran, *ibid.*

80 *Ibid.*

81 See generally, DFB Tucker, *Law, Liberalism and Free Speech* 1-63 (Rowman and Littlefield, Lanham, 1985).

Thomas Scanlon and Ronald Dworkin, often dubbed the neo-Kantians,⁸² because like Kant they place the rights and dignities of the speaker as the central point of their theories rather than looking at the reasonably foreseeable consequences of the speech,⁸³ look at the state's moral duty to protect the individual's autonomy and therefore, necessarily detest censorship in any form. To quote Dworkin:⁸⁴

Censorship is degrading because it suggests that the speaker or writer is not worthy of equal concern as a citizen, or that his ideas are not worthy of equal respect; that censorship is insulting because it denies the speaker an equal voice on politics and therefore denies his standing as a free and equal citizen; or that censorship is grave because it inhibits an individual's development of his own personality and integrity.

The roots of this individual-centric reading of free speech can indeed be traced back to the Lockean theory of inalienability of rights when he advocated a minimalist state intervention regime in his *Life, Liberty and Property*, which, according to him, were inalienable rights.⁸⁵

On the other hand, functionalist liberals took a consequentialist view that made them support free speech because it is beneficial to the society. John Stuart Mill's theory of *Marketplace of Ideas* stated that "if we suppress an opinion, it may turn out to be true. To assume otherwise is to assume that we are infallible, which is not the case".⁸⁶ He did not look at truth as an absolute unchallengeable principle, but as a product of "the reconciling and combining"⁸⁷ of conflicting arguments. Mill believed that the "prevailing opinion on any subject is rarely or never the whole truth,"⁸⁸ and that it is "only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."⁸⁹ Citing the examples of intellectual movements in Europe, Mill argued that vast improvements "in the human mind or in institutions"⁹⁰

82 Jeffrie G. Murphy, *Character, Liberty and Law: Kantian Essays in Theory and Practice* 127 (Kluwer, Dordrecht, 1998).

83 Philip Petit, "Consequentialism" in Stephen Dawrall (ed.), *Consequentialism* 95 (Wiley-Blackwell, Oxford, 2003).

84 Ronald Dworkin, *A Matter of Principle* 386 (UP, Cambridge, 1985).

85 See generally, John Locke, *The Two Treatises of Government* (1689) referred to in a work available at: http://www.fee.org/the_freeman/detail/john-locke-natural-rights-to-life-liberty-and-property (last visited on July 4, 2014).

86 See generally, John Stuart Mill, *On Liberty* (1869) referred to in Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth" 1 *Duke LJ* 1 (1984).

87 Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberalist Analysis*, 2 *Drexel LR* 557, 566 (2010).

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

had occurred because of fierce scholarly debate. He therefore firmly believed that the “mental well-being of mankind”⁹¹ was dependant on allowing freedom of speech, and that even erroneous opinions should not be suppressed. It was only if the speech could be harmful to others, something of the nature of hate speech, that Mill would advocate forceful proscriptions of such speech or expression.⁹²

Alexander Meiklejohn, another functionalist liberal, derived his theory from Mill’s *Marketplace* model. He looked at the first amendment to the US Constitution and argued that free speech is an essential prerequisite for democratic governance. Like Mill, he also argued about the importance of participatory debate and decision-making, and would leave it to the market to decide the best and the most effective idea. Meiklejohn believed that it was essential to protect art and literature from censorship as “[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created”.⁹³ Thus, to quote him further:⁹⁴

Civilized society is a working system of ideas. It lives and changes by the consumption of ideas. Therefore it must make sure that as many as possible of the ideas which its members have are available for its examination. . . . Valuable ideas may be put forth first in forms that are crude, indefensible, or even dangerous. They need the chance to develop through free criticism as well as the chance to survive on the basis of their ultimate worth.

One finds reverberation of this functionalist liberal theory in a number of significant judicial pronouncements, especially in the United States from the times of the World War I. According to O.W. Holmes J, “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . .” in *Abrams v. US*⁹⁵ where, in his dissenting judgement (with Brandeis J), he also laid down that a governmental regulation on free speech is only justified where it is used to dispel a *clear and present danger*.⁹⁶ Otherwise, the market should be left to determine the veracity of the assertion.

91 *Ibid.*

92 LW Sumner, “Should Hate Speech Be Free Speech? John Stuart Mill and the Limits of Tolerance” in Raphael Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* 133 (University of Michigan Press, Ann Arbor, 2000).

93 Alexander Meiklejohn, “The First Amendment is an Absolute” 1961 *Sup. Ct. Rev.* 245, 257 (1961).

94 Martin H. Redish & Christopher R. McFadden, “HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association” 85 *Minn. L. Rev.* 1669 (2001).

95 250 U.S. 616 (1919) at 630.

