Freedom of Speech, Democracy and Cyberspace: Lessons from Australia, Singapore and India

Lasa Sun

BA (Zhejiang University of Technology, Hangzhou, Zhejiang Province, China)

MA (East China University of Political Science and Law, Shanghai, China)

Diploma of Law (Legal Profession Admission Board, Sydney, Australia)

Graduate Diploma of Legal Practice (The College of Law, Sydney, Australia)

Faculty of Arts

Macquarie Law School

Macquarie University, Sydney, NSW, Australia

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Thesis Abstract

It was predicted that everyone on Earth will be connected by 2020, posing for our world a host of new opportunities — and dangers. Free speech is the essence of modern democratic government and the very spirit of social life. The new technological sphere — cyberspace — has provided free speech with both a new frontier and unprecedented challenges. The challenges in the area of freedom of speech in cyberspace are not only technological, but also legal, political, social, cultural and economic.

In the light of these variables, an analysis of the status of freedom of speech in the context of both democracy and cyberspace in those three nations is undertaken in order to ascertain what are the commonalities and differences among those States in their approaches to maintenance of free speech: how do they, with their similar but different jurisdictions and pluralistic cultures, maintain a balance between free speech, democracy, and the challenges of cyberspace? The thesis has placed emphasis on the necessary aspects of comparison such as freedom of political speech, cyber-governance, cyber-sovereignty, the issues of diversity and tolerance, censorship, and international law rather than only on infrastructure and technology. Comparative analysis is the major method for the thesis along with doctrinal research.

Australian, Singaporean and Indian systems of governance are all democracies but are all different, responding to the nature of their culture and their policies on freedom of speech. The thesis demonstrated that:

- free speech grows well under democratic environments;
- the cooperation of government and private actors would be an appropriate means of furthering appropriate cyber-governance;
- free speech works at its best under conditions of diversity;
- the harmonization of diversity and tolerance to censorship needs legitimacy, public approval and transparency;
- a reasonable balance needs to be maintained between international treaty practice and domestic legislative power;
- cautious consideration is required when establishing rules for the flow of information in cyberspace; and
- there is a need to balance ‘Legal Paternalism’ and ‘Autonomy’.

Statement

I certify that the research presented in this thesis has not previously been submitted for a higher degree nor has it been submitted as part of the requirement for a degree to any university or institution other than Macquarie University.

I also certify that this thesis presents my original work. I have appropriately acknowledged any help or assistance I received during the research presented in and the preparation of this thesis, as well as any sources of information I used.

Signed:

Lasa Sun (Student Number:)

Date:

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  (See Chapter Five for details)

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Chapter 1 — Introduction

1.1 Freedom of Speech, Democracy and Cyberspace

Dr. Eric Schmidt, Executive Chairman of Alphabet, Google's parent company, says everyone on Earth will be connected by 2020,[1] which means around five billion new people will come online within four years, posing for our world a host of new opportunities — and dangers. Schmidt's book, *The New Digital Age* tackles some of the toughest questions about our future: how will technology change the way we approach issues like freedom of speech and privacy, security, diplomacy, revolution and terrorism, war and intervention, and how can we best use new technologies to improve our lives? This research develops its discussion on freedom of speech in the context of cyberspace.

Free speech is the essence of modern democratic government and the very spirit of social life. The new technological sphere — cyberspace — has provided free speech with a new frontier. Throughout the world cyberspace was seen as a great advance in promoting freedom of expression in that 'the free flow of information would lead to freer societies' and therefore 'cyberspace should remain a conduit for free expression of all information, not that information approved by any one government'.[2]

Free debate and open discussion have been considered as an essential part of democracy, as they 'enable a free competition of opinions on the marketplace of ideas'.[3] Ronald Dworkin, an American philosopher and scholar of constitutional law, one of the great defenders of freedom of speech, has argued that 'Laws and policies are not legitimate unless they have been adopted through democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be.'[4] 'Democratic process' requires that

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[1] Doug Gross, *Google boss: Entire world will be online by 2020* (15 April 2013) CNN <http://edition.cnn.com/2013/04/15/tech/web/eric-schmidt-internet/>. See also his new book: Eric Schmidt and Jared Cohen, *The New Digital Age* (Vintage 2014).

[2] Christopher Stevenson, 'Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World' (2007) 30 *Boston College International and Comparative Law Review* 531, 534.

[3] Markus Seitenberg, '*Chaplinsky v. New Hampshire*, 315 U.S. 568 — Classifying Speech as a means of Regulating Freedom of Speech — A comparison to Art. 5 of the German Basic Constitutional Law and the Adjudication of the German Federal Constitutional Court, respectively ' (2007) *DAJV Newsletter* 58, 58.

[4] Ronald Dworkin, *Ronald Dworkin on the right to ridicule* (23 March 2006) <http://www.cs.utexas.edu/~vl/notes/dworkin.html>. This article by Ronald Dworkin was published in the New York Review of Books on March 23, 2006.

everyone must have a voice according to the democratic procedure and laws, no matter how much the government may dislike what they are saying.

Freedom of speech has long enjoyed special recognition at common law. In *Evans v State of New South Wales*, freedom of speech is regarded as 'fundamental subject to reasonable regulation for the purposes of an ordered society'.[5] In *Derbyshire County Council v Times Newspapers Ltd*, a particular rule of the common law gives effect to the value of freedom of speech by preventing public authorities and local authorities from suing for defamation.[6] In *Bonnard v Perryman*, the Lord Coleridge said the right of free speech is 'one which it is for the public interest that individuals should possess, and indeed that they should exercise without impediment, so long as no wrongful act is done.'[7] In *Davis v Commonwealth*, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law.[8] Blackstone described freedom of speech as 'essential to the nature of a free State'.[9]

In his book *On Liberty*, Mill not only described the need for protecting against 'the tyranny of the prevailing opinion and feeling',[10] but also regarded the free exchange of ideas in society as a pathway for the expression of truth, which has benefits for societal progress — a product of 'the reconciling and combining' of conflicting arguments.[11] In other words, allowing freedom of speech 'does more to promote the good or utility than allowing censorship'.[12] Likewise, Meiklejohn argued that it is participatory debate that offers the greatest wisdom and effectiveness.[13] The reason he proposed to protect literature and art from censorship is: 'they lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.'[14]

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[5] *Evans v State of New South Wales* [2008] FCAFC 130, at 72.
[6] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.
[7] *Bonnard v Perryman* [1891] 2 Ch 269 at 284; see also *R v Commissioner of Metropolitan Police*; *Ex parte Blackburn (No 2)* [1982] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203.
[8] *Davis v Commonwealth* (1988) 166 CLR 79.
[9] William Blackstone, *Commentaries on the Laws of England* (1979), 151-152.
[10] John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green 1859), 63.
[11] Ibid 33-34, 86.
[12] Mark Walker, 'Censorship, Logocracy and Democracy ' (2008) 21(1) *Canadian Journal of Law and Jurisprudence* 199, 199.
[13] Alexander Meiklejohn, 'The First Amendment is an Absolute ' (1961) *SUP. CT. REV.* 245, 255.
[14] Ibid 257.

In this thesis, freedom of speech will include political speech. The restriction on freedom of speech (e.g. laws against defamation) is also intended to maintain the social order as much as restrictions on terrorist-inciting speech. The justification of censorship of freedom of speech should thus consider the following issues: though freedom of speech is of high value, it 'cannot be guaranteed as unlimited and that there has to be some way of controlling the way people communicate'.[15] In addition, there will always be a constraint upon any individual's right of free expression, having regard to others' rights. Therefore, a balance has to be made between freedom of speech and other human rights, such as privacy.

Cyberspace includes communication platforms such as Twitter, Facebook, Instagram and mobile devices besides the Internet. One of the most important features of cyberspace is: it 'has enormous potential as a means to increase the diversity of information and views that are expressed by and accessible to users around the world'[16], no matter where they may be located, nor, indeed, what they say. Those with access to a computer or other similar device can access cyberspace and enjoy the benefits of cyberspace so as to make his or her individual contributions and opinions known.

Cyberspace, 'regardless of living standard or nationality, has given a voice and the power to effect change.'[17] As a result, at the national level, some governments have taken steps to implement restrictions — 'a flurry of legislative and legal battles over how to regulate this evolving medium',[18] — while in other western democracies such as Australia regulation has occurred to prevent excesses of such freedom to say anything, insofar as such sayings hurt others, defame others, incite violence, or are opposed to the public order.[19]

Cyberspace has been considered as a new domain that transcends geography as well as national boundaries. What can human beings do regarding this new domain? 'The challenge for us is resolutely to accept the responsibility to influence its mores, to shape

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[15] Seitenberg, above n 3.
[16] Gareth Grainger, 'Freedom of Speech and Regulation of Information in Cyberspace: Issues Concerning Potential International Co-operation Principles for Cyberspace ' (1998) *International Trade & Business Law* 93, 95.
[17] Eric Schmidt and Jared Cohen, 'The Digital Disruption' (2010) 89(6) *Foreign Affairs* 75, 75.
[18] Kim Rappaport, 'In the Wake of Reno V. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online ' (1998) 13 *The American University International Law Review* 765, 768.
[19] See 6.4.1 for detailed information.

its concepts of morality and to enact, to the extent necessary, those laws that are appropriate to so transnational a domain.'[20] 'Connection technologies will carve out spaces for democracy as well as autocracy and empower individuals for both good and ill.'[21] Good, for forcing all governments to become more open and accountable; ill, for giving government new avenues to stifle opposition and become more repressive.[22] This conflict between openness and restriction in the public's or the nation's interests has become a dilemma and a challenge for democratic nations who take freedom and openness as their general principles.

Cyberspace is a metaphor for the communication potential of the Net;[23] it is the electronic medium of computer networks, in which online communication takes place. Compared to the Internet, cyberspace provides a broader view, which contains advanced communication tools, such as Twitter, Facebook and smart phones. Cyberspace now is widely recognized as the newest frontier for the exercise of the freedom of expression. Compared to the traditional media, cyberspace has special features: it has a large number of users. It provides an infrastructure which enables communications and information services to be used by millions of individuals and organizations around the world.

Cyberspace possesses a fluid environment. In traditional media the functions carried out by the content provider, the broadcaster and the audiences tend to be relatively fixed, domestically based and highly regulated. In contrast, the functions carried out by participants in the cyberspace environment are far more fluid and involve players from all around the world. Cyberspace simply refers to 'the potential of the Internet to provide an open communication not hindered by speed, by distance, by the number of participants in an exchange, nor potentially by limitations of sensory data'.[24] It has no centre of control, makes possible the exchange of ideas and information in a manner not possible via traditional electronic and print media.

In addition to the above-mentioned characteristics, easy access is another unique feature of cyberspace. The most significant aspect of cyberspace is that any person with

[20] Grainger, above n 16, 128.
[21] Schmidt and Cohen, above n 17.
[22] Ibid 76.
[23] Joe Ravetz, 'The Internet, Virtual Reality and Real Reality ' in Brian Loader (ed), *Cyberspace Divide* (Routledge 1998) 116.
[24] Ibid.

access can create material and make it available on-line. There are relatively low barriers to entry for both the broadcasters and recipients in the on-line environment. And, any person connected to the network can receive that material, regardless of where they are physically located around the globe.

Last but not least, cyberspace has the traits of immediacy and simultaneity. Immediacy and simultaneity are important attributes of the cyberspace. It allows for the exchange of information in cyberspace with minimum lapses of time, and less delay than real conversation, no matter how far away the distance is.

These characteristics mean that cyberspace has enormous potential for enhancing human communication and interaction, both domestically and internationally, which are important attributes that allow cyberspace to bring pertinent information to the reader, watcher and listener immediately.

Cyberspace is described as a democratic and free form of human communication. Subject only to access, cyberspace provides an infrastructure by which individuals from all walks of life have the ability to engage in public debate on virtually any topic imaginable. Cyberspace also offers the unique freedom of allowing users to transcend some of the normal constraints of human interaction.

Diversity of content is another benefit of cyberspace. This is because there are potentially as many sources of content as there are on-line users, all contributing their own thoughts, views, and designs to the on-line world. Moreover, it allows anonymity of participants.

As noted, cyberspace is a democratic from of human communication. However, the role of cyberspace as a means to enhance democracy has also been doubted. The following factors might prevent the fulfilment of cyberspace's function in assisting democratic transformation:

> The glut of information limited the effective use of the information; the Internet virtually created private lifestyle alternatives to public and political life; the cacophony of voices impeded serious discussion online; the difficulties for many in using the technology prevented them from participating in the process; the

> Internet is mainly used by the minority that is already politically interested and involved. This thus worsened the already existing problem of digital divide. [25]

The gap between the technologically poor and rich may be solved along with economic development, but the influence of political power could be the real determinant of the use of information technology. The new information technologies also allow easier and more efficient online surveillance and screening, and can become an effective means for manipulation and oppression.[26] Government can effectively regulate the internet by controlling relevant facilities and activities.[27] Guo expressed similar concerns as to the role of mass media as a source of power and a platform to exercise power in the course of commercialisation and constitutionalisation:

> The degradation of the mass media from a public sphere for critical debates and rational discussion to a stage for performance of power is threatening a society's democratic features, such as openness and plurality. The corruption of mass media thus imperils the foundation of a civil society by destructing its public sphere.[28]

Even with the rapid development of cyberspace, there is little agreement on the consequences of the new information technology. On the one hand, cyberspace can be 'the hope of liberation from the oppression of the old mass media and the salvation of the degeneration of the public sphere'[29]; as a means for democracy, cyberspace has given freedom of speech a big boost. On the other hand, cyberspace can also be seen as 'the danger of worsening of digital divides and abusing of technological power for political and economical oppression.'[30]

Therefore, the functioning of cyberspace in a society is complex, which involves the interplay of power in the society. And technology alone cannot decide whether cyberspace will become a tool of freedom or one of oppression, but rather the humans who use it.[31]

1.2 Research Question and Methodology

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[25] Denis McQuail, *McQuail's Mass Communication Theory* (SAGE Publications Ltd, 6 ed, 2012),as cited in Qin Guo, 'Internet and Political Participation in China' (2011) 5(1) *Masaryk University Journal of Law and Technology* 83, 85-86.
[26] Guo, above n 25, 87.
[27] Anlee Jyh, Yiliu Ching and Weiping Li, 'Searching for Internet Freedom in China: A Case Study on Google's China Experience ' (2013) 31 *Cardozo Arts & Entertainment* 405, 424.
[28] Guo, above n 25, 85.
[29] Ibid.
[30] Ibid 85-86.
[31] Guo, above n 25, 88.

The unprecedented tensions among freedom of speech, democracy and cyberspace in the new challenging world (see analysis in 1.1) underpins the necessity of striking an appropriate balance among them. Australia, Singapore and India share a common legal heritage (the common law), democracy, a wide diversity of ethnic groups among their people, and a global region (the Asian Indian Ocean), but have vastly different cultural practices and religions. In the light of these variables, an analysis of the status of freedom of speech in the context of both democracy and cyberspace in those three nations is undertaken in order to ascertain what are the commonalities and differences among those States in their approaches to maintenance of free speech: how do they, with their similar but different jurisdictions and pluralistic cultures, maintain a balance between free speech, democracy, and the challenges of cyberspace? The outcome of this comparison can point towards common denominators in protection of free speech in the new democracy of cyberspace, having regard also to diversity and plurality of customs, culture, religion, and traditions in different nation States. Such common denominators should prove useful for all nations in dealing with the challenges posed to free speech, and democracy in the cyber age.

1.2.1 Comparative Analysis

In this thesis, comparative analysis is the major method used along with doctrinal research.

Comparison will be made both with the past — (Vertical Comparison); and with experiences elsewhere — (Horizontal Comparison). Comparative research is often combined with historical research; 'it is often easier to understand phenomena when they are compared with similar phenomena from another time or place. Culture and society rely heavily on what has gone before and often use references from the past to justify the present.'[32] Similarly, different development trends are able to be revealed by different locations.

The method of comparison is a special function — 'The study and comparison of differences help to reveal the origins and development of social phenomena, locating them in a certain time and place, and thus defeating claims that they are universal and

[32] Nicholas Walliman, *Your Research Project* (SAGE Publications, 2nd ed, 2005) 114.

atemporal'[33] It would be foolish for scholars to research in a specific area concerning a specific issue, without carefully studying the changes in the past and in other places. However, the comparative method should be undertaken in a spirit of respect for each legal system. Indeed, constructive criticism is a sincere form of respect; and it enables us to make all possible efforts to avoid a narrowly chauvinistic[34] view.[35] Comparison is also a fundamental tool of scholarly analysis, which has more functions than self-reflection or normatively-driven advancement of cosmopolitan values through comparative reference.[36] Comparative scholarship 'sharpens our power of description and plays a central role in concept formation by bringing into focus potential similarities and differences among cases.'[37]

A good comparative analysis should normally devote substantial effort to exploring the functional equivalents of the issue in different legal systems.[38] In this research, comparison is the primary method and will be used from the beginning to the end. The research combines the historical approach with a concentrated comparative analysis on the specific topic — freedom of speech in cyberspace in the democracies of Australia, Singapore and India. In the process, great emphasis is laid on the understanding and unfolding of the comparative techniques for differences and commonalities among them, and the deep-rooted reasons for the differences and similarities.

I shall undertake the comparison by building upon my pre-existing knowledge of freedom of speech in cyberspace. Observations will then be made of how the same problem would be coped with in Australia, Singapore and India and consider the increasing availability of cases, statutes and articles on those legal systems. 'The general background of each legal system, the attitude of the courts towards written law and precedent, the way in which the legal minds work and the techniques they use, and so

[33] Ibid 115.
[34] From the perspective of Reitz, criticism coming from an outsider is always suspect on the grounds of chauvinism. See John Reitz, 'How to Do Comparative Law' (1998) 46 *The American Journal of Comparative Law* 617, 635.
[35] Ibid.
[36] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law ' (2005) 53(1) *The American Journal of Comparative Law* 125, 129.
[37] David Collier, 'The Comparative Method: Two Decades of Change ' in Dankwart Rustow and Kenneth Erickson (eds), *Political Science: The State of the Discipline* (New York: Harper Collins, 1991) 105.
[38] Reitz, above n 34, 621.

forth, all are involved in one way or another as the discussion starts off.'[39]

The overall purposes of comparison include the following points.

Firstly, there is the need for understanding diversity. 'In a world driven by trends toward global law, the question of diversity has become essential. The need to define diversity and its proper boundaries arises more fundamentally than ever. To the extent that cultural diversity is a reality, law is bound to be defined in diversified terms.'[40] The comparisons lay the basis for a better understanding of the many differences in different legal systems. The usefulness of comparison is to build a bridge connecting diversity, including the respective economic, political, and historical traditions and social systems of which they are a part and also the development of legal systems which have been influenced by the interactions between those other traditions and systems.

Second: recognition of legal problems and searching for better law. Only after comparison, can we see clearly the virtues and drawbacks of each legal system in the regulation of freedom of speech in cyberspace, as a result of shaping law, policy and best practice to produce effective outcomes. Comparative method is not only limited to criticizing; it may include a more thorough penetration of legal problems. And as a result, comparison truly holds exciting potential to lead us to deeper insight into law and finally to better law,[41] since looking at the solutions that other constitutional democracies have come up with would help to develop a better law.[42]This comparison can serve as a mirror in reflecting a better and proper understanding of one country's own law and bringing in a fuller appreciation of the operation and the purpose of law in society. Moreover, useful lessons may be learned from other countries by the sharp contrasts concerning the probable ways of future legal development. Comparison may provide the test by which it can be judged whether any rule by legislation is the best

[39] Joseph Dainow, 'Teaching Methods for Comparative Law' (1951) 3 *Journal of Legal Education* 388, 391-392.
[40] Franz Werro, 'Notes on the Purpose and Aims of Comparative Law' (2001) 75 *Tulane Law Review* 1225, 1231.
[41] K Zweigert, 'Methodological Problems in Comparative Law' (1972) 7(4) *Israel Law Review* 465, 466.
[42] Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law ' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 71.

solution of the particular problem.[43]

Indeed, different means may apply to solve the same problems in different societies. In spite of all differences in historical development, theoretical and systematic concepts and style of practice of different legal systems, however, the positive aspect of comparison is to find superior legal solutions which can functionally correspond to the existing ones; to consider and to prove which of those several solutions is more practical and just. On the other hand, there are still areas where it is hard to find similarity in the rules of law among different nations due to particularly strong moral and ethical values, such as religion, historical tradition, and civilization. Therefore, possibly, even excellent solutions of highly developed systems of law may be utterly unsuitable for developing countries.

In the process of examination, both distinctive characteristics and commonalities can be identified in the Australian, Singaporean and Indian legal systems. However, it becomes clear that despite many differences in regulations and technique, the possible similarity of final results in specific problem cases may lead to deeper consideration of general social and economic conditions, and of the purposes of law as a whole.[44] The comparison will be much more effective if the precise ways are identified in which they are similar or different. In other words, the comparison will have great value if the author draws it by summarizing the most important similarities and differences.[45]

1.2.2 Reasons of Choosing the Comparative Objects

I argue that the most suitable comparative analysis involves explicit comparison of aspects of two or more legal systems. Australia, India and Singapore share the heritage of the common law derived from England as part of their constitutional foundations, even though this foundation has been altered and adapted to local conditions over the years.[46] English common law heritage imported principles of a constitutional character relating to the rule of law and affected the interpretation of statutes in those countries in

[43] 'The most suitable solution for an immediate problem can be adopted as a result of comparative studies.' See Dainow, above n 39, 400.
[44] Ibid 393.
[45] Reitz, above n 34, 619.
[46] Chief Justice Robert French, 'Dialogue Across Difference: Freedom of Speech and the Media in India and Australia ' (2008) 1 *LAWASIA Journal* 1, 1.

a way relevant to the preservation of a variety of freedoms, including freedom of speech.[47] All three are constitutional democracies.

The protection of freedom of speech in those constitutional democracies raises similar issues, while the normative assessment of the boundaries of freedom and reasonable limits in a free and democratic society should be made by judges, which may differ in different countries and during different times.[48] The Australian and Indian Constitutions are federal in nature. Each Australian State and each Indian Union territory has its own government. Singapore is unitary State.

Australia is the world's sixth-largest country by total area of 7.7 million square kilometres with the population of 23.7 million. Australia was inhabited by indigenous Australians before the first British settlement in the late 18th century. The Commonwealth of Australia was formed in 1901. According to Australia's National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 in 2011, Australia is a stable, culturally diverse and democratic society.[49] It is a constitutional democracy with a parliamentary system of government based on the rule of law.[50]

While the common law recognises a fundamental common law right to freedom of speech, Australia has no express constitutional guarantee of freedom of speech. However, the High Court of Australia has also implied into Australia's Constitution a freedom of political communication or speech.[51] The Australian *Constitution* is predicated on a system of representative democracy and that, 'since free communication and debate on political issues and institutions of government is essential to that system, legislation which infringes the implied freedom of political communication is invalid, unless necessary to protect some other public interest.'[52]

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[47] Ibid.
[48] Ibid 1-2.
[49] National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, UN Doc A/HRC/WG.6/10/AUS/1 (5 November 2010), para.7.
[50] National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, UN Doc A/HRC/WG.6/10/AUS/1 (5 November 2010), para.8.
[51] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR.
[52] National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, UN Doc A/HRC/WG.6/10/AUS/1 (5 November 2010), para.12.

India is the largest and the most populous constitutional democracy in the world with over 1.2 billion people. It is the seventh-largest country by area, which is close to three million square kilometres. India was administered directly by the United Kingdom from the mid-19th century and became an independent nation in 1947 after the non-violent resistance led by Mahatma Gandhi. India has an express constitutional guarantee of freedom of speech.[53] The approaches to freedom of expression are affected by cultural traditions, sensitivities, religious and ethnic perspectives.

Singapore is a Southeast Asian island country of 710 square kilometres in total area. The British obtained sovereignty over the island in 1824 and Singapore declared independence from the United Kingdom in 1963, uniting with other former British territories to form Malaya. In 1965 Singapore became completely independent by separating from what then became known as Malaysia. Since then, Singapore has become one of the Four Asian Tigers (Hong Kong, Singapore, South Korea, and Taiwan) with a massive increase in wealth.

Singapore is a unitary multiparty parliamentary republic and the People's Action Party has won every election since self-government. According to the *Yearbook of Statistics Singapore 2013*, Singapore has population slightly over 5.31 million and is highly diverse; but almost 75% of the total population is Chinese. English, Malay, Chinese and Tamil are four official languages in Singapore. Buddhism and Christianity are the most widely practised religions in Singapore, followed by Islam, Taoism, and Hinduism.

Singapore and India are Asian countries. 'The ancient Asian economic strategies and cultural mindsets' is a notion that operates at a high level of generality and the model involves considerable similar diversity when subject to closer scrutiny:

> An emphasis on economic growth rather than civil and political rights during the initial stages of development, with a period of rapid economic growth occurring under authoritarian regimes … Greater protection of rights after democratization, including rights that involve sensitive political issues, although with ongoing rights abuses in some cases and with rights frequently interpreted in a communitarian or collectivist rather than liberal fashion … [54]

[53] See *Indian Constitution*, Art 19 (1) (a).
[54] Randall Peerenboom, 'Law and Development of Constitutional Democracy in China: Problem or Paradigm? ' (2005) 19(1) *Columbia Journal of Asian Law* 185, 189-191.

This selection of three nations describes countries at various economic levels, different stages of legal development, and with political regimes ranging from democracies to semi-democracies. Australia has a high level of wealth, a rule of law-compliant legal system, democratic government, and constitutionalism. Singapore is non-liberal Asian democracy with legal systems that fare well in terms of rule of law, and is wealthy as well. India is an Asian democratic country with a large population.

Of course, no country can claim to be absolutely and completely democratic, for each country has its own distinctive history and has travelled a unique path to its form of democratic rule. But quite a few come close enough to the ideal type to satisfy citizens and there may be some general paths and patterns on the road to democracy.[55] For example, all converts to democracy show the influence of cultural diffusion[56] — the results of a growing, world-wide culture of modernity, which fosters democracy and the rule of law.[57]

Another objective reason to choose those three countries is because most of the research materials regarding Australia, Singapore and India are presented in English, which make the research much easier (they include statutes, texts, and cases, with many excellent articles).

1.2.3 Doctrinal Analysis

The doctrinal method is the traditional but still the dominant and core legal research method at the basis of the common law.[58] 'Doctrine' is a word derived from the Latin noun 'doctrina', which means instruction, knowledge or learning, and it includes legal concepts and principles of all types, such as cases, statutes, and rules.[59] 'Doctrine' has been defined as 'a synthesis of various rules, principles, norms, interpretive guidelines and values'.[60] Pearce has given a relatively complete description to doctrinal research: it is a research:

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[55] Lawrence Friedman, 'Roads to Democracy ' (2005) 33 *Syracuse Journal of International Law and Commerce* 51, 52.
[56] Diffusion of democratic ideas needs an audience and a soil in which to grow. See ibid 62.
[57] Ibid 58.
[58] Terry Hutchinson, 'Defining And Describing What We Do: Doctrinal Legal Research ' (2012) 17(1) *Deakin Law Review* 83, 85. See also Richard Posner, 'The Present Situation in Legal Scholarship ' (1981) 90 *The Yale Law Journal* 1113, 1113.
[59] Hutchinson, above n 58, 84.
[60] Trischa Mann, *Australian Law Dictionary* (Oxford University Press 2010), 197, as cited in Hutchinson, above n 58, 84.

> which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.[61]

With regard to doctrinal research, the statement of the Council of Australian Law Deans involves the detailed instruction of what to do:

> Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials … and is a key to understanding the mystique of the legal system's simultaneous achievement of constancy and change, especially in the growth and development of the common law … [62]

Likewise, Posner proposed his own instructions in conducting doctrinal analysis in his paper *The Present Situation in Legal Scholarship* in 1981:

> Doctrinal analysis involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among case and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis … [63]

Doctrinal research is of great importance for legal analysis. 'The body of doctrinal scholarship appears to testify to the existence of a sophisticated and coherent system of principles providing a distinctive common law framework within which disputes may be addressed.'[64] The propositions that the doctrinal method provides as a proper resolution to penumbral cases may 'help to underpin and appears to justify judicial choices within the area of penumbral uncertainty'.[65]

The concept of 'Freedom of Speech' can have different meanings in Australia, Singapore and India due to the different backgrounds of regime, history, culture and as a result of disparate regulations of speech. In order to obtain the full significance of original meanings, there is occasion to look into their Constitutions or constitutional reports to

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[61] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service 1987), as cited in Terry Hutchinson, *Researching and Writing in Law* (Reuters Thomson 3ed, 2010), 7.

[62] Council of Australian Law Deans, *CALD Statement on the Nature of Research* (May and October 2005) <http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>.

Posner, above n 58, 1113.

[64] N.E. Simmonds, 'Protestant Jurisprudence and Modern Doctrinal Scholarship ' (2001) 60(2) *Cambridge Law Journal* 271, 271.

[65] Ibid 272.

reveal the meaning of any codification and the procedure actually followed in those three countries. Therefore, my topic requires the method of desktop research and doctrinal analysis.

In the thesis, I analyse case law into coherent categories by identifying relevant facts and legal issues in freedom of speech (see Chapter Three), locating primary materials of the law to analyse and synthesise the issues, and as a result to form a tentative conclusion to acknowledge similarities and identify differences among different legal systems. The process may include accessing and analyzing the historical and current legislation, along with judicial interpretation of those statutes; and may include the secondary literature, such as government reports, journal articles, law reform documents, and media reports.

After the background research of the primary sources and the secondary commentary and sources and the critical analysis of the existing research, an idea of what is known and not known about the freedom of speech topic is revealed and one can seek to achieve more than simply a description of the law. I propose to concentrate solely on the 'letter of the law' — National Law, and International Law insofar as it is relevant, focusing on primary sources, case law and statute, and to a lesser extent, academic commentary. The aim is to reduce the study of law to an essentially critical analysis of a large number of technical and co-ordinated legal rules to be found in primary sources; and to collate, organize and describe legal rules and to offer commentary on the emergence and significance of the authoritative legal sources in which such rules are considered, in particular, case law, with the aim of identifying an underlying system.

1.3 Structure of the Thesis

In order to answer the above-addressed research question, this thesis has been divided into eight chapters.

1.3.1 Chapter 1

The first chapter starts dealing with the basic information of freedom of speech and cyberspace. It is first necessary to have a broad general perspective of the potential problems of freedom of speech and its new context — cyberspace. It will then go on to the research question. Of course, it is impossible to cover the whole field of freedom of

speech in cyberspace in a PhD thesis. I shall therefore focus on some specific problems which I find particularly interesting and of real concern. The scope of topics covered includes free speech, especially relating to political communication, cyberspace and democracy.

It then goes on to the research methodology — comparative analysis, and doctrinal research. This discussion couples with an inquiry into the reasons for choosing those three comparative objects — Australia, Singapore and India — and how the same problem would be handled among them under common law principles; and lastly, the significance of the thesis.

The outcome of this comparison can point towards common denominators in protection of free speech in the new democracy of cyberspace, having regard also to diversity and plurality of customs, culture, religion, and traditions in different nation States. Such common denominators should prove useful for all nations in dealing with the challenges posed to free speech, and democracy in the cyber age.

1.3.2 Chapter 2

Chapter Two gives a brief overview of waves of and reasons for democracy, and focuses more sharply on the arguments for the definition of democracy. In order to see Singapore and India as a whole, I make extraordinary efforts to discern the sense of the role and nature of Asian-style democracy and the critique of Asian democracy. The third part of this chapter concentrates mainly on describing the subtle relationship between democracy and freedom of speech in Australia, Singapore and India. This covers the historical constitutional background, and the description of problems in their respective democratic development is also mentioned. In order to obtain a complete understanding of freedom of speech, effort is made to the point of the democratic rationale for freedom of speech.

1.3.3 Chapter 3

Freedom of political speech was an essential position in the research on freedom of speech. Chapter Three will focus on analysing the operation of freedom of political speech in Australia, Singapore and India. With respect to Australia, the aim is to examine

the development of political speech from recognition to reaffirmation. Then the nature and the scope of freedom of political communication will be addressed.

The second part of Chapter Three is in relation to freedom of political speech in Singapore and seeks to address the following questions: how political speech developed based on authoritarian grounds, and its relationship with domestic politics; and also how restrictions work on freedom of political speech based on public order and defamation. The discussion from the Public Entertainment and Meetings Act (PEMA) to the Speakers' Corner will be raised.

The third part of Chapter Three considers political speech in India, political hate speech in particular will be analysed. In India, there is a trend that hate speech has been carried out by a dominant social and political group during the election.

1.3.4 Chapter 4

The most important decisions affecting the future of freedom of speech will be decisions about technological design, legislative and administrative regulations rather than decisions occurring in constitutional law. Cyber-sovereignty and cyber-governance are increasingly contested issues in the digital world.

In order to have a broad and new perspective to the role and effect of cyberspace in social life, Chapter Four begins by examining the varying definitions of cyberspace and the Internet. It will then go on to the discussion of whether sovereignty in cyberspace can be established in the near future.

Compared to cyber-sovereignty, cyber-governance is a more realistic and more crucial topic in the present digital world. There are five main possible models for regulating cyberspace: no-governance, government-governance, self-governance, government and private actor-governance and international-governance. This Chapter will explore those five models in detail especially with respect to Australia, Singapore and India, and on the basis of that analysis draw tentative conclusions also to the type of governance most appropriate to the development of freedom of speech in cyberspace.

1.3.5 Chapter 5

The degree of free speech has an essential relationship with diversity and tolerance. The more a nation cherishes diversity, the freer atmosphere it may have for speech; the deeper one nation tolerates the intolerant, the higher freedom the speech may attain.

Chapter Five aims to analyse how the attitude of the three nations in treating diversity may influence freedom of speech, mediated through the discussion of culture, legal pluralism, multiculturalism and legal culture. The fourth part of the Chapter will discuss how free speech can be achieved under toleration but with appropriate limitation. This chapter will take Australia, Singapore and India as examples to analyse their attitude toward diversity and tolerance.

1.3.6 Chapter 6

There is continual struggle in western constitutional democracies between internet censorship and freedom of speech online, arising from a combination of political, cultural and legal issues—political motivations of government, technological difficulties and the potential effect of regulation. Freedom of speech is regarded as an integral concept in democracies and in protecting civil liberty from governmental intrusion. Internet censorship, however, to some extent, represents denial or oppression of freedom of expression.

The aim of Chapter Six is to examine how censorship can work better to protect free speech in democratic nations. The Chapter first analyses the continued struggle among censorship, freedom of speech and democracy. Also, it addresses the ideas of pursuing order in censorship, by examining the topics regarding legitimacy, public approval, transparency, and the balance between authentic identity and freedom of speech by giving an account of a useful solution for censorship regarding identity; and seeks to explore whether authenticity of identity in cyberspace can make greater contributions to the society than anonymity, or whether free speech must be given first priority. The last section of the Chapter takes Australia, Singapore and India as examples to address the current censorship schemes in those three countries.

1.3.7 Chapter 7

Cyberspace, more than any other technology, makes possible the implementation of the international instruments concerning free speech. Presently, it has become a necessity

for nations to have a substantial participation in and engagement with international law. The approaches the States used and the attitudes they have toward the implementation of international law affect the extent of protection of freedom of speech in their national law regimes. Therefore, it is both difficult and unrealistic to research freedom of speech without mentioning international law.

The objective of Chapter Seven is to determine how international law as an external element influences freedom of speech in the three national law regimes. The Chapter has been organized in the following way: it begins with a brief overview of the operation of international human rights in the context of democracy. Then the interaction and tension between international obligations and domestic law will be discussed, followed by the comparison of different attitudes in these three countries, in treating international treaties. Furthermore, the phenomenon of the convergence of domestic constitutional law and international law will be examined. The last part of the Chapter will take Australia, Singapore and India as examples among democratic nations to analyse the way they deal with international human rights and relating domestic practices.

1.3.8 Chapter 8

Chapter Eight is the conclusion of the thesis. In this chapter, a conclusion of findings for all the seven Chapters will be made and the research question that raised in Chapter One will be answered. The purpose and the importance of the research will be addressed in this final stage. Finally, a number of important limitations of the current study and recommendations for further work need to be considered.

1.4 Conclusion

Each chapter deals with issues of significance to freedom of speech, democracy and cyberspace. Each includes comparisons of Australia, Singapore and India with respect to the issues that chapter discusses.

The aim of the thesis is through highlighting the commonalities and differences between these three nation States to assist in establishing a normative approach to free speech, democracy and cyberspace on the bases of those comparisons.

Chapter 2 — Democracy and Freedom of Speech

2.1 Introduction

The protection of free speech requires an appropriate political, legal, cultural and economic environment in which to operate. In the process of advocating freedom of speech, the influence of the element of democracy is difficult to ignore. However, academic research to date has tended to focus on a theoretical analysis rather than a practical analysis of the influence of democracy on free speech. Furthermore, there have been few direct comparisons between democratic counties and semi-democratic countries with respect to the protection of free speech.

This Chapter seeks to remedy these deficiencies; its primary purpose is to examine the subtle connection between democracy and free speech, by looking into the different regulation regimes regarding the protection of free speech in democratic and semi-democratic countries, and evaluating the substantial disparities and commonalities among them.

This Chapter gives a brief overview of history of democratization. First, the trend and statistics of democratization, and potential factors essential to the progress of democratization will be discussed. Secondly, the disparity between the ideal structure and factual practice of democracy and free speech will be analysed. It will examine the essence of democracy, the democratic rationale for free speech and discuss the influence of special Asian-style democracy on free speech. The last part traces the examples of democratic operation of free speech in Australia, Singapore and India.

2.2 An Historical Overview of Democratization

2.2.1 The Trend and Statistics of Democratization

Accompanied by three waves of democratization, democracy has become a global trend and a hot topic for most of the countries in the world since the 1970s. Three waves were recorded chronologically: The first wave of democratization started in the late eighteenth and the nineteenth centuries with the establishment of nation-states in Western Europe and the Americas. Then subjects became citizens, and the people of about thirty nations established government by universal suffrage. However, democracy at this time was short-lived, with only twelve democracies left by 1940 and the rest

having fallen into dictatorial rule. Democracy started in Australia in 1901[1] and belongs to this period.[2]

The second wave of democratization began in 1945 in West Germany, Japan, Italy, and Austria, where it was forcibly implanted by victorious Allies. This foreign implant took root and remained stable even fifty years later. India and Singapore adopted modified versions of the democratic political systems of its former colonizers in this period of time.[3]

The third wave toward democracy was in 1970s, a global trend where one-half of the world's nations have democratic or semi-democratic administrations.[4]

The Economist Intelligence Unit[5] compiled a 'democracy index' in 167 countries in 2012, measuring world rankings of the state of democracy by five different categories: 'electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture'.[6] The measurement based on five categories is as follows:

> Five categories are inter-related and form a coherent conceptual whole. Each category has a rating on a 0 to 10 scale, and the overall index of democracy is the simple average of the five category indexes. The index values are used to place countries within one of four types of regimes: 1. Full democracies[7] — scores of 8-

[1] The establishment of the Commonwealth in 1901 by the *Commonwealth of Australia Constitution Act* 1900 (UK), and the subsequent *Franchise Act* (Cth) of 1902 which granted the franchise to men and women over the age of 21.
[2] Clark Neher and Ross Marlay, *Democracy and Development in Southeast Asia* (Westview Press 1995), 3. These writers are cited as publishing back in the 1990s. In my view, these statements are still relevant because the contents are about the history of waves of democratization.
[3] Ibid.
[4] Ibid 4.
[5] The Economist Intelligence Unit is a British company, with wide global influence. 'It is a research and analysis division of The Economist Group, the sister company to The Economist newspaper. Created in 1946, we have nearly 70 years' experience in helping businesses, financial firms and governments to understand how the world is changing and how that creates opportunities to be seized and risks to be managed.' The Economist Intelligence Unit, *The Economist Intelligence Unit: Who We Are?* (12 May, 2014) <http://www.eiu.com/home.aspx#about>.
[6] The Economist Intelligence Unit, 'Democracy index 2012: Democracy at a standstill' (2013) <http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf>.
[7] The Economist Intelligence Unit defined full democracies on the basis of the following standard: ' Free and fair elections and civil liberties are necessary conditions for democracy, but they are unlikely to be sufficient for a full and consolidated democracy if unaccompanied by transparent and at least minimally efficient government, sufficient political participation and a supportive democratic political culture. It is not easy to build a sturdy democracy. Even in long-established ones, democracy can corrode if not nurtured and protected.' ibid 1.

10; 2. Flawed democracies — score of 6 to 7.9; 3. Hybrid regimes — scores of 4 to 5.9; 4 Authoritarian regimes — scores below 4.[8]

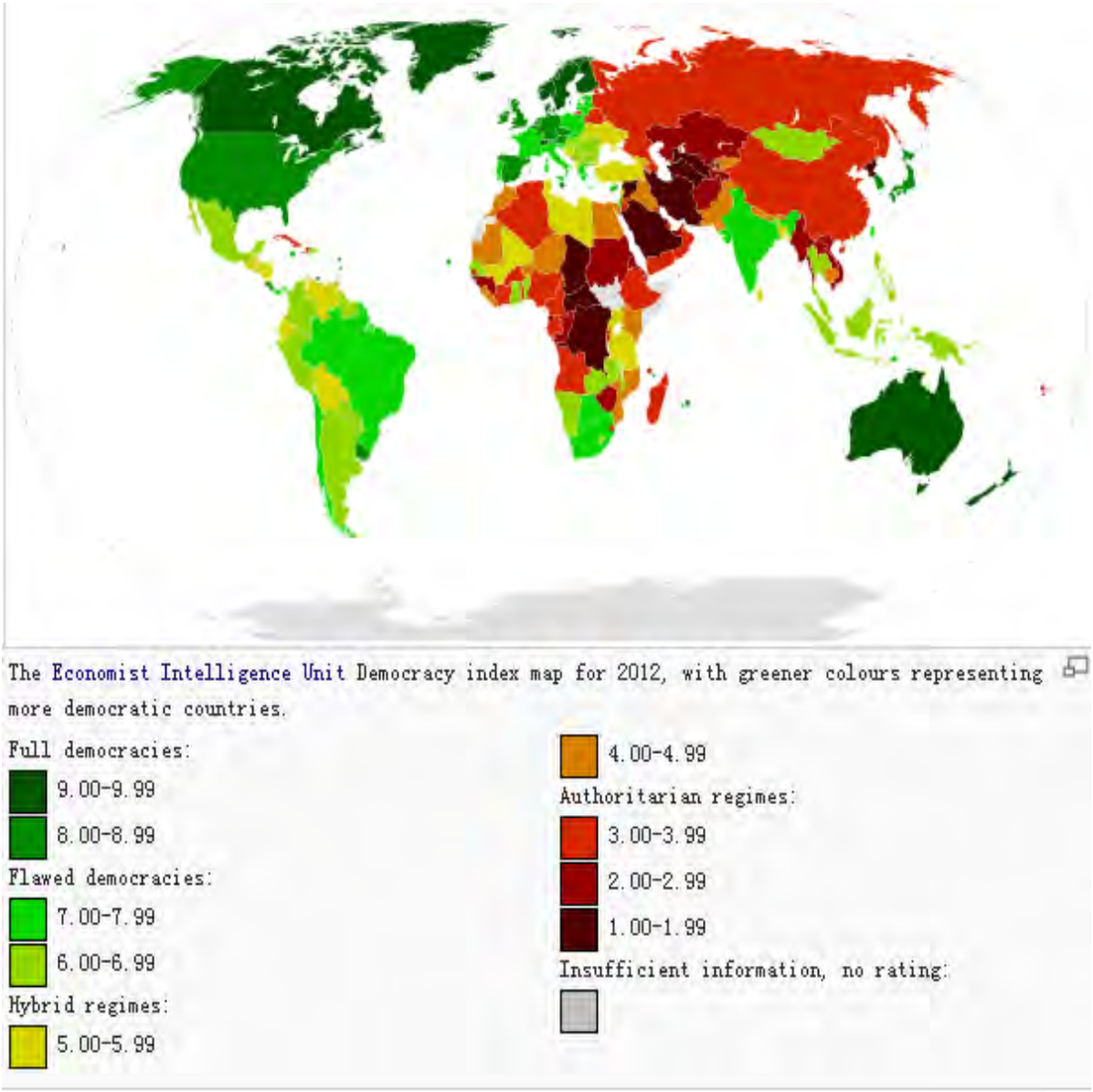

Figure 2.1: Democracy index map for 2012 of the world

Source: The Economist Intelligence Unit, Democracy index 2012. Electronic version is available at: http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex12.

The Economist Intelligence Unit also analysed the number and percentage of countries and the percentage of the world population for each regime type in 2012.

[8] Ivan Kolesnikov, *Democracy index 2012* (3 June, 2012) ,<http://cn.knoema.com/bhpllke/democracy-index-2012>.

Democracy index 2012, by regime type

	No. of countries	% of countries	% of world population
Full democracies	25	15.0	11.3
Flawed democracies	54	32.3	37.2
Hybrid regimes	37	22.2	14.4
Authoritarian regimes	51	30.5	37.1

Note. "World" population refers to the total population of the 167 countries covered by the index. Since this excludes only micro states, this is nearly equal to the entire actual estimated world population.

Source: Economist Intelligence Unit.

Figure 2.2: Democracy index 2012, by regime type

Source: The Economist Intelligence Unit, Democracy index 2012. Electronic version is available at: The Economist Intelligence Unit, 'Democracy index 2012: Democracy at a standstill' (2013) <http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf>, 1, 2.

From the table, approximately 47% of 167 countries in the world are full or flawed democracies. More than 50% of the countries are still under hybrid or authoritarian regimes. The overall ranking table shows that Australia ranks sixth, belonging to full democracies. India ranks 38th and Singapore ranks 81st — both are flawed democracies.[9]

Compared to the statistics compiled in 2006 and 2008 by the Economist Intelligence Unit, the world average democracy has experienced a period of global stagnation and slight decline.[10] Will there be a new wave of democratization in the future? The answer to this question may depend upon an analysis of the original factors contributing to democratization.

2.2.2 Potential Factors in the Progress of Democratization

There are many reasons for the rapid progress of democratic ideals around the globe over the 20th century. Neher and Marlay considered the process of democracy and concluded three main reasons for democratization:

[9] The Economist Intelligence Unit, above n 6, 4-5.
[10] See The Economist Intelligence Unit, above n 6, 10-15.

> Technical advances and information explosion were the primary reasons. Technology and access to information have made it far harder for authoritarian leaders to quarantine citizens from ideas of personal liberty. The inventions of copiers, cellular phones, personal computers, fax machines are the weapons of dictatorship protesters and prodemocracy demonstrators. Satellites made television broadcasts of antigovernment movements in other countries available.[11]

> The simple desire for better living standards for the human race was another cause of democratization. Some citizens of authoritarian Asian states considered democracy as a luxury beyond the reach of poor countries while regarding their own governments as embarrassing anachronisms. [12]

The third important factor contributing to democratization was the general disenchantment with socialist economics. There must be a relatively free flow of information between all the suppliers, producers and consumers to make a market economy work. Besides, modern economies demand highly educated scientists and trained technicians, who have studied and received education in democratic countries, and in turn bring and impart democratic information to their own countries.[13]

However, Neher and Marlay's analysis suffers from some weaknesses: while paying much attention to the outward factors that caused the waves of democracy, it tended to overlook the inner elements of each distinct country. For example, a society with a large middle class, particularly a self-employed middle class, was more likely 'to foster democracy, to seek to inhibit state power, and to accept political competition as legitimate.'[14] A self-employed middle class made the country ready to adjust to democracy.

According to the analyses of the Economist Intelligence Unit, to a lesser or greater degree, all authoritarian regimes share similar characteristics:

> Human rights abuses and absence of basic freedoms; rampant corruption and nepotism; small elites control the bulk of the nation's assets; and governance and social provision are poor. Economic hardships in the form of stagnant or falling incomes, high unemployment and rising inflation have affected many countries. Some authoritarian regimes have young and restless populations.[15]

Compared to the late eighteenth and nineteenth centuries, or even back to the third wave period of the 1970s, the potential factors that contributed to democratization in

[11] Neher and Marlay, above n 2, 2.
[12] Ibid.
[13] Ibid 3.
[14] Martin Lipset Seymour, 'The Expansion of Democracy' (1987) 60 *Temple Law Quarterly* 985, 985.
[15] The Economist Intelligence Unit, above n 6, 15.

this present age are more advanced: for example, even more advanced technical and informative developments, higher level of living standards and speedy global economic growth. However, there are common factors that deter the dissemination of new waves of democratization in most authoritarian countries: for example, suppression of voices of dissent; mobilising supporters to confront anti-governmental activities; and indifference to international legal norms. These factors may be enough to restrain regime change, at least in the short term.[16]

2.3 A Disparity between Ideal Structure and Factual Practice of Democracy and Free Speech

2.3.1 An Exploration of the Essence of Democracy

2.3.1.1 A Plan of Government

The definition of democracy can cause endless discussion. Political philosophers have faced the fundamental dilemma in defining 'Democracy', and they have debated the question for centuries. The term 'Democracy' has been given various meanings.

The greatest Greek thinkers like Pericles,[17] Plato[18] and Aristotle[19] regarded democracy as a plan of government which had been tried and found wanting.[20] Plato reserved his harshest comments for the democratic method:

> Democracy, then, I think, arises, whenever the poor win the day, killing some of the opposite party, expelling others, and admitting the remainder to an equal participation in civic rights and offices… A democracy, will be in all likelihood, an agreeable lawless, particolored commonwealth, dealing with all alike on a footing of equality, whether they be really equal or not.[21]

However, there are limits to how far the idea of Plato's democracy can be taken. Later European writers[22] critiqued Plato for seeing democracy as but the transition from oligarchy to anarchy. While the Greeks and Romans demonstrated certain principles of

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[16] The Economist Intelligence Unit, above n 6, 16.
[17] See The University of Vermont, *Athenian Democracy* (17 September 2015) <http://www.uvm.edu/~jbailly/courses/clas21/notes/atheniandemocracy.html>.
[18] See Plato, *The Republic* (Cambridge University around 380 BC).
[19] See Aristotle, *Aristotle's Constitution of Athens* (London: Seeley and Co., Limited, 1891).
[20] Ray Atherton, 'Democratic Perspectives ' (1946) 6(2) *University of Toronto Law Journal* 301, 303.
[21] Plato, above n 18, as cited in Atherton, above n 20.
[22] Such as Harold Tarrant and Bernard F. Suzanne. See Harold Tarrant, 'Chronology and Narrative Apparatus in Plato's Dialogues' (1994) 1 (8) *Electronic Antiquity* ; see also Bernard F Suzanne, 'An introductory essay on Plato and his dialogues' (1996) *Exploring Ancient World Cultures* .

democracy, democracy was absent for sixteen centuries in Europe.[23] It is the modern democracy that opened a new volume in the history of mankind by challenging privilege and injustice and championing the rights of all humanity.[24]

Nevertheless, history shows that the arguments for the definition of democracy by scholars have inevitably included elements from the nature of government, election and the rights of individuals.

2.3.1.2 Election and Political Participation

Brown's and Campbell's definitions of democracy are largely based upon the exercise of election in choosing the government to represent the people's will. Brown defined democracy as 'the provision of regular mechanisms for registering the people's wishes about who should govern them and what their policies should be, and for providing a check on the actions of government if it disregards these wishes or deprived the people of such basic rights as freedom of speech and association'[25] — the 1950 Indian Constitution took this mechanism as the basis of legitimate government. Campbell defined the nature of acceptable democratic processes as: 'it is majority election of rulers, the equal distribution of political power, the pursuit of consensus, the recognition of diversity, and a process of deliberation'.[26]

Likewise, Neher and Marlay had taken political participation by citizens as the essence of democracy: the voice of the people must be heard. Therefore, they gave a simple definition of a democratic nation: (1) the citizens participate in choosing government leaders, (2) candidates for elective offices compete against one another, and (3) the government recognizes citizens' civil and political liberties.[27]

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[23] See Peter Wagner, 'The democratic crisis of capitalism: Reflections on political and economic modernity in Europe' (2011) 44 <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper44.pdf>. See also Atherton, above n 20, 303-304.
[24] Atherton, above n 20, 304.
[25] Judith Brown, *Modern India- The Origins of an Asian Democracy* (Oxford University Press, 1985), 352.
[26] Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 37.
[27] Neher and Marlay, above n 2, 5.

It is not surprising that in a politically-charged climate, democracy has been equated with the existence of periodic elections.[28] However, overemphasis on election is problematic.

In supporting the view that election need not necessarily be a symbol for the existence of democracy, Palmer took Iran as a fairly good example of such: plausibly, in Iran it is possible to change power through elections, and Iran has a multitude of different power centres, but it is hardly a democratic society.[29] Palmer took Iraq as a further example in expressing that 'the single-minded focus on elections in the constitution of a democracy or in its definition has had serious negative consequences for the promotion of authentically liberal democracy. The more foundational and indeed inherently valuable elements of liberal democracy have been neglected ... '[30]

2.3.1.3 Free Discussion and Argument

Election or the right to vote merely can be seen as the first step towards democracy. Rather the sharing of political power and the right to free discussion and argument are the real foundation. The ideal of democracy should not be limited to the idea that everyone should have a vote, but that people have political power, and participate in the collective making of choices, which can be achieved through discussion and argument:

> If democracy means the sharing of political power, it requires more than just that everyone should have a vote, for if one is in a permanent minority that vote confers no effective power. The ideal of democracy would be that everyone is listened to, that everyone's views are taken account of and that proposals are formulated and reformulated in the light of discussion and argument.[31]

A certain capacity for reasoning and a certain elementary knowledge of facts by every citizen in the nation are requisite for any democratic advancement. In other words, every opinion must be able to be expressed and must be studied by authorities with the

[28] Russel Lawrence Barsh, 'Democratization and Development' (1992) 14 *Human Rights Quarterly* 120, 121.
[29] Tom Palmer, 'Democracy And the Contest For Liberty' (2008) 102(1) *Northwestern University Law Review* 443, 444.
[30] Ibid 445-446.
[31] Richard Norman, *Free and Equal- A philosophical Examination of Political Values* (Oxford University Press, 1987), 43.

utmost attention and care, for only through free discussion and clear reasoning based on actual political realities can an accurate theory of political issues be adopted.[32]

2.3.1.4 Human Rights

Nevertheless, it can be argued that examination of 'democracy' would have been more convincing if human rights were included. Neher and Marlay suggested that a rigorous definition of an ideal democracy should include the following elements: free speech, free press, meaningful elections, freedom to organize, majority rule, minority rights, and an independent judiciary.[33]

Similarly, as far back as 1939 Parker has suggested that democracy is the recognition of the rights of the individual in the life of the institution. It is more than a mere form of government and when it is applied to government, democracy means a great deal more than majority rule. It is a philosophy of life, which is based upon the reality and worth of each individual. By this, Parker meant institutions exist for humanity, not humanity for institutions;[34] there are three principles involved when democracy is applied to government, without which free government — political democracy — would not exist:

> (1) the protection of the rights of the individual against the power of the state;
>
> (2) popular sovereignty, or the right of the people to govern themselves in matters of social concern; and
>
> (3) the supremacy of the law based upon reason and justice. [35]

A better definition of democracy may well be to link the process of selecting government, the obligations of government and the right of the individuals all together, but placing the emphasis on the right of human being. Seymour in 1987 proposed a simple but profound definition. He defined democracy as 'the ability of citizens to choose their government through free elections that are contests among parties operating in an atmosphere of guaranteed freedom of speech and press, expanded beyond its present

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[32] Emery Reves, *Principles and Institutions* A Democratic Manifesto (Macmillan Company of Canada Limited 1942), 137.
[33] Neher and Marlay, above n 2, 5.
[34] John Parker, 'Democracy and Constitutional Government ' (1939) 27 *Indiana Law Journal* 27, 27. Though this is an old source, it explains very important points in the context of the evolution of the right to free speech.
[35] Ibid 29.

boundaries.'[36] The aim of a true democracy is serving the people and guaranteeing that they have rights and freedoms as human beings.

Therefore, as analysed above, the mainstream of definition of the essence of democracy has slightly shifted from a plan of government, and the need for election and political participation, to an emphasis on human rights and free discussion and argument. From the experience of history, compared to meeting the need to enable participation in elections, the real challenge for an authoritarian government is to promote the protection of free discussion, accept dissents that counter the government regime, and allow the collective making of choices. From the author's perspective, the essence of democracy is based on the solid foundation of freedom of speech.

No matter how perfect the definitions of democracy could be, the fact is that definitions only last for a certain period of time and will vary from country to country, from time to time. Democracies can differ profoundly with different nations and different designs of the 'power competitive processes'.[37] Therefore, democracy is considered as an atmosphere, in which modern humanity can live, prosper and progress. And democracy can never be a rigid system, whose very rigidity might lead to wars, revolutions and dictatorship. Conversely, constant readjustment and rejuvenation are needed for democracy.[38] However, it seems that a democracy that respects human rights and guarantees freedom of speech has greater potential for a longer life.

2.3.2 Democratic Rationale for Free Speech

2.3.2.1 The Governmental Role in Protecting Freedom of Speech

When studying the relationship between democracy and freedom of speech, a fundamental question needs to be asked: whether it is democracy that justifies freedom of speech or it is freedom of speech that serves democracy?

In answering this question, the starting point is the role of the government in relation to protecting freedom of speech. Generally, citizens' right to free speech connects to the obligation of the government — to protect citizens' right to free speech. Though it is not common phenomenon throughout all ages and continents, in some authoritarian

[36] Seymour, above n 14.
[37] Barsh, above n 28.
[38] Reves, above n 32, 143.

countries individuals 'have jealously guarded, have bravely fought for, freedom from tyranny. Governments have been seen to pose a constant threat to the rights of the governed; tyrannical rulers hover to challenge newly formed democracies.'[39]

Protecting freedom of speech is one of the obligations of a democratic government. A good government must represent justice and righteousness as well as power.[40] Because a government's power is derived from the people, any injustice to individuals by depriving them of fundamental rights which belong to them as human beings should not be permitted.[41] It could be seen that it is the obligation of the government to protect citizens' freedom to speech by lawful means in democratic society.

2.3.2.2 Freedom of Speech: Precondition for Democracy or Product of Democracy?

In a democratic society, what is the relationship between democracy and freedom of speech? Is freedom of speech the precondition for democracy or the product of democracy? The reason for the doctrine of considering freedom of speech as a precondition for democracy is that 'free speech can be seen as partly constituent of democracy itself'.[42] A democracy is not viable and stable if individuals, including the leading rivals for the administration in power, lack the right to free speech. A democratic system requires its leaders to fulfil commitments to respect individual rights.[43] At the very least, there is no doubt that freedom of speech plays an important role in the process of democratization.

Likewise, freedom of speech is a guarantee enabling citizens to participate effectively in the working of democracy. The most practical importance freedom of speech is designed to serve, is the integrity of democratic government. The freedom requires information about and opinions of the governmental and political officials being available to the electorate, and therefore enhances the efficacy of analysis of conflicting policies and

[39] Melinda Jones, 'The Fundamental Freedoms' in Jude Wallace and Tony Pagone (eds), *Rights & Freedoms in Australia* (The Federation Press, 1990), 2.
[40] Parker, above n 34, 30. Parker's perspectives are similar as Psalms 89: 14 that 'Righteousness and justice are the foundation of your throne; love and faithfulness go before you.' See Holy Bible, *Psalms 89: 14* (New International Version).
[41] Parker, above n 34, 30.
[42] Campbell, above n 26.
[43] Palmer, above n 29, 445.

therefore also of representative government.[44] Professor Buss described the relationship between democracy and free speech in the following plain language:

> It was imperative that the citizens of a democracy be in the position to state their views about government policy, to hear the views of others, and to communicate those views to their elected representatives who, in turn, were accountable to the people at the next election and obligated to justify their actions. Democracy could not work without freedom of speech, and the purpose of exercising that freedom was to do the business of governing.[45]

In the book named *Freedom of Speech*, Barendt presented two arguments for a free speech principle from the perspective of citizen participation in a democracy. The first argument viewed the purpose of speech as to serve democracy and is 'couched in terms of the need to expose citizens to a wide variety of views and to provide them with enough information to hold government to account'.[46] Therefore, 'a free speech clause would only cover political expression; and would be little justification for extending its protection to literary and artistic discourse, nor would it cover speech which challenged the existence of democratic government and institutions'.[47]

Another argument[48] which Barendt called 'awkward repercussion' is that the maintenance of a confident democracy is best guaranteed by protecting freedom of speech in all circumstances.[49] However, the ideal approach in preserving the value of a democracy from his perspective is by the suppression of some speech. The awkward repercussion is 'if the maintenance of democracy is the foundation for free speech, how can one argue against the regulation or even suppression of speech by a democracy acting through its elected representatives?'[50]

Regarding the relationship of freedom of speech and democracy, Meiklejohn held to 'slave theory' similar to the first argument presented by Barendt (that is, free speech serves democracy). He said 'Democracy meant self-government; self-government

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[44] Sydney Kentridge, 'Freedom of Speech: Is It the Primary Right? ' (1996) 45 *International and Comparative Law Quarterly* 253, 259.
[45] William Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication ' (2006) 34 *Federal Law Review* 421, 421-422.
[46] Eric Barendt, *Freedom of Speech* (Oxford University Press 2005), 18.
[47] Ibid 18-19.
[48] Barendt called this argument 'awkward repercussion', which means the values of a democracy from the point of the government, including its long-term commitment to free speech, can best be preserved by the suppression of some speech. See ibid 19.
[49] Ibid.
[50] Ibid.

created the need for freedom of speech; freedom of speech was necessary to serve democracy'.[51]

The 'servant' or 'slave' theory of freedom of speech has been subjected to considerable criticism. Loewy held a view contrary to the 'servant' theory. He claimed that freedom of speech should be viewed as a product of democracy, which means it has a free-standing status rather than that of a servant. He supported the idea that freedom of speech exists as an end in itself, and disagreed with the statement that freedom of speech must contribute to other values, such as democracy, in order to be protected.[52]

Regarding the relationship between freedom of speech and democracy, both 'precondition' and 'product' theories have reasonable justifications. However, whether freedom of speech is the servant to democracy or whether freedom of speech is the product of democracy should not be the key problem. The only demonstrated fact from the evidence is that freedom of speech and democracy promoted and combined with each other during the process of democratic development.

2.3.2.3 Majoritarian and Alternative Approaches

Barendt pointed to two concepts of democracy — majoritarian and alternative. The majoritarian concept of democracy and the alternative conception of democracy demonstrate different attitudes towards freedom of speech. The majoritarian concept allows majorities to determine the limits of the rights individuals are entitled to exercise. Barendt preferred to adopt the alternative conception of democracy, which claimed that:

> Everyone, including, of course, members of minority groups and parties, is entitled to participate in public discourse and debate, as a result of which temporary political majorities are formed. This right is so fundamental that it cannot be surrendered to the powers of the elected majority. It would be wrong for the majority to supress the right of minorities to express their dissent.[53]

The reason why Barendt proposed that the rights of minorities to contribute to political debate should be respected is because the minorities may have better ideas than those

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[51] Alexander Meiklejohn, 'Free Speech and Its Rlation to Self-Government ' (1948) 11; as cited in Buss, above n 45, 422.
[52] Arnold Loewy, 'Freedom of Speech As a Product of Democracy' (1993) 27 *University of Richmond Law Review* 427, 428.
[53] Barendt, above n 46, 19-20.

of the elected majority.[54] However, this explanation fails to fully convince the reader; Campbell noted:

> A democracy which rests on mere majority power may not be concerned with the freedom of minority opinions, whereas one which emphasizes some ideal of equal political power, will see majority decision making as second best to consensus and place special emphasis on the role of minority view.[55]

2.3.2.4 Mutual Contribution and Flexible Applicability

Consideration of the contribution of freedom of speech to democracy may enhance the understanding of the relationship between them. Campbell analysed the importance of free speech to democracy through the activities of discussion and dialogue. He argued that discussion is inherently democratic since the opinion of each person is given equal weight and has an important role in promoting social stability. As a result, when taking democracy to be a process of discussion, it will be more inclined to require freedom in relation to ongoing discussion.[56]

The subtle relationship between freedom of speech and democracy is flexible. With the different models of democratic process that are adopted in different countries, the particular freedom of speech rights intrinsic to that particular democratic model will vary.[57]

2.3.3 The Influence of Special Asian-Style Democracy on Free speech

2.3.3.1 The Factors Ingrained in Asian-Style Democracy

Singapore and India are Asian countries and possess Asian values critical to their development. The Economist Intelligence Unit classified both Singapore and India as flawed democracies.[58] In this thesis, the name of Asian-style democracy is given to both Singapore and India, in that both of them are Asian countries and possess Asian values.

2.3.3.1.1 Asian Values

[54] Ibid 20.
[55] Campbell, above n 26, 38.
[56] Ibid.
[57] Ibid 37.
[58] The Economist Intelligence Unit, above n 6, 4-5.

The term 'Asian values' derives from the late 1980s [59] and received particular prominence after the Bangkok Declaration of 1993'[60], being adopted particularly by Lee Kuan Yew[61]. In a 1994 1nterview with Zakaria Fareed, Lee stated that, speaking as an 'East Asian looking at America'[62]:

> I find parts of it totally unacceptable. … The expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of orderly society. In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms. This freedom can only exist in an ordered state and not in a natural state of contention and anarchy.[63]

When asked if there were an 'Asian model' Lee said:

> I don't think there is an Asian model as such. But Asian societies are unlike Western ones. The fundamental difference between Western concepts of society and government and East Asian concepts… is that Eastern societies believe that the individual exists in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society. The ruler or the government does not try to provide for a person what the family best provides.[64]

'Asian values' implies that 'the social, economic and political characteristics of certain Asian countries are based upon a shared value system which is identifiable and distinct and which transcends national, religious and ideological differences.'[65] 'Asian values' generally refer to 'Confucianism, respect for elders, emphasis on order and social harmony, group orientation, and the collective interests of the society and State.'[66] Indeed, Lee himself had referred to the value of Confucianism in his 1994 interview; Fareed wrote:

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[59] See Tania Groppi, Valeria Piergigli, Angelo Rinella (eds), *Asian Constitutionalism in Transition: A Comparative Perspective*, (Giuffrè Editore, 2008, English translation by G Gentili), 5.
[60] See also discussion at page166: the Declaration resulted from General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights, and its focus on Asian values (or the 'Asian model') was subsequently adopted by Singapore's Lee Kuan Yew.
[61] Prime minister of Singapore from its independence in 1959 (it became part of a federation with Malaysia in 1963 but was expelled in 1965) until 1990.
[62] See Zakaria Fareed, *Culture Is Destiny A Conversation with Lee Kuan Yew* (March/April, 1994) *Foreign Affairs*, 73(2), 109-26, 111, 113.
[63] Lee in Fareed, ibid 111.
[64] Lee in Fareed, above n 62, 113.
[65] Takashi Inoguchi and Edward Newman, 'Introduction: "Asian Values" and Democracy in Asia' (Paper presented at the The Future of the Asia-Pacific Region, Hamamatsu, Shizuoka, Japan, 28 March 1997).
[66] Same Varayudej, 'A Right to Democracy in International Law: Its Implications for Asia' (2006) 12 *Annual Survey of International & Compatative Law* 1, 13. See also Bilahari Kausikan, 'An East Asian Approach to Human Rights ' (1995-1996) 2 *Buffalo Journal of International Law* 263, 277.

> The dominant theme throughout our conversation was culture. Lee returned again and again to his views on the importance of culture and the differences between Confucianism and Western values.[67]

The desire for social harmony and acceptance of authority is generally accepted as essential Asian characteristics.[68]

During the development of democracy, Singapore and India did not fully adopt features characteristic of Western-style liberal democracy, such as competitive elections, citizen participation, and civil liberties, but conserved the best features of their ancient cultures. It has proven hard to reconcile Western democracy with Asian traditions.[69] For example, normally, they have free and fair elections and citizens' private lives are generally free from governmental interference and surveillance. However, due to the overall different patterns and characteristics of democracy, the style of democracy in Singapore and India could more accurately be termed as semi-democratic,[70] because under the influence of Asian values, the elements comprising Asian-style democracy include: 'Strong familial connections, sacrificing individual rights for that of the community, and maintaining a well-ordered society'.[71] Those elements have combined and bolster one another in the process of democracy in Singapore and India.

2.3.3.1.2 Confucianism

The political cultures of Singapore are heavily imbued with Confucian principles.[72] Confucianism is a complex set of beliefs that emphasizes harmony, stability, and consensus, which are also the basic elements for the progress of modernization. However, Confucianism also stresses hierarchy and reverence for power and authority;

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[67] Fareed, above n 62, 125.
[68] Beng Huat Chua, *Communitarian Ideology and Democracy in Singapore* (London and New York 1995), 153.
[69] Neher and Marlay, above n 2, 13.
[70] Ibid.
[71] Scott Goodroad, 'The Challenge of Free Speech: Asian Vlues v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order ' (1998) 9(1) *Indiana International & Comparative Law Review* 259, 261. Neher and Marlay described Asian-style democracy as 'Confucianism, patron-client communitarianism, personalism, authority, dominant political party, and strong state'. See Neher and Marlay, above n 2.
[72] See Chwee Huat Tan, 'Confucianism and Nation Building in Singapore ' (1989) 16(8) *International Journal of Social Economics* 5-16. See also Doh Chull Shin , *Confucianism and Democratization in East Asia* (Cambridge University Press 2012) and Andrew J. Nathan, 'Confucius and the Ballot Box: Why "Asian Values" Do Not Stymie Democracy', July/August 2012 *Foreign Affairs* Volume 91 Number 4, 136-9 See also above n 67.

these values provide a great support to authoritarianism.[73] In relation to Singapore, it should be recalled that 'Singaporeans live in an area of less than 700 square miles, so there is little room for nonconformity'.[74]

Confucianism is the cultural root of the people of Singapore. It contains the following unchanging elements: hard work, emphasis on education, pragmatism, self-discipline, familial orientation and collectivism. The ultimate aim of Confucianism is to achieve the state of harmony, and such harmony in turn engenders social discipline, social solidarity and community responsibility.[75]

2.3.3.1.3 Patron-client communitarianism

Patron-client communitarianism means Asian cultures stress that a person's duties to the group as a whole should be valued higher than personal liberty. Asian philosophy is suspicious of individualism and considers it a great threat to social harmony, while Western economic and political thought attempts to equate the interests of individual with that of society and to maximize benefits for everyone.[76]

2.3.3.1.4 Personalism

In Asia, personal relationships, personal bonds or personal alliances have a more significant role than impersonal laws and institutions. The reliance on leaders with commanding or charismatic personalities has become one specific manifestation of personalism prominent in Singapore and India, and the frequent incidence of hereditary leaders and political dynasties has turned into an important facet of Asian personalism. Having regard to the following paragraph, for example, could it be said that for Singapore Lee Kuan Yew held a position almost equivalent to God and reason in 'Asian values'? —

> Personalism developed in the late 19th century in Russia and the USA … In personalism the principles of idealist monism and Hegelian-inspired panlogism are juxtaposed with idealist pluralism — the idea of a multiplicity of existences, minds, wills, and personalities. Thus, personalism maintains the principle of theism —

[73] Goodroad, above n 71, 263. See also Neher and Marlay, above n 2, 14.
[74] Neher and Marlay, above n 2, 23.
[75] Chua, above n 68, 151-152.
[76] Neher and Marlay, above n 2, 14-15.

that is, the creation of the world by the ultimate person (god), who endows it with the capacity to develop. [77]

The power of Lee Kuan Yew in Singapore and Indira Gandhi in India came not from any constitutional prerogatives, but instead from their ability to show a forceful personality to an entire nation. Because of the fact that people over-identified with the charismatic leader, therefore, the transfer of power has become complicated in those Asian countries. In other words, personalism has made leaders reluctant to train successors who might be eager to take power too soon, which would be to endanger the existing leaders' own position.[78]

The selection of leaders is an essential problem of any democratic organization, especially for Asian countries. It appears that 'the quality of statesmanship, vision, wise leadership, self-sacrifice and capacity for action' are qualities far more necessary and essential than the qualities just required to obtain power.[79] The process of selection of leaders is tremendously important, because institutions and administrative offices are represented by human beings. At the beginning of democratic societies, the ideal way of selecting leaders was that 'the most capable person, regardless of rank, wealth and origin, should find his way to the top' (but this was, of course, the ideal).[80]

The system of representative government requires that representatives should possess not only 'colourful personality, influential friends and rhetorical talents' but also 'a certain minimum knowledge of public affairs and of democratic principles'.[81] The principle of democracy may refer to the right to freedom, equality, the right of security and sovereignty.[82]. Besides the principle of free voting, the consideration of selecting representatives gives a better opportunity to the citizens to exercise their democratic right of entrusting representation to those who have sufficiently deep-rooted democratic convictions.[83]

2.3.3.1.5 Authority

[77] I. F. BALAKINA and K. M. DOLGOV, *Personalism* (2010) <http://encyclopedia2.thefreedictionary.com/personalism>. But I prefer a simple definition as: a philosophical movement that stresses the value of persons. The Free Dictionary, *Personalism* (2008) The Free Dictionary <http://www.thefreedictionary.com/personalism>.
[78] Neher and Marlay, above n 2, 17-18.
[79] Reves, above n 32, 136-137.
[80] Ibid 137.
[81] Ibid 139.
[82] See ibid 131-132.
[83] Ibid 139.

There is a long history demonstrating that Asians show great respect for authority and hierarchy. Most Asians consider scepticism about government or the public criticism of a nation's leader as unacceptable—Asian countries have 'placed emphasis on proper behaviour and reverence for leaders to establish order'[84]—as Andrew J Nathan notes in his review[85] of Doh Chull Shin's book, *Confucianism and Democratization in East Asia*[86]:

> For example, [Shin] measures the strength of paternalism in each country on the basis of how many Asian Barometer Survey respondents agreed with two statements: "The relationship between the government and the people should be like that between parents and children" and "Government leaders are like the head of a family; we should all follow their decisions." Shin combines those data with responses to two statements about meritocracy: "If we have political leaders who are morally upright, we can let them decide everything" and "If possible, I don't want to get involved in political matters." He uses the four questions to generate a scale of adherence to paternalistic meritocracy—a value to which, he finds, the citizens of authoritarian China, Singapore, and Vietnam are the most highly attached and the citizens of democratic Japan and Taiwan are the least attached, just as the Asian values hypothesis would predict.

2.3.3.1.6 Dominant Political Party

In the Asian democracies, a single dominant political party often takes the place of two parties of approximately equal strength (as is often the case in Western countries like the US and Australia). Harmony and cooperation are preferred values rather than competition. Competition, which is highly valued in the West, is regarded as destructive and opposed to consensus and communitarian interests in Asian political cultures.[87] In Singapore, the People's Action Party, as Singapore's longest-ruling party, has never lost an election since Singapore achieved independence from Malaysia in 1965, and has won over ninety-five seats in Parliament in most years. In India, the Congress Party became India's dominant political party and ruled from Independence Day August 15, 1947[88]; as of 2015, in the 15 general elections since independence, it had won an outright majority on six occasions and had led the ruling coalition a further four times, heading the central government for 49 years. However, the current and 15th Prime Minister of India since 26 May 2014, Narendra Modi is a member of the Bharatiya Janata Party (BJT), which

[84] Goodroad, above n 7171, 263. Or it can mean, 'Absolutism and hierarchy have remained essential principles of Asian politics, although now manifested with less pomp and ceremony.' See Neher and Marlay, above n 2, 18-19. See also Shin, above n 72.
[85] Andrew J. Nathan, 'Confucius and the Ballot Box: Why "Asian Values" Do Not Stymie Democracy', July/August 2012 *Foreign Affairs* Volume 91 Number 4, 136-9.
[86] Shin, above n 72.
[87] Neher and Marlay, above n 2, 19-20.
[88] Ibid 19.

won a majority in the *Lok Sabha* (the lower house of the Indian parliament), for the first time since the 1984 general elections.

Asian States are strong enough to dominate any independent groups within their societies and forceful enough to steer and intervene in the economic affairs of their societies. It is the State who decides the public policy and the actual machinery of government. 'The leaders of the strong [Asian] states were largely insulated from pressure groups and economic interest groups, and they were careful to limit the rights of labour unions.'[89]

Confucianism, patron-client communitarianism, personalism, authority, a dominant political party, and a strong State are the essential factors contributing to the distinct Asian-style democracy in Singapore and India. Because of the historically ingrained influence of the above-mentioned factors, the gap between Asian-style democracies and Western democracies is hard to bridge, at least in the short term.

2.3.3.2 Criticisms of the Rationales of Asian Values and Self-Praise Behaviour

The concept of 'Asian values' was, and still is, a subject of debate and analysis.[90] There are continuing criticisms over the rationales of Asian values. Some regarded Asian values as a balm for the cultural wounds inflicted by western colonialism and argued that talking about Asian values has been a way to disguise the failure of some Asian societies to democratise and modernize.[91] Others argued that it is in the name of public order, national security and morality that the Asian value model espoused limitations on individual liberty.[92] When it comes to Asian-style democracy, the same concerns and conflicts arose accordingly.

Asian leaders, including former Singaporean Prime Minister Lee Kuan Yew[93] and former Indian Prime Minister Indira Gandhi,[94] justified and defended Asian-style democracy as

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[89] Ibid 21.
[90] See, e.g. Amartya Sen, *Human Rights and Asian Values*, Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy. 25 May 1997, at *https://www.carnegiecouncil.org/publications/archive/morgenthau/254* . See also Groppi, et al, above n 59.
[91] Kausikan, above n 66.
[92] Goodroad, above n 71, 259.
[93] In 1994 in an interview, Lee Kuan Yew spoke how the notion of distinct Asian culture and value system would make democracies in Asia a different form. See Fareed Zakaria, *A Conversation with Lee Kuan Yew* (March/April, 1994) Foreign Affairs <http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew>.
[94] See Indira Gandhi, *The 'Emergency' and Indian Democracy* (New Delhi: Oxford University Press 2001).

more effective by stating that strong government is needed until the people are ready for political competition and civil liberties (some may call this a rationalization for dictatorship).[95]

Self-praise (implicit in those justifications by the Indian and Singaporean Prime Ministers just alluded to) has been considered (by the West) as a fundamental weakness of Asian-style democracy, which might result in greedy and corrupt authoritarian governments, and could also lead to revolutionary movements and demands to over-throw the entire regime. However, in Western democracies, leaders can be replaced through elections when people's needs are not met rather than overthrowing the entire regime.[96]

Asian leaders denied that democracy was an intrinsic part of development. In December 1992, Lee Kuan Yew spoke of the significance of emphasizing discipline before democracy:

> I do not believe that democracy necessarily leads to development. I believe that a country needs to develop discipline more than democracy. The exuberance of democracy leads to undisciplined and disorderly conduct which is inimical to development.[97]

According to Lee, Asians traditionally value the precepts of discipline rather than political freedom. In his view, Western-style democracy is not applicable to Asia. Therefore, the attitude towards Western-style democracy must inevitably be much more sceptical in Asian countries.[98]

The attitudes of many in the West of considering the interpretation of Asian values as hostile to democracy are a result of a lack of critical scrutiny: for example, Roland argued against Asian values from the international perspective:

> The error in the Asian values argument was to translate different values to mean that Asians should have a different set of rights and a different form of governance. Universal rights deal with basic issues that flow from one's inherent dignity as a human being and they sit very comfortably with different cultural traits around the world. One of those universal values is everybody's right to participate in decisions

[95] Neher and Marlay, above n 2, 23.
[96] Ibid.
[97] Prime Minister Lee's nuanced and fascinating interview with Fareed Zakaria in *Foreign Affairs*. March/April 1994, pp. 109-126, as cited in ibid 2, 25; see also https://paulbacon.files.wordpress.com/2010/04/zakaria_lee.pdf .
[98] Varayudej, above n 66.

> that affect them as articulated in Article 21 of the Universal Declaration of Human Rights and from it flows basic reasoning for democratic forms of government.[99]

But that approach neglects the fact that in different conditions, changes caused by outside international intervention would not occur at the same speed when taking into account deep-rooted factors and sub-cultural conflicts. Some non-western countries' political and military leaders are accustomed to achieving political ends by using force rather than giving up their powers in the name of democracy.[100] Moreover, it is the people who must participate, and that people's history, culture and background that are the prime movers in the way in which that people wishes to develop. One could argue that it is the people of a country, not outside influences, that must determine that country's future. It is for that reason that freedom of speech between members of a community or a State is so important.

In summary, it could be said that a desirable and stable democracy requires limited government, separation of powers, and a respectable opposition. This last has been, in many respects, lacking in both India and Singapore. Apart from self-praise, when tracing back the history of Singapore and India, unlimited authority due to community acceptance of Asian values, is dangerous as well, as it focuses power on one person, one party, and one voice as the vehicle of the will of the people. This unlimited authority on the one hand is contrary to democracy, and on the other hand also runs the risk of undermining democracy itself by subjugation of the individual to the prevailing community view.[101] Democratic development in a country requires abandoning closed and extremely conservative attitudes and welcoming a more open-minded and humble approach that takes into account more significantly the people's views, rather than just that of the leader of controlling party. It is not impossible for 'Asian values' to adapt to a more broadly-based consensus.[102]

The debate concerning 'Asian values', their meaning and their effect, continues.[103]

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[99] Rich Roland, *Dynamism of Democracy in Asia* <http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/asia_pacific/asia_downloads/Asia-PDemo_speech_Aug02.pdf>. This speech is drawn from his chapter entitled 'Democracy in the Balance' in Julian Weiss Tigers' Roar-Asia's Recovery and its Impact (ME Sharpe New York 2001), cited in Varayudej, above n 66, 14.
[100] Varayudej, above n 66, 14.
[101] Palmer, above n 29, 444.
[102] See, e.g. Groppi et al, above n 59.
[103] See, e.g. the 14th ASLI (Asian Law Institute) Conference, hosted by the College of Law of the University of the Philippines to be held18-19 May 2017, which will bring together academics and professionals from

2.4 Examples of Democratic Operation of Free Speech

2.4.1 Australia

2.4.1.1 The Main Arguments of For and Against the Bill of Rights

Australia has limited legal and constitutional guarantees to freedom of speech. The Australian *Constitution* has no express protection for fundamental guarantees of human rights for the people nor is there any federal law providing substantive domestic legal effect to the freedom of speech. However, the common law of Australia has a constitutional dimension and an impact on the protection of freedom of political expression,[104] and also recognizes freedom of speech as a fundamental common law freedom.[105] There is no single clear reason why the framers of the Australian *Constitution* did not include individual rights protections in it;[106] however, it is generally thought that why there is no formal 'bill of rights' in the *Constitution*, is because the framers thought such fundamental rights were more than adequately protected by the common law.[107]

The application of the common law and principles of statutory interpretation have played an important role in human rights protection. The 'principle of legality' is a 'common law bill of rights'[108] in Australia, which has long been a crucial tool of the judiciary in enhancing the protection of human rights in Australia.[109] The common law has long protected certain fundamental common law rights and freedoms, which are used as rebuttable presumptions: that is, in the absence of clear language or necessary

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Asia and the world, to exchange knowledge related to the theme *"A Uniting Force? – 'Asian Values' and the Law." —see http://law.nus.edu.sg/asli/14th_asli_conf/.*

[104] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[105] *Evans v State of New South Wales* [2008] FCAFC 130, 72.

[106] Robert Trager and Sue Turner, 'The Internet Down Under: Can Free Speech be Protected in a Democracy Without a Bill of Rights? ' (2000) 23 *UALR Law Review* 123, 132.

[107] See Frank McGrath, *The Framers of the Australian Constitution: their Intentions* (Brighton-le-Sands, N.S.W 2003). See also 'The Intentions of the Framers of the Commonwealth of Australia Constitution in the Context of the Debates at the Australasian Federation Conference of 1890, and the Australasian Federal Conventions of 1891 and 1897-8'; 'The Understanding of the Framers of the Constitution as to the Meaning and Purpose of the Provisions of the Constitution which they Debated at these Assemblies'. Available at: http://ses.library.usyd.edu.au/bitstream/2123/850/2/adt-NU20020917.11150502whole.pdf.

[108] This phrase was coined by D C Pearce and R S Geddes: see D C Pearce and R D Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths 7th ed, 2011), 52.

[109] Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008), 49. See also Alexis Henry Comley, 'The Principle of Legality: An Australian Common Law Bill of Rights?' (2013) 15 *The University of Notre Dame Australia Law Review* 83, 85.

implication in a statute, the Parliament is presumed not to have intended to abrogate such rights and freedoms.[110] Such rights and freedoms are itemized as follows: [111]

> [Not to] invade fundamental rights, freedoms and immunities; retrospectively change rights and obligations; infringe personal liberty; interfere with freedom of movement; interfere with freedom of speech; alter criminal law practices based on the principle of a fair trial; restrict access to the courts; permit an appeal from an acquittal; interfere with the course of justice; abrogate legal professional privilege; exclude the right to claim self-incrimination; extend the scope of a penal statute; deny procedural fairness to persons affected by the exercise of public power; give executive immunities a wide application; interfere with vested property rights; authorize the commission of a tort; alienate property without compensation; disregard common law protection of personal reputation; Interfere with equality of religion.

It is these common law rights and freedoms are that sometimes referred to as the 'common law bill of rights' and are sometimes known as 'the principle of legality'. They represent, according to the unanimous High Court of Australia (French CJ, Gummow, Crennan, Kiefel and Bell JJ) in *Zheng v Cai* (2009) 239 CLR 446, at 455-6 [28]:

> Judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws … [and are] rules of interpretation accepted by all arms of government in the system of representative democracy.[112]

The debates about desirability of both constitutional and statutory Bills of Rights in Australia have frequently been a matter of controversy for at least 35 years and have drawn different voices. The possible weakness of lacking a statutory or constitutional Bill of Rights was revealed:

> Without any firm legal protection of civil liberties, they are easily eroded by governments who find them politically inconvenient (and in a federal system we have many governments in a position to chip away at our rights) … And the laws dealing with free speech are more concerned with its control than its facilitation and protection.[113]

The possible main arguments for and against a Bill of Rights were summarized in the following statement:[114]

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[110] Pearce and Geddes, above n 108, 165.
[111] Ibid 168-194.
[112] *Zheng v Cai* (2009) 239 CLR 446, at 455-6 [28].
[113] Jones, above n 39, 5-6.
[114] George Williams, *Human Rights under the Australian Constitution* (Oxford University Press 1999), 257-258.

The Main Arguments for the Bill of Rights	The Main Arguments against the Bill of Rights
1. Australian law affords inadequate protection to fundamental freedoms.	Rights are already well protected in Australia.
2. It would give recognition to certain universal rights.	The political system itself is the best protection of rights in Australia.
3. It would give power of action to Australians who are otherwise powerless.	It would be undemocratic to give unelected judges power to override the judgment of a parliament.
4. It would bring Australia into line with the rest of the world.	It would politicise the Australian judiciary.
5. It would meet Australia's international obligations.	It would be very expensive given the amount of litigation it would be likely to generate.
6. It would enhance Australian democracy by protecting the rights of minorities.	It would be alien to the Westminster tradition of parliamentary sovereignty.
7. It would put rights above politics.	It would actually restrict rights because to define a right is to limit it.
8. It would improvement government policy-making and administrative decision-making.	It would ignore legitimate differences between different regions of Australia.
9. It would serve an important educative function.	Rights listed in constitutions or statutes actually make little or no differences to the protection of fundamental freedoms.
10. It would promote tolerance and understanding in the community.	It would be unnecessary, as the High Court is already protecting rights through its interpretation of the Constitution and its development of the common law.

Table 2.1: The Main Arguments Concerning Bill of Rights

The main arguments against a Bill of Rights and to keep the current situation show strong evidence as well. However, the above arguments failed to analyze the situation from the Australian historical perspective. Basically, this topic has something to do with its very different histories. It is because the Australian *Constitution* was not born out of a struggle for freedom from the British. All of the colonies were self-governing; they had inherited the rule of law with a constitutional monarch based upon the Westminster pattern.[115] In the last decade of the 19th century the successful movement towards the formation of an Australian federation was driven by colonists' concerns about defence, trade, commerce, foreign affairs, immigration and industrial relations.[116] When the Constitution of the Commonwealth was framed, it was for a colony within the British Empire, and was undertaken wholly by the colonists without intervention by the imperial government.[117]

The same motivation as lying behind the drafting of the Australian *Constitution* was recognised in the book *Human Rights under the Australian Constitution*:

> The process was driven by factors such as the need for a greater defence preparedness, a desire for free trade, and a sentimental attachment to nationhood. Despite being drafted by popularly elected representatives, the Australian Constitution was not written primarily as a people's constitution. Instead, it was a compact between the Australian colonies that was designed to meet, amongst other things, the needs of trade and commerce.[118]

Therefore, it is understandable that the Australian *Constitution* has little to say about the relationship between the Australian government and the people, and does not contain the express fundamental rights of the Australian people. The citizens' rights are left to the protection of the common law.

2.4.1.2 Freedom of Speech under Representative Democracy

Australia is a democracy; the basic freedoms are highly respected by the political culture. The principle of liberty has demanded 'clear limits be placed on the actions of the state,

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[115] Chief Justice Garfield Barwick, 'Parliamentary Democracy in Australia ' (1995) 25 *Western Australian Law Review* 21, 22.
[116] Chief Justice Robert French, 'Dialogue Across Difference: Freedom of Speech and the Media in India and Australia ' (2008) 1 *LAWASIA Journal* 112, 12.
[117] Barwick, above n 115.
[118] Williams, above n 114, 26.

to ensure that the people are left to voice their opinions and to dissent from government action'.[119]

Freedom of speech is consistent with the democratic principles which underlie the Australian *Constitution* as a whole.[120] Two 1992 High Court judgments[121] constituted the highest recognition of freedom of speech in Australian constitutional and political history.[122] This freedom of political communication was implied as being essential to the system of representative government established by the Constitution.[123] The system of representative government requires that the Australian people must enjoy the freedom to communicate both with their elected representatives and amongst themselves about political affairs.[124]

Free discussion is integral to the operation of the *Constitution* and is the symbol of the representative democracy.[125] Sir Garfield Barwick, a former Chief Justice of the High Court of Australia, described democracy as 'a system of government under which a community manages and controls the whole of its affairs without exception'.[126]

In maintaining a democratic system of Australian government, freedom of speech has played an important role in preventing oppressive interference by the government:

> The Constitutional Commission127 emphasized the long standing recognition of the importance of freedom of expression to the maintenance of a democratic system of government and the exercise of democratic rights. A constitutional guarantee of freedom of expression would provide a safeguard against the use, by temporary majorities, of powers of government to eliminate competition from political rivals or place temporary minorities at a disadvantage in the market place of political ideas. It would ensure that channels for communication of information

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[119] Jones, above n 39.
[120] Michael Kirby, 'Freedom of Expression-Some Recent Australia Developments' (1993) *Commonwealth Law Bulletin* 1778, 1778. See also *Constitution* s7 and s24 articulating representation chosen directly by the people in the Senate and the House of Representatives respectively.
[121] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
[122] Katharine Gelber, 'Freedom of Speech and Australian Political Culture' (2011) 30(1) *University of Queesland Law Journal* 135, 135.
[123] Kentridge, above n 44, 255.
[124] Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs ' (2008) 29 *Adelaide Law Review* 247, 247.
[125] Kirby, above n 120, 1779.
[126] Barwick, above n 115, 21.
[127] A Constitutional Commission was established in 1985 by the Hawke Labor government to review the Australian *Constitution*.

> and ideas were not impeded and to remind governments that their policies and performances are never immune from criticism.[128]

In a democratic country, the right to freedom of expression has connections between individuals, the government and others in the society. Jones has used plain sentences to describe the significance of freedom of speech:

> An individual, to be free to act, must be free to think, to form opinions, and to develop ideas … Freedom of speech and expression are essential if people are to be able to criticize governments and to participate in the democracy… Further, individuals need the freedom to associate with others, to develop their ideas and to share their opinions. They need, too, to be able to assemble, to hear different points of view and to give mass expression to even the most unpopular opinion.[129]

Likewise, Justice Michael Kirby, President of the New South Wales Court of Appeal and later Justice of the High Court of Australia, highly valued the vital attribute of freedom of expression. He stated that the value of freedom of speech rests primarily on the ability of every individual to express his or her opinions; and a free society seeks to support this freedom as no less important than the protection of life itself. He said that life without freedom to express ideas is less than human. Freedom of speech is a vital protection against tyranny and a tool to criticize the government, and to protest peacefully against its policies and practices.[130]

Freedom of speech is recognized and highly valued by all Australians, from common citizens to public officials. Former Prime Minister Paul Keating delivered an opening address at the Global Cultural Diversity Conference in 1995, saying that it is Australians' responsibilities to accept freedom of speech as the basic principle of Australian society.[131] Similarly, in 1996, Prime Minister John Howard argued just after his election that under his leadership Australians were more free to enjoy and exercise freedom of speech than they had previously been under the Keating-led Labor government and he saw this change as a welcome development in public life:

> One of the great changes that has come over Australia in the past six months is that people do feel able to speak a little more freely and a little more openly about what they feel … I think there has been that change and I think that's a very good thing …

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[128] French, above n 116, 14.
[129] Jones, above n 39.
[130] Kirby, above n 120.
[131] Paul Keating, *Global Cultural Diversity Conference* (26 April 1995) <http://www.multiculturalaustralia.edu.au/library/media/Audio/id/526.Global-Cultural-Diversity-Conference>.

> I welcome the fact that people can now talk about certain things without living in fear of being branded as a bigot or as a racist or any of the other… expressions that have been too carelessly flung around in this country whenever somebody has disagreed with what somebody has said.[132]

From the example of Australia, there is no doubt that citizens are able to express opinions freely and to criticise the government and the conduct of public affairs publicly without fear as part of political discourse in a democracy. This freedom is one of the glories of the unwritten constitution of Australia.[133]

2.4.2 Singapore

Singapore has never adopted a *laissez faire* approach towards freedom of speech, but entrenched this constitutional right in article 14 of its Constitution.[134] Article 14 has 'the potential to be the source of a vibrant constitutional right to the freedom of speech' in Singapore.[135] It states:

> (a) every citizen of Singapore has the right to freedom of speech and expression;
>
> (2) Parliament may by law impose
>
> (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence.[136]

The framers of the Constitution in Singapore took the necessity to entrench the right to freedom of speech from the Federal Constitution of Malaysia.[137] The 1957 *Report of the Federation of Malaya Constitution Commission* stated that 'the right to free speech, together with the other fundamental freedoms were essential conditions for a free and democratic way of life'.[138]

The 1966 Report of the Constitutional Commission of the Republic of Singapore, which was led by Chairman Wee Chong Jin, explained and recommended the retention of the

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[132] John Howard, 'Edited Extract from Speech to the Queensland Liberal Party Convention', *The Australian* 25 September 1996, 13, as cited in Gelber, above n 122, 137.
[133] Kentridge, above n 44, 253.
[134] Li-ann Thio, 'The Virtual and the Real: Article 14, Political Speech and the Calibrated Managemeant of Deliberative Democracy in Singapore' (2008) *Singapore Journal of Legal Studies* 25, 29.
[135] Michael Hor and Collin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore' (1991) 12 *Singapore Law Review* 296, 296.
[136] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) Article 14.
[137] Hor and Seah, above n 135, 301-302.
[138] *Report of the Federation of Malaya Constitution Commission* 1957 (Malaysia) para 161, cited in ibid 302.

right to free speech in order to keep the national commitment to a free and democratic way of life:

> We find also in the years succeeding the Second World War the growth of a national spirit amongst the many peoples of many races who now regard Singapore as their home if not the home of their forefathers and we believe there is a growing awareness and acceptance amongst these peoples that in spite of their different origins, their destinies and that of their children are all inextricably intertwined, intermixed and interwoven and that of their future and the future of the nation lies in a non-racial approach to all problems under a form of government which would enable the growth of a united, multi-racial, free and democratic nation in which all its citizens have equal rights and equal opportunities.[139]

Regarding the value of free speech principle, the most famous arguments were proposed by Eric Barendt in his book of *Freedom of Speech*, including the importance of discovering truth, as an aspect of self-fulfilment, as citizen participation in a democracy and also as suspicion of government.[140] However, according to Hor and Seah, who are Singaporean scholars, the rationale of self-fulfilment of the individual or dignity when compared with public order is unlikely to prevail in a conflict with other public interests and has never been very popular in Singapore.[141]

As indicated earlier, freedom of speech and democracy have a subtle but important relationship between each other.[142] This relationship has two levels:

> At its lowest level, democracy requires that the government be popularly elected at stipulated intervals. Without the freedom of speech, the electorate will be unable to make a fully informed choice at the ballot box. Curtailment of speech will strike at the root of the democratic legitimacy of the government of the day.
>
> At another level, democracy gives the citizen the right of ventilating what he feels about particular government policies and decisions. This is to enable him to gather support from other members of the electorate and to influence the actual running of the government.[143]

Different voices and even the opposite opinions should be highly valued in the principle of freedom of speech:

> Freedom of speech is required to ensure that all sides are heard so that the electorate is able to arrive at a fully informed opinion on matters affecting the

[139] *Report of the Constitutional Commission* 1966 (Singapore) para 10.
[140] Barendt, above n 46, 6-23.
[141] Hor and Seah, above n 135, 302-303.
[142] See 2.1 and 2.3.2.4.
[143] Hor and Seah, above n 135.

> public interest. The need of the public to hear opinions which are contrary to or critical of those of the government of the day is especially important.[144]

As a result, for Singapore (as Hor and Seah argue) free speech would not only enable the decision-makers to fully appreciate the strength of the diversity of opinions but also would conduce to tolerance and acceptance of diverse views.[145]

2.4.3 India

2.4.3.1 Written Constitution of India: Ground for Democratic Freedoms?

A written Constitution has the function of defining the scope of the government's powers and fundamental political principles, while also establishing the governmental institutions' structure and procedures, and declaring the rights and duties of citizens.

The Constitution of India is the longest written constitution of any sovereign nation in the world, consisting of 444 articles in 22 parts, 12 schedules and 118 amendments. The Indian Constitution 'embodies a detailed scheme of ordered liberty, with a full-fledged parliamentary democracy and a system of judicial control to preserve individual rights even against a popular majority'.[146] However, 'if the constitution were merely a form of words, unsupported by understanding and true sentiment, it would provide a façade behind which dangers to freedom might grow large and undetected'.[147]

The effect of diversity on freedom of speech has yet to be determined in India (see 5.5.3 for diversity/pluralism in India). The Constitution of India has gone through a period of being viewed sceptically with respect to democratic freedoms. Grave difficulties existed and sceptics have a certain degree of anxiety, doubting whether concepts of freedoms that were deep-rooted in the background and experience of Britain, could effectively be transported to India, a land where different traditions and values had long prevailed.[148] In other words, the doubt was about whether the soil of India has been fully prepared to nourish a basic freedom of speech that can express various opinions.

2.4.3.2 The Survival of Democratic Constitutionalism in India

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[144] Ibid 303-304.
[145] Ibid 304.
[146] Pradyumna Tripathi, 'Free Speech in the Indian Constitution: Background and Prospect' (1958) 67 *Free Speech- Indian Constitution* 384, 384.
[147] Ibid.
[148] Ibid.

The Constitution of India was adopted by the Constituent Assembly on 26 November 1949, after the realization of independence in 1947, and became effective on January 1950.