96 This test was first introduced by Holmes J in the case of *Schenck v. US* 249 US 47 (1919), where he spoke for an unanimous court, asserting the fact that free speech is not an absolute right, and the state has got the power to intervene in circumstances of clear and present danger. This

This dissenting opinion of Holmes and Brandeis JJ was crystallized across subsequent judicial pronouncements in the US Supreme Court⁹⁷ and finally accepted when a modified version of it, the *imminent lawless action* test was upheld in *Brandenburg v. Ohio*⁹⁸ during the Vietnam War.

However, the *Marketplace of Ideas* rationale for freedom of speech has been criticized by scholars on the grounds that it is wrong to assume the assertion that all ideas will enter the marketplace of ideas, and even if they do, some ideas may drown out others merely because they enjoy dissemination through superior resources.⁹⁹ The theory is also criticized for its assumption that truth will necessarily triumph over falsehood. It is visible throughout history that people may be swayed by emotion rather than reason, and even if truth ultimately prevails, enormous harm can occur in the interim.¹⁰⁰

Alan Haworth has suggested that the metaphor of a marketplace of ideas is misleading. He opines that Mill's classic defence of free speech does not develop the idea of a market (as later suggested by Holmes) but essentially argues for the freedom to develop and discuss ideas in the search for truth or understanding. In developing this argument, Haworth says, Mill pictured society not as a marketplace of ideas, but as something more like a large-scale academic seminar. This implies the need for tacit standards of conduct and interaction, including some degree of mutual respect. That may well limit the kinds of speech that are justifiably protected.¹⁰¹

VII Conclusion

Considering the oft-repressive nature of censorship, it can frequently be seen that it has an evil effect on the unhindered expression of thoughts and ideas – it often seeks to annihilate independent opinion at its roots. On a jurisprudential plane, it can be said that Locke's inalienable *Right of Liberty* is very often made to be forcefully alienated to the hands of tyranny. Mill's *Marketplace of Ideas* theory thus fails to find an

test would subsequently be used to replace the 'Bad Tendency' Test, a legacy from the British common law, which suggested that any speech could be outlawed if it harmed public welfare, a test that was followed in most free speech cases of that time, including *Sobenck*. See David Rabban, *Free Speech in its Forgotten Years*, (Cambridge University Press, Cambridge, 1999).

97 *Gitlow v. New York* 268 US 652 (1925); *Whitney v. California* 274 US 357 (1927); *Thornhill v. Alabama* 310 US 88 (1940); *Cantwell v. Connecticut* 310 US 296 (1940); *Bridges v. California* 310 US 252 (1941); *Dennis v. US* 341 US 494 (1951).

98 395 U.S. 444 (1969). The court in *Brandenberg* famously observed, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action".

99 Ingber, *supra* note 86.

100 *Ibid.*

101 See generally, Allan Haworth, *Free Speech* (Routledge, New York, 1998).

application, insofar as, let alone finding out the truth, dissident voices are not even allowed to be heard.

On the other hand, it can be said that although an evil, censorship is not totally an unnecessary evil, in view of the fact that while upholding one's human right of free speech, it has to be ensured that another's, and, in a utilitarian sense, the greatest numbers' human rights, are not in any ways violated or abridged. Thus, censorship in a way can be said to be a manifestation of the majority will for the purpose of the majority good, if it is done with an object and purpose, and done through the application of the proper means, the due process of law – a law that is fair, just and reasonable.

It can be seen that a minimal derogation from a guaranteed but derogable human right is internationally allowed, provided that it follows the principles of *necessity* and *proportionality*.¹⁰² The same test should also be applied to censorship, which would underline the need or needlessness for its application in particular instances.

In this connection, it is pertinent to note that the censorship should be *direct*, and not *subterranean*. A disguised restriction puts question marks on the welfare and democratic motives of a state. Thus, on the basis of satisfaction of the tests marked as prerequisites to be satisfied before derogation from a human right, a *direct* censorship should be imposed on the particular expression, and no colourability should be associated with it.

Finally, although the UDHR and ICCPR purport to guarantee identical human rights to 'everyone', irrespective of national and socio-legal differences, when it comes to an issue so intrinsically connected with the social mores as censorship, one needs to, in lines of the ECHR, adopt a '*Margin of Appreciation Doctrine*',¹⁰³ a notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests, or among different moral convictions. Only then, the proper worth and need for a curb like censorship will be realized.

To sum up, one can safely conclude by quoting Curry Jansen:¹⁰⁴

A State which carries out its routine operations behind closed doors is not a Democracy...If Censorship is ever justified in a Democracy, it is only when its groundings are open to public scrutiny...The essential question is not, 'Is there Censorship?' but rather 'What kind of Censorship?' Posing this question is not an affirmation of darkness but an invitation to enlightenment. To expand the boundaries of human freedom, we must first identify them.

102 R v. *Oakes* [1986] 1 SCR 103, 138-139.

103 Eyal, Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" 31 *International Law and Politics* 843, 843-844 (1999).

104 Jansen, *supra* note 13.