The preamble of the Indian *Constitution* has guaranteed a democratic and federal scheme of government:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

The right to freedom of speech was guaranteed as a fundamental right in Article 19 of the Indian *Constitution*:

> 19. Protection of certain rights regarding freedom of speech, etc. —
>
> (1)All citizens shall have the right —
>
> (a) to freedom of speech and expression;
>
> …
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In the era of India's struggle for independence from British rule, freedom of speech was given enormous importance by the national Indian leadership. The Founding Fathers of the Indian *Constitution* attached great significance to all citizens' freedom of speech and expression. Sorabjee, a Senior Counsel of the Indian Supreme Court, supported this statement by saying:

> The Founding Fathers' experience of waves of repressive measures during British rule convinced them of the immense value of this right in the sovereign democratic republic which India was to be under its Constitution. They believed that freedom

> of expression and the freedom of press are indispensable to the operation of a democratic system. They knew that when avenues of expression are closed, government by consent of the governed will soon be foreclosed. In their hearts and minds was imprinted the message of the Father of the Nation, Mahatma Gandhi, that evolution of democracy is not possible if one is not prepared to hear the other side.[149]

The free speech provision was designed to provide Indian citizens with the same kind and measure of liberty as had been available to the individual in the United Kingdom, notwithstanding that in major points of form, technique and method, the Indian *Constitution* is different from the British system. It has been argued that the deviations do not derogate from the underlying principle of individual liberty, which permeates the form and practice of the Indian scheme.[150]

The concerns over the survival of democratic constitutionalism arise from four factors: 'Hinduism; the illiteracy of the masses; the poverty and the low standard of living of the common man; the lack of democratic and libertarian traditions among the people'[151], and the last one is the item that could pose the most serious challenge. The reason is that in the West, the transition from autocracy to democracy was a slow and gradual process; by contrast, in Asia, democracy arrived quickly by transplantation onto Asian soil. With such a rush, there has been no time for the slow adaptation to new circumstances which was basically characteristics of the West's experience.[152]

Therefore, the understanding and the knowledge of ancient tradition is a necessary tool to understand India's democratic development and prospects, since India approached the ideas of democracy and freedom of speech with its own cultural equipment and examined them according to its own experience.[153]

2.4.3.3 The Intrinsic Connection: Gandhi's Non-Violence Value and Western Democracy and Freedom

Mohandas Karamchand Gandhi was the preeminent leader of Indian nationalism in British-ruled India. Gandhi led India to independence by employing non-violent civil disobedience. The Gandhi movement resulted in other non-violent civil rights and

[149] Soli Sorabjee, 'Freedom of Expression and Censorship: Some Aspects of the Indian Experience' (1994) 45(4) *Northern Ireland Legal Quarterly* 327, 328-329.
[150] Tripathi, above n 146, 385.
[151] Ibid 386.
[152] Ibid 389-390.
[153] Ibid 390.

freedom movements all around the world. The Gandhi movement was not a rejection of Western ideals, but rather a translation of changing them into specifically Indian terms:

> It grew not as an early and angry protest against foreign domination, but as an expression of matured attitudes, not in fact inconsistent with some of the philosophic conceptions of the western world.[154]

The most significant influence of Gandhi was his teachings of democracy and freedom. The insistence on non-violence made the Gandhian movement essentially and exclusively one of propaganda and even extended to words and thoughts. Speech and writing became the primary tools of political action.[155]

> Gandhi constantly sought to link the non-violence value to the values underlying western democracy and freedom. He taught through this ancient and familiar code the very essentials of democratic ideals — individual and collective assertion of opinion, respect for the views of the opponent, equality, inviolability of the person and dignity of the individual, courage, patience and, above all, nonviolence and peace.[156]

That is, as Reeves said long ago, a reasonable world can only be achieved by political victory rather than military victory.[157] In other words, absolute hierarchy and dictatorships are the products of war but, democracy is generated only under the atmosphere of peace. It would seem that, as Palmer noted, any attempt to promote democracy in a system of constitutional government, by military force, have always had negative effects.[158]

2.4.3.4 India's Own Style of Democracy

India was considered as a showcase of democracy in Asia.[159] This study would be incomplete without consideration of India's continuing experience of democracy since independence.[160] In the 1970s, during the development and progress of India's democracy, there were many considerations to be borne in mind, which in themselves would appear to militate against the success of the democratic experiment in India. For example, poverty has a straightforward impact on political issues, such as an inadequate level of saving, lack of occupational adaptability, poor work-capacity, low housing

[154] Ibid 390.
[155] Ibid 391.
[156] Ibid 396.
[157] Reves, above n 32, 133.
[158] Palmer, above n 29, 446.
[159] Chief Justice French, above n 116, 10.
[160] Brown, above n 25, 351.

standards, ill-health and malnutrition[161], and limited means of communication. At that time, even though India's democracy had had twenty years of vigorous life, the effects of these difficulties meant that to some considerable degree, the viability of India's democratic system was conspicuously and increasingly challenged.[162]

Nevertheless, despite the manifold deep problems of geography, poverty, population and divisions, India has been cited to show that the absence of economic development was not necessarily an obstacle to the functioning of democracy.[163] India's ability to sustain democratic forms of government and politics without military bids for power through the second half of the 20th century is 'in sharp contrast to the experience of its neighbours and most former colonies in Africa'.[164]

Democracy in India has its own Indian characteristics, which were based on a dominant party system and dynasty: 'Political unity and the sense of political community was initially engendered by the overwhelming dominance of the Congress Party (but now the dominant party is Bharatiya Janata Party [BJT]) and by the national appeal of a succession of charismatic leaders from the Nehru family: Jahawarlal Nehru, Indira Gandhi, and Rajiv Gandhi'.[165]

India has gone through a long and hard process in the development of democracy. Many questions needed to be asked and clarified over this long period, such as 'whether there should be any restrictions on the right to vote, and whether it might be best to have the higher legislative bodies elected indirectly'.[166] In the 1990s the question which was required to be asked turned out to be 'whether India's democracy will survive the growth of religious extremism [167] without some modification to its political institutions.'[168]

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[161] Joan Hanson and Janet Douglas, *India's Democracy* (Weidenfeld and Nicolson, 1972), 7.
[162] Ibid 10.
[163] Heng Chee Chan, 'Democracy: Evolution and Implementation ' in Heng Chee Chan (ed), *Democracy & Capitalism* (Institute of Southeast Asian Studies 1993) , 10-11.
[164] Brown, above n 25, 351.
[165] Chan, above n 163, 11.
[166] John Adams and Walter Neale, *India: The Search for Unity, Democracy, and Progress* (D. Van Nostrand Company, 2 ed, 1976), 63.
[167] 'Religious extremism ignores the moderate views of most religious people and those with no religion, and it has the potential to do serious damage to the health and well-being of anybody in its path.' See David Nolan, 'Religious Extremism ' (2013) 34 (2) *Conscience* 1, 1.
[168] Chan, above n 163, 12.

In India, the modern idea of democracy as representative and responsible government is derived from Britain in origin, even though there has been a strong belief among educated Indians that democracy is native to Indian soil,[169] which dated back to antiquity in the 'village republics'.[170] In the book, *India of My Dreams*, Gandhi not only described his dream of turning villages into republics which do not have much interference, but also outlined his dream of village government, which was a perfect democracy based upon individual freedom: the individual is the architect of his own Government.[171]

There are two reasons why Indian leaders chose the same kind of democracy as Britain. The first is because Indian leaders were educated in Britain, or in Indian schools and colleges modelled on those in Britain, and studied the books upon which Western liberal philosophy is based. The second is that Indian leaders admired the British and the British system even while struggling for independence.[172] For example, as a result of great British influence, 'the union parliament's lower house was founded as almost a carbon copy of the House of Commons'.[173]

Democracy in India has been associated with the ideal of unity — Adams and Neale laid a great emphasis on the relationship between democracy and national unity:

> India's policies cannot be understood without reference to her desire to achieve a permanent national unity and her determination to achieve a functioning democracy. Democracy without unity is impossible, but for many Indians unity without democracy would be a sore disappointment, perhaps a dream betrayed.[174]

To India, political unity was the only possibility of safeguarding and maintaining cultural diversity.[175]

India is well known for its diversity (see 5.5.3 for diversity/pluralism in India). The most spectacular expression is in its multiplicity of languages. The Census of India in 1961

[169] See B.R. Ambedkar, *Thus Spoke Ambedkar: A Stake in the Nation* (Navayana Publishers, 2011).
[170] Adams and Neale, above n 166, 7-8.
[171] Gandhi Mahatma, 'Every Village a Republic ' in R. K Prabhu (ed), *India of My Dreams* (Navajivan Publishing House, 1947) 83.
[172] Adams and Neale, above n 166, 8.
[173] Ibid.
[174] Ibid.
[175] Reves, above n 32, 136.

identified 1652 'mother tongues'[176].[177] According to Census of India of 2001, 30 languages are spoken by more than a million native speakers, 122 by more than 10,000. Persian and English as two contact languages have played an important role in the history of India.[178] English, the most widely-used language in the world, even though it is used in all parts of the country, remained as the second language of a small educated minority. Therefore, this linguistic diversity has been shown as an obstacle to nation-wide political communication.[179]

Differences of religious belief, especially the predominance of Hinduism with its characteristic caste system, have had a long-term influence. 'The caste system defines and delimits a person's hereditary rights and duties with a thoroughness, comprehensiveness and rigidity unparalleled by any other system of social organisation.'[180] Equally important is the fact that caste divisions have become related to class divisions, which further affected economic status.[181]

The cultural and traditional varieties and diversities need to be preserved, for they are some of the great charms of the existence of India. However, India must 'aim to prevent these varieties from degenerating into armed conflicts, to guide the eternal struggle for life into more civilized channels and to create a political order that will at last make possible the solution of the economic and social problems.'[182]

India's particular dominant party system, dynasty, cultural and religious diversity constitute India's own style of democracy and its own environment for free speech.

2.5 Conclusion

[176] 'Mother tongues' thus identified may not have been identical to the languages, dialects, or even speech forms of the individuals. These were the labels used by the individuals to identify their speech, when asked to give the name of the early childhood language used in the household of the individual. See Mallikarjun B, *Mother Tongues of India According to the 1961 Census* (5 August) <http://www.languageinindia.com/aug2002/indianmothertongues1961aug2002.html>.
[177] Ibid.
[178] Ministry of Home Affairs Government of India, *Data on Language* (2011) <http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/data_on_language.aspx>.
[179] Hanson and Douglas, above n 161, 2.
[180] Ibid 5.
[181] 'Indeed what appears to be caste competition is often a more-or-less distorted reflection of a class struggle, in which groups of people enjoying comparable economic advantages or suffering comparable economic disadvantages engage in battle for access to the rights and privileges (e.g. education, jobs, contracts) that governmental and private agencies have to offer'. See ibid 6.
[182] Reves, above n 32, 136.

Australian, Singaporean and Indian systems of governance are all democracies but are all different, responding to the nature of their culture and their policies on freedom of speech. Each country's own historical and cultural factors have a long-term and deep-rooted influence on the development of freedom of speech. The understanding and the knowledge of the respective traditions is a necessary tool to understand each country's democratic development and prospects. It is not only difficult but also unrealistic to expect an exact same model of democracy as a uniform context for free speech throughout the world.

The aim of the true democracy is serving the people within that nation and guaranteeing that they have the right to freedom as human beings. Therefore, free speech grows well under democratic environments, which provides sufficient nutrient through free discussion and argument (or alternatively, freedom of speech nurtures democratic government where the people determine what happens to them). A certain capacity for reasoning and a certain elementary knowledge of facts by every citizen in the nation are requisite for any democratic advancement. The culture of accepting diversity is a solid foundation and fertile soil for freedom of speech to sprout and blossom into beautiful flowers. Even though without a constitutional or statutory Bill of Rights, freedom of speech is highly recognized and valued by Australians.

Asian-style democratic countries like Singapore and India need to give a priority to balancing Asian values with characteristics of true democracy. Imbalanced heavy emphasis on social order, social harmony and respect for the authority, to a certain extent, cannot perfectly co-exist with the guarantee for freedom of speech. Readjustment and sacrifice is demanded to give citizens the right freely to speak their minds. Is this a desirable goal? It is, insofar as it invests each citizen with an interest in the outcome of his or her government; it is not, insofar as it may tend to go against 'Asian values'.

But everyone should have the freedom to think and articulate his or her own thoughts. In this sense, a constitutional guarantee of the protection of freedom of speech in Singapore and India needs to be put into practice and to apply equally to all.

Democracy is clearly not a one-stop shop. It is organic, like a plant, and grows differently according to the culture which gives it sustenance. The attitudes of tolerance (see 5.4 for

discussion on tolerance), understanding and appreciation are required in analysing and comparing different styles of freedom of speech, and also of the cultures in which they grow.

Chapter 3 — Freedom of Political Speech

3.1 Introduction

This Chapter analyses the operation of freedom of political speech in Australia, Singapore and India. With respect to Australia, the aim is to examine the development of political speech from recognition to reaffirmation. Then the nature and the scope of freedom of political communication will be addressed. A test for constitutionality will be discussed through the case of *Lange v Australian Broadcasting Corporation*.[1]

The second part addresses how political speech has developed in Singapore, its relationship with domestic politics, and how restrictions are placed on freedom of political speech based on public order and defamation. The *Public Entertainment and Meetings Act* (PEMA, 2001, Singapore)[2] and the Speakers' Corner will be examined.

In India, political hate speech has in recent years assumed a significant role in relation to freedom of speech. There has been a trend toward hate speech being used by a dominant social and political group during elections.

3.2 Freedom of Political Communication in Australia

3.2.1 Freedom of Political Speech: From Recognition to Reaffirmation

Like any other Western liberal democracy based upon the common law Westminster system, Australia has a freedom of speech common law tradition (*Evans v State of New South Wales* [2008] FCAFC 130). But in the early 1990s the Australian High Court began to explore the idea that 'the Constitution contains, by implication, a commitment to certain fundamental freedoms or democratic values which could operate as judicially enforceable limits on the legislative powers of the Commonwealth, and perhaps on those of the States as well.'[3] Since then the most remarkable trait of Australian constitutional development has been the advent of the constitutional protection of political speech.[4]

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[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[2] Cap. 257, 2001 Rev. Ed. Sing. The *Public Entertainment and Meetings Act* is an Act to provide for the regulation of public entertainments and meetings in Singapore.
[3] Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (The Federation Press 5ed, 2010), 1257.
[4] Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law ' (1998) 26 *Federal Law Review* 219, 219.

The recognition and development of the implied freedom of political speech has been controversial; there has been uncertainty about the 'foundation for, and nature and extent of, the limitation'.[5] In 1992 that a majority of the High Court recognized that the Australian *Constitution* implies a commitment to freedom of political communication[6] in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. And it was later the unanimous decision of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 that reaffirmed and secured the existence of implied constitutional freedom of political communication. Despite the unanimous support for this implied freedom in *Lange*, the case law both preceding and following that judgment paints a picture of an unsettled constitutional doctrine.[7]

Initially, there were suggestions that there existed a general conception of 'representative democracy'[8] inherent in the Australian *Constitution* generated by the requirement of free political communication.[9] This freedom was said to derive from s 7[10] and s 24[11] of the text of the Australia *Constitution*, which state that the Senate and the House of Representatives shall be directly chosen by the people, and s 128 which provides that amendments to the *Constitution* may be made only by the people. This direct choice required freedom of political communication or discussion.[12] Later,

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[5] James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government ' (2007) 31 *Melbourne University Law Review* 239,240.

[6] The impact of this implication on the law of defamation, initially explored in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) CLR 211'. See Blackshield and Williams, above n 3.

[7] See Stellios, above n 5, 241.

[8] Initially judges referred to 'representative democracy' (see, e.g., *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J); but later it was found there was not real content to this phrase as related to the Australian *Constitution*, and instead, falling upon *Lange*, 'representative and responsible government' was used, based on ss7, 24, 64 and 128 in particular.

[9] Blackshield and Williams, above n 3. See also Dan Meagher, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication ' (2004) 28 *Melbourne University Law Review* 438, 451. Eric Barendt, 'Free Speech in Australia: A Comparative Perspective ' (1994) 16 *Sydney Law Review* 149, 161. David Bogen, 'Comparing Implied and Express Constitutional Freedoms ' (1995) 2 *James Cook University Law Review* 190, 197. Katharine Gelber, 'Distracting the Masses: Art, Local Government and Freedom of Political Speech in Australia ' (2006) 10 *Law Text Culture* 195, 205.

[10] 'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate…' See *Commonwealth of Australia Constitution Act 1900*, c1, s7.

[11] 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators…' See *Commonwealth of Australia Constitution Act 1900*, c1, s24.

[12] Glenn Patmore, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia-Three Possible Models ' (1998) 7(1) *Griffith Law Review* 97, 98.

however, it was found there was no real content to 'representative democracy' when related to the Australian *Constitution*; rather, drawing upon the text and structure of the *Constitution*, the High Court unanimously stated in *Lange* that sections 7, 24, 64, and 128 provided for a system of 'representative and responsible government'.[13] To put it simply, in order to exercise a free choice at elections, people eligible to vote must to be free to discuss political matters,[14] and to 'secure the effective functioning of constitutional system of representative and responsible government' should be the primary purpose of the implied freedom.[15]

3.2.2 The Nature of Freedom of Political Communication: From 'Personal Rights' to 'Institutional Rights'

There is unanimity among Australian scholars that freedom of political communication 'is not a guarantee of a personal or individual guarantee capable of conferring private rights';[16] — indeed this is stated explicitly by the unanimous High Court in *Lange*.[17] Castan described the role of freedom of political communication as a shield, not a sword, by which she means citizens have immunity from the adverse effects of laws or the exercise of powers that curtail political communication, rather than having individual rights in the strict freestanding sense.[18] As *Lange* stated:

> Those sections [ss7 and 24] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.[19]

In particular:

> What it does not do is give citizens any freestanding constitutional rights. Rather, a person who believes her freedom has been infringed must first establish the invalidity of legislation or the content of the relevant common law and then use any statutory or common law remedies or defences available. Whether this makes any substantive difference to the individual concerned, however, is debatable.[20]

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[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.
[14] Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs ' (2008) 29 *Adelaide Law Review* 247, 248.
[15] Meagher, above n 9, 452.
[16] Melissa Castan, *Constitutional Law* (Pearson Education Australia 2008), 217. See also Gelber, above n 9.
[17] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[18] Castan, above n 16. Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Federal Law Review* 41, 43.
[19] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[20] Kris Walker, 'It's A Miracle! High Court Unanimity on Free Speech ' (1997) 22(4) *Alternative Law Journal* 179, 180.

By describing political free speech in Australia as 'institutional'[21] rather than 'personal', 'negative' rather than 'positive', 'vertical' rather than 'horizontal', Stone argued this freedom exists to support a certain system of government rather than protecting values more closely related to individuals; it provides freedom from interference instead of a guarantee of a right to participate in and require government action; it is associated with relationships between the State and the individual rather than relationships between individuals or to protecting individuals from actions of other private parties.[22]

The most impressive statement of Stone in her article was that she not only pointed out freedom of political communication is not a personal right, she also argued that it falls squarely into the category of rights that serve larger interests, which means the protection of representative and responsible government.[23]

3.2.3 The Scope of Freedom of Political Communication: From Narrow to Broad

As to the scope of the Australian implied right, Barendt argued in 1994 that, at first glance, it seemed apt only to cover the speech which is apparently pertinent to election campaigns or to the conduct of government. However, he predicted the High Court would inevitably be called on to determine the scope in following years.[24] In respect of the principle of defining the scope for restriction on freedom of political speech, in the first instance it will rely, it was said, on the interpretive powers of legislators and regulators, and of judges in the second.[25]

The nature of freedom of political speech inevitably brought the Australian High Court to the conclusion after 1992 cases of *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v Commonwealth* that the category of political communication is narrow—it only protects certain federal institutions of representative and responsible government, as the law stood, it included only 'discussion of laws and policy of the federal Parliament, the conduct of members of Parliament, and non-federal political

[21] Here 'institutional' means its rationale being protection of certain institutions of government. See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication ' (2001) 25 *Melbourne University Law Review* 374, 375.
[22] Ibid.
[23] Ibid 377-378.
[24] Barendt, above n 9.
[25] Gelber, above n 9, 207.

affairs (such as the political affairs of a state) that are very closely related to federal matters.'[26]

However, after *Levy's case* the scope of political communication extended further to include State and Territory matters within the federal system. In *Levy v Victoria*, political communication included 'non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth'.[27] In addition, among the Justices in the case of *Australian Capital Television* and *Nationwide News*, there were Justices supporting a broad implied guarantee of freedom of expression, even though the terminology they used varied significantly.[28] For example, 'the freedom to communication with respect to public affairs and political discussion',[29] 'the freedom to discuss governments and governmental institutions and political matters',[30] 'the freedom of communication of information and opinions about matters relating to the government of the Commonwealth',[31] '… freedom of political discourse, and that discourse is not limited to communication between candidates and electors'.[32]

Similarly, on the basis of the related cases,[33] there are two methods of considering the scope of the implied freedom: the subjects of communication (government and political matters); and types of communication (communications between the electors and their representatives, as well as between the electors themselves).[34] *Lange* had stated that political communication includes communication that could 'affect choice in federal elections or constitutional referenda'.[35]

After *Lange*, the scope of political speech still remains an open question and still requires considerable elaboration. With the social and economic development of human

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[26] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138; as cited in Stone, above n 21, 378.
[27] The former Chief Justice, Sir Gerard Brennan, *Levy v Victoria* (1997) 189 CLR 579, 595.
[28] Neil Douglas, 'Freedom of Expression under the Australian Constitution ' (1993) 16(2) *UNSW Law Journal* 315, 334.
[29] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 66 ALJR 695, 704 (Mason CJ).
[30] *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658, 670 (Brennan J).
[31] *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658, 680 (Deane and Toohey JJ). Justice Deane and Toohey explained that, in their view, the implication of freedom of communication operates at two levels. The first is communication between the Australian people, their Parliamentary representatives as well as the members of other Commonwealth instrumentalities and institutions. The second level is communication between the people. See Douglas, above n 28, 335.
[32] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 66 ALJR 695, 735 (Gaudron J).
[33] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 121; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 73-74; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[34] Jolly, above n 18, 45.
[35] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

beings and their ever-increasing demand for human rights, the scope of the freedom of political communication as a restriction upon legislative and executive power, rather than sustaining any individual right, may not satisfy the current need.

Many scholars considered a more generous definition of the concept of political communication. Stone proposed four categories of communication that could be included in the concept of political communication: explicitly political communication; potential subjects of government action;[36] communication that influences attitudes towards public issues;[37] communication that develops qualities desirable in a voter.[38] In relation to 'explicitly political communication', Stone supported the statement of Judge Robert Bork in developing this category:

> The category of protected speech should consist of speech concerned with governmental behaviour, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda.[39]

Meagher suggested that before deciding a case, the Court needs to acknowledge comprehensively the nature of the concept of political communication, the possibility of involving a broad range of matters and its own limited institutional capacity for determining such questions.[40] Further, he listed two reasons to explain the impossibility of drawing a precise line between political and non-political speech, but rather advocated carving a generous zone:

> First, this recognises both the breadth of matters that may constitute 'political communication' and the limited institutional capacity of the judiciary to determine this issue. Second, and more importantly, it provides the conditions for the sovereignty of the people to be meaningfully exercised through an informed and wide-ranging political discourse.[41]

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[36] Stone suggested that we should recognise that the freedom of political communication should cover 'issues that could become matters of federal law or policy or, in some way, the subject of federal governmental action'. See Stone, above n 21, 385.
[37] This means the discussion of matters that might influence the attitudes of voters toward the government.
[38] 'It includes communication that is relevant to democratic government because of the qualities it develops in the citizenry.' See Stone, above n 21, 387.
[39] See Robert Bork, 'Neutral Principles and Some First Amendment Problems ' (1971) 47(1) *Indiana Law Journal* 27 , 28, as cited in Stone, above n 21, 383.
[40] Meagher, above n 9, 466.
[41] Ibid 466.

In Australia, the constitutionally implied freedom of political communication as found by the High Court has had a short life to date. Not all scholars are satisfied with the current situation relating to the implied freedom of political communication. Stellios pointed out four uncertainties and concerns which have accompanied the development of the implied freedom — the very existence of the freedom; the question of what is relevantly political for the purpose of the implied freedom; whether communication about state government is protected;[42] and the scope of protection provided by the *Lange* doctrine.[43] Campbell and Crilly argued their concerns that:

> The current state of the law leaves a variety of questions unanswered. Most judges have consistently avoided answering questions such as whether there is a higher standard of review for laws that directly or intentionally (rather than incidentally) burden communication, what communication is 'political', and what nexus to a federal election is required for a communication to be sufficiently connected to sections 7 and 24 to merit protection.[44]

Though Stellios, Campbell and Crilly have had pointed out the possible problems with the implied freedom of political communication, they failed to provide possible solutions for the current possible problems. With respect to whether there will be any possibility that political speech appears within constitutional formation of text and structure, which is similar to those that have been adopted in the United States, Buss concluded 'the fact the source of the freedom is implied rather than express should matter little — less and less as time goes on'.[45] Maybe, the common law be sufficient after all.

3.2.4 The Case of *Lange v Australian Broadcasting Corporation*: A Test for Constitutionality

In relation to the implied freedom of political communication, there are many cases in Australia during the period of 1992 and 2013.[46] These will not be discussed in great

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[42] Whether communication about state government is protected has since been settled. See recent case like *Coleman v Power* (2004) 220 CLR 1, which is a High Court of Australia case that deals with the implied freedom of speech. The *Coleman v Power* appeal presented the High Court with an opportunity to further consider the scope of the implied constitutional freedom of political speech.
[43] Stellios, above n 5, 261-264.
[44] Tom Campbell and Stephen Crilly, 'The implied freedom of Political Communication, Twenty Years On ' (2011) 30(1) *University of Queensland Law Journal* 59, 66.
[45] William Buss, 'Constitutional Words about Words: Protected Speech and "Fighting Words" under the Australian and American Constitution' (2006) 15 *Transnational Law & Contemporary Problems* 489, 513.
[46] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v WA Newspapers Ltd* (1994) 182 CLR 211; *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Maloney v The*

detail, except where necessary to develop and articulate the thesis argument and to understand the reasoning employed in certain cases, particularly, the case of *Lange v Australian Broadcasting Corporation.*

David Lange, a former Prime Minister of New Zealand, brought a defamation action against the Australian Broadcasting Commission (ABC) regarding matters published when he was a member of the New Zealand Parliament. Because of the constitutional issue, the case was removed from the Supreme Court of New South Wales into the High Court of Australia.

The ABC pleaded that there was no constitutional defence available to Mr Lange for the following reasons: Firstly, because the program was published according to a freedom guaranteed by the Commonwealth *Constitution* to publish material and it was in the course of discussion of government and political matters. Secondly, the ABC had a duty to publish material related to subjects of public interest to viewers who had a legitimate interest in receiving that information (this was a common law, not a constitutional conclusion, relying upon the common law doctrine of 'qualified privilege').

The Court held no constitutional defence was available to the ABC as the implied freedom of political communication did not establish any free-standing personal right, as well as holding that the constitutional implication could not directly alter private rights and immunities[47], (but it did extend the ambit of the common law defence of 'qualified privilege').

Lange was a decision in which the Court 'reconsidered the concept of representative democracy and the implied freedom of political communication established by the Constitution'.[48] It was one of the first serious challenges to the Court's application of the

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Queen (2013) 252 CLR 168; *Monis v The Queen* (2013) 249 CLR 92; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Wotton v Queensland* (2012) 285 ALR 1; *Momcilovic v The Queen* (2011) 245 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Hogan v Hinch* (2011) 243 CLR 506; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *South Australia v Totani* (2010) 242 CLR 1; *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; 79 ALJR 1620; 219 ALR 403.

[47] See also Chief Justice Robert French, 'Dialogue Across Difference: Freedom of Speech and the Media in India and Australia ' (2008) 1 *LAWASIA Journal* 1, 25.

[48] Patmore, above n 12, 116.

implied freedom of political discussion,[49] and the unanimous High Court was attempting to settle the rationale, scope, and test for the judicially-developed implied freedom.[50]

In *Lange*, the High Court started by reaffirming that representative government[51] and responsible government[52] are guaranteed by the *Constitution*.[53] In other words, the *Lange* case confirmed that freedom of political speech is not a positive right, but rather a means to more effectively secure representative and responsible government, by acting as a fetter on legislative and executive action that might improperly impinge upon that freedom in a manner inconsistent with the constitutionally prescribed system of representative and responsible government.[54] The Court unanimously agreed that the implied freedom of political communication was part of Australian constitutional law, and established a test for constitutionality — that is, the approach it would take in considering the validity of laws said to offend against the implied freedom in the future:[55]

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 for submitting a proposed amendment of the Constitution to the informed decision of the people…If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[56]

Therefore, a successful argument for infringement of the implied freedom of political communication requires the court to discern whether the challenged law affects the implied freedom, and has a sufficient impact on this freedom to be a burden. But, even if the law does place a burden upon the freedom of political communication, if that burden

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[49] Ibid.
[50] Buss, above n 45, 429.
[51] 'The Court relied on a number of terms for its implication of representative government in the Constitution: ss.1, 7, 8, 13, 24, 25, 28 and 30.' See Walker, above n 20, 179.
[52] 'Other provisions provided support for the principle of responsible government: ss. 6, 49, 62, and 83.' See ibid 179-180.
[53] The text of the Constitution itself outlines both representative (ss7, 24, 128) and responsible (s64) government.
[54] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561. See also *Coleman v Power* (2004) 220 CLR 1, 50-51 (McHugh J).
[55] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556-559.
[56] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568.

is reasonably appropriate and adapted to achieving a legitimate constitutional end it may still be considered to be a valid exercise of legislative power.

This test has been consistently accepted as setting the limits of the implied freedom in many following cases.[57] However, 'notwithstanding the unanimous *Lange* judgement and the subsequent acceptance of this test as controlling, its application has not always commanded agreement on just how tight a fit is required to justify restrictions on political communication to further permissible government objectives';[58] and some scholars see 'the experience with the implied freedom reveals an unenthusiastic application of the limitation by many recent members of the High Court.'[59] In addition, even though the High Court has established the test to determine when freedom of political communication is unconstitutionally regulated, there is no separate test to identify a 'political communication'.[60]

The High Court demonstrated that 'the freedom of communication which the *Constitution* protects is not absolute' and hence can be restricted by a reasonable regulation.[61] It is limited to 'what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[62] That is, the implied freedom of political communication 'will not invalidate a law which has a legitimate object or purpose (that is, one that is compatible with the maintenance of

[57] See *Unions NSW v New South Wales* (2013) 304 ALR 266; *Maloney v The Queen* (2013) 252 CLR 168; *Monis v The Queen* (2013) 249 CLR 92; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Wotton v Queensland* (2012) 285 ALR 1; *Momcilovic v The Queen* (2011) 245 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Hogan v Hinch* (2011) 243 CLR 506; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *South Australia v Totani* (2010) 242 CLR 1; *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; 79 ALJR 1620; 219 ALR 403; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620, 219 ALR 403; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *Robert v Bass* (2002) 212 CLR 1; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *McClure v Australian Electoral Commission* (1999) 163 ALR 734.

[58] William Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication ' (2006) 34 *Federal Law Review* 421, 332. For example, In *Levy*, Justice Brennan CJ said that Australian court lacked power to determin that 'some more limited restrction…could suffice to achieve a legitimate purpose'. See *Levy* (1997) 189 CLR 579, 598, as cited in ibid.

[59] Stellios took *Coleman* (2004) 220 CLR 1, 32, 48, 50, 51 as example, and listed the unenthusiastic application of the limitation as 'the experience so far has seen substantial deference by a number of justices to legislative policy-making, imprecision in the identification of the test to be implied, a reluctance to expand the boundaries of the protection, and a reluctance to openly concede the policy role of the Court and to identify factors to be taken into account in determining whether a law contravenes the limitation'. See Stellios, above n 5, 245.

[60] Leslie Zines, 'The Present State of Constitutional Interpretation ' in Adrienne Stone and George Williams (eds), *The High Court at the Cross Roads* (The Federation Press, 2000), 227-231, as cited in Buss, above n 58, 494. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

[61] Patmore, above n 12. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

[62] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

responsible and representative government) and which is reasonably appropriate and adapted to achieving the legitimate end.'[63]

However, the *Lange* decision did much to ground the implied freedom within the text, structure and history of the *Constitution*.[64] For example, the High Court confirmed the essence of the earlier decisions by declaring that:

> Ss7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.[65]

But the Court 'firmly rejected the notion that the development of the implied freedom could proceed by reference to a free-standing, extra-constitutional principle of representative democracy'[66] — because, as stated earlier, any such implied freedom must be formally based in the text and structure of the *Constitution* itself, and was confined to the constitutional notions of representative, and responsible, government under the Australian *Constitution* (which in turn is based on the Westminster system of representative and responsible government).

In *Lange*, the High Court did not give a definition to 'political communication'. Compared to the preceding cases, Buss commended the *Lange* decision as giving a broad scope to the implied freedom,[67] because it has established the scope for political communication, which was not confined to election periods:

> The freedom encompasses relevant information concerning the functioning of government and about the policies of political parties and candidates; communications between electors and the elected representatives, between the electors and candidates for election, between the electors themselves; communications concerning the conduct of executive branch officials, including ministers, the public service, statutory authorities and utilities.[68]

3.2.5 Conclusion

The development of implied freedom of political communication in Australia has gone through a gradual but steady evolution. As having representative and responsible

[63] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.
[64] Meagher, above n 9, 445.
[65] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560, as cited in ibid.
[66] Ibid. See also *Lange* (1997) 189 CLR 520, 560, 567.
[67] Buss, above n 58, 427. See also Buss, above n 58, 493-494.
[68] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560-561, as cited in Buss, above n 58, 427.

government, Australia not only reaffirmed the existence of implied freedom of political communication but also secured its position by the unanimous decision of the High Court in *Lange*'s case. The High Court's acknowledgement of an implicit freedom of political communication as an institutional right as restricting the powers of the legislature from impinging on anyone's freedom of political speech, rather than as an individual personal right, broadened the scope of freedom of political speech, and strengthened the protection of such political speech.

The case of *Lange* is a leading case in the area of political communication in Australia and was a milestone. It not only established the implied freedom of political communication as part of Australian constitutional law, but also entrenched a test for constitutionality, an approach that would ascertain the validity of laws which may offend against the implied freedom in future.

However, the protection of freedom of political speech in Australia is not absolute. It can be restricted by reasonable regulations and it may also be limited for the effective operation of representative and responsible government as stated by the *Constitution*.

3.3 Freedom of Political Communication in Singapore

3.3.1 Political Speech Based on Semi-Authoritarian Grounds

Since its independence, Singapore has had a single-party system and popular election of parliament, but the governance is authoritarian. The People's Action Party (PAP), the ruling party, has won all the elections since 1959 with majority support (in the 2015 Singapore general election, the PAP won 83 of the 89 constituency elected seats in the Parliament of Singapore, representing 69.86% of total votes cast), and has 'successfully curbed any meaningful opposition by a sophisticated usage of legal restrictions, judicial punishments, media control, and hegemonic construction'.[69] However, the opposition parties have never made any significant challenges to the domination of the ruling party and were only able to obtain a handful of seats in the parliament since the state was established in 1965.[70] As a result, in Singapore, political competition among parties is

[69] Weiyu Zhang, 'The Effects of Political News Use, Political Discussion and Authoritarian Orientation on Political Participation: Evidences From Singapore and Taiwan' (2012) 22(5) *Asian Journal of Communication* 474, 479.
[70] Ibid 475.

low, 'manifested in the fact that many voters did not get the chance to vote as their constituencies only had PAP candidates'.[71]

Furthermore, the term 'authoritarian democracy' is used to describe Singapore, 'where the authorities limit basic civil liberties such as freedom of speech, assembly, and association',[72] partly because the political culture and political participation[73] in Singapore are tainted (according to Zhang) by apathy and fear, which discourages citizens from directly influencing political decision-making.[74] Conversely, a democratic communication system should be expected to act against authoritarian rule through 'the free flow of information and the open exchange of opinions through both interpersonal and mediated channels'.[75] On the other hand, Singapore's current Prime Minister, Lee Hsien Loong, eldest child of former Prime Minister Lee Kuan Yew, could be said to be carrying through the Asian values mind-set of the Singaporean people; yet he has engaged with President-elect Trump.[76]

The idea of an Asian democracy based on 'Asian values', to which constitutional and public law values must conform, has been vigorously espoused by the PAP since the 1990s.[77] 'In accordance with "Asian values", Singapore's authoritarian government has sought to construct a version of parliamentary government consonant with a communitarian vision of democracy that prioritises the collective goods of stability and multi-racial harmony.'[78] Accordingly, political participants 'have been exhorted to respect hierarchy in conducting debate and to address political leaders deferentially.'[79] The above values and ideology can be explained respectively in the following detailed description:

> In particular, the shared values of 'community over self' and 'consensus over contention' influence constitutional ordering and political practices. These

[71] See ibid 479.
[72] Ibid.
[73] 'Political participation, therefore, is mainly through legal and feedback channels, such as contacting political leaders or joining activities that are allowed by the government'. See ibid.
[74] Ibid.
[75] Ibid.
[76] See ABC News, *Piracy: Malcolm Turnbull highlights role of ISPs in stopping illegal downloads as Government releases discussion paper* (31 July 2014) ABC News <http://www.abc.net.au/news/2014-07-31/discussion-paper-highlights-role-of-isps-in-piracy-fight/5637418>.
[77] Li-ann Thio, 'The Right to Political Participation in Singapore: Tailor-making a Westminster-modelled Constitution to Fit the Imperatives of 'Asian' Democracy' (2002) 6 *Singapore Journal of International & Comparative Law* 181, 195.
[78] Ibid 242.
[79] Ibid 199.

> advocated a collectivist or communitarian slant in state-society relations, prioritising public order and harmony over rights. These 'Neo-Confucian' values support paternalism, translating to a strong, authoritarian government as reflected in the idealised model of a single-party dominant state where the opposition role is marginal, if not inconvenient.[80]
>
> The Singapore version of Asian values, which informs the state's constitutional discourse and practice, rejects the Western tradition of distrusting government and, instead, advocated respect for honourable, trustworthy Confucian gentlemen-governors. Social harmony through hierarchical relational orders is the primary community interest.[81]

Ambivalence remains whenever the government purports to liberalise space for political speech.[82] The Singaporean government has sought to confine political debate through a determination to 'chill' speech and cordons off sensitive topics to preserve political stability and to stipulate who may participate in such discourse.[83]

3.3.2 Political Speech and Domestic Politics

Regarding the category of political speech, there is in Singapore neither judicial definition nor recognition.[84] There are two types of political speech that are discernible attracting distinct government approaches: first, political speech based on formal or informal party political affiliation or commitment; and second, political speech which turns on an ideological bias (to which political terms like 'conservative' or 'liberal', 'left' and 'right', apply).[85] It seems that the only guidance on what constitutes political speech in Singapore may be drawn from the meaning of 'domestic politics' under section 16 of the *Newspaper and Printing Presses Act* of 1974 Singapore[86] to which the Singapore Court has given an expansive definition. For example, in *Dow Jones Publishing Co v. AG,*[87] the Court of Appeal gave an all-encompassing definition of 'domestic politics' as that which captures 'the multitude of issues' relating to the effect of 'the political, social and

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[80] Ibid 196.
[81] Li-ann Thio, 'Singapore: Regulating Political Speech and the Commitment 'to Build a Democracy Society'' (2003) 1 *International Journal of Constitutional Law* 516, 523.
[82] Thio, above n 77, 199-200.
[83] Ibid 198.
[84] Li-ann Thio, 'The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore ' (2008) *Singapore Journal of Legal Studies* 25, 37.
[85] See Nicholas Aroney, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30 *Melbourne University Law Review* 605, 608, as cited in Thio, above n 84. Partisan political speech attracts a robust adversarial response, while ideological political speech, not affecting the incumbent government's standing, receives a more muted response. See ibid.
[86] *Newspaper and Printing Presses Act* of 1974 Singapore Original Enactment: Act 12 of 1974, REVISED EDITION 2002. Cap. 206, Rev. Ed. Sing, as cited in Thio, above n 84, 29.
[87] *Dow Jones Publishing Co v. AG* [1989] 2 MLJ 385.

economic policies' of the government[88] — the 'government' includes the following: 'the political system of Singapore', public institutions, political ideology and government policies 'that give life to the political system'.[89]

3.3.3 Restrictions on Freedom of Political Speech

Even though the free discussion of political matters is integral and essential to a representative democracy, freedom of political speech is never absolute. In article 14 (2)(a) of the Constitution of Singapore, there are eight grounds upon which freedom of speech may be curtailed: the security of Singapore, friendly relations with other countries, public order or morality, protecting parliamentary privilege, defamation, contempt of court, or incitement to any offence.[90] The following paragraphs explore the special relationship in Singapore between political speech and public order, and political speech and defamation.

3.3.3.1 Political Speech vs Public Order

Although political speech (an especial kind of freedom of speech) serves significant purposes in a democracy, it is a double-edged sword, especially when views conflict, for example 'when there is conflict among different political factions within a country.'[91] Freedom of political speech can thus in certain circumstances become a threat to the existing public order. This is not necessarily a bad thing. However the law must always regulate speech that poses a significant danger to citizens to ensure public order[92] — the most challenging and difficult issue is that the law has to perform a very delicate act of balancing two competing interests: democratic process and public order; for example, how far should the law go in restricting political speech under normal circumstances?[93]

Because of the double-edged nature of political speech, 'speech relevant to political affairs should be given a special status. Society should be prepared to take greater risk when it comes to political speech, as compared to other types of speech and

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[88] Thio, above n 84, 30.
[89] *Dow Jones Publishing Co v. AG*, (1998) Sing. L. R. 70, 89 E-H.
[90] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) ss14 (2)(a).
[91] See Michael Hor and Collin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore ' (1991) 12 *Singapore Law Review* 296, 332.
[92] Art 149 of the *Constitution of the Republic of Singapore*; *Public Order (Preservation) Act* Cap 258 Statutes of the Republic of Singapore (1985 Rev Ed) and the *Internal Security Act* Cap 143 Statutes of the Republic of Singapore (1985 Rev Ed).
[93] Hor and Seah, above n 91, 333.

expression.'[94] However, this perspective failed to recognize the possibilities of differences among different countries, which may well consider the function of political speech in different ways.

In Singapore, political speech 'can be restricted in the interests of public order by the imposition of subsequent penal sanctions,'[95] and even adversarial dissent can be regarded as destabilizing to social harmony and political institutions.[96] This view was supported by Hor and Seah who wrote:

> This [the interests of public order] is certainly justified on the basis of harm prevention. Political speech should lose its special status here since there is a real threat to public order. The law is thus entitled to treat political speech no differently from other forms of conduct that threaten public order. Even if the speech does not actually lead to public disorder, prosecution is still justified on the ground that the law is entitled to draw an analogy with an attempt to commit an offence, which is punishable under s 511 Penal Code.[97]

Anyone who intends to cause public mischief by making a political speech can be prosecuted under the Penal Code ss 505 (b) and (c):

> Whoever makes, publishes or circulates any statement, rumour or report — (b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public where by any person may be induced to commit an offence against the State or against the public tranquillity; or (c) with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of persons, shall be punished with imprisonment which may extend to two years or with fine or with both. [98]

Not only has the Singaporean government placed priority on public order, but also the courts have tended to conform to the government's assessment of the needs of public order while interpreting article 14 of the Singaporean *Constitution*, 'without requiring that the restrictions be informed by substantive standards of reasonableness, proportionality, or necessity within a democratic society.'[99]

The most valuable part of Thio's paper — *Singapore: Regulating Political Speech and the Commitment 'to build a Democracy Society'* — is that, in her analysis of the principal

[94] Ibid 332.
[95] Ibid 478.
[96] Thio, above n 81, 517.
[97] Hor and Seah, above n 91, 334.
[98] See ss 505 (b) and (c) *Penal Code* (2013 Rev. Ed); s 13 (f) *Miscellaneous Offences* (Public Order and Nuisance) Act; and s 4 *Sedition Act* Cap 290 Statutes of the Republic of Singapore (1985 Rev. Ed).
[99] Thio, above n 81, 516.

causes of the courts' deference, she was able to identify the special legal and political culture that is rooted deeply in Singapore:

> This deference appears consonant with the dominant 'communitarian' or Neo-Confucian ethos of Singapore's legal and political culture, which values community interests ahead of individual rights. Additionally, government-fixed informal rules of engagement in political debate chill free speech, particularly political discussion.[100]

3.3.3.2 'Impugned speech'

There are certain kinds of speech that may be considered of having the possibility to lead to public disorder: one of them is 'impugned speech', which is regulated in the Singaporean Penal Code.[101] *The Sedition Act* 1985 (Singapore) uses the word 'tendency' as a substantive test to assist in determining whether certain impugned speech is likely or has a tendency to cause public disorder.[102] In order to decide whether a particular kind of speech is likely to lead to public disorder, taking into account the intention of the speech, the test is sub-divided into two types — 'direct test' and 'indirect test':

> The first type applies a 'direct test' where the inquiry is whether the speech is likely to lead directly to public disorder. These are found in the Penal Code[103] and the Miscellaneous Offences Act.[104] The second type applies an 'indirect test', for example, whether the speech is likely to have particular effects on the audience.[105] If it does, an offence is committed. Such offences are found in the Sedition Act[106]…It is possible to justify these offences on the grounds of the public order only if it is presumed that the effect on the audience is likely to lead to public disorder.[107]

The advantage of the tests is that they provide some principled guidance in deciding whether certain speech leads to public disorder. However, on investigation, the tests turn out to be superficial and lack prudence. They failed to give any detailed instruction as to how to differentiate the effects of the different kinds of speech: for example, to what extent or under what circumstances can it be said that the speech is likely to have

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[100] Ibid 516-517.
[101] See ss 505(b) and (c) *Penal Code* (2013 Rev. Ed): (b)with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public, whereby any person may be induced to commit an offence against the State or against the public tranquillity; or(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community of persons.
[102] *Sedition Act* (Cap. 290, 1985 Rev. Ed) s3.
[103] [See *Penal Code* (2013 Rev. Ed) s504, 505.]
[104] [See *Miscellaneous Offences (Public Order and Nuisance) Act* (Cap. 184, 1997 Rev. Ed) Part II].
[105] For example 'to raise discontent or disaffection amongst the citizen', or 'to promote feelings of ill-will and hostility between different races or classes of the population', see Hor and Seah, above n 91, 334-335.
[106] [See *Sedition Act* s3(1)(a)-(e)].
[107] Hor and Seah, above n 91, 334-336.

particular effects on the audience, since the effects on the audience are extremely subjective.

3.3.3.3 Acceptable and unacceptable speech

In addition to the category of 'impugned speech', the theory of acceptable and unacceptable political speech is another standard proposed by the Singapore government.[108] Following are the differences between acceptable and unacceptable political speech, having regard to the status of the individuals making the speech, and also to the topics of the speech:

> Briefly, non-politicians were cautioned to abstain from political debate; people were expected to maintain deference in speaking to political authorities. In addition, certain topics, such as those apt to trigger racial and religious disharmony were off limits.[109] The indeterminacy of these unwritten guidelines corralling speech hindered robust debate and were designed to identify the category of persons permitted to participate in political discourse, to signal acceptable modes of such engagement and to insulate sensitive topics from frank debate.[110]

Furthermore, in Singapore, policy distinguishes between local and foreign speakers. Notably, the free-speech constitutional guarantee extends only to citizens.[111] 'The government typically frowns upon noncitizens commenting on what it considers domestic political matters.'[112] Foreigners are not allowed to interfere in domestic politics, and any political speech by foreigners is considered as unacceptable speech as well. Public discourse over Singaporean laws and politics reflects that 'the values of our society' is 'reserved for Singaporeans'.[113]

Even though the government uses different names (regardless of whether named impugned speech or unacceptable speech) to decide whether certain political speech is

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[108] The term "Out of Bounds (OB) markers" was first used in 1991 by the then-Minister for Information and the Arts George Yeo to describe the boundaries of acceptable political discourse. See Channel NewsAsia, *Remaking Singapore Team Wants People to Speak Up without Fear* (13 June 2003) Channel NewsAsia <http://www.contactsingapore.sg/nm/oversea_sg/news/ngeneral_br_13062003_2.htm>. 'Previously, the government seized upon the metaphor of 'out of bounds markers' to delineate the spheres of acceptable and unacceptable political speech.' See Thio, above n 84, 33.

[109] Li-ann Thio, 'Recent Constitutional Development: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) *Singapore Journal of Legal Studies* 328, 336-337, as cited in Thio, above n 84, 33.

[110] Thio, above n 84, 33.

[111] 'Every citizen of Singapore has the right to freedom of speech and expression'. See *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) ss14 (1) (a).

[112] Thio, above n 81, 518-519.

[113] Thio, above n 84, 36.

against the public order or not, the nature of the standard is the same—to maintain harmony of the society. And in relation to the distinction between natives and foreigners, over the long term, politicians maintain that it is not wise or prudent to contravene 'established principles' and that 'comments on domestic matters ought to be reserved for Singaporeans'.[114]

Despite the strict policies in regulating political speech, Deputy Prime Minister Lee still encouraged civic participation and robust debate, by declaring that: [115]

> The Government's approach sets the tone of the public debate. How it responds will depend on the spirit of the criticism. The Government will not view all critics as adversaries. If it is a sincere contribution to improve Government policies, but one which we do not agree with, then our response will be dispassionate and factual, pointing out where we think the criticism is mistaken but encouraging the critic to continue to stay engaged or even counter-argue.
>
> But a criticism that scores political points and undermines the government's standing, whether or not this is intended, is another matter altogether. Not everyone joins the public debate merely to help the government to govern better. For example, when the opposition criticises an action or policy, the purpose is usually to show that the government is not providing good leadership or making good policy. They are fully entitled to do so, but the Government has to rebut or even demolish them, or lose its moral authority. Anyone entering the arena should understand that these are the rules of the game of politics everywhere.

3.3.3.4 Defamation

It is undeniable that restrictions on freedom of political speech in Singapore, to some extent, discourage the public from becoming politically active.[116] 'The dominant community interest is invariably identified with assuring respect for the reputations of politician and public institutions.'[117] This can be seen especially in Singapore's defamation laws. Freedom of speech in Singapore is qualified by the power given to Parliament to impose necessary or expedient restrictions 'in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or

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[114] Sing., *Parliamentary Debates*, vol. 84 (15 February 2008) (Minister BY Lee) as cited in ibid.
[115] Deputy Prime Minister Hsien Loong Lee, *Building a Civic Society* (1 June 2004) <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan015426.pdf>.
[116] Cameron Sim, 'The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law ' (2011) 20(2) *Pacific Rim Law & Policy Journal Association* 319, 353.
[117] Thio, above n 81, 523.

morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence'.[118]

> Defamation laws in Singapore give greater rights to those in positions of power, which is indicative of Singapore's selective judicial application of common law precedent. Under the Singapore Chill,[119] the risks of legal liability are so substantial that the law deters Singaporeans and others from criticizing the government and instead persuades them to maintain their silence.[120]

In Singapore, not only are criticisms of public officials in terms of their official conduct restricted by the law of defamation, [121] but also the value of free speech for politicians themselves is limited through the pressure created by defamation law. In order to maintain the day-to-day functioning of the executive, Singapore's judiciary feels there is a need to afford protection to them.[122] In *Lee Kuan Yew v. Vinocur*,[123] Goh J held that an accusation of nepotism and corruption against three government ministers 'was an attack on the very core of their political credo and would undermine their ability to govern.'[124]

The most difficult question to be answered before dealing with the relationship between defamation laws and political speech, is, in the context of local conditions how to strike an appropriate balance between the interests of freedom of political speech and protection of reputation. The courts in common law jurisdictions have considered three approaches to striking this balance:

> First, a 'preferential right' approach, where freedom of speech is preferenced over protection of reputation if it is reasonable and relates to government and political matters. Second, a 'fundamental right' approach, where freedom of speech trumps protection of reputation, unless the defamatory statement was published with malice.[125] Third, a 'co-equal rights' approach, where neither freedom of speech nor

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[118] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) art. 14 (2) (a).
[119] [According to Sim, 'Singapore Chill' means 'the risks of legal liability deter Singaporeans and others from making socially valuable comments and instead persuades them to maintain their silence'. See Sim, above n 116, 332].
[120] Ibid 353.
[121] See, e.g., *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin*, 1 Malayan L. J. 281 (1979); *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*, 2 Malayan L. J. 282 (1979); *Goh Chok Tong v. Jeyaretnam Joshua Benjamin & Anor*, 3 Sing. L. Rep. 337 (1998).
[122] See *Lee Kuan Yew v. Seow Khee Leng*, 1 Malayan L. J. 172 (1989). 'Moral authority is the cornerstone of effective government. If this moral authority is eroded, the government cannot function'. See *Lee Kuan Yew v. Seow Khee Leng*, 1 Malayan L. J. 176 (1989), as cited in Sim, above n 116, 331.
[123] *Lee Kuan Yew v. Vinocur*, 3 Sing. L.Rep. 491 (1995).
[124] *Lee Kuan Yew v. Vinocur*, 3 Sing. L.Rep. 491 (1995), as cited in Sim, above n 116, 330.
[125] See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Lange v. Atkinson*, (2000) 3 N.Z.L.R. 385.

protection of reputation takes precedence over the other.[126] It is notable that under none of the three approaches was protection of reputation preferred over freedom of speech.[127]

3.3.4 From PEMA to Speakers' Corner

The selection of the venues for political speech is another important element to which the Singaporean government has paid great attention — by distinguishing between outdoor and indoor venues. For fear of disorder that might be caused by organizers, the government steadfastly prohibited outdoor and street demonstrations.[128] Gradually, speech is also being regulated through licensing laws, such as the *Public Entertainment and Meetings Act* (PEMA),[129] which encompasses outdoor political rallies.[130] That Act requires licences to make speeches at public meetings. Public entertainments are defined statutorily as including 'any lecture, talk, address, debate or discussion' given 'in any place to which the public … has access whether gratuitously or otherwise.[131]

The introduction of the 'Speaker's Corner' in Hong Lim Park, an area delineated in 2000, was inspired by the English prototype in Hyde Park, London, with the purpose of balancing the urges toward political liberalization with the preservation of social order.[132] The ruling People's Action Party (PAP) government in Singapore endorsed the idea of having a 'Speakers' Corner' as a free-speech venue. It was established as an open space exempted from PEMA licensing requirements,[133] and this, indeed, was established through subsidiary legislation in the form of the *Public Entertainments and Meetings (Speakers' Corner) (Exemption) Order* of 2000.[134]

At present, Speakers' Corner is concurrently regulated by the new regulations, but the applicable conditions[135] have remained essentially unchanged: for example, those under the Parks and Trees Regulations (Cap. 216, Rg. 1, 2006 Rev. Ed.), the Public

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[126] See, e.g., *Mosley v. News Group Newspapers Ltd*., (2008) E.M.L.R. 20 (U.K.).
[127] Sim, above n 116, 340.
[128] Thio, above n 84, 35-36.
[129] Cap. 257, 2001 Rev. Ed. Sing.
[130] Thio, above n 84, 33.
[131] See The Schedule, *Public Entertainments and Meetings Act*, (Cap. 257. Rev. ed. 2001), 2, available at http://statutes.agc.gov.sg/.
[132] Thio, above n 81, 517.
[133] Thio, above n 84, 35.
[134] Chapter 257. Section16, Order (1st September, 2000).
[135] For example, in the revised edition of *Parks and Trees Regulations* 2006, 'carpark' still means 'any area that is within or adjacent to a national park, nature reserve or public park and is designated as a carpark by the Commissioner, and includes any access road to such an area.' See *Parks and Trees Regulations* (Cap. 216, Rg. 1, 2006 Rev. Ed.) s2.

Entertainments and Meetings (Speakers' Corner) (Exemption) (No. 2) Order 2011 (S 493/2011) (issued under the PEMA) and the Public Order (Unrestricted Area) (No. 2) Order 2011 (S 494/2011) (issued under the Public Order Act 2009 (No. 15 of 2009) ('POA')).

'Speakers' Corner is quite symbolic, then, in simultaneously preserving a literal 'space' for practicing free speech, while limiting or 'cornering' it in that space.'[136]

> … the ostensible purpose of [*the Public Entertainments and Meetings* (Speakers' Corner) (Exemption) (No. 2) Order 2000] was to permit the freer expression of divergent political views. This initiative was politically significant, given the widespread perception of the ruling PAP government's low threshold for political criticism and its inclination to curb or otherwise chill and impose sanctions upon political dissent.[137]

However, Speakers' Corner is not an oasis or free-speech zone, since the freedom of speech in this Corner is still subject to stringent conditions:[138] by a restrictive administrative regime with restrictions on speakers' status — the speaker should be a citizen of Singapore [139]; subject-matter — '(a)the person does not deal with any matter — (i) which relates, directly or indirectly, to any religious belief or to religion generally; or (ii) which may cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups in Singapore'[140]; and languages[141] — speakers only speak in any of Singapore's four official languages (Malay, Mandarin Chinese, Tamil, and English)[142] or a related dialect.[143].

The *Public Entertainments and Meetings (Speakers' Corner) (Exemption) Order 2013* has ameliorated many formerly strict conditions: such as volume — 'no sound amplification device is used during the public speaking', [144] time period — 'the performance or

[136] Thio, above n 81, 522.
[137] Ibid 517-518.
[138] 'These conditions are now discussed and briefly related to other pertinent Singapore laws, the better to gauge the impact of this initiative on Singapore constitutional law.' See ibid 518.
[139] See *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, 2(a) (27th January 2013).
[140] See *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, (1) (a).
[141] *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, (1) (b).
[142] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) art. 123.
[143] *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, (1) (b).
[144] See *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, (1) (e) (1st Sept., 2000).

exhibition takes place only between 7 a.m. and 7 p.m.' [145] The 2000 Order Administrative regulations required speakers 'to apply in person to a registration officer at the designated place, not earlier than 30 days before the public speaking'.[146] Noncompliance with these conditions could have resulted in penalties, including a thirty-day suspension from use of the Corner:

> Where any person being the organiser of or a participant in any public speaking, performance or exhibition at the Speakers' Corner fails to comply with any of the conditions of exemption specified in paragraph 3 or contravenes any other written law during any such public speaking, performance or exhibition (as the case may be), the Licensing Officer may serve a notice on him for all or any of the following purposes, as the Licensing Officer thinks appropriate:
>
> (a) to suspend him from registration under paragraph 4;
>
> (b) to prohibit him from participating in any public speaking, performance or exhibition exempted under this Order,
>
> for a period not exceeding 30 days from such date as may be specified in the notice.[147]

Nevertheless, the impact of Speakers' Corner in Singapore is limited, being contained in time and space, and also because of the subtle influence of 'Asian Values' in the culture of Singapore.

> Singapore's Speakers' Corner, in regulating the expressive modes and content of discourse, is an exercise in tokenism. Contained in time and space, its impact is limited, since any move toward liberalization is constrained by the imperatives of control, which resonates with the state's espousal of 'Asian Values' as they inform state-society relations. It is this same espousal of Asian values, so called, which also represents a contemporary strain of cultural relativism in human rights discourse. This view postulates that the enjoyment of civil and political rights is contingent on cultural and economic particularities.[148]

Furthermore, another obstacle for the operation of Speakers' Corner is the judiciary, 'as is evident in the political libel …, is largely in agreement with the government's articulation of Asian values as the ordering principle for balancing rights and community

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[145] See *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, (2) (d) (ii) (1st Sept., 2000).
[146] *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, 4(1) (b) (1st Sept., 2000).
[147] *Public Entertainments and Meetings (Speakers' Corner) (Exemption)* Cap. 257. S 16. Order 3, 5(1) (a) (b) (1st Sept., 2000).
[148] Thio, above n 81, 522-523.

interests'.[149] Those principles 'mute the effectiveness of free speech in promoting accountable, transparent government'.[150]

3.3.5 Conclusion

'The pragmatic management of speech by gradually increasing free political space, in order to encourage citizen participation in public affairs, is an antidote — progressively applied — to a political apathy exacerbated by chilled political speech',[151] because:

> Fair comments and active public debate over legitimate matters of public interest facilitates such confidence, removing suspicions that information and truth are being suppressed. Such degrees of freedom help distil a genuine community-based — not state-dictated — consensus on public affairs. Political speech is necessarily a dialogue, not a monologue, even if the government initiates, moderates, and can guillotine discourse on public policy.[152]

3.4 Political Free Speech in India

Free speech plays the role of facilitating the exchange of diverse opinions and is essential for maintaining democracy, and to political pluralism and personal autonomy. Especially in a democratic nation such as India, 'dialogue facilitates the testing of competing claims and obtaining of diverse input into political decision making'.[153] Hate speech, on the contrary, as a threatening form of communication is opposed to democratic principles. Hate speech 'not only asserts personal opinion but also aims to prevent segments of the population from participating in deliberative decision making.'[154]

In other words, on the one hand, as modern societies are becoming more diverse, the fundamental right of freedom of speech plays the role of reflecting and reinforcing pluralism by encouraging tolerance of different opinions. On the other hand, the

[149] Ibid 523.
[150] Ibid 524.
[151] Ibid 522.
[152] Ibid 524.
[153] Alexander Tsesis, 'Dignity and Speech: The Regulation of Hate Speech in a Democracy ' (2009) 44 *Wake Forest Law Review* 497, 497.
[154] Ibid 501. See also Charles Ogletree, 'The Limits of Hate Speech: Does Race Matter? ' (1996) 32 *Gonzaga Law Review* 491, 502; Alexander Tsesis, 'The Boundaries of Free Speech ' (2005) 8 *Harvard Latino Law Review* 141 , 149.

potential of hate speech to incite conflict and intolerance due to diversity may be an inherent trait of modern pluralistic democracy and poses a threat to public order.[155]

India's coexisting extremes of wealth and poverty as well as different classifications of contradictory religious groups (even within close proximity) form a foundation for its paradoxes and potential ground for hate speech. The most dominant religion in India today is Hinduism. Buddhism and Jainism are two other ancient religions. The largest non-Indian religion is Islam, followed by Christianity, Zoroastrian and Judaism.[156]

Political hate speech is a topic which cannot be neglected when India's political speech is being discussed. There are three reasons: First, political hate speech has flourished in India in electoral campaigns in recent years.[157] Second, the destructive effect of political hate speech can be both physically and psychologically damaging to the least powerful people or minorities in society.[158] 'Political hate speakers seek to intimidate targeted groups from participating in the deliberative processes.'[159] The freedom to insult or intimidate with political speech a vulnerable group prevents them from enjoying equal rights in public affairs. Third, to certain extent, political hate speech has threatened India's secular democracy.[160]

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[155] Stuart Chan, 'Hate Speech Bans: An Intolerant Response to Intolerance ' (2011) 14 *Trinity College Law Review* 77, 80. Chan regards hate speech as a manifestation of underlying intolerances in society. He said 'it is a means of communicating the prejudicial and discriminatory ideas, attitudes and opinions which increasingly beset culturally diverse modern democracies. Thus hate speech bans must be understood as only suppressing the symptoms of intolerance and discrimination in society, mitigating the harms that could result from these ills'. See ibid 83.

[156] Aharon Daniel, *Religions in India* (18 September 2015) Tripod <http://adaniel.tripod.com/religions.htm>.

[157] 'Two recent decisions by India's Supreme Court have brought back the focus on political hate speech. On January 30, [2014] the court decided to review a set of controversial rulings - popularly known as the Hindutva Judgements, which hate-mongering politicians have been using with impunity. Then, on March 12, [2014] the court, while stopping short of cracking down on political hate speech, asked the Election Commission to examine ways of eradicating this malaise.' See Saurav Datta, *Political hate speech flourishes in India* (18 March, 2014) ALJAZEERA <http://www.aljazeera.com/indepth/opinion/2014/03/political-hate-speech-india-201431832847177887.html>.

[158] 'Although the spread of intimidating hate speech does not always lead to the commission of discriminatory violence, it established the rationale for attacking particular disfavoured groups.' See Tsesis, above n 153, 505.

[159] Ibid 499.

[160] 'Permitting persons or organizations to spread ideology touting a system of discriminatory laws or enlisting vigilante group violence erodes democracy'. See ibid 506. See also Steven Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression ' (1998) 78 *Boston University Law Review* 1275, 1375-1376.

> As much as self-expression is fundamental to democratic institutions, it can, nevertheless, be balanced against the social interest in safeguarding a pluralistic culture by preventing the instigation of demagogic threats.[161]

When harassing speech is disguised as political speech, it leaves no room for democratic debate. Some historical examples have demonstrated how hate groups developed ideologically-grounded organizational infrastructures based on destructive messages. Examples listed are Nazi Germany[162] and Rwanda, where 'politicians relied on anti-Semitic and anti-Tutsi diatribe to temporarily gain control of the government'.[163] In addition, hate speech 'extols injustices, devalues human worth, glamorizes crimes, and seeks out recruits for antidemocratic organizations.'[164] Moreover:

> A danger to democracy from hate speech is that, through repetition, the violent paradigm of treatment toward disparaged groups can become inculcated into destructive social practices. In this way, the internalization of hate messages can not only affect immediate conduct but also inform habitual behaviour toward social groups.[165]

In India, recent trends tend to show that hate speech has been carried out by a dominant social and political group during the election.[166] Political hate speakers aim, with those who share the same visions, to manifest hostility rather than be involved in political debate, and espouse exclusionary rather than democratic perspectives.[167] Therefore, if it is a compelling governmental policy to protect the electoral process against the harassment of voters, the urgency of protecting the electoral process from political hate speech by political parties or candidates is even more compelling, because it is more offensive to, and poses a long-term threat to, the social well-being of a democracy.

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[161] Tsesis, above n 153, 508.

[162] 'Before Nazis began implementing the attempted genocide of the Jews, German political folkore regarded Jews as vermin, unworthy of life and requiring fumigation'. See ibid 505-506.

[163] Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide ' (2008) 48 *Virginia Journal of International Law* 485, 501. See also Tsesis, above n 153, 501-502.

[164] Chris Demaske, 'Modern Power and First Amendment: Reassessing Hate Speech ' (2004) 9 *Common Law & Policy* 273 , 283, 291. See also Tsesis, above n 153, 504.

[165] Tsesis, above n 153, 519.

[166] 'Amit Shah, a close aide of the opposition prime ministerial candidate, Narendra Modi, was momentarily banned by the EC after calling for "revenge" and "to teach a lesson" to people who he said had committed "injustices" in the riot-hit Muzaffarnagar district of northern Uttar Pradesh state.' See Baba Umar, *Getting Away with Hate Speeches in India* (24 April, 2014) ALJAZEERA <http://www.aljazeera.com/indepth/features/2014/04/getting-away-with-hate-speeches-india-201442474555948198.html>.

[167] 'The historical evidence that hate speech is critical to the perpetration of violence is overwhelming. Expressions meant to incite harm are not merely self-expressions; they can influence some of the most destructive behaviour.' See Tsesis, above n 153, 516.

There is imperative need to critically examine the issue of political hate speech in India not just from the angle of freedom of speech as was done with respect to Australia and Singapore, but from the aspect of electoral politics. This third part of the chapter will mainly focuses on the topic of political hate speech in India, and analyse its regulation, its causes, and examine its possible influences on the freedom of speech and democracy.

3.4.1 Cases related to Political Hate Speech

In India, many political leaders and candidates have been censured for alleged hate speeches during an election campaign.[168] Campaigning during the 2014 Indian election has drawn the attention of people worldwide; the campaign was depicted as the greatest show on Earth by the media as follows: [169]

> Electioneering for the Indian elections of 2014 has reached a fever pitch. Never before in the history of modern India has it seemed likely that the country is ready to cut its cord with the Congress Party's Gandhi family, and never before has its chief opposition party, the Bharatiya Janta Party (BJP) been projected as the sole inheritance of one man – Narendra Modi.
>
> The 'greatest show on Earth' – the Indian elections – is underway. There are 37 days of polling across 9 states, with a 814 million strong electorate, and more than 500 political parties to choose from. The hoardings all seem to scream the 'development' agenda, but unfortunately in India, this conversation seems to be skating on thin ice. Cracks quickly appear, and beneath the surface, political parties seem to be indulging in the same hate speech, communal politicking and calculations that work to polarise the electorate and garner votes.

Even the Supreme Court is looking for guidelines to prevent provocative statements by demanding the Law Commission of India draft guidelines to define such infractions

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[168] For example, 'The BJP's Amit Shah was briefly banned by the EC for his campaign speech in the riot-affected state of Uttar Pradesh, that, Shah had said that the general election, especially in western UP, "is one of honour, it is an opportunity to take revenge and to teach a lesson to people who have committed injustice". He has apologized for his comments. Azam Khan, a leader from the Samajwadi Party, was banned from public rallies by the EC after he insinuated in a campaign speech that the 1999 Kargil War with Pakistan had been won by India on account of Muslim soldiers in the Army. The EC called both these speeches, "highly provocative (speeches) which have the impact of aggravating existing differences or create mutual hatred between different communities."' 'Most recently, the Vishwa Hindu Parishad's Praveen Togadia has been reported as making a speech targeting Muslims who have bought properties in Hindu neighborhoods. "If he does not relent, go with stones, tyres and tomatoes to his office. There is nothing wrong in it… I have done it in the past and Muslims have lost both property and money," he has said. See Mahima Kaul, India's elections: Hate speech and the "greatest show on Earth" (22 April, 2014) Index: The voice of Free Expression http://www.indexoncensorship.org/2014/04/indias-elections-hate-speech-greatest-show-earth/.

[169] The News said 'Political parties seem to be indulging in the same hate speech, communal politicking and calculations that work to polarise the electorate and garner votes'. See Mahima Kaul, *India's elections: Hate speech and the "greatest show on Earth"* (22 April, 2014) Index: The voice of Free Expression <http://www.indexoncensorship.org/2014/04/indias-elections-hate-speech-greatest-show-earth/>.

before elections. 'According to the apex court, this would help in fine-tuning the norms that define hate speech and also remove ambiguity.' [170] The Court may realize that placing no limits on political speech is preserving the rights of speakers at the expense of targeted groups. Actually, the lack of prosecution for hate speeches was due to lack of enforcement and not because the existing law did not possess sufficient provisions. In order to curb hate speech, it is better that once the Law Commission approved the guidelines, the government should legislate to empower the Election Commission of India to prosecute offenders.[171]

The concerns of the Supreme Court, to some extent, show the powerlessness of India's Election Commission in curbing hate speech in elections, even though it is its job and responsibility to regulate and ensure a harmonious environment for election campaigns. The Election Commission has a Model Code of Conduct, and its main aim is to ensure a safe and fair election. The first three main points of Model[172] regulate the conduct of the political parties and candidates as follows:

> (1) No party or candidate shall include in any activity which may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious or linguistic.
>
> (2) Criticism of other political parties, when made, shall be confined to their policies and programme, past record and work. Parties and Candidates shall refrain from criticism of all aspects of private life, not connected with the public activities of the leaders or workers of other parties. Criticism of other parties or their workers based on unverified allegations or distortion shall be avoided.
>
> (3) There shall be no appeal to caste or communal feelings for securing votes. Mosques, Churches, Temples or other places of worship shall not be used as forum for election propaganda.

However, the outcome does not live up to its aims. Hate speech expressed by political parties or candidates in election campaigns has a far more detrimental influence on

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[170] See Anuja, *Existing laws sufficient to curb hate speech: Supreme Court* (March 12 2014) Live Mint & The Wall Street Journal <http://www.livemint.com/Politics/j65K3t2agISofDMajWEBbI/SC-asks-Law-Commission-to-look-into-issue-of-hate-speeches.html>.

[171] See ibid.

[172] Election Commission of India's Model Code of Conduct are the guidelines issued by the Election Commission of India for conduct of political parties & candidates during elections mainly with respect to general conduct, speeches, poling day, polling booths, election manifestoes, processions. The aim for such code is to ensure free and fair elections. The Model Code of Conduct comes into force immediately on announcement of the election schedule by the commission. For 2014 general election the Code came in force on 5 March 2014 when the Commission announced the dates. The Code remains in force till the end of the electoral process. The electronic version is available at http://eci.nic.in/eci_main/MCC-ENGLISH_28022014.pdf.

society than any conveyed by an ordinary person. This is because candidates can use the election verdict as an authorized licence to spread hate speech, provoke violence and hatred,[173] and thus actively threaten a nation's democracy from the political level. Therefore it is not an exaggeration to say that there is no graver urgency than to regulate political hate speech in India on the part of the legislature and judiciary to secure India's secular democracy.

3.4.2 Applicable approaches to political hate speech in India

3.4.2.1 Secure Equity as Moral Approach

To guarantee a more effective, harmonious and tranquil electoral speech environment, it is not enough only to state the aim of hate speech laws; in other words, it is not enough for law to be only deployed to facilitate better community relations, but without specifying an approach, which should be universally accepted voluntarily. As a solid foundation is needed for building a house, so too an acceptable approach is required to secure an ideal speech environment in which to conduct elections.

A moral approach based on the principle of equality is one of the approaches India could consider.[174] The rationale for this approach is that like other individual rights, freedom of speech has to give way to other democratic values in some circumstances; equality of human dignity is one of them. When the social impact or harm caused by the speech relating to ethnicity, race, sexual orientation or national origin is greater than its expressive value, the social valuation of personal dignity, and society's interest in order and morality allow for some limitation on the content of speech and any benefit the speaker might derive from the speech.[175] 'Because intimidating hate speech has so often inflamed dangerous attitudes, the value of such expression should be balanced against the likelihood that it will cause harm.'[176] Therefore, equality can be a valid foundation for a moral approach.

Such equality has been defined as 'that government has no power to treat the speech of similarly situated persons differently; potential interpersonal friction exists where the

[173] 'The spread of ethnic and racial hatred continues to elicit violence throughout the modern world.' See Tsesis, above n 153, 510.
[174] See ibid 502.
[175] Ibid 502, 504.
[176] Ibid 508.

speech of one person threatens the rights or safety of another'.[177] That is, it is the obligation of a contemporary rational pluralistic society to safeguard individual expression along with 'promoting egalitarian principles against harming others' safety and dignity'.[178] However, India treats the right to expressive freedom more as a legal right rather than a natural right (or a universal human right).[179] In the Constitution of India, the right to free speech is described as 'the right conferred by' the state and is affirmatively granted to the people in Art 19 (1). If government becomes the source of the right to free speech, the state restrictions on free speech will be easier to justify.

In the article *Hate Speech and Equality*, Bright draws upon the concepts of dignity and treating persons as equals; she explores the potential of equality as the best foundation of a moral approach. Bright did not give a specific definition to 'equality', but acquiesces in its normal meaning — it is wrong to judge or rebuke a person on the ground of his race or religion.[180] Bright's justification is that she considered equality as 'the sole relevant moral criteria for determining whether the proscription of hate speech is justified'.[181] However, whether the principle of equality is the best or the sole criteria for a moral approach needs time to be tested, and it would be premature to make a rash conclusion.

However, equality is an ideal moral theory to be applied into practice of the free speech principle. Based on equality, each person has the right of free speech. For example, individuals' or groups' political or religious views are open to attack by hate speakers. It helps to determine the reasonable scope of the free speech principle. Equality will direct the speaker and the hearer to discern the intrinsic value of freedom of speech, and any proscriptions on speech are demanded to be justified or discussed.[182] The ideology of equality is a prerequisite to treating a person as an autonomous being and treating him/her justly.[183]

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[177] Ibid 497.
[178] Ibid.
[179] See *Indian Constitution*, Art 19 (1) (2). Natural rights are different from legal rights. Natural rights are universal and inalienable and are those not contingent upon the laws, customs or beliefs of any particular government or culture.
[180] Abigail Bright, 'Hate Speech and Equality ' (2005) *UCL Jurisprudence Review* 112, 112.
[181] Ibid.
[182] Ibid 113.
[183] Stephen Guest, 'Why the Law is Just ' (2000) *Current Legal Problems* 31 , 31-52.

> Without equality, our sharpened appreciation of principle, including equal concern and respect, the consideration of individuality, autonomy, and dignity is forever beyond our reach. Equality makes sense of principle.[184]

In order to secure a pre-eminent position for equality as the moral approach, Bright challenged the following two theories: one considers speech as instrumental arguments, the other as wounding arguments. Instrumental grounds identify freedom of speech in an instrumental way — 'securing and sustaining positive conditions of mutuality and responsibility within a community.'[185] Instrumental theory argued that divisive speech needs to be censored for better community relations and democratic discourse.[186] Even though this approach aims to sustain and secure a positive condition within a society, 'there is no demonstrable nexus shown between incursions on speech and conducive community-living.'[187]

The 'wounding approach' to speech aims to show sympathy to the victim of hate speech.[188] However, it is not satisfactory without taking further protective action; 'it fails to give shape to what is special about the link between hate speech and the moral content of the speech'.[189]

Therefore, a more substantial approach is needed to protect freedom of speech. A moral element attaching to the protection of any form of speech, including speech derogatory of a race or religion is a potential approach that India could consider. However, the specific practical means require considerable time to achieve; it is not a one stop procedure. Bright stated her perceptions as follows:

> Taking the liberty of the hate-speaker to equal participation in a democracy as the starting point, then look to whether the speaker has offended the principle of equality…[190]

Participation in debate in a democracy guarantees that no person is silenced and maintains the moral position of equality, but equal participation alone is not sufficient to curb hate speech in political elections as expressed by political parties and candidates.

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[184] Bright, above n 180, 115.
[185] Ibid 114.
[186] Ibid 113-114.
[187] Ibid 114.
[188] Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story ' (1989) *Michigan Law Review* 2320, 2320.
[189] Bright, above n 180, 114.
[190] Ibid 117. The principle of equality refers to, for example, equal treatment and the right to non-discrimination.

Equality still needs to combine with certain laws to prevent the dangerous dissemination of messages without interfering with legitimate discourse. It has been said that, hate speech has a silencing effect:

> (Hate Speech) discouraging social integration and participation by imparting the message that members of identifiable groups should not be given equal standing in society; they are not human beings deserving of equal concern, respect or consideration. The resultant harms caused by this message run directly counter to the values central to a free and democratic society.[191]

In order to balance the participation in debate with the prevention of hate speech, laws should develop the ability to mobilize effectively among the three governmental powers — legislative, judicial and executive.

3.4.2.2 Applying International Convention into Domestic Law

Article 20 of the *International Covenant on Civil and Political Rights* states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[192]

The United Nations General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* on 9th of December, 1948 and was registered ex officio on 12 January 1951.[193] In 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* was adopted by the United Nation, [entry into force on 4 January 1969] and prescribes punishment for the following behaviour:

> All dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.[194]

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[191] Chan, above n 155, 83.
[192] *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), 53, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[193] *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 (III), at 174, U.N. Doc. A/810 (Dec.9, 1948), available at http://untreaty.un.org/English/CTC/Ch_IV_1p.pdf.
[194] *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX), at 48, U.N. GAOR 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx.

Free speech is critical to collective decision making. However, when political hate speech is not reasonably prohibited in the electoral process, such discriminatory conduct undermines not only the collective autonomy but also the democratic ideology.

3.4.3 Conclusion

India has put much more effort into restricting individuals' hate speech than on political speech expressed by electoral parties. There are two reasons for the different balance: one of them is the preservation of social harmony as mentioned above; the other implied reason is 'the government's fear of losing its authority, or at least the appearance thereof, and the impact of oppressive majoritarian communal politics.'[195] However, when related to political hate speech, no practical restrictive means have been put into effect, and not enough attention has been paid to preventing its harmful influences.

The dilemma in regulating political hate speech has disclosed Indian's legal and political tension on political speech. Reconciling the mode of classical liberal and common law principles which were inherited from the British colonial government (such as freedom of speech) with traditional, communal social values (such as harmony and well-being) is a long-term strategy in India.[196]

The way of the Indian *Constitution* in treating freedom of speech as legal right imposes more flexible reasonable restrictions on free speech. It is one of the reasons that political hate speech is potentially hard to prevent. Political speech has been abused by the powerful for suppressing political adversaries and dissent, and has had an inconsistent application by electoral parties and candidates.[197] Instead, freedom of speech should be considered as a 'shield to protect the vulnerable or to promote cultural, religious, and political pluralism'.[198] The detrimental effects of political hate speech 'undermine a

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[195] Daniel Hantman, 'Shaking Fists and Simmering Craniums: India's Tolerance for Restricting Socially Offensive and Emotionally Harmful Speech ' (2013) *The Indonesian Journal of International & Comparative Law* 73457, 74. This theory could be far more persuasive based on the ealier mentioned specific concrete examples of the kind of hate speech that had been indulged in during the election, and also its evil consequences.

[196] The tension can also be called as tension between India's Western governing system and indigenous communal social structure.

[197] For example, 'starting in the early 1980s, India's expression regulatory regime has been successfully mobilized by conservative, mainstream Hindus to attack religious minorities and suppress dissenting Hindu voices.' In other words, 'Hindus utilizes India's speech regulations to attack what they view as unorthodox constructions of their religious liturgy'. See Hantman, above n 195, 102-103.

[198] Ibid 103.

healthy public discourse and the personal dignity of India's citizens', and freedom of speech itself.[199]

3.5 Conclusion

Australia, Singapore and India each accept freedom of speech, but freedom of political speech is far different in each. The practicalities of freedom of political speech are constrained by each nation's cultural perspective and values, having regard also to diversity and plurality of customs, religion, and traditions in different nation States.

The development of freedom of political speech in Australia was gradual but steady. The existence of implied political communication was reaffirmed and secured by the High Court (the case of *Lange*). In Singapore and India, the value of freedom of political speech is limited through the pressure created by legal and political tensions on political speech, and the influence of Asian values, such as the preservation of social harmony and public order (see 2.3.3, 3.3.1 and 5.5.2 for discussion on Asian values).

[199] Ibid 104.

Chapter 4 — Cyber-governance and Freedom of Speech

4.1 Introduction

The most important decisions affecting the future of freedom of speech will, however, not occur in the constitutional regimes of nation States like Australia, India and Singapore, but rather will be decisions about technological design, and legislative and administrative regulations affecting cyberspace. Cyber-sovereignty and cyber-governance are increasingly contested issues in the digital world.

Cyber-governance has a subtle relationship with freedom of speech. As speech in cyberspace has become increasingly important, a number of governments have made widely criticized attempts to control it. Cyber-governance is evolving and is more about the application and development by governments, the private sector and civil society, in their respective roles, of shared norms, rules, principles, programmes and decision making procedures that shape the use of cyberspace and its evolution. The policy issues of cyber-governance to date have focussed primarily on the liability of intermediaries for unlawful speech, while simultaneously ensuing that the right to privacy is protected. It not uncommon that the policy of cyber-governance may include erecting substantial barriers to individuals' ability to engage in anonymous speech in cyberspace, which is a significant component of the right to free speech. Cyber-governance is becoming more essential at a time when an open cyberspace is critical to a nation's freedom of speech and digital innovation and also poses significant problems for individual nations' security and their democratic national governance.

In order to have a broad and new perspective on the role and effect of cyberspace in social life, this Chapter begins by examining the varying definitions of cyberspace and the Internet. It will then go on to the discussion of whether sovereignty in cyberspace can be established in the near future, because cyber-sovereignty is connected to cyber-governance. The understanding of the cyber-sovereignty principle has a possible effect

on the evolution of the governance of cyber-governance and consequently, also on freedom of speech in cyberspace.[1]

However, compared to cyber-sovereignty, cyber-governance is a more realistic and more crucial topic in the present digital world. Therefore, the focus of the thesis is cyber-governance. Five main possible models for regulating cyberspace are discussed: no-governance, government-governance, self-governance, government and private actor-governance, and international-governance. This Chapter will explore those five models in detail especially with respect to Australia, Singapore and India, and on the basis of that analysis draw tentative conclusions also to the type of governance most appropriate to the development of freedom of speech in cyberspace.

4.2 The Varying Definitions of Cyberspace and the Internet

'Cyberspace' has been described as 'critical infrastructure' based on the 42 U.S. Code § 5195c (2003) — Critical infrastructures protection:[2]

> In this section, the term 'critical infrastructure' means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.[3]

In addition, also in 2003, in the United States the following sectors were identified as critical infrastructure according to *the National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*: 'agriculture, food, water, public health, emergency services, defence industrial base, government, information and telecommunications, energy, transportation, banking and finance, chemical industry and hazardous materials, and postal and shipping.'[4]

Even though the report (the announcement of the strategy by the White House) did not expressly mention cyberspace in the list, it is clear that cyberspace can be classified as

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[1] See also Yi Shen, *Cyber Sovereignty and the Governance of Global Cyberspace* (Chinese Political Science Review 2016).

[2] Michael Preciado, 'If you Wish Cyber Peace, Prepare for Cyber War: The Need for the Federal Government to Protect Critical Infrastructure from Cyber Warfare ' (2012) 1(99) *Journal of Law & Cyber Warfare* 99, 120.

[3] 42 U.S. Code § 5195c - Critical infrastructures protection, Chapter 68, Subchapter IV-B, § 5195c (e), 2003. Available at: http://www.law.cornell.edu/uscode/text/42/5195c.

[4] The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets, the White House, Washington, February 2003. Available at https://www.dhs.gov/xlibrary/assets/Physical_Strategy.pdf.

information and is playing a far greater role in society than physical infrastructure did. As critical infrastructure, cyberspace has been defined historically from different perspectives.

In 1984 William Gisbson coined the term 'cyberspace' in his science fiction novel '*Neuromancer*';[5] the internet has been considered as the most outstanding example of this realm of communications networks that are accessed through computers. For Michael Sinks, the term in this original context was used to refer to 'a shared virtual environment, whose inhabitants, objects, and spaces comprise data that is visualized, heard and touched.'[6] 'The alternative descriptor for this is "on-line", relating the form of communications to its mode of transmission by telecommunication lines'.[7] The definitions of cyberspace have undergone alteration[8] over the course of time. A more simplistic definition of cyberspace is preferred by modern scholars. Wingfield used plain language for its definition:

> Cyberspace is not a physical place — it defies measurement in any physical dimension or time space continuum. It is a shorthand term that refers to the environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures commonly referred to as the World Wide Web.[9]

Not only do definitions of cyberspace change over time, but also differ from one government department to another within the United States.[10] The Department of Defence defined cyberspace to mean a 'global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.'[11] Cyberspace was redefined as the

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[5] William Gibson, *Neuromancer* (Ace Books, 2000). See also Jason Healey, 'The Five Futures of Cyber Conflict and Cooperation' (2011) 11 *Georgetown Journal of International Law* 110, 117.
[6] Michael Sinks, *Cyber Warfare and International Law* (Air Command and Staff College, 2008), 3.
[7] Grainger Grainger, 'Freedom of Expression and Regulation of Information in Cyberspace: Issues Concerning Potential International Co-operation Principles for Cyberspace ' (1999) *International Trade & Business Law* 93, 94. See also Bradley Raboin, 'Corresponding Evolution: International Law and the Emergence of Cyber Warfare' (2011) 31(2) *Journal of the National Association of Administrative Law Judiciary* 602 , 607.
[8] Compared to 1990s, today cyberspace is most commonly associated with notions of the Internet, the World Wide Web, and globally connected computer systems and operating networks. See Sinks, above n 6.
[9] Thomas Wingfield, *The Law of Information Conflict: National Security Law in Cyberspace* (Aegis Research Corporation 2000), 17.
[10] Raboin, above n 7, 607-608.
[11] Joint Chiefs of Staff, Joint Publication 1-02, Dep't of Def. Dict. Of Military & Assoc'd Terms 141 (2001), available at http://www.dtic.mil/doctrine/j el/newpubs/jp l _02.pdf.

'total interconnectedness of human beings through computers and telecommunication without regard to physical geography' by the Congressional Research Service in its 2001 report.[12]

For the purpose of national military strategy, in 2006 the U.S. Department of Defence defined cyberspace as 'A domain characterized by the use of electronics and the electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructures.'[13]

Five years later, the *U.S. Department of Defence Dictionary of Military and Associated Terms* defined cyberspace as 'A global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.'[14]

In 2011, the U.S. Department of Defence stated:

> Cyberspace is a defining feature of modern life. Individuals and communities worldwide connect, socialize, and organize themselves in and through cyberspace ... Cyberspace has become an incubator for new forms of entrepreneurship, advances in technology, the spread of free speech, and new social networks that drive our economy and reflect our principles.[15]

The continuing changing of the definition by the U.S. Department within five years demonstrates that the role of the Internet has been broadened and its effect in social life has been described much more than 'a tool for communication, a vast [sum] of information, a trading ground for commerce or an open space for socialisation'.[16] And 'it

[12] Steven Hildreth, Congressional Research Service Report for Congress No. Rl 30735, Cyberwarfare 11 (2001) [hereinafter 2001 CRS Report]. See also Raboin, above n 7, 608.
[13] Chairman of the Joint Chiefs of Staff, U.S. Department of Defense, National Military Strategy for Cyberspace Operation 3 (December, 2006). Available at http://www.dod.mil/pubs/foi/joint_staff/jointStaff_jointOperations/07-F-2105doc1.pdf.
[14] U.S. Department of Defence Dictionary of Military and Associated Terms, Joint Publication 1-02, 93. 8 November 2010 (As Amended Through 31 January 2011). Available at http://ra.defense.gov/documents/rtm/jp1_02.pdf. See also Stephen Tully, 'Protecting Australian cyberspace: Are our international lawyers ready?' (2012) 19 *Australian International Law Journal* 49, 50.
[15] U.S. Department of Defense Strategy for Operating in Cyberspace 1 (July 2011). Available at http://www.defense.gov/news/d20110714cyber.pdf.
[16] Constance Zhang, 'Regulation of the Internet- New Laws & New Paradigms ' (2006) 17 *journal of Law, Information and Science* 53, 53-54.

is the content the Internet generates and the activities it facilitates that make it the fascinating cyberspace we know today'.[17]

Cyberspace transcends international boundaries and territorially-based barriers. Todd regarded cyberspace as a man-made domain designed to transfer data and information:

> I define cyberspace as an evolving man-made domain for the organization and transfer of data using various wavelengths of the electromagnetic spectrum. The domain is a combination of private and public property governed by technical rule sets designed primarily to facilitate the flow of information.[18]

Folsom chose a more technical definition to describe cyberspace — 'as an embodied switched network for moving information traffic, further characterized by varying degrees of access, navigation, information-activity, augmentation (and trust)'.[19] Importantly, he gave a definition of the Internet to differentiate it from cyberspace — the Internet was 'a tool that creates a gateway to cyberspace. The tool, or gateway, is itself an embodied switched network for moving information. The Internet is the prime example of such a gateway'.[20] According to this definition, the internet is a prerequisite for cyberspace.

'A consensus does seem to be developing that cyberspace is a domain.'[21] Unfortunately, in this man-made global 'domain'[22], international law has failed to keep pace with the new applications of present technologies in the regulation of cyber-governance and cyber-sovereignty for two reasons:[23] First, 'the current international legal paradigm predates cyberspace and cannot adequately address the various issues raised by

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[17] Ibid 54.

[18] Major Graham Todd, 'Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition ' (2009) 64 *Air Force Law Review* 65, 68. This definition was developed jointly with his cyberspace law cohourt, Major Noah Bledstein. See also Daniel Ryan et al, 'International Cyberlaw: A Normative Approach' (2011) 42 *Georgetown Journal of International Law* 1161, 1167.

[19] Thomas Folsom, 'Defining Cyberspace (Finding Real Virtue in the Place of Virtual Reality)' (2007) 9 *Tulane Journal of Technology & Intellectual Property* 75, 80. Ryan gave a similar definition in his paper: 'The combination of the Web, a system of interlinked hypertext content, the Internet, a system of computers and electronic communications infrastructure, and the user community.' See Ryan et al, above n 18, 1168.

[20] Ibid.

[21] Ryan et al, above n 18, 1167.

[22] Tully predicted that 'US Department of Defense will strategically address cyberspace as an operational domain in which to organise, train and equip itself so as to take full advantage of cyberspace's potential.' See Sinks, above n 6, 51.

[23] Todd, above n 18, 66.

cyberspace'.[24] Second, 'the rapid growth of cyberspace has outpaced the ability of nations individually and the international community as a whole, to understand and control it'.[25]

More definitions will emerge in the new digital world as the role and effect of cyberspace in social life has been broadened. In order to address the new issues raised by the new technology, such as cyber governance, the international community has to determine the appropriate response, preparation or framework for the debatable proposition of establishing sovereignty in cyberspace.

4.3 The Consideration of Establishing Sovereignty in Cyberspace

In the twenty-first century, securing the advantage in cyberspace is an essential issue. Unlike the twentieth century, in the twenty-first century the future of the system of free expression requires different sources of assistance: 'The most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislative and administrative regulations, the formation of new business models, and the collective activities of end-users.'[26] Cyber-sovereignty is an increasingly contested issue in the digital world.

Sovereignty is understood in jurisprudence as the full power and right of a governing body to govern itself without any interference from outside sources or bodies.[27] In political theory, sovereignty is a substantive term designating supreme authority over some polity. *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted in 1970 by the United Nations General Assembly, provided that 'no state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state'.[28]

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[24] Lieutenant Colonel Patrick W. Franzese, 'Sovereignty in Cyberspace: Can it Exist?' (2009) 64 *Air Force Law Review* 1, 6.
[25] Ibid.
[26] Jack Balkin, 'The Future of Free Expression in a Digital Age ' (2009) 36 *Pepperdine Law Review* 427, 427-428.
[27] For example, Article 79 (2) of the *United Nations Convention on the Law of the Sea* limits the extent to which a coastal State may interfere with submarine cables on its continental shelf. See *United Nations Convention on the Law of the Sea*, 10 December 1982.
[28] *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. Doc. A/8028 (24 October 1970), 121 ff.

The accepted definition of 'sovereignty' was set forth in the *Island of Palmas* Arbitral Award of 1928: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State.'[29] Sovereignty refers to 'supreme and full authority and in international law it connotes authority and power over a certain territory and over its people to the exclusion of any other authority'.[30] In Black's Law Dictionary, the word 'Sovereignty' is defined as '1. Supreme dominion, authority or rule. 2. The supreme political authority of an independent state. 3. The state itself'.[31] Sovereignty was conceptualized in four ways: domestic sovereignty, interdependence sovereignty, international legal sovereignty and Westphalian sovereignty.[32] Sovereignty was also defined by its function, which allows nations to protect democratic decision-making and individual liberties.[33]

Cyberspace tests a State's independent sovereignty by challenging a State's ability to regulate trans-border movements.[34] It is important to disentangle sovereignty as a concept from territory and link the essence of sovereignty to power, because nationality and territoriality as bases of jurisdiction can be interpreted extensively and expand further the scope of a State's jurisdiction and thus sovereignty. As a result, sovereignty can extend not only beyond any allocated territory but also to non-territorial entities.[35] The questions about sovereignty in cyberspace could be stated as: Can national sovereignty exist in cyberspace and how does cyberspace impact national sovereignty?

Before States can realize and establish sovereignty in cyberspace, four significant requirements must be addressed and met: first, recognizing and taking additional steps to shape cyberspace as a sovereign domain, over which each individual State is able to

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[29] *Island of Palmas* (Neth. v. US) 2 R.I.A.A. 829, 838 (Perm, Ct. Arb. 1928).
[30] Nicholas Tsagourias, 'The Legal Status of Cyberspace ' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015) , 17.
[31] Black's Law Dictionary 1430 (8th ed. 2004).
[32] 'Domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control trans-border movements; international legal sovereignty, referring to the mutual recognition of states; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.' See Stephen Krasner, *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press 2001), 6-7.
[33] Julian Ku and John Yoo, 'Globalization and Sovereignty ' (2013) 31(1) *Berkeley Journal of International Law* 210, 211.
[34] Franzese, above n 24, 8.
[35] Tsagourias, above n 30, 18-19.

assert sovereignty. Second, States have to desire sovereignty in cyberspace.[36] Third, national civilian expectations should be a focus, which means individuals are able to access the internet freely. Finally, States must have the capacity to solve, monitor and control numerous technical challenges to make sovereignty in cyberspace a reality.[37]

Even though discussion about the sovereignty in cyberspace has become a hot topic, its future is still uncertain, as no one can 'predict the conditions under which an international consensus towards sovereignty in cyberspace might evolve or how long that development might take.'[38] 'The process will begin only after more and more States realize that cyberspace is a domain where they can exert sovereignty and that is it their interests to do so.'[39]

Consequently, it is still too early to make an assessment as to whether sovereignty in cyberspace can be established in the near future. However, as a new technology, cyberspace has the potential to enhance sovereignty by strengthening national and global governance:

> From the perspective of national governance, the Internet can be harnessed to promote the Rule of Law, which is critical for good governance of societies all over the world. Globally, the Internet can contribute to international cooperation by: (1) strengthening international law; (2) strengthening economic interdependence; (3) empowering non-governmental organizations and improving their abilities to contribute productively to the development of international regimes designed to deal with global problems; and (4) supporting international security mechanisms. [40]

One of the best examples is that sovereignty can be reoriented rather than be undermined when responding to information brought to decision makers by cyberspace.

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[36] Franzese predicted China may prefer to preclude state sovereignty in cyberspace, since state sovereignty in cyberspace 'might force a degree of openness that China does not want', which 'require agreed-on rules and procedures for when and what type of content or information can pass through cyberspace, across borders, and directly to the citizens of each state', by following Article 19 of the *Universal Declaration of Human Rights*. Thus 'any international regime regarding cyberspace might incorporate these values; something that China might oppose.' See Franzese, above n 24, 36-37.

[37] Ibid 33-40.

[38] Ibid 38.

[39] Ibid 38.

[40] See Henry Perritt, 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance ' (1997-1998) 5 *Indiana Journal of Global Legal Studies* 423, 424.

Thus, in return, cyberspace can support government to be more effective in shaping public opinion:[41]

> Liberal governments can use the Internet as a powerful engine of open government by providing the citizenry with more information about the operation of the government and the effectiveness of laws. The Internet provides a powerful unification device by making laws and legal materials of all types widely available for reference, adoption, or adaptation … The Internet has great potential to help transition countries not only to establish democracy and the Rule of Law but also preserve them.[42]

Although no State may claim sovereignty over cyberspace, a State may exercise control over cyber infrastructure and activities within its sovereign territory.[43] Territorial sovereignty generally extends over the territory of a State and protects it from undue interference by any other State.[44] The aspect of territorial sovereignty including the exercise of full and exclusive authority over a territory including its air space, protects physical components of cyber infrastructure that are located on a State's territory or under its exclusive jurisdiction.[45] Compared to cyber-sovereignty, cyber-governance is a more realistic discussion in the present digital world.

4.4 The Feasibility and Exploration of Cyber-governance

4.4.1 The Necessity for Cyber-governance

The demand for a more organized and accountable cyberspace system appears to be growing as the Internet becomes a new method of communication and convenient access to information worldwide. A transparent and non-discriminatory legal environment is required in order to maximize the benefits of the information society. A trustworthy governance system needs to be developed.

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[41] Ibid 426.
[42] Ibid 435. One of the problems with this view is that few people can actually understand the laws (legislation) or the legal cases interpreting them: and there is a paucity of informed comment in the general media, and also on the net…. For example, Commonwealth legislation is available on comlaw.gov.au, and all Commorwealth court cases' finding are available through the Courts' websites and also on Austlii – but it is very doubtful if any people other than lawyers (your ordinary person in the street) ever use these sources, or could understand them if they did access them.
[43] International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press 2013), 15-18.
[44] Katharina Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace*. International Law, International Relations and Diplomacy, NATO CCD COE Publication, Tallinn 2013, 191.
[45] Ibid 162.

To certain extent, dangers and risks always accompany benefits when referring to new technologies such as cyberspace. In 1991, the National Research Council issued a report on the topic of 'security and trustworthiness' under the command of the Advanced Research Projects Agency, which is a research branch of the US Department of Defence.[46] The report noted presciently that 'Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb.'[47]

Highlighting the risks of the Internet has become a reality in today's digital world in that the internet system is vulnerable to hostile actors, even as the global community is experiencing an ever increasing interdependence upon the Internet. Cyberspace as a platform can also be as dangerous as a battleground for war. To some extent, it still remains uncertain to law-makers and also under the existing international instruments in place, as to how to apply laws to cyber warfare. This phenomenon was viewed as 'the potential vulnerabilities — as well as opportunities — of an interconnected society'.[48] 'Internet's greatest virtue — expanding the number of users and creating a global marketplace of ideas — … also presents a grave security risk.'[49]

> Cyber threats pose fresh challenges to sovereignty and to international law on state responsibility … Cyber-attacks represent new ways of intruding on the sovereign prerogatives of states. As usual, the law has struggled to keep pace with technology.[50]

The following questions are required to be answered before cyber-attacks (whether from domestic or international actors) can be combatted: Who should govern the cyberspace? How to govern the cyberspace? How to judge whether a cyber-attack has reached the equivalence of an armed attack upon sovereign territory and self-defence is

[46] The name of Advanced Research Projects Agency has been switched to the name of Defence Advanced Research Projects Agency.
[47] Sys. Sec. Study Comm.. Nat'1 Research Council, Computers at Risk: Safe Computing in the Information Age (1991). See also Michael Gervais, 'Cyber Attacks and the Laws of War ' (2012) 1(8) *Journal of Law & Cyber Warfare* 8, 9-10.
[48] Marco Roscini, 'World Wide Warfare Jus Ad Bellum and the Use of Cyber Force' (2010) 14 *Max Planck Yearbook of United Nations Law* 85, 97-98. See also Gervais, above n 47, 10.
[49] Gervais, above n 47, 16.
[50] Peter Margulies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility ' (2013) 14 *Melbourne Journal of International Law* 1, 1.

approved? When does or might the reaction violate the general international prohibition on the use of force?[51]

Governance is a concept that has been used in a variety of ways.[52] The definitions for governance are not only various but also controversial. In general terms, the following definition is more persuasive than others:

> Governance refers to the rules, processes, procedures, and specific actions that impact the way in which power is exercised on a specific area of concern. Governance responds to the "who" question, or, who has the authority to make decisions with respect to a specific set of issues or problems, and therefore, who takes the responsibility for the issue area; that is, who has the mandate? [53]
>
> [In addition], Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfil their wants.[54]

Furthermore, the function of governance has been described in three levels:

> Governance describes the mechanisms an organization uses to ensure that its constituents follow its established processes and policies. It is the primary means of maintaining oversight and accountability in a loosely coupled organizational structure. A proper governance strategy implements a system to monitor and record what is going on, takes steps to ensure compliance with agreed-upon policies, and provides for corrective action in cases where the rules have been ignored or misconstrued.[55]

With regard to cyber governance, currently there is no authoritative definition available. However, there are many professional perspectives on internet governance:[56]

> Telecommunication specialists see Internet Governance through the eye of technical infrastructure; computer specialists focus on the development of various standards, languages and applications; communication specialists emphasize the facilitation of communication; human rights activists view Internet Governance

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[51] See *Charter of the United Nations*, Chapter I, and Article 2 (4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[52] 'In effect, governance has been used in the context of: the minimal state; Corporate Governance; the new public management; good governance.' See R.A.W. Rhodes, 'The new governance: governing without government' (1996) 44 *Political Studies* 4, 4.

[53] Mani Tripathi, Anshu Singh and Dipa Dube, 'Internet Governance: A Developing Nation's Call for Administrative Legal Reform' (2009) 37(3) *International Journal of Legal Information* 368 , 370-371.

[54] See James Rosenau and Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics* (Cambridge University Press 1992). See also Tripathi, Singh and Dube, above n 53, 370-371.

[55] Tripathi, Singh and Dube, above n 53, 371.

[56] See ibid.

> from the perspective of the freedom of expression, privacy, and other basic human rights; lawyers and jurists concentrate on jurisdiction and dispute resolution; politicians usually focus on issues related to their electorates, such as computer education and Internet security, and the use and misuse of internet services; and diplomats are mainly concerned with the process and protection of national interests. Thus, it can be said that an Internet Governance regime is very complex because it involves many issues, actors, mechanisms, procedures, instruments, and management of internet infrastructure.

In 2003 *the World Summit on the Information Society* (WSIS) released its working definition of internet governance as 'the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of the Internet'.[57] From the definition given by WSIS, internet governance is more likely to be a type of international governance.[58]

In 2005, the report of the Working Group on Internet Governance gave the following definition:

> Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision making procedures, and programmes that shape the evolution and use of the Internet.[59]

By contrast with other governance, internet governance is conducted by a more decentralised network of stakeholders and therefore would result in a more diverse distribution of authority throughout the regime.[60]

Cyber governance is an unresolved and global issue. Though cyberspace has come to be accepted as indispensable and of immense public utility, the need to establish its operation within a global legal framework is still a major challenge. Since the late 1990s the question of how the Internet should be governed has continued to be a contentious issue and a hotly debated topic internationally, but is only in recent years that 'increasingly sophisticated cyber-attacks, global geopolitical shifts, and social media-

[57] The World Summit on the Information Society, Tunis Agenda for the Information Society, 2005, para. 34, available at: http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.
[58] See also Tripathi, Singh and Dube, above n 53, 371-372.
[59] Report of the Working Group on Internet Governance (2005), page 4, art 10. Available at http://www.wgig.org/docs/WGIGREPORT.pdf.
[60] Jeremy Malcolm, 'The Space Law Analogy to Internet Governance ' (2007) 18 *journal of Law, Information and Science* 57, 58.

empowered political movements have exacerbated ideological disagreements and amplified the stakes for invested national governments.'[61]

The most contested issue in global cyber governance is who should be the governor for the international management of the cyberspace. Cyber governance bodies with decision-making powers demand a degree of accountability and legitimacy.[62] It is clear that there is still no consensus on who should govern cyberspace. Ramdial argued against both unilateral governance and multilateral governance because the former could potentially favour one country over others while the latter could impede technical advances and have bureaucratic dimensions that hamper Internet innovation and use.[63]

The most complicated issues relating to cyber governance are political ones. The maintenance of the internet and its technical administration is inherently non-political, but the discussion of internet governance is indeed politically grounded for the following reasons:

> Internet governance is not indicative of bureaucratic and burdensome oversight commonly associated with such systems. Rather, it is decentralized in the way information is accessed, processed, and produced. However, like other systems, the Internet requires oversight and coordination in order to run smoothly[64]… The Internet has evolved into a system that enables and empowers people to become socially, politically, and financially active, accessing information while also producing it for dissemination; thus, Internet governance, the method for controlling, administering, and maintaining the network system, inevitably takes on a technical as well as a political role.[65]

Another thing not to be ignored is that the political will to use the technological tools will increase accordingly along with the development of cyberspace. In fact, decisions concerning the issue of governance in cyberspace have become vital in that they will influence not only political and non-political affairs, but also the future of freedom of expression and democracy in cyberspace.

4.4.2 Possible Models for Cyber-Governance

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[61] Scott Shackelford and Amanda Craig, 'Beyond the New "Digital Divide": Analyzing the Evolving Role of National Governments in National Governance and Enhancing Cybersecurity ' (2014) 50(1) *Stanford Journal of International Law* 119, 121.
[62] Tripathi, Singh and Dube, above n 53, 375, 376. 380.
[63] Saretta Ramdial, 'Who Should Govern the Internet?
' (2007) 18 *LBJ Journal of Public Affairs* 71, 77.
[64] Ibid 72.
[65] Ibid 77.

There are five main possible models for regulating cyberspace: no-governance, government-governance, self-governance, government & private actor-governance and international-governance. It is essential to explore those five models in detail and analyse which is the type of governance most appropriate to the development of freedom of speech in cyberspace.

In considering the options, one critical question always will be: under conditions of digitization, which actors are able to win influence and whose claims have legitimacy?

4.4.2.1 No-Governance

Early in 1990s, the assertion of no-governance in cyberspace had pre-eminent popular position. John Perry Barlow,[66] co-founder of the Electronic Frontier Foundation, declared the independence of cyberspace on February 8, 1996 (*A Declaration of the Independence of Cyberspace*), in order to ensure that cyberspace avoided governmental intervention and legal regulation:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> … I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear…We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.[67]

In Barlow's declaration, he 'vehemently rejected the right of any national government to create laws for cyberspace'.[68] In other words, cyberspace should be immune from any

[66] John Perry Barlow is an American poet and essayist, a retired Wyoming cattle rancher, and a cyberlibertarian political activist who has been associated with both the Democratic and Republican parties. He is also a former lyricist for the Grateful Dead and a founding member of the Electronic Frontier Foundation. Since May 1998, he has been a Fellow at Harvard University's Berkman Center for Internet and Society. He has been identified by Time magazine as one of the "School of Rock: 10 Supersmart Musicians". See Kim, Wook (6 September 2012), John Perry Barlow, "School of Rock: 10 Supersmart Musicians", Time (magazine), retrieved 23 September 2012.

[67] John Barlow, *A Declaration of the Independence of Cyberspace* (February 8, 1996) <https://projects.eff.org/~barlow/Declaration-Final.html>.

[68] Amy Bomse, 'The Dependence of Cyberspace ' (2001) 50 *Duke Law Journal* 1717, 1717.

State claims to sovereignty, and from any State interference.[69] The self-organizing community[70] was a new approach to establishing a community, in this case the cyber-space community, non-hierarchical but collective. Barlow expressed 'a skeptical view of the legitimacy and feasibility of traditional forms of governance within cyberspace'[71] by rejecting the possibility of traditional regulation for cyberspace activity. Barlow implicitly acknowledged that governmental regulation is based on territoriality, jurisdiction, and citizenship. However, when referring to cyberspace, it is difficult to locate users' physical position and hard to identify whether any particular jurisdiction's law may apply.[72]

Another scholar who asserted a libertarian dream of no-governance is Lorenz Muller. He argued that it is the unique advantage of the internet that it facilitates global communications without political and geographical borders. He also noted that the internet proved to be immune to regulatory attempts of governments, and is a threat to authoritarian governments.[73] Muller argued that governments need to make a decision of when to control or lose control on these new technologies:

> Since the Internet is representing freedom of information and, at the same time, is already of enormous and steadily increasing economic significance, authoritarian governments and totalitarian societies have to face the dilemma either to try to stifle the new communication technologies at high economic and political costs or to lose control when permitting or even promoting the new technologies.[74]

However, the view that jurisprudential doctrines are inapplicable to cyberspace was rejected by Professor Jack Goldsmith; he explained that 'like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction'.[75] In his

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[69] See also Jonathon Penney, 'Privacy and the New Virtualism' (2008) 10 *Yale Journal of Law and Technology* 194, 196.

[70] I could not trace when the world 'self-organizing community' was first used. But it is confirmed that this phrase was popular early in 1990s. See *Self-organizing Community Networks*, available at <http://www.co-intelligence.org/P-neighbornets.html>.

[71] Harvard Law Review, 'The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance ' (2008) 121 *Harvard Law Review* 1387, 1389.

[72] Ibid. See also Stephen Lukasik, 'Protecting the Global Information Commons' (2000) 24 *Telecommunications Policy* 519, 525; See also Mary Franks, 'Unwilling Avatars: Idealism and Discrimination in Cyberspace ' (2011) 20(2) *Columbia Journal of Gender and Law* 224 , 236; see alsoPenney, above n 69, 196.

[73] Lorenz Muller, 'Cybersociety' (2000) 2 *Int'l L. F. D.* 163 , 164.

[74] Ibid.

[75] Jack Goldsmith, 'The Internet and the Abiding Significance of Territorial Sovereignty ' (1998) 5 *Indiana Journal of Global Legal Studies* 475, 476.

view, 'territorial sovereignty supported the regulation of communication taking place within a territory and of the local effects of conduct taking place outside the territory'.[76] Tully held the same view as Goldsmith: 'the enabling physical infrastructure is clearly located within the territorial jurisdiction of a state. Thus cyberspace, like any other territorial domain, is subject to national interests.'[77] Even Muller had noted that:

> Despite the associations of the 'Cyber'-word Internet users live in real space in front of a real screen. Their behaviour can cause real threats, real harms and real costs in the real space, which the Internet community has not internalized and cannot internalize. This applies not only to copyright violations, kiddie porn and hate speech, but also to hacker attacks and virus-writing.[78]

Basically, it is very difficult to regulate a network that has the potential of borderlessness: for example, in locating and suing or prosecuting people for their speech on the internet, particularly if the speech is anonymous or the person is in a foreign jurisdiction. There are tricky questions involved here — Which law and whose law should be applied? To which law can individuals look for remedy? Which countries are able to assert jurisdiction over others? In cyberspace, physical boundaries that separate distinct sovereign and independent law-making communities (i.e., nation States) from one another, have no concrete meaning.[79] Balkin suggested that a way to solve this problem is simply to sue the online service provider who let the speech be published on the site or the network provider who let the traffic through.[80]

Although adopting an approach different from Balkin's, Muller also had presented several practical and technical solutions to modify and control the code in cyberspace: 'conditioning access, filtering devices and geographical discrimination.'[81] See for example:

> The 'Rights Protection System' (RPS) favored by the phonographic industry, which is designed as a national protection system and creates the opportunity to enforce national law on the Internet by enabling 'on-border-seizures' in Cyberspace. Systems like RPS have the potential to reduce the borderlessness and thus the jurisdictional problems that impede enforcement of national laws. Even the 'sacred cow' of libertarian Cyberculture, anonymity, could be slaughtered: Technical and

[76] Ibid, as cited in Review, above n 71, 1393.
[77] Sinks, above n 6.
[78] Muller, above n 73, 167.
[79] David Post, 'Governing Cyberspace: Law ' (2008) 24 *Santa Clara Computer and High Technology Law Journal* 883, 885.
[80] Balkin, above n 26, 434.
[81] Muller, above n 73, 167-168.

> regulatory tools for identification are available ranging from serial numbers of processors, to biometric devices, to digital ID-systems, to the imposition of severe penalties on Internet Providers for giving anonymous access to the Internet.[82]

Franzese listed five key reasons why cyberspace is not immune from State sovereignty to argue against Barlow's declaration. First, the control by some entity is necessary for cyberspace to exist and function.[83] Second, the relationships and transactions of a financial nature in cyberspace require laws to govern them. Third, content sent through cyberspace is significant in the offline world.[84] Fourth, national security requires States to assert their presence in cyberspace. Fifth, the potential harm in cyberspace is increasing, therefore, the necessity to reduce vulnerability needs the control and authority of some entity.[85] Consequently, to conclude Franzese's analysis, the sovereign influence of some entity is required to regulate, protect and punish activities that happen in cyberspace. However, Franzese failed to give persuasive reasons in his article to support his arguments: a general summary is not enough.

Like Franzese, Ryder challenged the statement that cyberspace is beyond the limits of governance by exploring three main facts: First, nowadays, national governments continue to exercise control over cyberspace by national law. Second, despite growing globalisation, governments keep retaining central significance in cyberspace using their authority. Third, an increasingly bordered internet has become a feature worldwide: in other words, each country takes its own responsibility in regulating the Internet.[86]

Muller gave a name to the status of 'no-governance' in cyberspace as 'Cybersociety'. However, he also challenged the reality of Cybersociety in that it may be a misnomer in many respects: first, not all countries in the world have the privilege of equal access to networks and databases — rather, the Internet has deepened existing differences among countries worldwide.[87] Second, Muller doubted the feasibility of self-ruled Cybersociety in that internet participants may not be willing to regulate their own behaviours in an

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[82] Ibid.
[83] For Franzese, cyberspace is based upon a physical architecture or called physical structure. See Franzese, above n 24, 12, 17.
[84] This means, 'states have valid interests in and legitimate control over what occurs in cyberspace'. See ibid 13.
[85] Ibid 12-14.
[86] Rodney Ryder, 'Regulating 'India' Cyberspace - the Battle for 'Control' in the New Media Version ' (2009) 5(2) *Convergence* 250, 251.
[87] Muller, above n 73, 165.

appropriate manner.[88] He continued his argument by suggesting that since the Internet has become a mass medium and increasingly commercialized, more complicated problems need to be faced and fixed. However, in most cases self-regulation has seldom been applied or enforced in Cybersociety.[89]

It needs to be emphasised that 'no-governance' in cyberspace could not and should not mean no law or regulation in cyberspace at all. It is clear that just as members of societies prefer a certain degree of law and order in real society, so too a social community will expect to have trustworthy rules in cyberspace as well. Further law enforcement in cyberspace can be much more effective than in real space, but it also can be a more dangerous threat for personal liberties.[90] We have 'to find a way to translate what is salient and important about present day liberties and constitutional democracy into this architecture of the Net.'[91]

Twenty years have passed since the emergence of Barlow's *Declaration of Independence of Cyberspace*. Even though cyberspace has seen an amazing social and technological growth during this period, it has not proven to be invulnerable to governmental legal regulation nor to abuse by independent and political actors (and perhaps also, State actors). Cyberspace was as extremely independent never nor as universally beneficial as some early idealists believed.[92]

4.4.2.2 Government-Governance

Scholars who support cyberspace government-governance appear to hold either strong (government-governance only) or soft opinions (government-governance combined with other styles of governance). Preciado (strong opinion) vigorously argued against international means of regulating cyberspace; in his view, it is the responsibility of

[88] The example Muller mentioned to support his argument is 'the field of privacy protection, which was supposed to be good area for self-regulation. But, as the U.S.-Federal Trade Commission stated recently, in reality "self-regulatory initiatives to date fall far short of broad-based implementation of effective self-regulatory programs. The Commission thus concluded that such efforts alone are not enough and recommended to enact legislation that 'will ensure adequate protection of consumer protection online. '' See Privacy Online. Fair Information Practices in the Electronic Marketplace. A Report to Congress, Federal Trade Commission May 2000, p. ii. See also ibid 166.

[89] Ibid 167.

[90] N.S. Nappinai, 'Cyber Crime Law in India: Has Law Kept Pace with Emerging Trends? An Empirical Study' (2010) 5(1) *Journal of International Commercial Law and Technology* 22, 169.

[91] Lawrence Lessig, 'The Laws of Cyberspace ' in Richard Spinello and Herman Tavani (eds), *Readings in CyberEthics* (Jones and Bartlett Publishers 2 ed, 2004), 143.

[92] Alex Kozinski and Josh Goldfoot, 'A Declaration of the Dependence of Cyberspace ' (2009) 32(4) *Columbia Journal of Law & The Arts* 365, 372.

individual governments to institute active defence measures on critical infrastructure networks, by applying and enforcing law to cyberspace.[93]

Along with the worldwide reach of the global network, the need for establishing legal order in cyberspace has grown, especially the necessity to find a way to accommodate all existing local laws and internet content regulation.[94] In the future, more and more States may try to ensure that they have the same degree of authority over the digital world as over the offline world; rules and principles developed may be applicable to both online and offline areas, though this would in fact be very difficult to achieve. However, no State has ever claimed the authority to regulate all human activities in all parts of the world during the globalization of the Net.[95]

The first step to establish legal order in cyberspace is to recognize the authority of States to regulate online activities within their jurisdiction based on local preferences, and to take into account the diversity of values and interests in that State.[96] Basically, States use national law enforced through administrative agencies and the courts.[97] Even though 'the influence of the international community and international cooperation might contribute to convergence of values, the authority of a state to make an independent choice is undisputed.'[98]

> In the offline world the concepts of sovereignty and territoriality played and continue to play an important role, defining not only the state authority but also the limits of this authority and contributing to peaceful coexistence of different states and cultures. So should it remain in cyberspace.[99]

With regard to the importance of maintaining sovereignty, Franzese (strong opinion) argued 'the sovereignty of the state forms the fundamental basis of the current international order',[100] and preserving State sovereignty is 'a vital goal of both state-

[93] Preciado, above n 2, 102-103.
[94] Yulia Timofeeva, 'Establishing Legal Order in the Digital World: Local Laws and Internet Content Regulation' (2006) 1(1) *Journal of International Commercial Law* 41, 41.
[95] Ibid.
[96] Ibid 50.
[97] Henry Perritt, 'Dispute Resolution in Electronic Networked Communities' (1993) 38 *Villanova law review* 349, 355, as cited in Llewellyn Gibbons, 'No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace ' (1997) 6 *Cornell Journal of Law and Public Policy* 475, 501.
[98] Timofeeva, above n 94, 50.
[99] Ibid.
[100] Franzese, above n 24, 7.

based international organizations[101] and individual countries'.[102] He argued further that States must improve their capacity to exert control in cyberspace to ensure that their sovereignty is stable, by protecting their borders and responding directly to any violation of that sovereignty.[103]

However, Franzese failed to address the compelling question: why should governments maintain sovereignty in cyberspace? It was Lewis (strong opinion) who provided arguments to support this view and to oppose the belief that the role of government in cyberspace, this new domain, should be minimal. Lewis argued that 'this belief [that States had no role in cyberspace] had profound and ultimately damaging implications for security'.[104] In other words, adequate security of a State's citizens will not be guaranteed, in the absence of government intervention:

> The self-organizing Internet community without the intervention of the state has proven to be either wrong or moving at a place so slow that threatens security. Beliefs about the nature of cyberspace have downplayed the role of formal governance and governments. Changing this assumption is part of the long-term process to adjust to the new environment created by technological change.[105]

Because of his support for State sovereignty and intervention in cyberspace, Lewis opposed the view which stated the concept of cyberspace was a global commons, due to its supposed lack of borders. He explained by pointing to the fact that the trend of governments seeking technological and policy solutions to extend their control in cyberspace is increasing globally.[106] And he believed that only governments will lead the way of administering and securing the Internet, not private actors.[107]

The reasons why some argue that the State is the appropriate regulator of cyberspace are three: the State 'has the democratic legitimization, the procedural setup, and the institutional enforcement to make regulations, including ones pertaining to cyberspace.'[108] However, opponents point to concerns that any national law applied to

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[101] Such as United Nations. 'In fact a key principle of the United Nations, and its Members, is that the United Nations is based on the principle of the sovereign equality of all its Members.' See ibid 7.
[102] Ibid.
[103] Ibid 32.
[104] James Lewis, 'Sovereignty and the Role of Government in Cyberspace ' (2010) 16 *The Brown Journal of World Affairs* 55, 55.
[105] Ibid 63.
[106] Ibid 56.
[107] Ibid 64.
[108] Viktor Schonberger, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) 43 *Virginia Journal of International Law* 605, 612.

cyberspace would lack the necessary democratic legitimacy on a global network, because users would have to subject to regulation by a State or States of which they are not citizens.[109]

Rabkin (strong opinion) is even more determined than the above-mentioned scholars (Lewis and Schonberger) by arguing that there are no reasonable grounds that government could or should give up control of cyber-strategy to non-government actors. Even though Rabkin agreed that private companies and research institutions may have far broader and deeper technical capabilities than a government alone can muster,[110] Rabkin questioned the capacity of private actors in that they may have difficulties in subduing confrontations or disputes and as well in dealing with the standards of cyber restraint:

> Private vengeance seekers — or thrill seekers — might provoke confrontations or inflame disputes, even where government officials judge that a more subdued response would be preferable. Private hackers might undermine standards of restraint which the government might otherwise hope to maintain, the better to invoke against foreign attackers.[111]

China could be the best example for government governance. The Chinese government has extensive experience in controlling domestic access to content on the Internet through the Great Firewall of China.[112] Under an international system of sovereign States, China, like other States, has legal authority and power to establish laws and institutions within its territories to ensure the welfare and safety of the nation and its citizens in cyberspace.[113]

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[109] 'Should anyone operating in cyberspace be subject to a cyber-regulation in whose enactment she did not partake even in the most indirect way? Isn't democratic legitimization all about taking part in the political process?' See ibid. See also Aron Mefford, 'Lex Information: Foundation of Law on the Internet' (1997) 5 *Indiana Journal of Global Legal Studies* 211, 217.

[110] Jeremy Rabkin and Ariel Rabkin, 'Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea ' (2013) 14 (1) *Chicago Journal of International Law* 197, 245. Rabkin took the following statements as example: 'US Cyber Command and the NSA have assembled teams of technical experts in computer science and network security, but private firms have more resources available ... Organizations operating independently of governments-or directly against governments-in foreign countries may also have a valuable role to play in counteracting cyber abuses.' See ibid.

[111] Ibid 243.

[112] 'By filtering Internet traffic through eight gateways that connect the Chinese Internet to the global Internet and configuring Internet routers at those gateways to block certain website addresses and keywords, the Chinese government can prevent information from entering China that it deems threatening to its own regime.' See Catherine Lotrionte, 'State Sovereignty and Self-Defense in Cyberspace: A Normative Framework for Balancing Legal Rights ' (2012) 26 *Emory International Law Review* 825, 846.

[113] Ibid.

States not only have the authority to establish the laws in cyberspace, they also have the right to determine what are harmful actions which impact individuals or entities within their territories and prevent the flow of detrimental information, including blocking access to the Internet.[114] However, there is a limit: a State could not coerce other States to accept its regulations to ensure internet access; the only possible legal mechanism is through State unanimity at the United Nation Security Council.[115] Article 24 (1) of the *Charter of the United Nation* states that: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'[116]

Compared to Rabkin's strong argument, Deibert (strong opinion) is softer in his approach to government governance. He acknowledged the function of users and private sector in sharing cyberspace itself. However, he stated that it is undeniable that governments are becoming more and more influential in exercising power in and through cyberspace, both non-democratic states and democratic states.[117]

Consequently, there is little more persuasive than Deibert's statement to summarise this section:

> Whereas once it was popularly assumed that cyberspace was immune to government regulation because of its dynamic nature and distributed architecture, a growing body of scholarship has shown convincingly how governments can shape and constrain access to information, freedom of speech, and other elements of cyberspace within their jurisdictions.[118]

4.4.2.3 Self-Governance

[114] Ibid 846-847.
[115] See also ibid 850.
[116] *Charter of the United Nation*, Article 24 (1).
[117] Ronald Deibert and Crete-Nishihata Masashi, 'Global Governance and the Spread of Cyberspace Controls ' (2012) 18 *Global Governance* 339, 339. Deibert further mentioned that 'Particularly noteworthy are how non-democratic states outside of Europe, North America, and parts of Asia have begun to forcefully assert their interests in cyberspace governance regimes, including some, like the International Telecommunications Union, that were previously marginalized in the Internet space. Western liberal democracies are also moving away from laissez-faire and market-oriented approaches to more state-directed controls and regulations.' See ibid.
[118] Ibid.

There is yet another group: Schonberger named it 'a second flavor of cyber-separatism', which aimed for self-regulation of cyberspace.[119] While such commentators reject government-governance in cyberspace, they 'express faith in private or self-enforced regulation of cyberspace as a preferable alternative to state-created laws.'[120] For example, Professors David Post and David Johnson agreed with Barlow's assertion of the independence of cyberspace and its distinctiveness in their famous article '*Law and Borders — The Rise of Law in Cyberspace*', that self-governance could substitute for formal governance to create an ordered system.[121] Their reasons for the critique of formal governance are due to the nature of the Internet — intangibility and lack of geographic boundaries —[122] and they considered government control over cyberspace as both unfeasible and illegitimate.[123]

Nevertheless, they forwent 'the cyberutopian dream that cyberspace can or will be a self-governing domain, independent of the laws of territorial governments'.[124] Instead, they 'consciously negotiated the "borders" between cyber and real space, drawing parallels and connections in order to better understand how law can and should work in the virtual landscapes',[125] by stating further that special online-only rules should govern cyberspace to assure users of the security and confidence of using cyberspace:

> Under such a regime, it would be clear to users what law applied to them, and they would not have to fear that the governments of various jurisdictions would hold them responsible for conduct that they did not even know was prohibited.[126]

In other words, the knowledge of law by individuals should occur before subjecting them to its implementation. Post's view was greatly influenced by Thomas Jefferson, who invoked a radical decentralization of law-making.[127] The sovereignty of the

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[119] Schonberger, above n 108, 620.
[120] Bomse, above n 68, 1718.
[121] 'Self-governance was the solution to the problem of nonregulability'. See David Johnson and David Post, 'Law and Borders — The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1387.
[122] 'Post and Johnson advocate that legal critics and policymakers should 'take cyberspace seriously' by abandoning traditional territorial borders and making use of the already existing technological borders within cyberspace.' See ibid 1381, as cited in Bomse, above n 68, 1727.
[123] 'Government is perceived as antithetical to the rapidly changing, highly versatile character of the computer industry'. See Bomse, above n 68.
[124] Penney, above n 69, 197. See also Johnson and Post, above n 121, 1367-1375.
[125] Penney, above n 69, 197.
[126] Johnson and Post, above n 121, 1370.
[127] 'The way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to.' See David Mayer, 'Letter from Thomas Jefferson to Joseph Cabell (Feb. 2, 1816)' in David Mayer (ed), *The Constitutional Thought of Thomas*

individual is the heart of Jeffersonian mode of law-making: 'the recognition that individual choice — consent of the governed — is the firmest basis on which to build political order.'[128] Therefore, in Post's own early article, *Governing Cyberspace*, written in 1996, he recommended an 'electronic federalism'; in this model:

> Individual network access providers, rather than territorially-based states, become the essential units of governance; users in effect delegate the task of rule-making to them — confer sovereignty on them — and choose among them according to their own individual views of the constituent elements of an ordered society. The 'law of the Internet' thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join.[129]

Apart from Professors Post and Johnson, other scholars also hold the idea that cyberspace should have its own law, such as Perritt; he said 'Cyberspace, the set of electronic network communities, may be distinct enough to have its own law and legal institutions — a system of "cybergovernment". This self-governance may be more efficient for cyberspace.'[130] But Perritt also noted that making up its own rules and establishing its own institutions, does not necessarily assure cyberspace of an immunity from regular law.[131] Self-regulation is different from absolute autonomy; self-regulation needs the cooperation of government management. Formal contracts would also be an appropriate scheme as Gibbons proposed:

> The formal contract-based form of government as the legitimate model for creating institutions to which governments will grant some form of autonomy. A self-regulation model based on contract law is appropriate because the contract law model, when it represents the true meeting of the minds, best fits the libertarian frontier traditions of cyberspace. A contract-based law of cyberspace facilitates the governing of cyberspace. Contract is, in essence, private law-making.[132]

Jefferson (University of Virginia Press, 1994), 316-317, as cited in David Post, 'Governing Cyberspace ' (1996) 43 *The Wayne Law Review* 155, 165.

[128] Post, above n 127, 171.

[129] Ibid, 167.

[130] Henry Perritt, 'Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?' (1997) 12 *Berkeley Technology Law Journal* 413, 414. 'Usually there is little controversy over the application of special bodies of substantive law and the use of specialized institutions to resolve intro-organizational disputes pursuant to charters and bylaws of these organizations. It may seem strange that something can be law without being adopted by a legislature or a court, but it happens all the time and has for centuries'. See ibid 415.

[131] Ibid 416.

[132] Gibbons, above n 97, 483-484.

Two distinct advantages of contracts have been listed: first, 'contracts can provide for choice of law, forums, jurisdiction, and dispute resolution, thus avoiding the difficult questions of which jurisdiction's laws will govern the dispute'.[133] Second, 'unlike government, contracts made in the marketplace can rapidly react to changing economic, technological, or social circumstances.'[134] The danger of the contract law model is easy to foresee, in that contract law is peculiar to each nation State and international affairs are governed by international regulations.

Bomse gave all those who advocate self-regulation or self-ordering the name of 'Digital Libertarians' in his article *The Dependence of Cyberspace*, and summarised their position — Cyberspace is capable of self-ordering:

> First, greater access to information levels the playing field between consumers and sellers, and therefore promotes fair, arms-length bargaining. Second, normally prohibitive transaction costs that prevent parties from reaching mutually beneficial private agreements … are reduced or eliminated by digital communication. Finally, cyberspace lets users choose between websites and Internet service providers based on their rules and practices … In economic terms, cyberspace reduces the costs of exit and entry.[135]

The danger of the contract law model[136] had become the chief advantages of a self-ordering system for Bomse — non-coercive. She considered a self-ordered Internet as more democratic, because 'its laws would be selected and endorsed by those who are subject to them':[137]

> All parties choose to accept the conditions of the agreement… Moreover, self-ordering systems are seen as reflecting a natural order, because they arise spontaneously rather than through a planned set of policy objectives … and possessing a correspondingly high level of trust … libertarians prefer the invisible hand to any elected decision-maker.[138]

The self-ordering system, to some extent, is the free market with evident advantages. For example, 'it allocates resources efficiently, and second, it achieves this efficiency by allowing a natural order to reign and by eliminating the distraction of emotional or

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[133] Ibid 484.
[134] Ibid.
[135] Bomse, above n 68, 1733-1734.
[136] The same standard from contract that establishes the right will also specify how that right will be enforced.
[137] Bomse, above n 68, 1739.
[138] Ibid 1734. See also Johnson and Post, above n 121, 1454.

political preferences'.[139] But the conclusion in Bomse's article becomes too absolute: she asserts 'the self-ordering model seems to solve all the problems associated with state regulation: centralization, uniformity, lack of legitimacy, and absence of notice.'[140] And her conclusion was made even more unconvincing by her statement — 'the self-regulation model of cyberspace requires a conception of cyberspace divorced from the real world.'[141]

To a certain extent, Barlow's perspective — independence of cyberspace — was appealing to many early 'cyberlaw' scholars[142] who were deeply influenced by it and 'shared similar skepticism[143] about the appropriateness and feasibility of traditional state-enforced regulation of activities within the new virtual landscape',[144] but has received more critiques than support in later years. Franks considered the independence theory as 'Cyberspace idealism' (the 'independence' theory holds that: the benefits provided by the unregulated and free exchange of ideas far outweigh the harms caused by cyberspace; or a utopian realm of the mind: all can participate equally, free from physical, historical, and social limitations and prejudice; the only limitation, if one exists, is individuals' creativity and imagination).[145] Penney called this utopian vision 'New Virtualism'.[146]

Franks criticised such idealism in that it fails to recognize 'how the same features of cyberspace that amplify the possibilities of individuals' liberty also amplify the potential for discrimination'.[147] She further argued, because on the one hand, idealists often highly regarded cyberspace as more real than real life based on its ability to control an existence, they easily dismissed the harms committed in cyberspace and considered them as not really 'real' just because the harm by its nature is not physical, bodily harm.

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[139] Bomse, above n 68.
[140] Ibid 1739.
[141] Ibid.
[142] See Perritt, above n 130, 419-420; see also Joel Reidenberg, 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 *Emory Law Journal* 911, 912-917; see also David Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1367-1375. The first generation of legal scholarship often explored innovative ways to preserve liberty, self-government, and autonomy in cyberspace from coercion. See Jonathon Penney, 'Virtual Inequality: Challenges for the Net's Lost Founding Value' (2012) 10(3) *Northwestern Journal of Technology and Intellectual Property* 209, 210.
[143] Skepticism includes the knotty problems of jurisdiction, legitimacy, notice, and enforcement on the Internet. See Bomse, above n 68, 1718.
[144] Ibid.
[145] Franks, above n 72, 225-226.
[146] Penney, above n 142, 194.
[147] Franks, above n 72, 226.

On the other hand, idealists also emphasized the excitement of the possibility and ability of participating in cyberspace with confidence, especially for those who have limited freedom in physical life.[148] Barlow put this ideal view clearly in his Declaration of the Independence of Cyberspace:

> We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.[149]

Even though Barlow and early virtualists did offer a vital perspective about the uniqueness of cyberspace and how it might influence cyberlaw problems, they were arguably wrong about the independence of cyberspace.[150] Penney, for example, concluded with respect to New Virtualism as follows:

> … While exploring the legal and technological implications of cyberspace and virtual worlds as places distinct from real place … the New Virtualism consciously negotiates the borders between cyber and real space, drawing parallels and connections in order to better understand how law can and should work in virtual landscapes.[151]

4.4.2.4 Government and Private Actor Governance

The governance by Government and by the private actor are different. According to Malcolm, governments participate in the internet governance regime through rules, whilst the private sector is involved through market mechanisms and in shaping the internet's technical architecture.[152] Even though there are differences between government governance and private actor governance, there is a variety of emerging relations between them: non-state actors both work with and against the State, as Lee argued:

> The expansion of non-State governance should not be read as a 'rolling back' of the State or filling in a vacuum left by this retreat. Rather, it involves a re-articulation of relations between State and non-State actors. In particular, the legal role and authority of the State is expanding as part of new forms of governance which co-ordinate, or respond to, non-State actors.[153]

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[148] Ibid.
[149] Barlow, above n 67. Penney, above n 142, 197.
[150] Barlow, above n 67.
[151] Penney, above n 142, 197.
[152] Malcolm, above n 60, 74.
[153] John Lee and Kevin Stenson, 'Security, Sovereignty, and Non-State Governance "From Below" ' (2007) 22 *Canadian Journal of Law & Society* 9, 10.

Concerning the debate of by whom cyberspace should be regulated, there is a middle-ground approach, illustrating that self-governance and traditional regulation can complement one another.[154] In other words, 'self-governance and private arrangements would operate within a generalized legal framework instead of replacing official regulation altogether'.[155] This principle of collaboration and cooperation combines self-governance and traditional law, while recognising that 'a need for self-governance may be inherent in the Internet's fabric'.[156]

The reason to consider a compromise between self-governance and governmental regulation as an optimal approach is that 'it can take advantage of the benefits[157] of each model while addressing some of the problems associated with relying too heavily or exclusively on self-governance or on traditional, public regulation'[158]:

> Government has an important role to play, online as much as elsewhere, in developing clear rules and ensuring that even informal regulation of online conduct reflects the interests of all those affected, not just of large corporations. At the same time, private parties can help smooth the workings of the regulatory regime by developing online self-governance mechanisms that allow for flexibility, cooperation, and the leveraging of new technologies.[159]

The method of cooperation is also important:

> If the government's role is to set forth the general background law, leaving to private online actors the job of hashing out the details how that law will be followed, the importance of establishing clear, general, fair laws remains at least as great as ever. First, the government must set out rules of its own, preempting private actors' attempts to establish socially suboptimal norms. Accordingly, policymakers should take care to ensure that the government retains some authority over the general background law.[160]

However, to the contrary, Professor Neil Netanel argued that 'governmental regulation was not only possible, but also normatively superior to self-regulation of the Internet'.[161]

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[154] Review, above n 71, 1387.
[155] Ibid.
[156] Review, above n 71, 1397.
[157] The benefits of self-governance's flexibility would be combined with the government's ability to ensure full representation in the policymaking process. Furthermore, ideally, this approach would 'feature clear, general legislative rules, complemented by private arrangements developed through an inclusive negotiation process fostered by the government itself'. See ibid 1403.
[158] Ibid.
[159] Ibid 1408.
[160] Ibid 1404.
[161] Neil Netanel, 'Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory ' (2000) 88 *California Law Review* 395, 395, as cited in Review, above n 71, 1395.

4.4.2.5 International Governance

Compared to domestic governance, international governance is more complex. Domestic governance is 'provided by actual governments — formal, hierarchical institutions with the authority to establish and enforce binding rules'[162]; whereas international governance is composed of independent sovereign units that recognize no higher authority.[163] Furthermore, the sphere of international governance in cyberspace is the area that scholars mentioned the least.

The history of global governance is a process of adaptation to new technologies — 'sovereign governments have sought common standards and rules to facilitate cooperation and mitigate conflict'.[164] In 2014, writing in *Foreign Affairs*, Patrick was aware of the possibility of cooperation by establishing common standards of behaviour in international spheres, but also pointed out the fact that even the most cooperative multilateral bodies lack real power to enforce compliance with collective decisions.[165] As Rabkin argued, even if all the political obstacles have been surmounted to negotiate a treaty against cyber-attacks, great difficulties still exist in enforcing such a treaty.[166] Meanwhile, demand for effective global governance continues to outstrip supply of realistic ideas. Therefore, Patrick shifted his emphasis from States, the dominant actors, to non-state actors, which may be more realistic in terms of having an effect on shaping the global agenda, defining new rules, and monitoring compliance with international obligations.[167]

In contrast to Patrick, Shacklford still has hope for the international community to reach agreement on the future of internet governance and promotion of cyber peace. The reason for his confidence is that he recognized that there still exists a continuum of governmental interest in and approaches to regulating cyberspace. However, he stated that the appropriate time for international agreement on internet governance is only

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[162] Stewart Patrick, 'The Unruled World-The Case for Good Enough Global Governance ' (2014) 93 *Foreign Affairs* 57, 57.
[163] Ibid.
[164] Ibid 71,72.
[165] For example, universal membership bodies such as 'various regional institutions, multilateral alliances and security groups, standing consultative mechanisms, self-selecting clubs, and hoc coalitions, issue-specific arrangements, transnational professional networks, technical standard-setting bodies, global action networks, and more.' See ibid 59.
[166] Rabkin and Rabkin, above n 110, 255.
[167] Patrick, above n 162, 59, 72.

after the international community notices the value of focusing on common ground between nations.[168]

Meanwhile, there are several other reasonable justifications for the advocacy of international governance in cyberspace. Rosenzweig argued that the sheer scale of the network, which is as large as any human enterprise that has ever been created, demands a global approach. Consequently, the rules need to be set only on an international basis.[169] Gervais argues that international law must take responsibility in deterring unlawful action regardless of whatever policies a nation might implement to defend its cyberspace. He believes that international treaties would be beneficial to regulate the rules of engagement online and States may continue to rely on the existing regime of international law to govern cyber affairs while they await the international community's response to the modern form of waging battle.[170]

One of the reasons why Perritt supported international governance for new technologies such as cyberspace is that international covenants have been crafted and have proved to work well for older technologies. Perritt's supportive examples are:

> One of the first multilateral treaties was the Universal Postal Union, which continues to perform good service in assuring the free flow of the mails across national boundaries. The International Civil Aviation Organization (ICAO) administers a variety of international treaties that assure open access by air to most countries.[171]

Therefore, he was convinced that international treaties would also work well for cyberspace. Importantly, Perritt advocated the combination of international governance together with self-governance. He recognized that potential exists for combining treaty-based regulation with forms of private regulation of the Internet.[172]

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[168] Shackelford and Craig, above n 61, 123.
[169] Paul Rosenzweig, 'The International Governance Framework for Cyberspace ' (2012) 37(2) *Canada-United States Law Journal* 405, 405.
[170] Gervais argued that 'an international treaty that regulates the rules of engagement online would certainly be a helpful addition to the corpus of the laws of war.' See Gervais, above n 47, 97.
[171] See Perritt, above n 130, 433.
[172] 'The successful ICAO and ITU regimes rest on treaty obligations but depend greatly on industry input for the development and enforcement of the rules.' See ibid34, 433-434.

In fact, an international strategy for cyberspace was released in 2011: the United States issued a report called *International Strategy for Cyberspace — Prosperity, Security, and Openness in a Networked World*.[173] The reasons for the report were:

> The digital world is no longer a lawless frontier, nor the province of a small elite. It is a place where the norms of responsible, just, and peaceful conduct among states and peoples have begun to take hold. It is one of the finest examples of a community self-organizing, as civil society, the private sector, and governments work together democratically to ensure its effective management…This is what sets the Internet apart in the international environment, and why it is so important to protect.[174]

The strategy goes further in articulating that it seeks to support both internet freedom and privacy; enhance security, reliability and resiliency; and build capacity and prosperity. However, the strategy was questioned by Rosenzweig that 'these norms are articulated at too high a level of generality; and are unlikely to find great acceptance in many nations that value neither privacy nor freedom.'[175] Consequently, obtaining an international consensus for the strategy has proved difficult.

It is true that before any international governance could be well and firmly established, the international community needs to work through the wide gap between rich and poor nations, especially those in the developing world, compensating for the clear technological disadvantages that developing countries confront. Tripathi argued that the role of developing countries in formulating regulations for internet governance is of prime importance; therefore, it is critical to develop a multi-national and legitimate forum to ensure impartial representation of all member countries in the Internet governance process.[176]

4.5 The Influence of Models of Cyber-Governance on Freedom of Speech and Democracy

4.5.1 The Influence of Models of Cyber-Governance on Freedom of Speech

'New technologies offer ordinary citizens a vast range of new opportunities to speak, create and publish; they decentralize control over culture, over information production

[173] The White House, *International Strategy for Cyberspace — Prosperity, Security, and Openness in a Networked World* (2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf.
[174] Ibid.
[175] Rosenzweig, above n 169, 424-425.
[176] Tripathi, Singh and Dube, above n 53, 370.

and over access to mass audiences.'[177] Therefore, in the digital age, new cyber-governance models have to be designed to adapt to the new environment.

Since nations are 'demanding control over the computers electronically in their territory, even if it is from the computers of their citizens',[178] therefore, how the different models of cyber-governance affect freedom of speech or democracy in cyberspace has become a vital issue that needs to be faced and investigated. Regardless of the model, any governance in cyberspace must ensure that individuals have a fundamental right to access the Internet.

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression views a complete denial of access to the Internet as not only an unacceptable way of controlling freedom of speech, but also a violation of International Law: 'Cutting off users from Internet access, regardless of the justification provided, is disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights'.[179]

The extent and availability of citizens' access to cyberspace has, more or less, related to the extent of freedom of speech that they can enjoy. Freedom of expression is critical, especially in digital communication — 'it appears to reduce significantly traditional market imperfections by offering nearly costless transactions and by placing greater information at the users' fingertips'.[180] Cyberspace, as a new technology, provides an unprecedented chance to promote freedom of expression globally. Former Secretary of State Hillary Rodham Clinton expressed her views on internet freedom:

> We see more and more people around the globe using the Internet, mobile phones and other technologies to make their voices heard as they protest against injustice and seek to realize their aspirations…There is a historic opportunity to effect positive change … so we're focused on helping them do that, on helping them talk to each other, to their communities, to their governments and to the world.[181]

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[177] Balkin, above n 26, 441.
[178] Rosenzweig, above n 169, 415.
[179] Frank Larue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/17/27 (May 16, 2011), 38, 78.
[180] Bomse, above n 68, 1735.
[181] James Glanz and John Markoff, *U.S. Underwrites Internet Detour Around Censors* (June 12, 2011) The New York Times <http://www.nytimes.com/2011/06/12/world/12internet.html?pagewanted=all&_r=0>.

The potential of cyberspace in enhancing human rights and international communication is evident:

> It would permit individuals to organize around these areas and provide forums to debate policy issues. It provides instant access to a wide range of information. It also has unparalleled potential to increase citizen oversight of public affairs and to decentralize political decision making, which would empower a great many people around the world.[182]

An essential feature of responsive and democratic government is freedom of speech. In a democratic society, the right to freedom of speech has an extended meaning — the rights and access to public information: 'the possibility of accessing virtually the entire stock of public information generated by governments at the click of a mouse button.'[183] Under a free system of information, not only do citizens have a convenient and quick access to governmental information, but also governments are able to disseminate information with little cost.[184]

4.5.2 The Influence of Models of Cyber-Governance on Democracy

The nature of cyber-governance has a direct effect on democracy. Natanel challenged government-governance on the basis of its not being democratic:

> Cyberspace … needs to be governed, but not by some distant, unaffected national legislature; rather, it should be governed by the people who are actually affected, the people interacting in cyberspace; the netizens themselves. Self-regulation, is the single best way to ensure the legitimacy of governance.[185]

There is little doubt that cyberspace 'is an enormously important tool and potential space for democratic participation at all levels, for strengthening civil society, and for the formation of a whole new world of transnational political and civic projects.'[186] Cyberspace provides a space for the implementation of democracy. Similarly, 'the

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[182] Gara Lamarche, 'International Free Expression Principles in Cyberspace ' (1995) 17 *Whittier Law Review* 279, 280.
[183] Henry Perritt, 'Sources of Rights and Access to Public Information' (1995) 4 *William & Mary Bill of Rights Journal* 179, 179.
[184] See Perritt, above n 130, 435.
[185] Netanel, above n 161,152, as cited in Schonberger, above n 108, 621.
[186] Saskia Sassen, 'On the Internet and Sovereignty' (1998) 5 *Global Legal Study Journal* 545, 546.

democratic and open character of cyberspace has made it a space of distributed power that limits the possibilities of authoritarian and monopoly control'.[187]

In the digital age free speech is to promote a 'democratic culture — it is a culture in which ordinary people can participate, both collectively and individually, in the creation and elaboration of cultural meanings that constitute them as individuals'.[188] Furthermore, the reason why it is democratic, is because 'people get to participate in the production of culture through mutual communication and mutual influence. Democratic culture invokes a participatory idea of democracy'.[189]

Regarding the proper legal approaches to cyberspace in ensuring freedom of speech and democracy, the rule of law has to be served as a persistent theme, 'requiring that government authority be exercised only in accordance with clear, established laws that have been adopted through politically legitimate processes.'[190]

> While new paradigms and mechanisms of control will be necessary to adapt to governance of cyberspace, the rule of law still plays a crucial role in achieving the ultimate regulatory objective: to utilise technology to facilitate a fair, safe and efficient space for social and commercial interactions while maintaining a balance between various competing interests and values.[191]

Lessig's model of extending regulatory theories to cyberspace has been one of the most influential among cyber-scholars. He attempted to 'find a way to translate what is salient and important about present day liberties and constitutional democracy into this architecture of the Net'.[192] He identifies four modalities of regulation: Law, market, norms and architecture:[193]

> Law through coercion and punishment; market through commercial incentives and imperatives; norms through social and communal pressure; and architecture through more direct behaviour-shaping techniques.

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[187] Ibid 547. 'It is now well known that the particular features of the Internet are in part a function of the early computer hacker culture that designed software that strengthened the original design of the Internet-openness and decentralization-and sought to make the software universally available for free.' See ibid.

[188] Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1, 3-4, as cited in Balkin, above n 26, 438.

[189] Balkin, above n 188, 4-5, as cited in Balkin, above n 26, 438.

[190] Andrea Slane, 'Democracy, Social Space, and the Internet' (2007) 57 *University of Toronto Law Journal* 81, 85.

[191] Zhang, above n 16, 53.

[192] Lessig, above n 91, 143.

[193] Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999), 86-88, as cited in Zhang, above n 506, 55. Another argument of Lessig is that 'digital libertarians are blind to the way the Internet is moving toward an architecture of control.' See Bomse, above n 68, 1719.

Lessig emphasises the way in which these four distinct models of regulation function interdependently and their potential to regulate one another in order to effect control on the ultimate subject.

4.6 The Models of Cyber-governance in Australia, Singapore and India

Even though cyberspace has a key role in promoting and protecting freedom of speech and democracy, the extent of its activity can be monitored and limited by national governments: 'as is often the case with emerging technologies, the technology is much too concentrated in the hands of people who already have a great ability to communicate'.[194] Take Singapore and India for example:

> In Singapore, the government is, on the one hand, trying to promote this technology while, on the other hand, policing it as vigorously as possible to ensure that no one communicates any message that is not acceptable to the government via the Internet. In India, exorbitant licensing fees have operated as a barrier to many peoples' participation in the Internet.[195]

Therefore, the rule of law method also has to be applied in the field of on-line speech:

> Any restrictions of on-line speech content should be clearly stated in the law and limited to those which directly lead to incitement of acts of violence. On-line free expression should not be restricted by indirect means, such as the abuse of government or private controls over computer hardware or computer software. The right of anonymity should be preserved in the global information infrastructure.[196]

With regard to the models of cyber-governance, it is hard to say which way is better than another. Each style has its own justifications based on the process of development, as well as each having its own disadvantages, which may in turn become more obvious when criticized by advocates of other models. Tests are still ongoing to discern the best model for cyber governance in the digital world, and theoretical debates are still more than welcomed. Though engagement with private actors or international cooperation still needs plenty of time to progress to a mature level, more and more countries are supporting the multi-stakeholder model of cyber-governance.

Australia balances its the cyber-governance between two competing key visions: one is of a globally interconnected and open system subject to multi-stakeholder governance

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[194] Lamarche, above n 182, 281.
[195] Ibid 281.
[196] Ibid 283.

where states participate but do not dominate; the other seeks to put the state at the forefront of cyberspace, upholding the concept of state sovereignty in cyberspace.[197] Australia is committed to supporting an open cyberspace which is administered by the existing multi-stakeholder approach to cyber-governance that has evolved organically, and successfully. The Australian government is working to ensure that cyberspace remains stable, free and resilient and continues to be a powerful platform for freedom around the country.[198]

Singapore supports a multi-stakeholder model of cyber-governance. At the opening ceremony of Internet Corporation for Assigned Names and Numbers (ICANN)'s 52nd Public Meeting (9 Feburary 2016), Singapore's Minister of Communications and Information, Dr Yaacob Ibrahim, and former Senior Advisor to President Bill Clinton, Ira Magaziner, talked about the success of the multi-stakeholder model of Internet governance:

> Singapore supports the shift to a multi-stakeholder model. We have consistently articulated our belief that no one person, organisation, or even country, has a monopoly on the expertise and wisdom needed to meet the challenges that we are facing on the Internet on a day-to-day basis … Such an inclusive, multi-stakeholder approach will enhance the Internet's role as a catalyst for information flow and economic activity.[199]

The Indian government will continue to have supreme right and control on matters relating to national security. However, India supports a multi-stakeholder approach in matters of cyber-governance based on its industry and human resources, which would involve all stakeholders and help to preserve the character of cyberspace as a unified, dynamic engine for innovation, and which encourages equity and inclusion.[200] A series of multi-stakeholder consultations/ roundtable meetings are being organized by

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[197] Prime Minister Malcolm Turnbull, *Launch of Strategy and Statecraft in Cyberspace research program* (8 March 2014) Ministers for the Department of Communications and the Arts <http://www.minister.communications.gov.au/malcolm_turnbull/speeches/launch_of_strategy_and_statecraft_in_cyberspace_research_program#.WArqZ8mOLc1>.

[198] Prime Minister Malcolm Turnbull, *Australia is committed to a multi-stakeholder system of Internet governance* (15 March 2014) Malcolm Turnbull MP <http://www.malcolmturnbull.com.au/media/australian-committed-to-a-multi-stakeholder-system-of-internet-governance>.

[199] Asia CIO Summit 2016, *Singapore supports multi-stakeholder model of Internet governance* (10 February 2016) <http://www.cio-asia.com/mgmt/it-governance/singapore-supports-multistakeholder-model-of-internet-governance/>.

[200] Ministry of Electronics & Information Technology, Government of India, *Internet Proliferation & Governance* (21 October 2016). For example, multi-stakeholder approach will also align with investment strategy for Digital India and will help India in participation in the multi-billion dollar business opportunity of Internet industry.

Department of Electronics & Information Technology in collaboration with National Internet Exchange of India. There have been 9 multi-stakeholder consultation meetings up till December 2015.[201]

On 8 March 2014 the former Australian Minister for Communication, now Prime Minister, Malcolm Turnbull, stated that:

> Maintaining an open, global cyberspace system not dominated by governments is one of the key strategic issues of our time and it is a goal the Australian Government is committed to pursuing … Australia supports the existing multi-stakeholder approach to internet governance that has evolved organically, and successfully. Under this model, the private sector, governments and users all participate in shaping the evolution and use of the internet. Multi-stakeholder arrangements maximise access and opportunity to the benefit of all.[202]

Indeed, cyber governance will still remain an ongoing research work in progress. It is hardly to be expected that it would have its final manifestation in the immediate future. However, it is possible that the combined participation of private actors and the international community will be enhanced, and the engagement of the governments of developing countries will occur, just as Tripathi foreshadowed. To that end, the convergence of national governments, private actors and the international community would be a desired goal.

4.7 Conclusion

Australia, Singapore and India are mainly under the governmental model of cyberspace management. Parliament or related government institutions are in charge of promulgating laws to regulate cyberspace. Governmental governance has played an essential role over the course of time.

However, it seems that the multi-stakeholder model of cyber-governance is the best model to protect freedom of speech when compared to other models. Under this model, the private sector, governments and users all participate in shaping the evolution and

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[201] Topics of the consultation include technical and policy related issues with respect to Internet Governance like WHOIS related issues, The New Generic Top Level Domain Programme – Opportunities and Challenges for India , IANA Stewardship and CCWG Accountability, WSIS+10 Review. See Ministry of Electronics & Information Technology, Government of India, *Internet Proliferation & Governance* (21 October 2016).

[202] Malcolm Trurnbull, *Launch of Strategy and Statecraft in Cyberspace research program* (8 March 2014) Ministers for the Department of Communications and the Arts <http://www.minister.communications.gov.au/malcolm_turnbull/speeches/launch_of_strategy_and_statecraft_in_cyberspace_research_program#.Vv34X_mhlAA>.

use of cyberspace. Multi-stakeholder arrangements maximise access and opportunity to the benefit of all.

Nevertheless, before any such desired goal could be achieved, national governments still need to play their current role. At least, it is clear that cooperation of government and private actors would be an appropriate means of furthering appropriate cyber-governance, which would improve democratic participation in cyberspace, since people who are affected would have the opportunity to participate in the decision-making process. Therefore, this is the reason why all three States support the multi-stakeholder approach to internet governance.

Chapter 5 — Pluralism, Diversity, Tolerance and Freedom of Speech

Pluralism is not diversity alone, but the energetic engagement with diversity … pluralism is not just tolerance, but the active seeking of understanding across lines of difference.[1] *— Diana L. Eck*

5.1 Introduction

Pluralism, diversity and tolerance are distinct theoretical terms, but they interconnected. Pluralism signifies and permits the peaceful coexistence of a diversity of views, lifestyles, and interests rather than a single approach. Pluralism appears in many different forms, such as cultural pluralism, legal pluralism, religious pluralism. Diversity is a concept encompassing respect and acceptance and recognizes individual differences with respect to gender, age, religion, race, socio-economic status or physical abilities. Tolerance emphasizes a subjective consciousness, by tolerating or putting up with different even opposing opinions, or religions.

The three nations considered as comparative studies — Australia, Singapore and India — all have widely diverse populations and religions. This Chapter analyses the ramifications of such diversity for freedom of speech (for practical details on these nations, please see 5.5 below)

The integration and recognition of pluralism, diversity and tolerance in one nation is an essential prerequisite for free speech to grow. The operation of freedom of speech can be affected by many factors, such as political policy, national regulations, and civil aspiration. Regard always needs to be paid to the balance between freedom of speech and privacy, social order and fame. In fact, the extent of free speech has an essential relationship with pluralism, diversity and tolerance. The more a nation cherishes its diversity, the freer atmosphere it may have for speech; the deeper one nation tolerates the intolerant, the higher freedom the speech may attain.

This Chapter aims to theoretically analyse how the attitude of the three nations in treating pluralism, diversity and tolerance may influence freedom of speech, mediated through the discussion of culture, cultural pluralism, legal pluralism, multiculturalism

[1] Diana L. Eck, *What is Pluralism?* (22 May, 2015) Harvard University <http://www.pluralism.org/pluralism/what_is_pluralism>.

and legal culture. The fourth part of the Chapter will discuss how free speech can be achieved through toleration but with appropriate limitation.

Freedom of speech as a language of entitlement may connect to the development of a responsibilities-oriented culture, including the elements of 'duty, civility, prudence, forbearance and common sense, which are needed to sustain tolerance and solidarity as public values. Constitutionalism does not relate only to a settled constitutional order, but refers also to an interactive process of connectedness.'[2]

The discussion of cultural pluralism and legal pluralism, legal pluralism and legal culture is designed as a theoretical foundation for the further analysis about diversity, tolerance and freedom of speech. The interaction between cultural pluralism and legal pluralism, legal pluralism and legal culture can shed light on the nature of the relationship between diversity, tolerance and freedom of speech.

5.2 The Interaction between Cultural Pluralism and Legal Pluralism

5.2.1 The Interactive Relationship between Cultural Pluralism and Law

Why did law develop in different ways when coping with similar or common problems in different nations? Culture is thought to be one of the important factors, since laws are culture-laden. Sometimes people 'rely on their own culture to discern the good from bad, and a combination of cultural law and universal law will emerge through a global transmission of ideas and institutional information.'[3]

Culture not only has a crucial link between democracy and economic development, but also has a subtle, dialectical, interactive and dynamic relationship with law. Culture cannot be separated from law, and attempts to do so must fail.[4] Law is a component of culture and culture the product of human beings.[5] In any society, most legal rules reflect generally-held beliefs and values; conceptions of law are cultural phenomena—'shared

[2] Li-ann Thio, 'Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy ' (2010) *Singapore Journal of Legal Studies* 484, 513.
[3] See Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan ' (2006) 27 *Michigan Journal of International Law* 873, 875.
[4] John Haley, 'Law and Culture in China and Japan: A Framework for Analysis ' (2006) 27 *Michigan Journal of International Law* 895, 896.
[5] Zhongqiu Zhang, 'Human Being & Culture and Law ' (2005) 2(2) *US-China Law Reviews* 1,1.

beliefs that generate shared habits and expectations'.[6] In turn, 'existing processes for both lawmaking and legal enforcement inexorably influence the continuity or change of culture'.[7] It is culture that gives distinct identity to a national legal system.[8]

Culture has been defined in many different ways by many scholars: culture is a 'highly stable and powerful determinant of cognition, evaluation, and action';[9] it is an aggregate of disparate elements and Cotterrell has emphasized that an understanding of all those elements and their interaction in a particular place and time is a prerequisite for understanding of culture:

> Culture can be thought of as a complex aggregate of many elements — matters of tradition, language, and shared historical experience; shared beliefs, and ultimate values, common emotional allegiances, and resistances; and economic and technological conditions creating a common material environment. [10]

However, culture can also be summarized as a much broader aggregate of 'collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artefacts, ritual.'[11] Law is both an object of culture and a producer of culture. Therefore, law is an 'element of the social structure, and a set of opinions, beliefs, sentiments, and actions supporting legal change and is, thus, a form of social movement'.[12]

Culture has proved itself as long-lived, persistent as well as changing, flexible and accommodative: 'In law, as in other manifestations of human civilisation, various legal cultures in a society may co-exist, clash, and conflict, while at the same be changing, developing and transforming themselves.'[13] It is a mistake to discuss culture as an

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[6] Haley, above n 4. 'Economic, social, and political change inexorably produces cultural change. New patterns of daily life produce changed habits and expectations.' See Haley, above n 4, 898.
[7] Ibid.
[8] Setsuo Miyazawa, 'How Does Culture Count in Legal Change? A Review With a Proposal From a Social Movement Perspective ' (2006) 27 *Michigan Journal of International Law* 917, 918.
[9] Ibid.
[10] Roger Cotterrell, 'Conscientious Objection To Assigned Work Tasks: A Comment on Relations of Law and Culture ' (2010) 31 *Comparative Labor Law & Policy Journal* 511, 512. Culture was defined as 'values, beliefs, habits, and expectations shared within a community' by Professor Robert Smith from Cornell University. See Haley, above n 4. Some scholars also define culture comprising meanings. See Franz Benda-Beckmann and Keebet Benda-Beckmann, 'Why Not Legal Culture? ' (2010) 5(2) *Journal of Comparative Law* 104, 116.
[11] Naomi Mezey, 'Law as Culture ' (2001) 13 *Yale Journal of Law & the Humanities* 35, 35.
[12] Miyazawa, above n 8, 929.
[13] Alice Tay, 'Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law ' (1996) 26(2) *Hongkong Law Journal* 194, 194.

unchanging, monolithic entity, because depending on various contingencies different cultures will take turns to occupy a dominant position.[14]

Take India's caste associations as an example to explain the traits of culture:

> India's caste associations rather than having been discarded as modernization proceeds, have themselves modernized. In the process, they have converted themselves into interest associations, and thus have bridged the gap between traditional and modern. [15]

Correspondingly, law and culture have been suggested as an integrated whole:

> Like every other aspect of a culture, law lives in a place that is not solely of its own making. As we open up the idea of law to intersect those other domains where we fabricate the categories of our everyday experience, we open up the possibility not just for an enlarged sense of how law draws upon all the other domains of life for its own ends: we also see how cultures embrace both the order law seeks and the open-endedness that life requires to fashion a world that, for those who entangle their lives in its terms, gives order and flexibility to individuals and groups alike.[16]

Under the multiculturalism paradigm, law can also be explained to be multicultural and can be separated into two parts: an institution delineating or demarcating the lives of individuals[17] and a locus of collective moral judgment.[18]

A simple but profound definition to explain the difference between multicultural society and multiculturalism is: the former is a society where cultural diversity exists and the latter is the normative response to the cultural diversity of the society. [19] Multiculturalism has the same meaning as cultural pluralism. Multiculturalism is a particular State response to the challenge of increasing social diversity which supports the accommodation of difference within the public sphere.[20] Multiculturalism can be presented in two levels: descriptive and normative:

> At a descriptive level, 'cultural pluralism' or 'multiculturalism' usefully describes the increasing diversity of culture, race and religion of citizens in liberal

[14] Miyazawa, above n 8, 928.
[15] Howard Wiarda, 'Political Culture and National Development ' (1989) *The Fletcher Forum* 193, 194.
[16] Lawrance Rosen, 'Law as Culture ' (2006) 16(9) *Princeton University Press* 1,23.
[17] It means without law individuals would not have the capacity to choose, feel or judge. Since law is 'the frames of legality that set the ground rules for human cognition and generate categories of meaning and choice, law cannot be said to be the sheer product of such individual choice.' See Talia Fisher, 'Nomos Without Narrative ' (2008) 9 *Theoretical Inquiries in Law* 473, 497.
[18] Ibid 496.
[19] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2006), 3.
[20] Maleiha Malik, ''Progressive Multiculturalism': Minority Women and Cultural Diversity ' (2010) 17 *International Journal on Minority and Group Rights* 447, 447.

> democracies … At a normative level, 'cultural pluralism' or 'multiculturalism' are terms used to indicate the idea that the correct legal and political response to increasing cultural diversity is to adopt policies of public accommodation.[21]

Normative description is the notion used in this chapter: the way that government treats cultural diversity determines the extent of freedom of speech. There are four possible responses the State may have toward multiculturalism: assimilation, toleration, non-discrimination or accommodation of difference and multiculturalism. Different nations may choose different responses:

> Conservative nationalism places a greater emphasis on assimilation; traditional liberal individualism focuses on tolerance and the right to non-discrimination; whereas liberal pluralism goes further than tolerance and non-discrimination to also include policies for the accommodation of difference and multiculturalism.[22]

Assimilation is a selective model, which accepts only approved elements but requires sacrifice of characteristics distinguishable from the mainstream national culture. Non-discrimination is more about allocation of power and resources between minorities and majorities. Liberal pluralism goes further because it cares about distinct needs of minorities in the public sphere.[23]

The rule of law emphasizes a single source of legal authority in one sovereign territory and encourages equality as universalism. The politics of recognition means equality should include a sense of recognition of difference. In other words, equality requires treating all people with equal respect and concern, with respect for their right to speak as well.[24]

In the process of answering whether liberalism can justify multiculturalism[25], liberal toleration and autonomy need to be involved. A truly liberal society should be prepared to tolerate and respect minority cultures and be able to deal with cultural conflict.[26]

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[21] Ibid 448.
[22] Ibid 449.
[23] Ibid.
[24] Ibid 454.
[25] See Parekh, above n 19. Xanthaki defined multiculturalism in a different way: 'Multiculturalism is primarily about respecting and celebrating the culture of the individual in the public sphere.' See Alexandra Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards ' (2010) 32 *Human Rights Quarterly* 21, 24.
[26] Robert Lipkin, 'Can Liberalism Justify Multiculturalism? ' (1997) 45(1) *Buffalo Law Review* 1, 2-3.

'Tolerance is a derivative value based on autonomy'.[27] There is a famous saying in how to differentiate the liberal strains from the republican strains:

> Let us say that the liberal elements bespeak concern for choice, autonomy, toleration, and bracketing moral arguments and disagreement, while the republican elements bespeak concern for justifying freedoms on the basis of substantive moral arguments about the goods or virtues they promote, or on the basis of their significance for citizenship.[28]

There is an intimate relationship between freedom and culture, and autonomy and culture — '… the value of freedom and autonomy must be embedded in the culture for it to be intrinsically valuable'.[29] This relationship can be called a 'freedom-culture connection',[30] which means 'freedom requires certain intrinsically valuable cultures'.[31] In other words, cultures consist of language, religion and history; however, language, religion and history need freedom to exist and move around in one's culture.

Article 1 of the 2001 *UNESCO Universal Declaration on Cultural Diversity* notes cultural diversity as the common heritage of humanity:

> Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.[32]

UNESCO goes on to describe the relationship between cultural diversity and cultural pluralism:

> In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural

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[27] Ibid 39.
[28] James Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (The University of Chicago Press, 2006), 154. See also Linda McClain and James Fleming, 'Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights' (2011) 91 *Boston University Law Review* 1311, 1316.
[29] Lipkin, above n 26, 19.
[30] Ibid 17.
[31] Ibid.
[32] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 1, UNESCO Doc. CLT. 2002/WS/9 (2002).

> pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.[33]

In the development of a society law and multiculturalism have interaction between each other. Law was developed based on culture while culture has a great impact on law. Multiculturalism is a factor to promote law to be more democratic and comprehensive in regulating the society. For example, in April 1992 Australia issued a report *Multiculturalism and the Law* (ALRC Report 57).[34] The report:

> examined the principles underlying Australian family law, criminal law and contract law and the ways disputes about them are resolved, to see if they take enough account of the cultural diversity of Australian society … reviewed the extent to which the law recognises, accommodates, respects and protects the rights and diversity of cultures … concluded that there needed to be reform of the substantive law to make the legal system more accessible to everyone.[35]

The issue of multiculturalism and the law is an ongoing issue. Since ALRC Report 57, the issue has gained extensive coverage.

5.2.2 The Intrinsic Influence of Legal Pluralism and Legal Culture

Issues about multiculturalism and legal pluralism involve the legal, political and philosophical spheres. Legal pluralism is defined as primarily articulating 'an understanding of law as a multi-centred field that deals with the convergence of a multiplicity of norms, localities, states, global sites, and practices'.[36]

The function of legal pluralism is to convey 'recognition of the socio-cultural diversity of the legal domain within a nation State.'[37] Multiculturalism applied to law should lead to an acceptance of legal pluralism.[38] There not only should be more respect for legal

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[33] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 2, UNESCO Doc. CLT. 2002/WS/9 (2002).
[34] PDF version is available at: <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc57.pdf>.
[35] Australian Law Reform Commission, *Multiculturalism and the Law (ALRC Report 57)* (14 April, 1992) Australian Government - Australian Law Reform Commission <http://www.alrc.gov.au/report-57>. The website was last modified on 30 April, 2015.
[36] Gad Barzilai, 'Beyond Relativism: Where is Political Power in Legal Pluralism? ' (2008) 9 *Theoretical Inquiries in Law* 395, 396.
[37] Helene Kyed, 'The Politics of Legal Pluralism: State Policies on Legal Pluralism and Their Local Dynamics in Mozambique ' (2009) 59 *Journal of Legal Pluralism* 87, 88.
[38] Gary Bell, 'Multiculturalism in Law is Legal Pluralism-Lessons from Indonesia, Singapore and Canada ' (2006) *Singapore Journal of Legal Studies* 315, 315.

pluralism, but also legal pluralism ought to be part of the solution to the challenges facing the world.[39]

Apart from law, many other things exist in society to regulate the lives of citizens — 'rule systems, normative orderings, symbolic meanings, economic forces and the laws of nature'.[40] The question of asking to what extent those things can be treated as 'law' affects the notion of legal pluralism, which is fundamental to the establishment of regulation. From the perspective of history 'customary and religious and laws existed long before the modern nation-state and the rule of law'.[41] India is a good example:

> In postcolonial and multicultural societies, like India, various customary and religious laws continue to exist side by side with the law of the state at varying levels of recognition by, and interaction with, official law. [42]

There are many reasons to consider law itself as pluralist, in the sense, for example, that state law can mean different things when related to how it interacts with other regulatory orderings.[43] Legal pluralism has a function that not only decentres the place of official law in our understanding as final authority, but also empowers and democratizes the living law of the people — rules, customs and symbols generated internally by families, corporations, ethnic and religious groups, and lastly changes the definition of law to embrace the 'living law'.[44]

The role of the law has a different function under cultural pluralism:

> In a society characterized by deep cultural pluralism, the role of the law is to operationalize a political commitment to multiculturalism by serving as custodian and wielder of the twin key tools of tolerance and accommodation … [45] The tacit starting proposition of legal multiculturalism is that law is a means of managing or adjudicating cultural difference but enjoys a strong form of autonomy from culture.[46]

Toleration and accommodation have an interactive relationship. A virtuous toleration will 'accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and

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[39] Ibid 316. His narrow definition for legal pluralism is 'one concerned with state recognition of legal diversity in a multicultural state.' See ibid 321.
[40] Christine Parker, 'The Pluralization of Regulation ' (2008) 9 *Theoretical Inquiries in Law* 349, 349.
[41] Ibid 352.
[42] Ibid.
[43] Ibid 351.
[44] Ibid 352-353.
[45] Benjamin Berger, 'The Cultural Limits of Legal Tolerance ' (2008) 21(2) *Canadian Journal of Law and Jurisprudence* 245, 245.
[46] Ibid 246.

codes of conduct'.[47] In other words, cultural toleration is the process of recognition of the diversity and differences of various cultures.

Legal pluralism has positive functions not only in reinforcing equality,[48] but also in providing great flexibility.[49] Any reform efforts in legal pluralism should 'realise and make explicit the political dynamics of pluralistic arrangements, rather than try to remove or ignore politics'.[50] Such hybrid and plural governance arrangements can result in 'sustained peace, strengthened government, and improved local security and justice provision'.[51]

In order to manage law to not only encompass and account for social plurality but also retain its universal and normative role, the theories of 'responsive'[52] and 'reflexive'[53] law were presented by scholars:

> Philip Selznick's ideal of responsive law suggests that law should promulgate broad substantive values across a range of self-regulating or semiautonomous social fields … Gunther Teubner's notion of reflexive law suggests that law should catalyse processes of social coordination by which people in different social fields can work out for themselves which values to apply to which problem.[54]

Responsive law is closely related to politics. The purpose of responsive law is to put principles and values of political discussion into practice in a participatory and flexible manner, not only preserving their integrity but also embracing plurality. In addition,

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[47] Bernard Williams, 'Tolerating the Intolerable ' in Susan Mendes (ed), *The Politics of Toleration in Modern Life* (Duke University Press 1999) 65. Williams argued that 'the difficulty with tolerance is that it seems to be at once necessary and impossible ... we need to tolerate other people and their ways of life only in situations that make it really difficult to do so. Toleration, we may say, is required only for the intolerable.' See Williams, above n 47.

[48] 'Reinforce equality by decreasing the binding power of the law over the more powerful.' See Helene Kyed, 'Legal Pluralism and International Development Interventions ' (2011) 63 *Journal of Legal Pluralism* 1, 16.

[49] Increase great flexibility by 'working against the weaker parties because the strong tend to determine the choice of forum or rules'. See Ibid.

[50] Ibid.

[51] Ibid 18.

[52] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction 1978), 463-476. Helene took Somaliland case as example to 'support the case for international engagement with internal processes of change, including the facilitation of linkages and spaces for negotiations between a diverse set of actors.' Furthermore, this case also 'focuses on how a 'hybrid political order has *de jure* been institutionalised as result of an internally driven peace-building process, rather than on driven by international agencies.' For more information, please see Louise Wiuff Moe, 'Negotiating Political Legitimacy: the Case of State Formation in Post-conflict Somaliland ' (2009) *Centre for International Governance and Justice* <http://regnet.anu.edu.au/sites/default/files/CIGJ-IssuesPaper10-full.pdf>.

[53] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law ' (1983) 17 *Law & Soc'y Rev* 239, 239.

[54] See Nonet and Selznick, above n 52. See also Parker, above n 40, 356.

responsive law continually revises itself according to political discussion.[55] By contrast, reflexive law has different function — it 'emphasizes law's limitations for the purpose of expressing common values in a world of plural values, identities and motivations'.[56]

The remarkable point in Parker's article is she not only addressed the advantages[57] of responsive and reflexive law, but also analysed that both approaches are dangerously incomplete and advocated avoiding the extreme of either:

> Responsive law expects to have substantive public interest-oriented goals set for it through 'political' deliberation … It assumes that political deliberation is capable of yielding just solutions to society's problems … But this lack of political capacity for justice is exactly the problem to which the facts of pluralism, multiculturalism and global conflict point.[58]
>
> Reflexive law apparently comprehends the empirical reality of plurality better than responsive law, seeing society as so plural, and law as so limited, that law may not even be infused with substantive purpose or infuse it into others ... (However) reflexive law seems insufficiently cognizant of the ugly reality of pluralism, and too naive about the possibility that a consensus on values might emerge from processes of deliberation.[59]

The disadvantages of responsive law and reflexive law exposed the inherent weaknesses of these theories:

> On these accounts, law may play a crucial role in shaping the institutional environment in which decisions are reached, but it does not specify the need to achieve specific, pre-conceived goals. And even the procedures established by law may themselves be seen as self-consciously provisional and imbued with the logic of reflexive adaptation.[60]

If law is to be pluralized, it must be both responsive and reflexive:

> It must be aimed at catalysing processes of social coordination for people to agree on values — but it must also take up these values and apply them to the processes

[55] Parker, above n 40, 357.
[56] 'It argues that the role of law is rather to catalyse the processes of self-regulation by which other individuals, organizations, and social systems coordinate themselves with the rest of the world- and even that is asking a lot.' See ibid 358.
[57] 'The notion of responsive and reflexive law is particularly attractive for explaining, and maintaining some optimism about, the possibilities for effective governance at a transnational or federal level. It also provides a set of normative criteria for assessing the capacity to cope with the pluralism of any official law.' See ibid 365-366.
[58] Ibid 359.
[59] Ibid 359-360.
[60] Grainne Burca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism' in Grainne Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (2006) 17.

> in order to make participation in these processes of deliberation possible in the first place and to critique their outcomes and not just the processes themselves. [61]
>
> Reflexive and responsive law recognizes that substantive goals cannot come from inside law itself but only from political discussion outside of law, yet law has to help make sure that discussion happens freely and fairly, and go on to continuously make sure it takes on and elaborates the substantive justice goals that result.[62]

Legal pluralism is an inherent feature of legal culture. When it comes to 'legal culture', the available definitions for 'legal culture' encompass the elements including attitudes, values, the appropriate way to resolve disagreements and process disputes, beliefs, and behaviours produced by community members.[63]

Similarly to culture, legal culture has interactive relationships with law and society. 'Law in motion'[64] creates all necessary components for legal culture.[65] Law sits in a managerial role above the realm of culture.[66] Legal culture is the way in which 'legal structures, rules and norms influence social action and decision-making'.[67] 'The plurality of legal cultures and legal systems in the world is paralleled by the plurality of legal attitudes, traditions, expectations, and "cultures" within any one society.'[68] The phrase 'legal pluralism' emphasizes not only the existence of different national or political communities but also internal social complexity.[69]

Some scholars argue that there is even a mutual benefit and influence between legal pluralism and interactive governance.[70] Legal pluralism is a product of a state's political and legal strategy, and in turn, political power should have been of crucial significance to

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[61] Parker, above n 40, 368.
[62] Ibid 368-369.
[63] See Reza Banakar, 'Power, Culture and Method in Comparative Law ' (2009) 5 *International Journal of Law in Context* 69, 69. See also Vlee Hamilton, Joseph Sanders and Yoko Hosoi, 'Punishment and the Individual in the United States and Japan ' (1988) 22 *Law and Society Review* 301, 301.
[64] Saldias defined 'law in motion' by stating that 'when air stands still it is invisible to us. When it moves, we call it "wind", and as it blows the autumn leaves around, we believe that we can see it. Similarly, the concept of "legal culture" is indeterminate when we use it as a static aggregation of elements that explain current law. But if the law gets in motion, we become aware of the particularities of its environment.' See Osvaldo Saldias, 'Can We Explain the Emergence of Legal Cultures? A Methodological Approach Based on the Example of the Andean Community's Legal Culture ' (2010) 5 *Journal of Comparative Law* 232, 232.
[65] Ibid.
[66] Berger, above n 45, 247.
[67] Debbie Girolamo, 'Seeking Negotiated Order Through Mediation: A Manifestation of Legal Culture? ' (2010) 5(2) *Journal of Comparative Law* 118, 119.
[68] Tay, above n 13, 197.
[69] Ibid.
[70] An interactive and collaborative process of governance involves government, markets and civil society. See Svein Jentoft, 'Legal Pluralism and the Governability of Fisheries and Coastal Systems ' (2011) 64 *Journal of Legal Pluralism* 149,149.

legal pluralism 'in its various forms as normative concept, theory and praxis.'[71] Legal pluralism is the outcome of interactive governance based on the traits of its diversity, complexity, and dynamics.[72] As a result, the indicators of good governance such as accountability, transparency and effectiveness produce a solid foundation of citizen support. In other words, legitimacy and trust are prerequisites for governability and a more democratic form of governance.[73] Similarly, political legitimacy is based on shared values and beliefs and it is a prerequisite for governance.[74]

Interactive governance has a subtle inter-relationship with the operation of power. Interactive governance means governance in the context of interactive forms: between State and social actors such as networks, with market actors or with other governments. All these forms represent methods of governing involving mixtures of State action with the actions of other entities.[75] Power relations are a form of government and are perpetuated through cultures and customs, which shape and direct human beings in their perceiving, thinking, acting and reacting.[76] Political power is a control — 'control over public resources and control over means of socioeconomic and political discipline in ways that significantly affect social consciousness and behaviour.'[77]

However, governance is not simply a matter of control, but a process of 'socialisation, identity formation and knowledge',[78] which are the production of individuals. Likewise, Foucault came to the conclusion that the individuals form their collective identity by absorbing the culture[79] in society and in social groups.[80] In other words, 'the individual

[71] Barzilai, above n 36, 396, 415. According to Barzilai, 'legal pluralism has been a political tactic to use recognition in order to disempower for reforming the forms of political power organized and maintained by the nation-state.' Barzilai, above n 36, 396, 416.
[72] Jentoft, above n 70, 150.
[73] Ibid 156-157.
[74] Haley, above n 4.
[75] Jacob Torfing et al, *Interactive Governance Advancing the Paradigm* (Oxford University Press 2012).
[76] Fauzia Shariff, 'Power Relations and Legal Pluralism: An Examination of 'Strategies of Struggles' Amongst the Santal Adivasi of India and Bangladesh ' (2008) 57 *Journal of Legal Pluralism* 1, 9. 'Culture ideas are contested and connected to relations of power… They are typically plural, with contending ideas about many crucial areas of social life.' See also Sally Merry, 'What is Legal Culture? An Anthropological Perspective ' (2010) 5(2) *Journal of Comparative Law* 40, 42.
[77] See Barzilai, above n 36.
[78] Shariff, above n 76.
[79] Proposed, suggested as well as imposed by culture. See Michael Foucault, 'The Ethic of Care For the Self As a Practice of Freedom ' in J Bernauer and D Rasmussen (eds), *The Final Foucault 1954-1984* (London: Penguin Books 1988) vol 3, 11.
[80] Ibid 1-20.

constitutes him/herself under the direction and influence of power relations within the semi-autonomous social field encompassing legal orders'.[81]

In the domain of power relations, the element of freedom is required:

> Power is exercised only over free subjects, and only insofar as they are 'free'. By this we mean individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behaviour are available.[82]

There is a complicated interplay, a realistic struggle and an intimate co-existence between freedom and power — 'slavery is not a power relationship when a man is in chains, only when he has some possible mobility, even a chance of escape.'[83] Freedom and the will are recognized by Foucault at the heart of the power relationship — 'At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom'.[84]

Though tolerance plays an important role in cultural diversity, resistance is a notion in helping to understand how the opposite forces co-exist:

> Resistances as strategies of struggles, then, do not constitute an escape from power but function as an integral part of the power relation. In this respect there is always a possibility that resistance may reverse power for a moment but what is important is that each triumph is only a moment in an ongoing power relation...The only thing we can be certain of is that resistance is always present where there is power, the two co-exist. [85]

5.2.3 Conclusion

Culture and Law share each other and are an integrated whole. Law is both an object of culture and a producer of culture. Therefore, the discussion of freedom of speech and its historical evolution could not be conducted without the involvement of culture, because law was developed based on culture while culture has a great impact on law. Furthermore, the development of the notion of legal pluralism and legal culture has interactive relationship with freedom of speech. Legal pluralism is a product of a State's political and legal strategy, and in turn, political power should have been of crucial

[81] Shariff, above n 76, 10.
[82] Michael Foucault, 'The Subject and Power ' in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984* (London: Penguin Books 1994) vol 3, 326-343.
[83] Ibid 342.
[84] Ibid.
[85] Shariff, above n 76, 12.

significance to legal pluralism. Legal pluralism is the outcome of interactive governance based on the traits of its diversity, complexity, and dynamics. All these forms represent methods of governing involving a realistic struggle and an intimate co-existence between freedom and power.

5.3 The Role of Diversity in Governance and in Freedom of Speech

5.3.1 The Role of Diversity in Governance

The concept of diversity encompasses respect for and acceptance of the differing dimensions of gender, age, religion, race, physical abilities, socio-economic status, sexual orientation or political beliefs within a society. Therefore, good governance requires respect for such diversity within the society, and accommodation of it within the parameters of the rule of law. For this to occur, States must have endorsed freedom of speech, so that the diversity of views may be heard and considered. In large measure, such governance is governed by international norms accepted by the international community as a whole.

For example, States have an obligation to protect cultural diversity as part of human rights. *The Universal Declaration on Human Rights* confirmed the importance of culture: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'[86] *The Declaration on Cultural Diversity*, unanimously adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its thirty-first session on 2 November 2001, states that:

> The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.[87]

Such a human rights-based approach is an effective negotiating approach to solve the conflicts among low-power or vulnerable groups.[88] In essence, a State's values and the

[86] *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess, (Resolutions, pt. 1), at 71, art. 27 (1), U.N. Doc. A/810 (1948).
[87] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 4, UNESCO Doc. CLT. 2002/WS/9 (2002).
[88] E.D. Battaa, 'The Theory and Practice of Negotiation: Mainstreaming the Human Rights-Based Approach in Conflict Situations ' (2011) 85 *Philippine Law Journal* 564, 564. Here Battaa means 'social conflict

nature of its governance are demonstrated by its respect for human rights; full development can be achieved only when basic human needs and aspirations are met. And it is the responsibility of the State to protect, respect and fulfil human rights.[89] Article 6 of the *Declaration on Cultural Diversity* makes it clear that in achieving Making access for all to cultural diversity, freedom of speech is essential:

> While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.[90]

The recognition of diversity within a State is extremely important in the contemporary world. The environment of cultural diversity promotes freedom of speech, but it also requires the cooperation of political authority. It has been noted that:

> In democratic societies in which political authority responds to majoritarian values and needs, legal rules tend to reflect and reinforce those interests. In those societies where political authority is concentrated, the rules tend to favour the interests and values of the few who govern. In societies in which political authority rests on broader bases of community consensus, the legal norms generally reflect broader, more widely shared community interests and values.[91]
>
> Therefore, determining who controls norm-creating or lawmaking processes illuminates the configurations of political authority and influence within a society. Conversely, prevailing legal norms are themselves equally revealing with respect to who governs.[92]

Therefore, diversity is critically important in achieving good, dynamic, and better governance.

Good governance is indicated in accommodation to diversity; thereby increasing the likelihood that public officials will implement optimal public policies and reduce the

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between two opposing parties, where the other party has the clear advantage over power and resources.' See Battaa, above n 88, 573.

[89] Ibid. Battaa argued 'The State, as the primary duty-holder in the realization of human rights, has three general obligations - to respect, to protect, and to fulfil human rights ... The obligation of respect requires the State to refrain from taking actions that would restrict the person from fulfilling her or his rights when she or he is able to do so without state interference….obligation to protect compels the State to take steps to prevent or prohibit others from violating recognized rights and freedoms … The obligation to fulfil is still another type of positive obligation, which requires two dimensions: first, the State has to actively create conditions aimed at achieving full realization of human rights … ' See ibid 578.

[90] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 6, UNESCO Doc. CLT. 2002/WS/9 (2002).

[91] Haley, above n 4, 899.

[92] Ibid.

potential harm caused by the adoption of misguided policies or extremist positions.[93] Since the ability of policy-makers to predict or control the outcome of a shift in policy is limited, the opportunity to try multiple options is critical.[94] 'As more individuals become responsible for decisions, their policies will tend more toward the middle of the ideological spectrum'.[95] A wide range of views and the need for compromise will force them to moderate positions and increase the opportunity for the best ideas to emerge.[96]

The value of diversity in the free speech or political decision-making context was defended thus:

> Expanding the diversity of voices realistically available generally reduces some important political risks, including the risks of committing serious errors of public policy, as well as failing to recognize or acknowledge, and then correct, those errors. In the area of free speech and in various other contexts, diversity and risk-reduction go hand in hand.[97]

Furthermore, diversity in governance protects the public against the abuse of power, by frustrating the possibility of a tyrannical authority.[98] In other words, diversity ensures fair opportunity.[99] Thio argued that this principle has been proved true in legal cases by reference to *Turner Broad*:[100]

> … Right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.[101] The right to speak freely and to promote diversity of ideas and programs is…one of the chief distinctions that sets us apart from totalitarian regimes.[102] The widest possible dissemination of

[93] David Orentlicher, 'Diversity: A Fundamental American Principle ' (2005) 70 *Missouri Law Review* 777, 790-792.
[94] Ibid 790.
[95] Ibid 792.
[96] 'A government may see only a fairly narrow range of plausible alternative policies, with its own current policies at the ideological centre. Other alternatives are thought impractical, or themselves on-sided. Similarly, a government may irrationally undervalue, or exaggerate its differences with, what the rest of the world sees as rather closely related alternative policies.' See R George Wright, 'Dominance and Diversity: A Risk-Reduction Approach to Free Speech Law' (1999) 34(1) *Valparaiso University Law Review* 1, 13.
[97] Ibid 1.
[98] Like the division of power among executive, legislative and judicial branches of government makes it more difficult for a single entity to accumulate excessive power, diversity in governance share the same outcomes. See Orentlicher, above n 93, 792.
[99] 'Determining whether someone has been given a fair opportunity to succeed is often difficult to establish; it is a much simpler matter to decide whether diversity is being achieved.' See ibid 811.
[100] Thio, above n 2, 510.
[101] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
[102] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

> information from diverse and antagonistic sources is essential to the welfare of the public … [103]

In the final analysis, diversity promotes unity in the society: 'unity without diversity through coercive, homogenising assimilation degenerates into authoritarianism; diversity without unity devolves into fissiparous chaos which thwarts sustainable peace by eroding the shared life of a plural nation.'[104] Unity in diversity 'requires the recognition of an irreducible plurality and a shared commitment to an indivisible unity.'[105]

Thus various scholars have recognised the significance of diversity, and governmental acceptance of diversity, as being part and parcel of a good governance regime. Such a regime also acknowledges that diversity informs freedom of speech.

5.3.2 The Role of Diversity in Freedom of Speech

Free speech is vital to the functioning of a democratic government and good governance. In maintaining democracy, free speech facilitates the exchange of diverse opinions and is essential for a democracy 'committed to personal autonomy and political pluralism'.[106] In a representative democracy, 'dialogue facilitates the testing of competing claims and obtaining of diverse input into political decision-making'.[107]

Free speech works at its best under conditions of diversity — 'Freedom of speech may be at its optimal not merely when many people are talking and listening, but when the potential diversity of the messages delivered is preserved and encouraged.'[108] What's more, 'when different perspectives are encouraged from a variety of speakers, unnecessary social risks, including unnecessary delays in detecting and correcting political mistakes, may be reduced.'[109] Particularly, a large number of varied and distinct critiques of any given policy play best at reducing any risks in public policy.

An effective free speech environment demands that government preserves diversity in speech:

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[103] *Turner Broad. Sys. Inc. v. F.C.C.*, 520 U.S. 180, 192 (1997).
[104] Thio, above n 2, 510.
[105] Ibid.
[106] Alexander Tsesis, 'The Boundaries of Free Speech ' (2005) 8 *Harvard Latino Law Review* 141, 498.
[107] Ibid 497.
[108] Wright, above n 96, 11-12.
[109] Ibid 12.

> Free speech requires that governments hedge those bets by tolerating the expression of multiple, diverse, and potentially valuable critiques of those policies. Hedging governmental policy bets via free speech enables the society to more quickly appreciate and correct governmental misjudgments, and to minimize the 'groupthink' in collective decisionmaking.[110]

The UNESCO *Cultural Diversity* Declaration has recognized the function of cultural diversity as a factor in development:

> Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.[111]

> Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent … All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.[112]

As noted earlier, the *Declaration* itself in Article 6 also states that freedom of expression is a guarantee of cultural diversity. In fact, diversity not only affects and promotes free speech but also relates to human dignity: for example, the right to hear various views and then to adopt the most compelling one, which 'recognizes the individual as a morally responsible agent who makes decisions guided by reason and conscience.'[113]

In a democratic society, an authentic respect for diversity enables people to live with their deepest differences, even as they continue to debate them. Thus free speech also works at its best under the condition of recognition of diversity, which in turn optimises good governance. Furthermore, to certain extent, the appreciation of diversity is equal to tolerance. The absence of tolerance is at the root of peer cruelty, religious and political persecution, hate crimes and unjust discrimination that increasingly plague the world. Therefore, tolerance can also be defined as respecting and accepting others' diversity, including their values and beliefs. Tolerance is also a liberal virtue, which is among the most honourable of the respectable habits of liberal citizens.

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[110] Ibid 16.
[111] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 3, UNESCO Doc. CLT. 2002/WS/9 (2002).
[112] *Universal Declaration on Cultural Diversity*, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 5, UNESCO Doc. CLT. 2002/WS/9 (2002).
[113] Thio, above n 2, 489.

Just as rational acceptance of diversity informs and promotes free speech, so too does acceptance of diversity (and the subsequent acceptance and promotion of freedom of speech) demand tolerance.

5.4 Justifications for the 'Toleration of the Intolerable' Paradox

The definitions of toleration vary according to the times, but each of them has a similar general meaning which indicates a preparedness to endure unpleasant things. For example, the Latin verb *tolerare* means 'to bear or endure' or a 'grudging and temporary acceptance of an unpleasant necessity'.[114] The Concise Oxford English Dictionary says 'To tolerate is to endure, without interference, beliefs or conduct which one believes to be wrong'.[115]

Toleration has also been defined thus: it 'involves the reluctant acceptance of things that one hates or despises'.[116] A comprehensive definition could be the one that toleration is 'disapproval or disagreement coupled with an unwillingness to take action against those who are viewed with disfavour in the interest of some moral or political principle. It is an active concept, not to be confused with indifference, apathy or passive acquiescence.'[117]

The operation of freedom of speech not only has a close connection with cultural and legal diversity but also is determined by the national attitude toward the degree of toleration; in general, the larger the extent of tolerance the freer atmosphere speech has. The meanings and function of toleration on free speech will be analysed in this part. However, an appropriate degree of toleration also needs to be regulated with limitation. The boundaries of tolerance, which determine the right exercise of power (or, good governance), on the one hand, and of liberty on the other, are to be marked out with an impartial view to both these fundamental democratic and liberal values.

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[114] Randolph Head, 'Introduction: The Transformations of the Long Sixteenth Century' in John Laursen and Cary Nederman (eds), *Beyond the Persecuting Society: Religious Toleration Before the Enlightenment* (Springer, 1998) 95, 97. 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' See art. 1, *Universal Declaration of Human Rights*, GA Res. 271(m), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR].

[115] Concise Oxford English Dictionary, 11 th ed. (2004) at 1515.

[116] Richard Vernon, *The Career of Toleration: John Locke, Jonas Proast, And After* (McGill-Queen's Press, 1997) 71.

[117] Peter Garnsey, 'Religious Toleration in Classical Antiquity' in W. J. Shiels (ed), *Persecution and Toleration* (1984) 1. See also E. Gregory Wallace, 'Justifying Religious Freedom: The Western Tradition ' (2010) 114(2) *Penn State Law Review* 485, 500.

Toleration creates a harmonious environment where differences can coexist. Toleration accommodates difference, and it also produces among the differences a pattern of accommodation that makes coexistence easier than it might otherwise have been.[118] Tolerance is able to make a society continue to diversify and become more globally interconnected. Furthermore, tolerance is an essential method to foster diversity, and in particular cultural variances.[119]

> Toleration, hearing all perspectives, is designed to protect moral deliberation in a democratic setting, not to enforce a moral imperative by fiat. Therefore, toleration extends to protecting the expression of views, not endorsing specific views nor immunising them from critique.[120]

The concept of tolerance plays a role essential to moral traditions and liberal politics. Collective toleration and associational freedoms are not modern, liberal productions, 'but liberal constitutionalism additionally requires equal legal associational freedoms and non-discrimination, not fully guaranteed in pre-liberal arrangements.' [121] Furthermore, tolerance has been considered as a virtue.[122] However, the paradox of 'tolerating the intolerable'[123] has raised a number of tough questions: Should tolerance be accepted without limitation? How to balance tolerance with national control toward morally wrong actions or beliefs? How to judge when toleration is necessary?

The paradox can be shown directly even from the concept of tolerance itself. For example, tolerance can be viewed as 'a moral decision in favour of exercising restraint when another's moral stance violates one's substantial view of the good'.[124] However, it becomes complicated when trying to depict the paradox of tolerating the intolerable thoroughly. The paradox is more like a psychological process:

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[118] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1992), 67-68. See also Gordon Christenson, '"Liberty of the Exercise of Religion" in the Peace of Westphalia ' (2013) 21 *Transnational Law & Contemporary Problems* 721, 751.
[119] Jessica Jones, 'Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State ' (2009) 22 *National Black Law Journal* 1, 6.
[120] Li-ann Thio, 'Between Eden and Armageddon: Navigating 'Religion' and 'Politics' in Singapore ' (2009) *Singapore Journal of Legal Studies* 365, 402.
[121] Veit Bader, 'Post-Secularism or Liberal-Democratic Constitutionalism?' (2012) 5 *Erasmus Law Review* 5, 23.
[122] John Horton, *Toleration: An Elusive Virtue* (Princeton University Press, 1996), 28.
[123] Harel Arnon, 'Legal Reasoning: Justifying Tolerance in the U.S. Supreme Court ' (2007) 2 *NYU Journal of Law & Liberty* 262, 262. 'One of the earliest philosophers to champion tolerance - and one of the most inspiring-was John Locke.' See Arnon, above n 123, 266.
[124] Ibid 266.

> The paradox arises because we appear to believe both that we have conclusively good reasons against tolerating a given attitude, belief, action, practice, person or way of life, and equally compelling reasons for doing so. This is not because the reasons are equally balanced, at least not at the same level of reasoning. Instead, we are confident that we are right and they are wrong, but that for reasons of a different kind we should let them alone. This seems highly paradoxical, even irrational, and, a critic might add, clearly wicked, for if we are confident in our reasons, why should we tolerate anything that opposes our beliefs, attitudes, or practices? Why allow people to do that or believe that which we know is hideously wrong or deeply misguided?[125]

It is not easy to tolerate without appropriate justifications. 'It is absurd to ground tolerance in incertitude. We must therefore look elsewhere for the proper ground of tolerance.'[126] Therefore, a few theories developed to support toleration: social order-based tolerance, truth-based tolerance, and pluralism.

It was John Locke who mentioned social order-based tolerance in 1689, but the argument was focused on religious tolerance: that it was dangerous to allow States to control and enforce religion, especially when States adopt (what might be seen by some to be) false religion. Consequently, 'if we truly care for the salvation of the souls of all citizens in all States, we must, as a matter of principle, allow room for citizens to act according to their own consciences, rather than according to the prevailing faith in their States.'[127]

Likewise, 'for the sake of social unity, public discourse must rely on non-sectarian arguments and be assessed in terms of commitments all citizens can share'.[128] In other words, tolerance is necessary in order to maintain and keep safe social order. 'Prudence rather than principle may dominate and influence understandings of toleration, driven by pragmatic concerns of civil peace.'[129] This means harmony in a diverse society could not be achieved with a laissez-faire system, but rather with prudent management.

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[125] Hans Oberdiek, *Tolerance: Between Forbearance and Acceptance* (Rowman & Littlefield Publishers 2001), 12.
[126] R. Mary Lemmons, 'Tolerance, Society, and the First Amendment: Reconsiderations ' (2006) 3(1) *University of St. Thomas Law Journal* 72, 76.
[127] John Locke, *A Letter Concerning Toleration* (Black Swan 1689), 119. Electronic version is available at: <https://books.google.com.hk/books?id=k6_kYuw22cQC&pg=PR3&lpg=PR3&dq=John++Locke,+A+Letter+Concerning+Toleration+%28Black+Swan+1689%29&source=bl&ots=7OBWQXAL5G&sig=rPZtG-cqNFLer7IpFpFXxTIrsDU&hl=zh-CN&sa=X&ei=42FdVe-hKeLXmAW874HoCw&ved=0CBsQ6AEwAA#v=onepage&q=John%20%20Locke%2C%20A%20Letter%20Concerning%20Toleration%20(Black%20Swan%201689)&f=false>.
[128] Thio, above n 120, 372-373.
[129] Ibid 402.

It is in an environment of tolerance and forgiveness that harmony is best pursued rather than one of contention or prosecution.[130] Laws should be enacted based on the ground of preventing the possibility of the disturbance of public order in order to reduce any significant damage[131] before it is too late to mitigate.[132] The reason that toleration could promote harmony is it mitigates the gaps among differences:

> As a matter of justification, the principle of tolerance directly promotes social harmony. Without tolerance, differences which should be tolerated might unnecessarily become sources of conflict. The failure to practise tolerance highlights the differences, which might have been below the actual threshold limit of tolerance, thus deepening the fault lines between the various communities, eventually leading to racial or religious schisms.[133]

Truth-based tolerance was articulated by John Stuart Mill first in 1859 in his book of *On Liberty*. It was one of the foundational texts that remains highly influential in any rights discourse.[134] Different from Locke, Mill did not limit his discussion from the angle of religion. Mill started his arguments from the point of humankind evolution: that it is a historical progression in that different opinions need to be refined and adopted before true statements show up. Thus, in order to obtain truth, it is necessary to open up channels to allow a wide range of voices and opinions to be presented. Toleration of divergent practices contributes to knowledge of the truth.[135]

The tolerance shown here is an inevitable outcome of progress and the nature of human beings' evolution, even though falsities or evil claims might be accepted during the process. The existence of various ideas, including 'correct' ideas and also 'false' opinions, is a prerequisite for attaining the truth; and allowing various opinions to coexist is a necessary precondition to progress.[136]

Regardless of how irrational falsehoods might be, the theory of toleration is still supported on the basis of respecting human beings' capacity to make autonomous decisions:

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[130] Ronald Wong, 'Evangelism and Racial-Religious Harmony: A Call to Reconsider Tolerance ' (2011) 29 *Singapore Law Review* 85, 86.
[131] For example, 'provoke members of different races or classes to riot, or cause other immediate threats to public safety, peace or order, or commit other acts which ultimately result in violence, or at least have a shattering effect on public tranquillity and society in general.' See ibid 89.
[132] Ibid 88.
[133] Ibid 105.
[134] John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green 1859).
[135] John Stuart Mill, *On Liberty* (Oxford World's Classics 1859) 22-27.
[136] Ibid.

> Since the free, autonomous will grounds morality, any individual should be allowed to choose his own ends, to be the sole legislator of his normative world. If we are genuinely to respect the essence of being human — that is, our capacity to choose freely — we must allow people to make their own choices, even when they make bad ones. Allowing people to make only good choices does not respect their capacity to make autonomous decisions.[137]

The discovery of truth is a process determined by the degree of the power a State exercises over the individuals: it also means whether a State allows the individuals to express their views freely so to expose the truth. Mill's harm principle articulates the limitations of the State over individuals on their rights and freedoms as well as of individuals to each other:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-preservation. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[138]

The harm principle implied that except in doing harm to others, human beings have free will:

> … The individual was sovereign over his own body and mind and he should not be compelled to do what is considered wise, right or moral in the eyes of others. This idea that the rights and freedoms of an individual or group only extend until they infringe on the rights of others has been fundamental to contemporary liberal societies.[139]

However, the concept of individual autonomy should not be unlimited. There should be a bottom line for autonomy. For example, Kant argued that moral condemnation was a factor limiting autonomy (in his view, for example, he deemed extramarital sex and homosexuality as absolutely immoral).[140]

The word 'autonomy' is problematic, because different people have a different concept of the level of freedom and tolerance under autonomy. The bottom line must be that everyone is subject to the national constitution — in accordance with local characteristics that are in line with that constitution, which in turn is formulated on the basis of recognition of the diversity of the society within the framework of representation and the rule of law.

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[137] Arnon, above n 123, 270.
[138] John Stuart Mill, *On Liberty* (Doubleday, Doran and Company 1935), 310.
[139] Alex Fielding, 'When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada ' (2008) 13 *Appeal: Review of Current Law and Law Reform* 28, 32.
[140] Immanuel Kant, *Lectures on Ethics* (Cambridge University Press, 1930), 162-171.

Pluralism is another justification for tolerance. It was first captured by Isaiah Berlin in 1998 in a book whose title was borrowed from Kant, *Idea for a General History with a Cosmopolitan Purpose* (1784), Proposition 6: *Out of the crooked timber of humanity, no straight thing was ever made*.[141] In a time where citizens' consciousness of expressing freely is becoming stronger and stronger with diverse opinions, the question of how to live together in disagreement goes to the heart of pluralism. The best way of accommodating different ideas and cultures is to seek peaceful, pluralistic coexistence as the ultimate goal. Liberalism itself was born out of a theory which focused on the individual, free from imposition and interference by the sovereign or State.[142]

Similarly, it is liberalism's basic characteristics to give individual reason a high valuation and to acknowledge law as a tool to confine the State's interference in the lives of individuals.[143] There is no doubt that liberalism seeks to respect individual thought. However, 'where these commonly-held views diverge is in the interpretation of tolerance, universal values, and the growing challenge of cultural pluralism.'[144]

Liberty and tolerance have been deemed as the most immediate political implications of pluralism.[145] Many States, especially Western States, have a compelling interest in promoting tolerance due to the indispensable role of tolerance in a pluralistic society and in assisting the growth of freedom of speech as an aid to good and democratic governance. No pluralistic community can exist without toleration.[146]

It is not too hard to understand that pluralism depends on tolerance, which means pluralism demands a plurality of values and normative sources but 'rejects a single, universal, absolute source of normative human values' and 'there is no value or set of values that consistently overrides all others'.[147]

> In a pluralistic society, individuals must be allowed maximum liberty in order to exercise moral imagination, which in turn requires that individuals tolerate

[141] Isaiah Berlin, *The Crooked Timber of Humanity* (Pimlico, 1998), 20.
[142] Fielding, above n 139, 30.
[143] Benjamin Berger, 'The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State ' (2002) 17 *Canadian Journal of Law and Society* 39, 39.
[144] Fielding, above n 139, 31.
[145] Arnon, above n 123, 274.
[146] Lemmons, above n 126, 72, 77.
[147] Arnon, above n 123, 272. Arnon argued that 'Instead, pluralism argues that values are conditional - predetermined by historical and cultural contexts and always a product of the personal, local, and incomplete perspective of the individual or individuals who hold them. As a result, the plurality of normative values forms the basis of the human condition.'

> choices made by others. Choices that seem plainly bad or tasteless should not be seen as a threat but as an expansion of the moral choices available in society. For this reason, the fact that different people have different views should be welcomed and celebrated.[148]

Pluralism thus celebrates freedom of speech, within the liberal framework.

In addition, pluralism recognises that values are often incompatible and cause tension in the society; otherwise there is no need to tolerate. Pluralism demands those incompatible values be welcomed but not feared. 'These ever-going conflicts make our lives richer, more meaningful and colourful;'[149] as Harvel Armon noted in 2007 in his article, *'Legal Reasoning: Justifying Tolerance in the U.S. Supreme Court*':

> A work of art cannot be said to be true nor false in an absolute sense, since it does not draw its value from conformity to external, universal artistic criteria. A play can be tasteless, or poorly done, but it cannot be "false." Similarly, in a pluralist society, there is a shared understanding that moral choices cannot be true or false in this sense, since there are no absolute universal criteria against which to judge them.[150]

However there must be some limits to toleration, else the harmony of the pluralist society could not be maintained within a framework of both freedom of speech and respect for individuals' autonomy.

Preserving scarce resources in the society is another possible reason for promoting tolerance; Bader noted that:

> [The] democratic state must not pre-emptively reduce the polyphonic complexity of the diverse public voices because it cannot know whether it is not otherwise cutting society off from scarce resources for the generation of meanings and the shaping of identities.[151]

Why this is, is because freedom of political speech is the centre of a liberal understanding of modern democracy as opposed to majoritarianism. Restrictions on public reason or political speech without reasonable justifications extend beyond legitimate restrictions (such as incitement to violence and serious discriminatory speech).[152]

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[148] Ibid 274.
[149] Margaret Canovan, 'Friendship, Truth and Politics: Hannah Ardent and Toleration' in *Justifying Toleration* (Cambridge University Press 1988), 177.
[150] Arnon, above n 123, 273.
[151] Bader, above n 121, 17.
[152] Ibid 24.

Plurality of opinions or disagreement on ideas is the virtue of democratic society. Insistence on an agreement of all opinions in speech impedes the way to truth and justice, as Mill had noted in *On Liberty*.

Toleration welcomes different insight into a perspective. Truth demands free inquiry, and freedom is especially presupposed by truth.[153] To some extent, tolerance can be considered as respecting others' right to freedom of speech: 'What we really mean by saying that we tolerate certain ideas is that we tolerate the existence of certain men who hold those ideas and that we respect their freedom of speech'.[154]

Thus free speech is determined by the degree of the power a State exercises over individuals, and is interdependent with the degree of tolerance manifested amongst the governed, which in turn is represented by the corresponding degree of prudent governance.

5.5 Practical Examples from Australia, Singapore and India of their Attitudes toward Diversity, Pluralism and Tolerance with respect to Free Speech

5.5.1 Australia

5.5.1.1 Multicultural Policy in Australia

Since its founding, Australia has changed dramatically, but no changes are more far-reaching than the relation between cultural diversity and citizenship.[155] Australia's multicultural policy started almost 50 years ago, which 'moved from indigenous exclusion and a restrictive and racially-based immigration policy to an acceptance of cultural diversity'.[156]

[153] Lemmons, above n 126.
[154] Etienne Gilson, *Dogmatism and Tolerance* (Rutgers University Press, 1953), 7, 12. For Gilson, tolerance is a moral and a political virtue, not an intellectual one. 'As rational beings, our only duty towards ideas is to be right, that is to say, to seek truth for its own sake and to accept it as soon as we see it. As to error, whether it is found in ourselves or in the minds of other men, our only duty towards it is to denounce it as false…The two notions of "tolerance" and of "intolerance" simply do not apply to the order of ideas'.
[155] Jeremy Webber, 'Multiculturalism and the Australian Constitution ' (2001) 24(3) *UNSW Law Journal* 882, 883.
[156] Ibid.

'The term multiculturalism entered Australian parlance in 1973[157] following its introduction some years earlier in Canada'.[158] Three important elements comprise multiculturalism in Australia: Toleration, non-discrimination and the value of cultural diversity.[159] In the *National Agenda* in 1989, the Commonwealth Government identified three dimensions of multicultural policy: cultural identity, social justice and economic efficiency. Cultural identity refers to 'the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion'.[160] All Australians share the benefits and responsibilities arising from the cultural, religious and linguistic diversity of the society.[161]

The significance of the cultural identity principle plays an essential role in Australia and should not be underestimated. Thus:

> People are free to express their distinct cultural identities, in the public and private domains, without hindrance and with substantial help by government. The right to cultural identity constitutes a real and radical departure from both assimilationism and mere non-discrimination. [162]

The Australian government takes different measures to sustain cultural and linguistic distinctiveness. For example, 'providing information to the public in many languages, either directly or via interpreter and translator services, and multilingual explanations appear on electoral ballots, census forms, and so on'.[163] Again, this is easy to see from the websites of the Department of Immigration and Border Security and the Department

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[157] 'Since that time, there has been express acceptance in Australia political life of a non-discriminatory immigration policy and a multi-ethnic Australia, often justified under the rubric multiculturalism'. See ibid 886.

[158] Geoffrey Levey, 'The Political Theories of Australian Multiculturalism ' (2001) 24(3) *UNSW Law Journal* 869, 872.

[159] Government documents (*The Abolition of the 'White Australia' Policy*: it describes Australia's approach to immigration from federation until the latter part of the 20th century, which favoured applicants from certain countries. Available at: https://www.immi.gov.au/media/fact-sheets/08abolition.htm) claim that rather than the loss of large numbers of migrants' language, culture and identity, they chose to follow a new period of 'integration' and 'toleration', 'which largely leaves minorities to live as they please as long as they do not interfere with the dominant culture. Non-discrimination, which protects the individual rights and liberties of all citizens by outlawing discrimination on the basis of race, religion, ethnicity and other group characteristics. In this, it seeks to ensure that the common citizenship rights of liberalism are truly common. Finally, the affirmation of multiculturalism, rejects the individualistic bias of the non-discrimination model, recognises the valued of cultural diversity, and actively assists groups to maintain their distinct cultures within in the larger society.' See ibid.

[160] Office of Multicultural Affairs, Department of the Prime Minister and Cabinet, *National Agenda for a Multicultural Australia* (1989), vii.

[161] Australian Government-Department of Social Services, *A Multicultural Australia* (2 April, 2015) Australian Government-Department of Social Services <https://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia>.

[162] Levey, above n 158, 873.

[163] Ibid 876.

of Human Services, where the various translation and interpreter service are prominent.[164]

In addition, the *Racial Discrimination Act* 1975 (Cth) s18C demonstrates Australia's diverse and tolerant policy in sustaining both equality and multiculturalism. S18C (1) states that: 'It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.' [165]

S18C of *Racial Discrimination Act* lists three certain acts that could not be counted as in private. For example, acts that '(a) causes words, sounds, images or writing to be communicated to the public; or (b) is done in a public place; [166] or (c) is done in the sight or hearing of people who are in a public place.'[167] The import of this provision is to counteract 'hate speech' (a phenomenon that has been occurring particularly of late in India (see 3.4) —a threatening form of communication opposed to democratic principles.

However, in contemporary Australia, the word 'multiculturalism' still remains as a politically controversial word. 'Whenever issues of religion, ethnicity, and cultural difference hit the headlines, the country's commitment to multiculturalism is invariably questioned.'[168] In the political spectrum[169], one criticism of multiculturalism is that it can undermine unity. There are also three official limits to Australian multiculturalism:

> 1. Multicultural policies are based upon the premises that all Australians should have an overriding and unifying commitment to Australia, to its interests and future first and foremost;

[164] See website as: http://www.immi.gov.au/about/charters/client-services-charter/charter-translations.htm; and http://www.humanservices.gov.au/customer/themes/migrants-refugees-and-visitors.
[165] *Racial Discrimination Act* 1975, s18C(1).
[166] 'Public Place' includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.
[167] *Racial Discrimination Act* 1975, s18C(2). Please also compare this 'hate speech' provision with what has been happening in India in 3.4.
[168] Levey, above n 158, 869.
[169] 'The principles of Australian multiculturalism relate to three cultural rights claims often discussed by political theorists: the symbolic recognition of cultural minorities in official emblems, anthems, flags, public holidays, and the like; the public subsidisation of ethnic festivals, media, and traditions; and special representation in the legislature.' See ibid 875-876.

> 2. It requires all Australians to accept the basic structures and principles of Australian society — the Constitution and the rule of law, tolerance and equality, Parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes;
>
> 3. It imposes obligations as well as conferring rights: the right to express one's own culture and beliefs involves a reciprocal responsibility to accept the right of others to express their views and values.[170]

Freedom of political speech[171] has a high level of support in Australia. Because of the tolerance in cultural diversity, the implementation of freedom of political speech is achieving close to an ideal outcome in Australia as well. Freedom of political speech has been identified as part of the national culture, part of being Australian, and key to achieving other goals, such as the development of individual capabilities.[172] In other words, 'Australian people saw Australia as relatively generous in its defence of free speech',[173] but when speech is aberrant, a preparedness to limit it will be at hand.

5.5.1.2 The Increasing Violation of s18C of the Racial Discrimination Act on Free Speech

The positive environment for free speech and cultural tolerance in Australia has slightly changed in the recent decades. This can be seen in events that occurred in 2015 and 2011 respectively.

Richard Kemp, the former commander of British forces in Afghanistan delivered a speech about the ethical dilemmas that faced military forces opposed by non-state groups on March 11, 2015 on the University of Sydney campus. Shortly after he had introduced his talk, the event was disrupted by the forceful entry of a group of students. Kemp described the frightening experience as follows:

> They entered the room aggressively and noisily. They had a loud speaker set at full volume into which one of the students was screaming abuse directed at me. The other students were chanting the same abusive words and some were waving banners and placards. They were shouting: "Richard Kemp, you can't hide, you

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[170] Office of Multicultural Affairs, Department of the Prime Minister and Cabinet, *National Agenda for a Multicultural Australia* (1989), vii.
[171] There is a necessity to mention the peculiar Australian position concerning the constitutionally implied 'freedom of political communication' (a constitutional addition to the common law freedom of speech); the constitutionally implied freedom of 'political communication' is, in Australia, a completely different species of freedom of speech.
[172] Katharine Gelber, 'Freedom of Speech and Australian Political Culture ' (2011) 30(1) *University of Queensland Law Journal* 135, 142.
[173] Ibid 143.

> support genocide". This group was joined in their chants by a few in the audience who had apparently positioned themselves in the room previously in order to join in the planned protest.[174]

The young woman who led the activity with the megaphone was said to belong to an extremist Islamist organisation that had gained notoriety.[175] Furthermore, two well-known academics of the University of Sydney were present and loudly supported it — Jake Lynch, director of the Peace and Conflict Studies Centre;[176] and Nick Riemer, a senior lecturer in the English department. Baldwin,[177] a member of the audience, questioned today's Sydney University, in that it had changed significantly from the original impression in his mind:

> The University of Sydney is one of Australia's most venerable higher education institutions. It should be a place where controversial issues are debated freely and openly with the contending sides able to present their cases without intimidation and harassment. It should be governed by an administration that strongly affirms the importance of free debate and acts swiftly and decisively to protect it if it comes under threat. It should definitely not be a place where mob rule is allowed to prevail or where activist groups get to decide which viewpoints can be expressed.[178]

That event that occurred on March 11, 2015 in the University of Sydney violated s18C of *Racial Discrimination Act.* The act offended, insulted, humiliated or intimidated Kemp or a group in the audience in a public place because of race or ethnic origin (ethical dilemmas of military tactics).[179] To some extent, the event manifested not only that the merits of cultural tolerance and diversity in Australia have been going downwards, but also revealed that the right to free speech has been challenged.

Another important case related to the *Racial Discrimination Act* s18C is *Eatock v Bolt*,[180] which has provoked considerable comment on free speech. In the case, Andrew Bolt, a

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[174] Richard Kemp, *Lynch's behaviour 'deeply shocking': Kemp* (March 15 2015) The Australian Jewish News <http://www.jewishnews.net.au/lynchs-behavior-deeply-shocking-kemp/41073>.
[175] Peter Baldwin, *Where the right to speak is howled down* (April 02, 2015) The Australian <http://www.theaustralian.com.au/opinion/where-the-right-to-speak-is-howled-down/story-e6frg6zo-1227288292791>.
[176] See for more information about Lynch and his defences regarding his involvement in the activity: Gerard Henderson, *Radical tolerance for the Left but intolerance towards conservatives* (March 14, 2015) The Australian <http://www.theaustralian.com.au/opinion/columnists/radical-tolerance-for-the-left-but-intolerance-towards-conservatives/story-fnkqo7i5-1227261889875>.
[177] Peter Baldwin was Minister for Higher Education (1990-93) in the Hawke-Keating government.
[178] Baldwin, above n 175.
[179] 'Kemp supported the tactics used by the Israel Defence Forces in its recent war with Hamas-led Gaza'. See Henderson, above n 176.
[180] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

conservative commentator, was found to have breached the *Racial Discrimination Act* in publishing two newspaper articles.[181] The articles were published by the Herald & Weekly Times in the *Herald Sun* newspaper and on that paper's online site.

The nature of Ms Eatock's complaint was that 'the articles conveyed offensive messages about fair-skinned Aboriginal people, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people.'[182] Eatock claimed that this conduct contravened section 18C of the *Racial Discrimination Act.* In order to succeed in her claim, Eatock was required to prove that Bolt's conduct violated the elements of the Act: first, that it was reasonably likely that fair-skinned Aboriginal people (or some of them) were offended, insulted, humiliated or intimidated by the conduct; and second, the conduct was done by Mr Bolt and the Herald &Weekly Times, including because of the race, colour or ethnic origin of fair-skinned Aboriginal people.

Justice Bromberg in the Federal Court determined that each of Mr Bolt and the Herald & Weekly Times engaged in conduct which contravened section 18C of the *Racial Discrimination Act*, because Bolt had both written factually incorrect statements and further omitted relevant facts by claiming that individuals decided to identify as Aboriginal in order to gain benefits available only to Aboriginal people. As a result, the publication was reasonably likely to offend, insult, humiliate or intimidate on the basis of race.[183]

More recent developments occurred in the beginning of 2016 regarding Aboriginal issues. There was a push for Aboriginal ID tests by indigenous leaders. Indigenous leaders called for tougher identity checks amid warnings that 'fake Aborigines' are involved in widespread rorting of benefits, government jobs and contracts, resulting

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[181] Andrew Bolt. 'It's so hip to be black', Herald Sun (Melbourne), 15 April 2009, available at: http://www.abc.net.au/mediawatch/transcripts/1109_heraldsun09.pdf; Andrew Bolt, 'White fellas in the black', Herald Sun (Melbourne), 21 August 2009, available at: http://www.heraldsun.com.au/news/opinion/white-fellas-in-the-black/story-e6frfifo-1225764532947.
[182] *Eatock v Bolt* [2011] FCA 1103. Available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2011/1103.html?stem=0&synonyms=0&query=andrew%20bolt.
[183] *Eatock v Bolt* [2011] FCA 1103, 196-211. Relevant comments on findings see also Barbara Ann Hocking and Yega Muthu, 'Australasian Reflections on Modern Slavery' (2012) 5(4) *Journals of Politics and Law* 69, 84-85. See also Sarah Joseph, 'Free Speech, Racial Intolerance and the Right to Offend ' (2011) 36(4) *Alternative Law Journal* 225, 225. See also Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere ' (2012) 41 *Common Law World Review* 167, 194.

from a landmark finding disqualifying a claim of Aboriginality by a former senior NSW public servant.[184]

Proposed changes to 18C racial discrimination laws to secure greater freedom of speech were dumped by the former Prime Minister Tony Abbott in 2014. As was seen in the 2011 Federal Court case of *Eatock v Bolt*, section 18C of the *Racial Discrimination Act* makes it unlawful to offend, insult, humiliate or intimidate another person or a group of people because of their race or ethnicity.[185] The proposed amendments would have removed protections against offending, insulting or humiliating someone. But the public storm led to months of delays and reports of angst at Cabinet level over the proposed changes. Mr Abbott said it was a 'complication' in the current environment and 'we're just not going to proceed with it':

> I'm a passionate supporter of free speech and if we were starting from scratch with section 18C we wouldn't have words such as offend and insult in the legislation. But we aren't starting from scratch. We are dealing with the situation we find ourselves in and I want the communities of the country to be our friend not our critic.[186]

However, the debate has continued, sparked in part by the Australian Human Right Commission (AHRC) pursuing complaints under section 18C against Queensland University of Technology students (for posting on Facebook complaints that they had been excluded from an unused indigenous space because they were not indigenous), and cartoonist Bill Leak, for publishing an allegedly racist cartoon. The QUT students' matter was thrown out by the Federal Circuit Court, and the complaints against Mr Leak were withdrawn, leaving many to draw the conclusion that the AHRC investigations were marred by legal errors, and perhaps also an over-exuberance.[187] Government consideration of the issue continues, as former Prime Minister Tony Abbott noted.[188]

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[184] Michael Mckenna, *Push for Aboriginal ID tests by indigenous leaders* (20 February 2016) The Australian <http://www.theaustralian.com.au/subscribe/news/1/index.html?sourceCode=TAWEB_WRE170_a_GGL&mode=premium&dest=http://www.theaustralian.com.au/national-affairs/indigenous/push-for-aboriginal-id-tests-by-indigenous-leaders/news-story/a0bd39a868ad44a22dab85cf76cb9dc7&memtype=anonymous>.

[185] *Racial Discrimination Act* 1975, s18C.

[186] Heath Aston, *Tony Abbott dumps controversial changes to 18C racial discrimination laws* (5 August 2014) <http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html>.

[187] Rosie Lewis, *Anthony Albanese says Bill Leak's received 'more publicity than he's ever got' over cartoon* (9 November 2016) The Australian <http://www.theaustralian.com.au/national-affairs/anthony-albanese-says-bill-leaks-received-more-publicity-than-hes-ever-got-over-cartoon/news-

Nevertheless, it is clear that s18C of the *Racial Discrimination Act 1975 (Cth)* , originally designed to protect against racial discrimination, has been used by interested groups to prosecute what is seen by them to be 'hate speech' or as demeaning to a group within Australian society. This has clearly had a chilling effect on free speech and free democratic debate, partly because the law (section 18C) encourages designation by interested minorities of free speech as 'hate speech' in that they have been (or assert that they have been) offended by it.[189]

5.5.2 Singapore

Singapore is one of the most ethnically diverse countries in the world. It is a nation of immigrants having ancestors from all over Asia, mainly from China, India, Indonesia and the Middle East. In 1965, Singapore's population was made up of about 75% Chinese, 13% Malays, 7% Indians and 5% others. Since then, multiculturalism is not simply a social reality but a political necessity in Singapore, which means multiculturalism has been the cornerstone of nation-building efforts. As of 10 December 2016, Singapore's population stood at 5.73 Million.[190] It is the second densest sovereign State in the world, after the microstate Monaco. Singapore is a multiracial and multicultural country with ethnic Chinese (76.6% of the resident population), indigenous Malays (15.1%), and ethnic Indians (7.2%) making up the majority of the population.[191] There are also Eurasians in Singapore. The Malays are recognised as the indigenous community.

Singapore has adhered to multiculturalism and has included this principle in its State ideology and even the Constitution. For example, s152 (1) of the *Singapore Constitution* regulates that 'It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore'; s153 states: 'The

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story/fc214cbd66243bed327ae40a6b824ea2>. See also Gabrielle Chan, *QUT computer lab racial discrimination lawsuit thrown out* (4 Nobember 2016) Australian Politics <https://www.theguardian.com/australia-news/2016/nov/04/qut-computer-lab-racial-discrimination-lawsuit-thrown-out>.

[188] Rosie Lewis, *Tony Abbott says Racial Discrimination Act 18C a bad law* (11 November 2016) The Australian <http://www.theaustralian.com.au/national-affairs/tony-abbott-says-racial-discrimination-act-18c-a-bad-a-law/news-story/e06a22c9cda49861f7c0f5efa6556746>.

[189] Peter Greste, *Chipping away at freedom of speech harms democracy* (17 November 2016) The Australian <http://www.theaustralian.com.au/opinion/chipping-away-at-freedom-of-speech-harms-democracy/news-story/24ab901b54bf029ad62094b731362639>.

[190] Worldometers, *Singapore Population (Live)* (10 December 2016) Worldometers <http://www.worldometers.info/world-population/singapore-population/>.

[191] National Population and Talent Division (NPTD), 'Population in Brief ' (2014) <http://www.nptd.gov.sg/portals/0/news/population-in-brief-2014.pdf>.

Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion'; s153A (1) establishes Malay, Mandarin, Tamil and English as 4 official languages in Singapore.[192] In large part, Singapore has maintained the legal pluralism which was inherited from the colonisers.[193]

The modern society of Singapore can be described as 'soft authoritarianism', which means there are basic components of a democracy (such as opposition parties and elections); nevertheless, fundamental political and social rights and rule of law are often compromised by military and political considerations or by the need for rapid industrialization. At times, the pursuing of rapid economic growth is at the cost of social rights. Though no draconian measures are applied against its opponents, it has been said that the State has been able to control political dissent through the law courts and through moral exhortation in the school system.[194] Regardless of modernist and rule of law pressures (to create one national law applied to all), legal pluralism has survived and continues to be recognized and practiced in Singapore.

However it has been argued that Singapore was much more plural in law under the British than it is now.[195] 'Under the British there was an effort to recognise the customary laws of the diverse Chinese, Indian and Malay communities'.[196] Therefore, the British rule affected the various ethnic and religious components of Singapore society and enabled different communities to live together in peace and tranquillity, each respecting one another's religion, culture, and language. Now Singapore has successfully managed ethnic and religious diversity through the use of law to regulate society and to manage religion. Inheriting English common law, Singapore has managed religious diversity and legal pluralism through State agencies, such as Islamic Religious Council of Singapore,[197] and through the *Maintenance of Religious Harmony Act*.[198]

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[192] See *Singapore Constitution.*
[193] Bell, above n 38, 319.
[194] Bryan Turner, 'Soft Authoritarianism, Social Diversity and Legal Pluralism: The Case of Singapore' in Adam Possamai, James Richardson and Bryan Turner (eds), *The Sociology of Shari'a: Case Studies from around the World* (Springer International Publishing, 2014) , 69-70.
[195] Ibid 325.
[196] Ibid 325-326.
[197] The Mission of Islamic Religious Council of Singapore is to work with the community in developing a profound religious life and dynamic institutions. Its strategic priority is to set the Islamic agenda, shape religious life and forge the Singaporean Muslim Identity. See Islamic Religious Council of Singapore, *About Muis* (25 October 2016), < http://www.muis.gov.sg/About/>.

Chan, Chief Justice of Singapore, delivered a speech '*Multiculturalism in Singapore — The Way to a Harmonious Society*' at the International Academy of Matrimonial Lawyers Audrey Ducroux Memorial Lecture on 8 September 2012. In the speech, he maintained that the achievement of Singapore is in being able to use multiculturalism as a building block of a new nation to foster social cohesion.[199] However, the concern is that cyberspace may make irresponsible speech regarding race and religion more difficult to control.

A paradox exists in Singapore between Asian values and cultural diversity. Such a diverse culture demands and promotes free speech while the narrative of Asian values has been used as a shield by the Singaporean government for authoritarianism and as justification for the restraint for freedom of speech. In the *Bangkok Declaration of 1993* (the declaration resulted from General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights), 'Asian values' were codified and promoted, which re-emphasized the principles of sovereignty. Asian values include preference for social harmony, collectivism and communitarianism; concern with socio-economic prosperity and the collective well-being of the community; and loyalty and respect towards figures of authority. [200] The preference for Asian values operates at the cost of the emphasis on individual freedoms.

Therefore, in order to maintain racial harmony and peaceful coexistence in Singapore, there are several practical measures: protection of minorities in Singapore; constitutional safeguards against 'differentiating' laws; [201] maintaining religious harmony and practical measures to promote racial integration (the integration of the dimension of race); and promoting understanding and harmony across races and

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[198] *Maintenance of Religious Harmony Act* (Singapore, 31 July 2001).

[199] Cheif Justice Chan Sek Keong, 'Multiculturalism in Singapore - The Way to a Harmonious Society ' (2013) 25 *Singapore Academy of Law Journal* 84 , 84. The electronic version is available at: http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/625/%282013%29%2025%20SAcLJ%2084-109%20%28multiculturalism%29.pdf.

[200] The Ministers and representatives of Asian States, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human rights, adopt this Declaration, to be known as "The Bangkok Declaration", which contains the aspirations and commitments of the Asian region.

[201] Article 68 of the Constitution of the Republic of Singapore (1999 reprint) defines a differentiating measure as 'any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community.'

religions.[202] Racial integration includes desegregation, which aims to create equal opportunities regardless of race.

Fortunately, for Singapore, multiculturalism was able to take root under an imperial power and ensured that each community preserved its own culture and respected the culture of other communities. There is no doubt that Singapore will become much stronger if it maintains the foundation of multiculturalism. Under multiculturalism, the virtue of toleration by the majority of the minority should be undergirded and backed by a strong political will and appropriate laws so as to ensure that multiculturalism is sustained and sustainable in Singapore. Also, there is a necessity for the Singaporean government to balance Asian values and cultural diversity, and to balance Asian values and freedom of speech.

5.5.3 India

India is one of the oldest civilizations in the world with rich cultural heritage of a kaleidoscopic variety. India is a home to people from diverse cultures, backgrounds, race and nationalities and has been a land of pluralism *par excellence*, as noted by Eberhard and Gupta: 'Symbiotic co-existence of diverse forms of life, as a given, immutable fact associated with human existence, grounds every sphere of life, religious, legal, cultural, social. Accommodation of diversity, neither to tame nor simply to tolerate it, but to allow it a natural flourishing, has always been the principal criteria for organising individual and social existence in India.'[203]

The diversity in India is unique. India, being a large country with a large population presents endless varieties of physical features and cultural patterns. The vast population is composed of people having diverse customs, colours and creeds.[204] Some of the important forms of diversity in India are: diversity of physical features, racial diversity, linguistic diversity, religious diversity and caste diversity.[205]

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[202] Keong, above n 199, 98-106.
[203] Christoph Eberhard and Nidhi Gupta, 'Legal Pluralism in India: An Introduction ' (2005) XXXI *Indian Socio-Legal Journal* 1, 1.
[204] Puja Mondal, *Essay on the Different Forms of Diversity in India* (30 March 2016) Your Article Library <http://www.yourarticlelibrary.com/india-2/essay-on-the-different-forms-of-diversity-in-india/4001/>.
[205] Please see 2.4.3.4 for detailed information regarding India's diversity.

There are five major racial types in India: Australoid, Mongoloid, Europoid, Caucasian, and Negroid all find representation among the people of India.[206] According to the 2001 census, out of the total population of 1,028 million in the country, Hindus constituted the majority with 80.5%, Muslims came second at 13.4%, followed by Christians, Sikhs, Buddhists, Jains, and others.[207] There are 22 different languages that have been recognised by the *Constitution of India*:[208] these are Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmir, zKonkani, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Tamil, Telugu, Urdu, Sindhi, Santhali, Boro, Maithili and Dogri. Hindi is an Official Language among those languages. Article 343(3) empowered Parliament to provide by law for continued use of English for official purposes.[209]

The challenge facing India is how it prioritize rights of cultural groups in contrast to individual rights in such a multicultural and diverse society. Indian culture has been the product of assimilation of diverse religions and cultures. Striving for peace and harmony in society and respecting for the dignity of an individual have been an abiding factor in Indian culture.

The role of the hate speech issue is considered as a challenge to pluralism, diversity, tolerance and freedom of speech. The fundamental right of freedom of speech plays the role of reflecting and reinforcing pluralism by encouraging tolerance of different opinions. However, the potential of hate speech to incite conflict and intolerance due to diversity is a current trait of modern Indian pluralistic democracy and poses a threat to public order (please refer to 3.4).

However, the multicultural arrangements in India tend to restrict individual autonomy in the interest of group preservation[210] 'Gandhian multiculturalism' was popular in India, which means 'all individuals, regardless of group membership, ought to accept limits on

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[206] Probir Roy Chowdhury, *Outsourcing Biopharma R&D to India* (Woodhead 2011), 7.
[207] Indian Government, *India at a Glance* (17 August 2016) National Portal of India <https://india.gov.in/india-glance/profile>.
[208] See the 8th Schedule of the *Constitution of India*.
[209] See the *Constitution of India*.
[210] The notion of the state as a guardian of group preservation was demonstrated in the case of *Rangīlā Rasūl*, and the adoption of Section 295A of the *Indian Penal Code* — the punishment (three years imprisonment or with fine, or with both) relates to deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs. In 1924, the pamphlet Rangīlā Rasūl ('the colorful Prophet') was released in Lahore by a publisher named Mahashay Rajpal. It was a satirical work that portrayed the Prophet Muhammad in a derogatory manner by mocking his sexual morality.

their autonomy out of respect for all groups' cultural sentiments'.[211] Given this particular arrangement, individual speech rights would conflict with group values and religious sentiments. Therefore, Indian traditions also indicate the presence of conscious theorizing about tolerance and freedom, which favour tolerance, in defence of freedom.

5.6 Conclusion

Pluralism has positive effects both in reinforcing free speech, equality and providing great flexibility. Laws are culture-laden: they are both an object of culture and a producer of culture; culture also has a dialectical, subtle, dynamic and interactive relationship with law. Law can also be explained to be multicultural under the multiculturalism paradigm. Law and culture have been considered as an integrated whole. Legal pluralism conveys the function of recognizing the socio-cultural diversity of the legal domain. A mutual benefit and influence exist between legal pluralism and interactive governance.

Diversity has its role both in governance and freedom of speech. Diversity in governance promotes good governance and also promotes unity in the society. Free speech works at its best under conditions of diversity. An effective free speech environment demands government to preserve diversity in speech.

In addition, the operation of freedom of speech is determined by the national attitude toward the degree of toleration. The larger the extent of tolerance the freer atmosphere speech has, because toleration makes a harmonious environment where differences can coexist. Tolerance is not only able to make a society continue to diversify, but also is an essential method to foster diversity. Freedom of speech can be fully enjoyed when a nation has an open and advanced attitude toward tolerance. Welcoming different opinions, even opposite ideas being expressed in the political forum, represents the highest quality speech atmosphere one nation may have.

[211] Ameya Balsekar, 'Seeking Offense: Censorship and the Constitution of Democratic Politics in India' (Cornell University, 2009), 5.

Figure 5.1 Interactions between Pluralism, Diversity, Tolerance and Free Speech

Australia, Singapore and India all describe themselves as multicultural, but the exact meaning for multicultural and multiculturalism is different. The only similarity is they all have 'accepted multiculturalism as meaning at a minimum that a diversity of cultural identities and practices is acceptable within the State and should be recognised by the State.'[212] Australia has, by and large, tended to give priority to individuals' freedom. However, the positive environment for free speech and cultural tolerance in Australia has slightly changed in the recent decades. The merits of cultural tolerance and diversity in Australia have been going downwards and the right to free speech has been challenged.

The traditions extant in Asian countries such as Singapore and India differ among themselves, but nevertheless may share some common characteristics. Singapore and India are faithful to their own system of political priorities (e.g., harmony and public order). Asian values do not give freedom of speech the same importance as it is accorded in Australia. The defence of authoritarianism in Singapore and India on grounds of the special nature of Asian values calls for historical scrutiny, though it is in the interest of economic development. Therefore, Singapore and India also share the common feature of being sceptical of freedom of speech, while emphasizing discipline and order.

[212] Bell, above n 38, 319-320.

The result of the comparisons between the three countries in the light of the theoretical analysis demonstrates that positive attitudes toward diversity and tolerance assist the development of free speech. Asian values are less supportive of freedom and more concerned with discipline and order, which prevents people from enjoying a large scale of free speech based on toleration.

Chapter 6 — Censorship and Freedom of Speech in Cyberspace

6.1 Introduction

There is continued struggle in western constitutional democracies between cyberspace censorship and freedom of speech online — a combination of political, cultural and legal issues: political motivations of government, technological difficulties and the potential effect of the regulation (this is especially so in the increasingly diverse populations of such countries; for a discussion of cyber and other censorship in the three nations chosen as comparative studies, see 6.4 below). Freedom of speech is regarded as an integral concept in democracies and as a force in protecting civil liberties from governmental intrusion. Cyberspace censorship, however, to some extent, represents denial or oppression of freedom of speech. Censorship is necessary to avoid the complexities now arising in relation to speech in cyberspace, such as terrorism, trolling and bullying, harassment, hate speech, and exposure of personal information or secrets.

The aim of Chapter Six is to ascertain what are the commonalities and differences among Australia, Singapore and India in their approaches to maintenance of free speech: how do they maintain a balance between free speech and censorship? In general, it also examines how censorship can work better to protect free speech in democratic nations. The Chapter first analyses the continued struggle among censorship, freedom of speech and democracy, and also addresses the idea of standardizing censorship regulation in cyberspace, by examining the topics regarding legitimacy, public approval, transparency, and the balance of authentic identity with freedom of speech, by giving a general account of a useful solution for censorship regarding identity; and seeks to explore whether authenticity of identity in cyberspace can make greater contributions to the society than anonymity, or whether free speech must be given first priority. The last section of the Chapter takes Australia, Singapore and India as examples to address the current censorship schemes in those three countries.

6.2 The Continued Struggle among Censorship, Freedom of Speech and Democracy in Cyberspace

Freedom of speech is the concept of the inherent human right to voice one's opinion publicly without fear of punishment or censorship. Cyberspace, because of its feature of

instantly sending and receiving information, has become a great ally of democracy.[1] The question is whether cyberspace will truly improve both the quality and spread of democracy, or only stay as 'a viable strategy for some regimes that are otherwise committed to the ideal of political democracy'?[2] There is another question also: whether cyberspace is actually undermining democracy, as the Twittersphere operates on a lowest common denominator and can be seen as undermining policies on which a government had been elected. Cyberspace censorship, however, represents denial or oppression of freedom of expression. Can, and should, such cyber censorship, be justified?

Compared to authoritarian nations, democratic nations face a more complex and difficult challenge in implementing and developing policies to respond to the prevalence of the Internet and the use of cyberspace, because of the tenets of democracy and freedom of speech.[3] The threat of government control over cyberspace might effectively stifle online criticism and opposing views, and bring a reduction in diversity of views.[4]

For example, political dissent and criticism are an essential element to the functionality of a democracy; a democratic government can and should be openly criticized. In addition, representing and serving the interests of the people is the responsibility and the ultimate goal of a democratic government, which principle is also applicable in regulating cyberspace content. However, 'the failure to act in accordance with stated objectives creates political distrust'.[5] For example, if the government states that its objective is to protect minors, it fails this objective if it fails to regulate content detrimental to children. Political distrust is 'democracy's greatest adversary in attempting to accrue support for the implementation of unfamiliar and unfavourable

[1] Eric Fish, 'Is Internet Censorship Compatible With Democracy? Legal Restrictions of Online Speech in South Korea ' (2009) 2 *Asia-Pacific Journal on Human Rights and the Law* 43, 43.
[2] Ibid 45.
[3] Derek Bambauer, 'Cybersieves ' (2009) 59 *Duke Law Journal* 377, 384, 403. 'The censorship measures taken by non-democratic nations in response to information deemed harmful on the Internet are not capable of being closely monitored through similar measures taken by democratic nations'. See Bambauer, above n 3, 401, as cited in Renee Keen, 'Untangling the Web: Exploring Internet Regulation Schemes in Western Democracies ' (2011) 13 *San Diego International Law Journal* 351, 357.
[4] R George Wright, 'Self-Censorship and the Constriction of Thought and Discussion Under Modern Communications Technologies ' (2011) 25 *Notre Dame Journal of Law, Ethics and Public Policy* 123, 135.
[5] Keen, above n 3, 372.

policies'[6], and political distrust is also likely to 'impede confidence in future policies, despite potential legitimacy'.[7]

It is understandable then that censorship was referred to in democratic societies thus:

> Censorship is no longer a tactic reserved for authoritarian administrations interested in silencing political dissent. Internet censorship has now become a method explored by democratic nations seeking to regulate illegal activities conducted online.[8]

'The major concerns stem from the increased availability of objectionable content and Internet misuse.'[9] Can both freedom of speech and censorship coexist in a democratic country? How to keep the balance between freedom of speech and censorship? How to restrict dangerous speech or criminal activity without limiting or damaging valuable educational, political and artistic expression has become a central challenge of censorship law in the cyberspace age.

Censorship has been divided into two distinct categories: multilateral censorship (which silences all opinions on some subject matter); and unilateral censorship (which silences a single view).[10] Censorship also encompasses 'political censorship', defined as 'the censorship of content that comments on matter related to governmental policies and personnel.'[11] 'Functionalist liberals' argue against political censorship thus: 'the consequences of freedom of expression include fierce intellectual debate and a citizenry that is better informed by being open to a variety of viewpoints'[12], and argue further as follows:

> 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.

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[6] Ibid.
[7] Ibid 373.
[8] Joshua Keating, *The List: Look Who's Censoring the Internet Now* (4 March 2009) Foreign Policy <http://www.foreignpolicy.com/articles/2009/03/23/the_list_look_whos_censoring_the_internet_now>, as cited in Keen, above n 3, 352.
[9] Kim Rappaport, 'In the Wake of Reno V. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online ' (1998) 13 *The American University International Law Review* 765, 767.
[10] Mark Walker, 'Censorship, Logocracy and Democracy ' (2008) 21(1) *Canadian Journal of Law and Jurisprudence* 199, 200.
[11] Arpan Banerjee, 'Political Censorship and Indian Cinematographic Laws: A Functionalist- Liberal Analysis ' (2010) 2 *Indian Cinema Tographic Laws* 557, 563-564.
[12] Ibid 568.

> They need the chance to develop through free criticism as well as chance to survive on the basis of their ultimate worth. [13]

Therefore, political censorship is undesirable for two reasons: it hinders intellectual debate, and it results in a citizenry that is less informed.

The concepts of the 'deep web' and 'dark web' also help in understanding the operation of censorship. The 'deep web' known also as the invisible web, containing 90% of the information on the internet, is those parts of the internet that are not indexed by conventional search engines, because they use dynamic databases that are devoid of hyperlinks and can only be found by performing an internal search query. The 'deep web' includes academic information, medical records, legal documents, subscription information, multilingual databases, financial records, government resources, competitor websites and organization-specific repositories, and is internally regulated.

The 'dark web' is a part of the deep web, accessible only through certain browsers such as Tor designed to ensure anonymity. It contains matter such as illegal information and activity, drug trafficking sites, political protests, Tor-encrypted sites and private communications, many related to child pornography and other similar illegal activities.[14] A new set of search tools called Memex, developed by the Defense Advanced Research Projects Agency (DARPA), peers into the deep web to reveal illegal activity. 'DARPA is creating Memex to scour the Internet in search of information about human trafficking, in particular advertisements used to lure victims into servitude and to promote their sexual exploitation.'[15]

6.3 Standardizing Censorship Regulation in Cyberspace

6.3.1 Balancing Legitimacy, Public Approval and Transparency

On the one hand, freedom of speech signifies speaking freely and also involving a vigorous and healthy dialogue between governments and citizens (and between citizens), since 'democracy both presupposes and supports liberty of expression and

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[13] See Brief for Alexander Meiklejohn et al. as Amici Curiae Supporting Petitioner, *Lawson v. United States*, 339 U.S. 934. (1950) (No. 248) at 30, as cited in ibid. Mill and Meiklejohn are considerd as the representatives of functionalist liberals.

[14] Adrian Lamo, *What is the deep web and how do you access it?* (21 March 2016) <https://www.quora.com/What-is-the-deep-web-and-how-do-you-access-it>.

[15] Larry Greenemeier, *Human Traffickers Caught on Hidden Internet* (8 February 2015) <http://www.scientificamerican.com/article/human-traffickers-caught-on-hidden-internet/>.

communication amongst citizens and between them and the state'[16]; on the other hand, in a democratic society, freedom of speech also implied restrictions and limitations. For example, to protect other rights such as privacy and reputation; and also the public order restrictions: these days, they are very likely the most important, given sex and people trafficking, child pornography, and terrorism. Such restrictions are recognised in all the international instruments (see 6.3.2.4 and 7.2.1 for discussions on international instruments). However, 'legal restraints upon individual freedom of speech should only be tolerated where they are absolutely necessary to prevent infliction of actual harm',[17] for example, defamation, obscenity and libel, which do not enjoy legal protection.

Though cyberspace should be governmentally regulated and censored in order to protect cyber security of nation States, the regulation of cyberspace would, in fact, violate the right to free speech. Therefore, there is a need to standardize censorship regulation so that those who seek to impose limitations on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct adverse to the community at large. Legitimacy of online censorship should largely be based on a foundation of offline laws:

> Government cannot and should not use the Internet as a means of covertly eliminating unfavourable content that is not regulated by offline laws. Implementing an online censorship scheme that has no legal basis offline is not a policy that will endure in a Western democracy, and is not a policy that will or should gain support from the organizations and bodies involved in this implementation.[18]

But some scholars argued that cyberspace should be subject to its own laws and both international and national laws should work together in dealing with the issues of cyberspace.[19] Promulgating the law is not enough; preventing vague laws which may have a chilling effect on free expression is said by some to be the most essential duty.[20]

Acquiring citizens' support and confidence for censorship proposals is the most important matter in implementing legislation, therefore, public approval is imperative in a democratic nation. 'Acquiring the approval of a public that is freely encouraged to

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[16] Grainger, above n 7, 133.
[17] Subhradipta Sarkar, 'Right To Free Speech In A Censored Democracy ' (2008) 7 *Sports and Entertainment Law Journal* 62, 89.
[18] Keen, above n 3, 375.
[19] Grainger, above n 7, 129. Please also refer to 4.4.2 for cyber-governance.
[20] David Hume and George Williams, 'Australia Censorship Policy and the Advocacy of Terrorism ' (2009) 31 *Sydney Law Review* 381, 382.

rebuke policies that contravene their rights as citizens must begin with not just ensuring, but demonstrating the legitimacy, transparency, and effectiveness of any such scheme.'[21] There are five conditions that should be demonstrated as a pre-requisite for acquiring public approval:

> (1) Clearly articulate the objectives of the government; (2) reflect the stated objectives; (3) exhibit transparency in order to ensure that the policy reflects the stated objectives; (4) acquire legitimacy through a valid foundation in offline laws; and (5) be effective in accomplishing its intended purpose. [22]

Transparency in censorship by democratic governments offers the participation that citizens are entitled to — 'In order to prevent individuals and organizations from seeking justice through unauthorized publication, the government must accept that permitting transparency is a crucial element of a successful Internet regulation policy.'[23] As U.S. President Barack Obama stated in speech to Shanghai students: 'the more freely information flows, the stronger the society becomes, because then citizens of countries around the world can hold their own governments accountable'.[24]

Likewise, in order to assess legitimacy of censorship, four questions should be asked:

> First, is a country open about its Internet censorship and why it restricts information? Second, is the state transparent about what material it filters and what it leaves untouched? Third, how narrow is filtering … Finally, to what degree are citizens and Internet users able to participate in decision-making about these restrictions, such that censors are accountable?[25]

Consequently, in order to strike a balance between 'the most basic and necessary levels of censorship and the inherently democratic rights of citizens', [26] democratic governments and their citizens have to work together:

> For a censorship scheme to succeed in a democratic nation, it must withstand criticism and accountability, acquire a sufficient level of support and approval, maintain legitimacy through transparency and a valid foundation in offline laws, and effectively accomplish its proclaimed goals. [27]

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[21] Keen, above n 3, 380.
[22] Ibid 371.
[23] Ibid 380.
[24] Elizabeth Dalziel, *Obama Pushes China To Stop Censoring Internet* (16 November 2009) NPR <http://www.npr.org/templates/story/story.php?storyId=120450377>.
[25] Bambauer, above n 3, 497.
[26] Keen, above n 3, 380-381.
[27] Ibid 381.

Similarly, Schmidt and Cohen suggested setting up alliances, which have to go far beyond government-to-government contact, to embrace non-profit organizations: 'in the interconnected estate, they will continue to shape government and corporate behaviour by promoting freedom of expression and by protecting citizens from threatening governments'.[28] The importance of the use of technologies in democratic societies also needs to be prioritised:

> Democratic states must recognize that their citizens' use of technology may be a more effective vehicle to promote the values of freedom, equality, and human rights globally than government-led initiatives… [29] Efforts by democratic governments to foster freedom and opportunity will be far stronger if they recognize the vital role technology can play in enabling their citizens to promote these values.[30]

In seeking standardization of censorship, many scholars have mentioned the Internet Governance Forum (IGF), a state-focused initiative that arose out of conferences organized by the United Nations on the nature of the information society, which was formally established by the United Nations Secretary-General in July 2006.[31] However, many scholars downplayed the expectation of the role that IGF can play: 'With limited resources and uncertain political support, the practical future of this forum as a real force for change in the context of internet governance is far from clear.'[32] 'The IGF has no real power, is unable to make decisions or compel governments to act in a certain way regarding the Internet. Accordingly, any progress … will merely remain as words or recommendations until the IGF are provided with real power.'[33]

Legitimacy, public approval and transparency are positive factors in regulating censorship in cyberspace. Legitimacy has the prime function in drawing an appropriate line between free speech and its limitation. Public approval enables the State to obtain public support from cyber users. Transparency is an essential element to justice. Another constructive practice is to balance authentic identity and free speech.

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[28] Schmidt and Cohen, above n 17, 84.
[29] Ibid 76.
[30] Ibid 83-84.
[31] See Internet Governance Forum, http://www.intgovforum.org/cms/. See also European Commission, *Action 98: Support the Internet Governance Forum* (2010) <https://ec.europa.eu/digital-single-market/content/action-98-support-internet-governance-forum>.
[32] Molly Land, 'Protecting Rights Online ' (2009) 34(1) *The Yale Journal of International Law* 1, 32.
[33] Kevin Rogers, 'The Digital Divide Revisited: The Grand Canyon of the Online Environment? ' (2007) *Masaryk University Journal of Law and Technology* 157, 170.

6.3.2 Balancing Authentic Identity and Freedom of Speech[34]

The emergence of the demand for authentic identity in cyberspace is a challenge to freedom of speech, because it exposes the identity of the cyber users and makes authentic individuals easy to be censored, resulting in personal disadvantages (such as to reputation or personal interests). Therefore, the balance between authentic identity and free speech is also required for standardized censorship. There are many questions to be asked: whether authenticity threatens the right of freedom of speech and whether free speech should or must mean people have the freedom to speak anonymously? How have the new technologies such as Facebook, YouTube and Twitter in cyberspace affected freedom of speech online?

Facebook and Google try to link online and offline personas,[35] while 4Chan[36] and other social sites prefer people to play with the freedom of pseudonyms.[37] Facebook profiles and Google IDs are tied to a person's real connections and real name, and increasingly to their activities across cyberspace. Users are familiar with logging into other services using Facebook or Google IDs, forming a single public identity that is an aggregated version of their offline past, the online present and their combined future.[38] However, 4Chan boasts two new design features: first, its 20 million users do not register an account to participate and are therefore anonymous; second, there is no archive.[39]

Before Facebook and Google became the megaliths of the web, the online world was a place where anyone could present themselves in any form they chose. The most famous

[34] As a Conference proceeding paper, this part of thesis was published in SDIWC digital Innovation in March 2013. The link to the paper: http://sdiwc.net/digital-library/battle-for-online-freedom-of-speechidentity-authenticity-or-anonymity.html.
[35] For example, the 'Statement of Rights and Responsibilities' of Facebook states that: 'Facebook users provide their real names and information, and we need your help to keep it that way.' Available at: https://www.facebook.com/legal/terms.
[36] 4chan is a simple image-based bulletin board where anyone can post comments and share images. There are boards dedicated to a variety of topics, from Japanese animation and culture to videogames, music, and photography. Users do not need to register an account before participating in the community. Feel free to click on a board that interests you and jump right in! See 4 Chan, What is 4chan? (November, 2012) <http://www.4chan.org/>.
[37] Aleks Krotoski, Online identity: is authenticity or anonymity more important? (19 April 2012) The Guardian <http://www.guardian.co.uk/technology/2012/apr/19/online-identity-authenticity-anonymity>.
[38] Ibid.
[39] Ibid.

online adage was, 'on the internet, no one knows you're a dog'.[40] It seems the days when people were allowed to be dogs are coming to a close. What happens when an individual's digital identity begins to merge with her real-world identity? The old web, a place where identity could remain separate from real life, is rapidly disappearing from the computer screen.[41] Nicknames and pseudonyms, regardless of their longevity — and some have been in use for decades — are considered breaches of terms of service. 'Any profile on Facebook or Google that does not appear to be tied to an offline name is removed.'[42] What people do online now, and will be doing in the foreseeable future, 'is inherently tied to their offline selves, and this confines what it is considered acceptable to do and who it is acceptable to meet.' [43] (However, this is not so on the dark web).

Some people stand for the pursuit of authenticity online:

> The pursuit of authenticity is creeping into the heart of most social media models and in the current internet landscape is playing an important role in how we engage with one another and with web content. For many people, Facebook and Google products are the sum total of their web interaction, and the value in creating a platform that provides confidence that a person is who they say they are, rather someone pretending to be them, is critical to a social network's success. [44]

But still others insist anonymity online far outweighs authenticity. Andrew Lewman, executive director of the Tor Project (free software and an open network),[45] hopes to re-anonymise the web:

> The ability to be anonymous is increasingly important because it gives people control, it lets them be creative, it lets them figure out their identity and explore what they want to do, or to research topics that aren't necessarily 'them' and may not want tied to their real name for perpetuity. [46]

6.3.2.1 Justifications of the 'Free Speech' Principle in Cyberspace

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[40] 'On the Internet, nobody knows you're a dog' is an adage which began as a cartoon caption by Peter Steiner and published by The New Yorker on July 5, 1993. The cartoon features two dogs: one sitting on a chair in front of a computer, speaking the caption to a second dog sitting on the floor.
[41] Krotoski, above n 37.
[42] Ibid.
[43] Ibid.
[44] Ibid. Aleks is the host of the Tech Weekly podcast. See < http://www.guardian.co.uk/profile/alekskrotoski.
[45] 'Tor is free software and an open network that helps you defend against traffic analysis, a form of network surveillance that threatens personal freedom and privacy, confidential business activities and relationships, and state security.' Tor website is available at: https://www.torproject.org/.
[46] Krotoski, above n 37.

In order to have a clear perspective on the meaning of 'free' when considered in the context of 'free speech' in cyberspace, there needs first to be an understanding of how the 'free speech' principle has historically been understood. There have been many arguments for a free speech principle. The most durable argument has been based on the importance of open discussion to the discovery of truth.[47] Barendt states that if restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion.[48] To some, truth may be regarded as an autonomous and fundamental good, or to others its value may be supported by utilitarian considerations concerning progress and the development of society.[49]

A second major theory of free speech sees it as an integral aspect of each individual's right to self-development and fulfillment — any restriction on what individuals are allowed to say and write, or to hear and read, inhibits personality and its growth.[50] This theory might regard freedom of speech as an intrinsic, independent good; alternatively, its exercise might be regarded as leading to the development of more reflective and mature individuals and so benefiting society as a whole.[51] Without this kind of freedom, people cannot participate in the give-and-take that broadens their views of the world and their understanding of themselves. Individuals will not grow and mature if their speech is repressed.[52]The emphasis on the importance of self-expression and self-fulfilment of individuals through their autonomous action is considered as one of the defining features of liberal theory.[53] In other words, 'the value of autonomy, as a rule,[54] prevails over the disvalue which specific consequences of an autonomous action may have.'[55]

Another theory concerns citizen participation in a democracy.[56] This is probably the most easily understandable, and certainly the most fashionable, free speech theory in

[47] See John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green 1859).
[48] Barendt, above n 9, 7.
[49] Ibid.
[50] Ibid 13.
[51] T. Campbell, 'Rationales for Freedom of Communication' in T. Campbell and W. Sadurski (eds), *Freedom of communication* (Aldershot:Dartmouth, 1994)33-4. See also Eric Barendt, *Freedom of Speech* (Oxford University Press, 2005) 13.
[52] Robert Trager, Donna L. Dickerson, *Freedom of Expression in the 21st Century* (Pine Proge Press, 1999) 6.
[53] Wojciech Sadurski , *Freedom of Speech and Its Limits* (Kluwer Academic publishers, 1999) 16.
[54] This of course is the vital qualification e.g. restrictions relating to public order, protection of the community, and also individuals' privacy.
[55] Sadurski , above n 53, 17.
[56] Please refer to 2.3.2.3 for Barendt's view regarding democracy.

modern Western democracies.[57] Democracy requires that citizens be free to receive all information which may affect their choices in the process of collective decision-making and, in particular, in the voting process. Consequently, all speech that is related to this collective self-determination by a free people must enjoy absolute (or near-absolute) protection.[58] This is fundamental to the need to protect the right of all citizens to understand political issues in order to participate effectively in the working of democracy.

If the above three justifications are regarded as positive theories for free speech protection, a fourth theory argues that there are particularly strong reasons to be suspicious of government in this context; it is a negative argument in that it highlights the evils of regulation, rather than the good of free speech.[59] It is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated.[60] This point is particularly evident in areas like hate speech or the publication of sexually explicit material or advocacy of terror (this has assumed significance in Australia recently, regarding radical jihadi sites being used to attract young Muslims).[61]

6.3.2.2 'Anonymity' Under the Free Speech Principle in Cyberspace

When the free speech principle applies to speech in cyberspace, the same needs and effects, characteristics or consequences of speech can be seen: it is needed for the discovery of truth, or human self-fulfillment or autonomy. Some people may want to speak, but do so anonymously. They may fear retribution, either in their personal lives or in their jobs.[62] Anonymity in identity may well bring myriad benefits.

Anonymity acts as a way of protection of speech. Anonymity has made it possible for people who might normally be restricted from communicating with the outside world to speak out without fear of the repercussions of their actions, which could put them in

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[57] Barendt, above n 51, 18.
[58] Sadurski , above n 53, 21.
[59] Barendt, above n 51, 21.
[60] Ibid.
[61] See Susan McDonald, *Islamic State: Up to 40 Australian women, including 'jihadi brides', supporting terrorist activity in Syria and Iraq, Julie Bishop says* (26 February 2015) ABC News <http://www.abc.net.au/news/2015-02-25/40-australian-women-supported-terrorists-iraq-syria-bishop-says/6262452>.
[62] Trager and Dickerson, above n 52, 173.

danger if carried out using their real personal information. Concealing one's true identity online has made it possible for free speech to break through the physical barriers enforced by authoritarian governments and dictatorships across the world.[63] Without anonymity, these actions can result in public ridicule or censure, physical injury, loss of employment or status, and in some cases, even legal action. Protection from harm resulting from this type of social intolerance is a definite example of an important and legitimate use of anonymity in cyberspace.[64]

Anonymous ways of communication make people open. Anonymity is beneficial because it gives people an outlet for their opinions, even controversial ones. This may have a cathartic effect in that it allows people to articulate their feelings without physically hurting people of other cultures, races, etc. Additionally, being anonymous on the web offers people a chance to discuss sensitive and personal subjects, such as physical abuse, medical conditions, sexual orientation, minority issues, harassment, sex lives, and many other things which may not available for discussion face to face, without those actions affecting their everyday lives in a potentially harmful or negative way.

However, the evil of anonymity is apparent. For example, the e-mail addresses of junk e-mailers are carefully hidden giving the receivers no place to complain. Again, anonymity may cause cyberbullying. This is because people can hide behind computers or smartphones and the face of anonymity, allowing them to feel free to say anything however hateful or hurtful to others without fear of consequences upon themselves.

6.3.2.3 'Authenticity' Under the Free Speech Principle in Cyberspace

There are many positive ways to use anonymity in cyberspace, but there can always be very destructive side effects too, which are all by-products of a digital world occupied by anonymous individuals who believe they are unidentifiable. Extreme abuse and illegal activity in cyberspace are the most visible drawbacks to anonymity, specifically, examples of the these actions include racism, bullying, kidnapping, terrorism, harassment, personal threats, hate speech, financial scams, disclosure of trade secrets

[63] Alex Masters, Identity on the Internet: The pros and cons of anonymity (19 September 2011) The Independent < http://blogs.independent.co.uk/2011/09/19/identity-on-the-internet-the-pros-and-cons-of-anonymity/>.
[64] Karina Rigby, Anonymity on the Internet Must be Protected (Fall, 1995) Ethics and Law on the Electronic Frontier <http://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall95-papers/rigby-anonymity.html>.

and exposure of personal information or secrets, among other things. One user expressed the desire to ban anonymity from the internet because he had no recourse against an anonymous user who posted his address, phone number and the name of his employer on the internet in retaliation for something that he had said.[65]

A large number of people who use anonymity servers which do not require users to provide their real names and information are attracted by the ease with which they can avoid responsibility and accountability for their actions. When these kind of damaging activities are carried out online, much of the time the perpetrators simply cannot be identified and therefore cannot be held accountable. How can the offenders ever be held accountable for their behaviour when they are almost entirely untraceable in the virtual world? The offending individual hides behind a pseudonym, masking his or her true identity and protecting themselves from the repercussions of their actions.[66]

Increasingly, things are starting to change. The rise of identity-centric social networks like Facebook, Google and LinkedIn, make it gradually more and more difficult to live an anonymous life in cyberspace other than on the dark web.[67] The Facebook Registration and Account Security Message states: 'Facebook users provide their real names and information, and we need your help to keep it that way. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.'[68] These platforms are inherently social and rely on an individual, as a user, to establish a network of friends and acquaintances. This effectively creates an online version of an individual's real life that relies on her true identity.[69]

Authenticity of identity in cyberspace encourages cyberspace users to be open, honest and direct in the here-and-now. It builds trust and confidence in online relationships. It is true that authentic communication in a manner that is completely honest is beginning to make contributions to our society. Technology journalist, Alex Masters, said:

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[65] Rigby, above n 64.
[66] Masters, above n 63.
[67] The emergence of single sign-on plugins, such as 'Facebook Connect', have rapidly increased the adoption of real world identities across the web. They enable users to auto-fill profile and registration form details on third-party web sites by securely linking to their verified Facebook profile information. See ibid.
[68] Facebook, The Agreement of Facebook (June 8 2012) <htt://en-gb.facebook.com/legal/terms>. See 6.3.2 for similar information.
[69] Masters, above n 63.

> We are already beginning to see positive side effects due to these new levels of transparency. Bullying, offensive comments and other forms of abuse are becoming less widespread now that people are no longer able to hide behind a mask. Offenders are often discouraged when they are no longer anonymous, so the benefits are immediately obvious. Not quite so obvious however, are the negative side effects that can occur when your personal history collides with your online identity.[70]

6.3.2.4 Permissible Restrictions on the 'Free Speech' Principle in Cyberspace

The right to freedom of speech is guaranteed in very similar terms by both Article 19 (2) of *International Covenant on Civil and Political Rights* (ICCPR), which is ratified by 165 States, and Article 19 of the *Universal Declaration on Human Rights* (UDHR). The former and latter state as following:

> 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. [71]

> 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. [72]

Both ICCPR and UDHR only regulated the *manner* (to seek, receive and impart) and the *form* of expression (regardless of frontiers: orally, in writing or in print, in the form of art, or through any other media of his choice); these are afforded strong protection, but from them it cannot be determined whether 'free' should mean or include anonymous speech or not. From another aspect, the regulation of authenticity of identity does not equal to invasion of free speech.

Freedom of speech is not absolute and systems of law provide for some limitations on it. Article 19 (3) of the ICCPR explains the basic and fundamental principle of when to choose anonymity or authenticity:

> 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:

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[70] Masters, above n 63.
[71] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. art 19 (2).
[72] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/180 (10 December 1948).

(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.[73]

To some extent, the free speech principle does mean that governments must show strong grounds for interference, but it need not entail absolute protection for any exercise of freedom of expression. Most proponents of strong free speech guarantees concede that its exercise may properly be restricted in some circumstances, for example, when it is likely to lead to imminent violence.[74]

When freedom of speech stands in opposition to other individuals' interests or public interests, it may therefore be subject to certain restrictions. According to the Freedom Forum Organization,[75] legal systems, and society at large, recognize limits on the freedom of speech, particularly when freedom of speech conflicts with other rights or values. Limitations to freedom of speech may follow the 'offence principle'[76] or the 'harm principle',[77] for example, as in the cases of hate speech, or pornography. Limitations to freedom of speech may occur through legal sanction or social disapprobation, or both.

There are words in cyberspace that hurt, and that produce harm to other people and to entire communities. The damage produced by words in cyberspace may be very high; for example, public statements that express racial hatred or contempt for an entire group of people hurt their victims more than many other unpleasant words.[78] Moreover, trolls and cyber-bullies exist on Facebook and Twitter who bombard victims with

[73] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. art 19 (3).
[74] Barendt, above n 51, 7.
[75] The Freedom Forum was founded in 1991 when the Gannett Foundation, started by publisher Frank E. Gannett as a charitable foundation to aid communities where his company had newspapers, sold its name and assets back to Gannett Company for $670 million.
[76] Offense principle is distinct with harm principle. Offense may cause discomfort while not necessarily cause harm. See A. P. Simester and Andrew von Hirsch, 'Rethinking the Offense Principle ' (2002) 8(03) *Legal Theory* 269.
[77] The harm principle holds that the actions of individuals should only be limited to prevent harm to other individuals. John Stuart Mill articulated harm principle in *On Liberty*: 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' See John Stuart Mill, *On Liberty* (Doubleday, Doran and Company 1935), 21-23.
[78] Sadurski, above n 53, 36.

threats and insults, which in some cases can develop into more serious behaviour, including cyberstalking[79] and cyber-harassment.[80]

6.3.2.5 A Right to Delete

Once an identity turns out to be authentic, and recalling that the online world has the ability to remember everything — 'Unlike God, however, the digital cloud rarely wipes our slates clean, and the keepers of the cloud today are sometimes less forgiving than their all-powerful divine predecessor'[81] — will an individual's unwise postings follow her around forever or can individuals ever be forgiven for their mistakes? What happens when an individual has a criminal conviction, confidential history, or have been impersonated by someone who has subsequently tainted her reputation?

These questions are becoming increasingly more vital as identities, both online and offline, continue to merge into one. Some U.S. privacy advocates have called for stronger rules here; Chris Conley of the American Civil Liberties Union of Northern California argued for the 'Right to Delete' as quoted by James Temple — without a right to delete, 'we may lose our ability to invent and reinvent ourselves, and instead find ourselves constrained by actual records of our past or feared records in our future,'[82] he wrote. 'The right to privacy, a right many consider fundamental to our society, may be rendered impotent if our private actions can be reconstructed from countless permanent records.'[83]

A standardized censorship in cyberspace requires a good balance with freedom of speech: it needs legitimacy, public approval and transparency, and balance between authentic identity and free speech.

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[79] Cyberstalking is the use of the Internet or other electronic means to stalk or harass an individual, a group, or an organization. This crime can be perpetrated through email, social media, chat rooms, instant messaging clients and any other online medium. It may include false accusations, defamation, slander and libel. It may also include monitoring, identity theft, threats, vandalism, solicitation for sex, or gathering information that may be used to threaten or harass. As with cyberstalking, cyberharassment is the use of cyberspace to harass a target. See Techopedia, *Cyberstalking* (22 March 2016) <https://www.techopedia.com/definition/14326/cyberstalking>.

[80] Gadgets, *Boredom Drives Trolling and Cyber-bullying on Facebok, Twitter: Report* (1 July 2013) Gadgets <http://gadgets.ndtv.com/social-networking/news/boredom-drives-trolling-and-cyber-bullying-on-facebook-twitter-report-386366>.

[81] Jeffrey Rosen, *The Web Means the End of Forgetting* (21 July 2010) The New York Times <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0>.

[82] James Temple, *Trying to balance privacy, free speech on Internet* (10 February 2012) SFGate <http://www.sfgate.com/business/article/Trying-to-balance-privacy-free-speech-on-Internet-3202437.php>.

[83] Ibid.

6.4 Examples of Censorship Schemes in Australia, Singapore and India

6.4.1 Australia's Current Censorship Scheme including Cyberspace

The censorship of a wide variety of material in Australia is regulated by the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*. There are new regulations of Australian censorship by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist) Act 2007 (Cth)*:[84] censorship decisions are made by the Classification Board and Classification Review Board, which are two independent bodies; the making of censorship decisions occurs under a co-operative and uniform scheme,[85] which ended the ongoing disagreements and the split between the States and the Commonwealth.[86]

Australia 'has traditionally been a country with rapid rate of uptake of new technologies',[87] such as the use of cyberspace. Australia has nearly 20 million Internet users by July 2016.[88] The regulation of cyberspace (such as Facebook and Twitter) and television are relatively recent phenomena.[89] The problematic content contained on cyberspace has seen growing community concern. In 1997, 'the Australia Minister for Communications and the Arts and the Australian Attorney General announced 47 principles for a national approach to regulate the content of on-line services such as the Internet'.[90] The former Minister for Communication, now (since 15 September 2015) Prime Minister, Malcolm Turnbull, has made a great effort in defining internet freedom. He stated that:

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[84] The purpose of this Act (s3) was 'to provide for the classification of publications, films and computer games for the Australian Capital Territory'.
[85] Hume and Williams, above n 20.
[86] It is a two-tier censorship system in Australia, since 'the structure of Australian censorship law has been determined largely by the allocation of legislative power by the Australian Constitution.' Commonwealth and the States both can regulate censorship in Australia. Therefore, in the early years of federation, ongoing disagreements and the split between the Commonwealth and the States occurred often, and they called for a uniform national censorship and a degree of consistency in decision-making. See ibid 390.
[87] Grainger, above n 7, 106.
[88] Internet Live Stats, *Internet Users by Country (2016)* (1 July 2016) Internet Live Stats <http://www.internetlivestats.com/internet-users-by-country/>.
[89] See Damian Tambini, Danilo Leonardi and Chris Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge, 2006), 94.
[90] Senator Richard Alston, *Minister for Communications and the Arts, Joint Media Release* (15 July 1997) <http://www.dca.gov.au>, as cited in Grainger, above n 7, 108. 'At the heart of thesse principles was the view that 'material accessed through on-line services should not be subject to a more onerous regulatory framework than 'off-line'material such as books, videos, films and computer games'.

> I'm a passionate defender of freedom on the internet but freedom on the internet doesn't mean freedom to steal … Rights holders can ensure that content can be accessed easily and at a reasonable price by their customers… Internet service providers can take reasonable steps to ensure their systems are not used to infringe copyright [and] consumers can do the right thing and access content lawfully.[91]

While Australia's states and territories have their own admixture of cyberspace content regulatory laws, the Commonwealth *Broadcasting Services Act 1992* is the Act within which the current internet censorship regime is encompassed (with purposes in s3).[92] *The Broadcasting Services Amendment (Online Services) Act 1999* made earlier amendments to the *Broadcasting Services Act 1992*[93] specifically relating to online services and the internet industry. Australia is not the first Western country to implement cyberspace censorship, but Australian proposed cyberspace censorship is unique in several respects:

> First, the Labor Party made filtering a key aspect of its program during its electoral campaign ('Australia's proposed Internet censorship was a key plank in Labor's electoral platform, but the government's effort to implement it have generated substantial opposition) … Second, Australia plans to mandate censorship by law rather than through informal pressure on Internet Service Providers … Third, the criteria by which sites will be designated for blocking remain opaque and uncertain … Finally, the government appears willing to trade performance degradation to block suspect sites.[94]

Before 1 January 2000, Australian cyberspace content regulation was virtually non-existent. Since 1 January 2000, two levels of internet filtering have been identified by the Commonwealth government. The first level has been referred in Schedule 5 of the *Broadcasting Services Act 1992* (Cth), which came into force on 1 January 2000:[95] to

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[91] ABC News, *Piracy: Malcolm Turnbull highlights role of ISPs in stopping illegal downloads as Government releases discussion paper* (31 July 2014) ABC News <http://www.abc.net.au/news/2014-07-31/discussion-paper-highlights-role-of-isps-in-piracy-fight/5637418>. See also Ben Grubb, *'It's not a filter': Malcolm Turnbull's anti-piracy crackdown wordplay defies logic* (11 December 2014) The Sydney Morning Herald <http://www.smh.com.au/digital-life/digital-life-news/its-not-a-filter-malcolm-turnbulls-antipiracy-crackdown-wordplay-defies-logic-20141211-124xx1.html>.

[92] *Broadcasting Act 1992*, No. 110, 1992. See website available at: https://www.legislation.gov.au/Details/C2016C00882.

[93] *Broadcasting Services Amendment (Online Service) Act 1999*, No. 90 (Amending Broadcasting Services Act, No. 110, 1992) See website available at: https://www.legislation.gov.au/Details/C2004A00484.

[94] See Derek Bambauer, 'Filtering in OZ: Australia's Foray into Internet Censorship ' (2009) 31(2) *University of Pennsylvania Journal of International Law* 493, 495, 502.

[95] Schedule 4-6 of the *Broadcasting Services Act 1992* (Cth) were prepared on 26 June 2006 taking into account amendments up to Act No. 71 of 2006. The electronic version is available at: <http://www.abc.net.au/mediawatch/transcripts/1105_act.pdf>.

keep Internet Content Hosts (ICHs)[96] and Internet Service Providers (ISPs)[97] from providing end-user access to 'prohibited content'.[98] According to *Labor's Mandatory ISP Internet Blocking Plan*, ISPs and ICHs have to delete prohibited content from their servers on the basis of the 'take down notice' issued by the Australian Communications and Media Authority (ACMA).[99] 'On 21 March 2006, the Federal Labor Opposition announced in a media release that a Labor Government would require all Internet Service Providers (ISPs) to implement a mandatory Internet filtering/blocking system'.[100] This proposal was retained as policy by the Rudd Labor government elected on 24th November 2007.

The second level has been referred in Schedule 7 of the *Broadcasting Services Act* 1992(Cth): to keep the internet safe for children. The Commonwealth government has a strong interest and makes a great effort in protecting children from harmful online content. For example, Australia regulates content through a classification system that divides material into generally available zones, restricted and prohibited. Schedule 7 of the *Broadcasting Services Act* 1992(Cth) provides a list of 'prohibited content', which means content other than eligible electronic publications. The Australian Communications and Media Authority (the ACMA) plays an important role in regulating 'prohibited content'. ACMA is an Australian Government statutory authority within the Communications portfolio, which is tasked with ensuring that media and communications works for all Australians through various legislation, regulations, standards and codes of practice. 'Prohibited Content' created by the government's Classification Board means:[101]

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[96] According to Schedule 5 of the *Broadcasting Services Act 1992 (Cth),* Internet content host means a person who hosts internet content in Australia, or who proposes to host internet content in Australia.

[97] For the purposes of this Schedule, if a person supplies, or proposes to supply, an internet carriage service to the public, the person is an internet service provider. See Schedule 5 of the *Broadcasting Services Act 1992 (Cth)* Clause 8.

[98] The meaning of 'prohibited content' in Schedule 5 has the same meaning as in Schedule 7. See *Broadcasting Services Act 1992 (Cth)* Sch 7 C1 20.

[99] Electronic Frontiers Australia, *Labor's Mandatory ISP Internet Blocking Plan (2006)* (20 March 2009) <https://www.efa.org.au/censorship/mandatory-isp-blocking/>.

[100] See Electronic Frontiers Australia, *Labor's mandatory ISP Internet blocking plan* (26 October 2008) Australian Policy Online <http://apo.org.au/research/labors-mandatory-isp-internet-blocking-plan-0>.

[101] See *Broadcasting Services Act 1992 (Cth)* Sch 7 C1 20: (1) For the purposes of this Schedule, content (other than content that consists of an eligible electronic publication) is prohibited content if:

(a) the content has been classified RC or X 18+ by the Classification Board; or
(b) both:
  (i) the content has been classified R 18+ by the Classification Board; and
  (ii) access to the content is not subject to a restricted access system; or

> RC (Refused Classification, i.e. child sexual abuse imagery, bestiality, sexual violence, detailed instruction in crime); or X 18+ (non-violent sexually explicit material depicting consenting adult); or R 18+ (unsuitable for a minor (person under 18 years) to see), and the content is not subject to an ACMA approved adult verification system; or MA 15+, where the content does not consist of text and/or one or more still visual images and the content is provided by a commercial services, or the content is provided by means of a mobile premium service and is not subject to an ACMA approved adult verification system.

Censorship in Australia not only includes current hard copy censorship, but also encompasses other censorship regarding cyberspace. For example, IP providers are now required to secure metadata in Australia. In August 2014, Attorney-General George Brandis revealed a new plan demanding telecommunications companies collect and keep Australians' metadata from their internet browsing for two years.[102] Virtual Private Networks (VPNs) enables users to hide their true location by adopting a new IP or internet address that pretends they are logging in from another country.[103] In 2015, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015*[104] was passed. It was a Bill for an Act to amend the *Telecommunications (Interception and Access) Act 1979*, and for related purposes.[105] The new legislation requires all

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(c) all of the following conditions are satisfied:
(i) the content has been classified MA 15+ by the Classification Board;
(ii) access to the content is not subject to a restricted access system;
(iii) the content does not consist of text and/or one or more still visual images;
(iv) access to the content is provided by means of a content service (other than a news service or a current affairs service) that is operated for profit or as part of a profit-making enterprise;
(v) the content service is provided on payment of a fee (whether periodical or otherwise);
(vi) the content service is not an ancillary subscription television content service; or
(d) all of the following conditions are satisfied:
(i) the content has been classified MA 15+ by the Classification Board;
(ii) access to the content is not subject to a restricted access system;
(iii) access to the content is provided by means of a mobile premium service.
See also Bambauer, above n 94, 502-503. See also Arts Law Centre of Australia, *Classification and Censorship* (28 May 2015) Arts Law Centre of Australia <http://www.artslaw.com.au/info-sheets/info-sheet/classification-and-censorship/>.

[102] Chris Griffith, *Australians flock to VPNs to avoid data retention* (13 August 2014) The Australian <http://www.theaustralian.com.au/business/technology/australians-flock-to-vpns-to-avoid-data-retention/story-e6frgakx-1227022957464>.

[103] Ibid.

[104] The electronic version is available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5375_third-reps/toc_pdf/14242b01.pdf;fileType=application%2Fpdf.

[105] See *Telecommunications (Interception and Access) Act 1979*. Available at: https://www.legislation.gov.au/Details/C2016C00889. See also Parliament of Australian, *Search Hansard* (12 May 2015) http://www.aph.gov.au/Parliamentary_Business/Hansard/Search?ind=0&st=1&sr=0&q=Telecommunications+%28Interception+and+Access%29+Amendment+%28Data+Retention%29+Bill+2015&hto=1&expand=False&drvH=7&drt=2&pnu=44&pnuH=44&f=12%2F11%2F2013&to=21%2F03%2F2016&pi=0&pv=&chi=0&coi=0.

telecommunications providers to keep internet and phone records for two years, and offer government agencies access to the stored data.[106] However, the mandate to retain data does not begin immediately, and companies have until 2017 to finish implementing the necessary architecture to adhere to the new law.[107]

While the Australian government justified the mandatory filter as a means to keep the internet safe for children, prohibiting sites containing child pornography and X-rated material, there is political, ideological and technical opposition to the implementation of mandatory internet content regulation and government intervention in internet content control. Some argue that regulation should not be driven by the government or take the form of a mandatory internet filter: 'there is danger in implementing mandatory internet content regulation in an environment that does not adequately protect the freedom of speech and communication'[108] and that mandatory internet content filtering in Australia is a mistake.[109] The reason is that Australian law does not have a developed legal framework for adequately protecting freedom of speech; therefore, the Commonwealth government has to make sure protections and balances exist to manage internet censorship.[110]

There are even scholars expressing doubts about the function of the filtering proposed by the Commonwealth government. For example, it cannot effectively block prohibited content transferred by file downloading, mail or file sharing, since the majority of child pornography is not accessed through websites, but exchanged via 'emails, file transferring platforms and peer-to-peer networks'.[111] It is the same with respect to other information on the dark web. Furthermore, internet censorship might stifle

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[106] The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* 'mandates the tracking of call records, assigned IP addresses, location information and billing information, among other data, and empowers security agencies to access them without a warrant.' See Aditya Tejas, *Australia Authorizes Data Retention Law, Requires Telecom Companies To Store Data For 2 Years* (26 March 2015) International Business Times <http://www.ibtimes.com/australia-authorizes-data-retention-law-requires-telecom-companies-store-data-2-years-1860100>.

[107] Ibid.

[108] James Duffy, 'Toothless Tiger, Sleeping Dragon: Implied Freedoms, Internet Filters and the Growing Culture of Internet Censorship in Australia ' (2009) 16(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 91, 91.

[109] Ibid, 97.

[110] Ibid 91. According to Duffy, 'creating a safe environment for children to surf the web is a laudable objective, but a default filtering position based upon age-appropriate online content is not a sensible solution.' See ibid 101.

[111] Irene Graham, *AU Gov't Mandatory ISP Filtering/Censorship Plan - Would ISP -level blocking prevent access to child pornography?* (18 April 2009) <http://libertus.net/ >.

internet development and would 'lead to over-censorship or collateral damage of information exchange'.[112]

Another concern was related to the relationship between filtering and the freedom of communication. Would the mandatory blocking of websites impinge upon the constitutionally implied freedom of political communication?[113] The filtering not only could restrict Australian citizens from viewing a range of websites, but also represent 'a denial of public discussion and a weakened ability to question the government's political stance on these issues.'[114] In other words, politically, the blocking might potentially harm the ability of the citizens to engage in informed debate about contentious social issues; socially, it may 'subtly impact upon the fullness of Australia's democracy and the self-development and autonomy of its people'.[115]

For example:

> There are strong reasons to keep the Internet free from unnecessary regulation … There is no doubt that Australia is a tolerant, pluralistic society … Freedom of communication protections must constantly be re-analysed in light of new technology that increases our ability to communicate. In Australia, we are incredibly fortunate — 'To be free enough to reassess the objectives of freedom of speech is a luxury that a western democracy can afford'.[116] We should continuously indulge in this luxury by questioning the potential danger of mandatory internet content regulation in a legal environment that does not adequately protect the freedom of speech and communication.[117]

Though Australia is open[118] in its filtering goals, there is criticism about its transparency[119] regarding what content is to be blocked — 'efforts to silence dissenters,

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[112] Carolyn Penfold, 'Censorship Legislation - Wrecking the Internet? ' (2000) *National Law Review* 1, 3. See also Australian Governments and dilemmas in filtering the Internet: juggling freedoms against potential for harm, at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/InternetFiltering ; See also Hume and Williams, at https://sydney.edu.au/law/slr/slr31/slr31_3/Williams_and_Hume.pdf.

[113] *See case Lange v Australian Broadcasting Corporation* (1997) 189 CLR.

[114] Duffy, above n 108, 102-103.

[115] Ibid 105.

[116] Melinda Jones, 'Free Speech and the 'Village Idiot' ' (2000) *University of New South Wales Law Journal Forum (Internet Content Control)* 43, as cited in ibid.

[117] Duffy, above n 108, 105.

[118] The Labor Party included a proposal to censor Internet content in its official National Platform for the 2007 federal election. See Australia Labour Party, National Platform and Constitution 23 (2007), available at http://www.alp.org.au/platform/index.php. 'The Australian Government has also been open about its normative reasons for engaging in filtering, and for its criterion.' See also Bambauer, above n 94, 518.

[119] Bambauer gave transparency a definition: 'Transparency measures how clearly the government discloses what content it seeks to block and explains why that material runs counter to its goals. By being

outsourcing of blocking decisions, and filtering's inevitable transfer of power to technicians undercut accountability',[120] and is opaque about 'the types of sites that will be blocked, how a site will be evaluated for filtering, and how those decisions map to larger social and political goals'.[121] Australia represents a shift[122] by Western democracies 'towards legitimating Internet filtering and away from robust consideration of the alternatives available to combat undesirable information.'[123]

Other oddities occurred; for example, in the classification system, an unequal standard existed in distinguishing online and offline material and material hosted in Australia and abroad.[124] The filtering not only faces the challenge of having been ambiguous about the scope of targeted content, but also faces the dilemma of restricting both too much and too little.[125] In addition, 'the spectre of Internet censorship raises special problems for democracies that have not developed mature traditions of legally protecting political expression.'[126] For example, because of no express guarantee of freedom of speech in the Constitution, this gives Australian parliament greater ability to censor internet materials and less judicial scrutiny than would be possible in other Western democratic countries.[127]

Before the mandatory filtering became law in 2009, Australia should score higher for accountability in censorship, based on the following democratic features: 'a robust democracy, independent judiciary, written constitution, protections for minority groups, and other features of a Western democracy'.[128] To improve accountability, the government should disclose how it plans to implement filtering at the ISP level.[129]

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transparent, a country lets citizens assess how the banned sites related to the government's broader rationales for censorship.' See Bambauer, above n 94, 519.

[120] Ibid 493.

[121] Ibid 519.

[122] 'Australia's shift from voluntary filtering through software installed on individual computers to mandatory, ISP-based censorship resulted from a change in government.' See ibid 497.

[123] Ibid 493.

[124] 'The same material may be treated more harshly online than offline, and material hosted in Australia receives more careful review than content hosted abroad'. See ibid 502.

[125] Ibid 508.

[126] Fish, above n 1, 47.

[127] Bambauer, above n 94, 503.

[128] Ibid 526.

[129] 'Including the process by which a site is selected for blocking and how that restriction is implemented at a technical level.' See ibid 529. See also Australian Communications and Media Authority, 'Closed Environment Testing of ISP-Level Internet Content Filtering — Report to the Minister for Broadband, Communications and the Digital Economy ' (2008) <http://www.acma.gov.au/webwr/_assets/main/lib310554/isp-level_internet_content_filtering_trial-

The political control of censorship has provoked substantial scepticism and is seen to constitute potential threats in a democratic nation. 'Political censorship offends both democratic and liberal strands of political thinking.'[130] The reasons are: 'When censorship decisions are made at political levels, there is risk they will be applied to stifle unpopular, but valuable, political speech, or applied for personal, partisan ends.'[131]

But the community representatives who possess the role (rather than politicians) of determining and applying community standards, serve to balance values in censorship.[132]

6.4.1.1 Conclusion: Australia

Australia has a relatively advanced censorship scheme among Western countries, but there is still space to improve, especially when facing the challenges from freedom of speech. Australia possesses good conditions in achieving public approval to censorship by clearly articulating the objectives of the government and is effective in accomplishing its intended purpose. However, there is criticism as to the transparency of the censorship regime. Australia's censorship scheme hovers between authenticity and anonymity, because it depends more on the types of the social media that cyber users choose to use. By and large, Australia strikes an appropriate balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens. Australia is a party to the *Universal Declaration of Human Rights* (UDHR) and has ratified the *International Covenant on Civil and Political Rights* (ICCPR).

6.4.2 Singapore's Current Censorship Scheme

Singapore enjoys high and rising levels of digital connectivity. Cyberspace has long been seen by the republic's technocratic leaders as an essential part of the national infrastructure for education and economic growth. As one of the most connected countries in the world, according to the statistics of the Media Development Authority of Singapore (MDA) 2014/2015 Annual Report, Singapore has 148 percent mobile penetration rate (that means an average of 1.5 mobile phones per Singaporean) and 87

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report.pdf>. See also Australian Computer Society, 'Technical Observations on ISP Based Filtering of the Internet ' (2009) <https://www.acs.org.au/__data/assets/pdf_file/0013/2641/ispfilteringoct09.pdf>.

[130] Hume and Williams, above n 20, 404.

[131] Ibid.

[132] Ibid 405.

percent of households enjoy broadband access (that means over 3 out of 4 Singaporeans).[133] However, there is less enthusiasm about cyberspace's potential for enhancing democratic participation and liberalizing political debate.

Censorship content in Singapore is regulated by the Media Development Authority of Singapore (MDA), which was formed on 1 January 2003. The MDA is a statutory board under the Ministry of Communications and Information (MCI). It is a merger of the Singapore Broadcasting Authority, the Films and Publication Department and the Singapore Film Censors.[134] MDA adopts a light-touch approach towards content management, working closely with the public and the industry on media content and standards. The MDA applies the following principles in the exercise of its functions:

> To foster a pro-business environment for industry players; to ensure fair market conduct and effective competition; to safeguard consumers' interests; to increase media choices for consumers; to uphold social values in tandem with societal expectations; and to foster a cohesive and inclusive society through quality content with wide reach and impact while promoting nation-building.[135]

In Singapore, the key pieces of legislation governing censorship in various media are: *Media Development Authority of Singapore Act* (Cap 172);[136] *Broadcasting Act* (Cap 28);[137] *Films Act* (Cap 107);[138] *Newspaper and Printing Presses Act* (Cap 206);[139] *Undesirable Publications Act* (Cap 338);[140] and *Public Entertainment and Meetings Act* (Chapter 257)[141] relating to arts entertainment.

The first Censorship Review Committee (CRC) was conducted in 1981 chaired by Professor Jayakumar. The CRC recommended adopting a contextual approach and public participation in the censorship process through the setting up of citizen committees to advise the Ministry of societal standards.[142] Another review committee was formed in 1992 and chaired by Professor Tommy Koh to allow for more artistic and creative

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[133] Media Development Authority, *Annual Reports* (2014/2015) Media Development Authority <http://www.mda.gov.sg/AboutMDA/AnnualReports/Pages/AnnualReports.aspx>.
[134] Media Development Authority Singapore, *About MDA* (07 January 2014) Media Development Authority <http://www.mda.gov.sg/AboutMDA/MissionVisionCoreValues/Pages/MissionVisionCoreValues.aspx>.
[135] Ibid.
[136] *Media Development Authority of Singapore Act* (Cap 172), revised edition 2003, 31st July 2003.
[137] *Broadcasting Act* (Cap 28), revised edition 2012, 31st August 2012.
[138] *Films Act* (Cap 107), revised edition 1998, 15th December 1998.
[139] *Newspaper and Printing Presses Act* (Cap 206), revised edition 2002, 31st December 2002.
[140] *Undesirable Publications Act* (Cap 338), revised edition 1998, 15 December 1998.
[141] *Public Entertainment and Meetings Act* (Chapter 257), revised edition 2001, 31st July 2001.
[142] Censorship Review Committee, 'Report of the Review Committee on Censorship ' (1981) <http://lkyspp.nus.edu.sg/ips/wp-content/uploads/sites/2/2013/02/CRC-report-1981_1.pdf>.

endeavours.[143] Another review committee was formed in 2002 was chaired by Mr Liu Thai Ker. The Committee's report was submitted to the Minister for Information, Communications and the Arts for consideration on 10 July 2003.[144]

The last Committee was formed in 2010. In September 2009, the Acting Minister for Information, Communications and the Arts (MICA) appointed 17 members of the public from various fields to the Censorship Review Committee (CRC). Chaired by Mr Goh Yew Lin, Chairman of the Yong Siew Toh Conservatory of Music and Deputy Chairman of the Singapore Symphonia Company Ltd, the CRC was tasked to conduct a midterm review of content issues across the spectrum of broadcast, films, videos, publications, audio recordings, the arts and new media. [145]

The CRC's censorship principles are:

> (i) Censorship is a necessary tool, but a blunt one. Its application, while with determination, should be with regret.
>
> (ii) Censorship is a restriction on personal freedoms, imposed by the government but reflecting the will of a substantial majority of the people. To be accepted as valid, it must be seen to fairly reflect widely-held sentiments.
>
> (iii) The boundaries of censorship, being subjective, should be set through an ongoing engagement with the public.
>
> (iv) Censorship decisions should be sensitive to context. Depiction is not necessarily promotion, and discussion is not necessarily incitement.
>
> (v) There should be clear accountability for censorship decisions. The competent authority should be identified when a decision is taken to disallow or censor.
>
> (vi) The Internet revolution has rendered some forms of censorship ineffective. For example, the proliferation of film content on the Internet has made the disallowing of a film primarily a statement of disapproval rather than an effective means of preventing the film's propagation.
>
> (vii) Greater emphasis should be placed on education, awareness and parental empowerment. Token gestures should be replaced by more effective tools.[146]

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[143] Censorship Review Committee, 'Report of the Review Committee on Censorship ' (1992) <http://lkyspp.nus.edu.sg/ips/wp-content/uploads/sites/2/2013/02/CRC-report-1992.pdf>.
[144] Censorship Review Committee, 'Report of the Review Committee on Censorship ' (2003) <http://www.mda.gov.sg/RegulationsAndLicensing/Consultation/Documents/Consultation%20with%20Committees/public_Consultation%20with%20Committees_CRC2003.pdf>.
[145] Censorship Review Committee, 'Report of the Review Committee on Censorship ' (2010) <http://lkyspp.nus.edu.sg/ips/wp-content/uploads/sites/2/2013/02/CRC_2010_Report.pdf>.
[146] Ibid page i.

The CRC proposed some key recommendations regarding the Internet and the future media landscape in the 2010 report (and they were accepted):

> Government should retain its power to ban websites on the grounds of national security. However, some form of checks should be put in place to ensure transparency and accountability of such government actions.
>
> Public education efforts on media literacy and cyberwellness should be enhanced to ensure that the public is equipped with updated information and knowledge to deal with the emergence of new media forms and the attendant evolution of media regulations. This will enable parents to take frontline responsibility for their children's explorations in cyberspace and ensure that children can deal with any undesirable content they may encounter.[147]

In general, cyberspace remains significantly more open than broadcasting or print as a medium for political discourse and news in Singapore. The restraint of online discourse is mainly due to fear of post-publication punitive action, such as racial and religious insult, defamation and contempt of courts. The People's Action Party (PAP) government does not block or filter as a means of restricting political speech, but it makes use of defamation, sedition and contempt of court laws to manage dissent.[148]

Singapore TV channel (Singapore-based cable channel) censored President Obama's remarks on gay rights progress on the Ellen Degeneres Show in February 2016. TV viewers in Singapore and parts of Asia would not have heard the US President discuss and congratulate the well-known openly lesbian TV host Ellen for her role in helping to change the attitudes of Americans towards LGBTI[149] people. President Obama appeared on a special Valentine's Day episode and told host Ellen:

> As much as we've done with laws and ending "Don't Ask, Don't Tell," et cetera, changing hearts and minds — I don't think anybody has been more influential than you on that … You being willing to claim who you were, that suddenly empowers other people. And then suddenly, it's your brother, it's your uncle, it's your best friend, it's your co-workers. And then attitudes shift. And the law is followed, but it started with folks like you. I'm so proud of you. [150]

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[147] Ibid page iii.
[148] Freedom House, *Freedom on the Net 2014 - Singapore* (2014) Freedom House <https://freedomhouse.org/sites/default/files/resources/Singapore.pdf>. The subsequent Reports (2015 https://freedomhouse.org/report/freedom-net/2015/singapore, and 2016 https://freedomhouse.org/report/freedom-net/2016/singapore) come to the same conclusion that Singapore is 'Partly Free' in its internet status.
[149] LGBTI stands for Lesbians, Gays, Bisexuals, Transgender and Intersex.
[150] Sylvia Tan, *Singapore TV channel censors Obama's remarks on gay rights progress on Ellen* (23 February 2016) Gay Star News <http://www.gaystarnews.com/article/singapore-tv-channel-censors-obamas-remarks-gay-rights-progress-ellen/#gs.Rkk9glA>.

The segment was cut entirely from the broadcast on Channel 5, an English-language general news and entertainment free-to-air channel owned by Mediacorp, a government-owned broadcaster which owns all seven free-to-air television channels in the island state. The channel had also cut the first lady Michelle Obama's recorded Valentine's Day greeting addressing Ellen and her wife Portia. Tan concluded as follows:[151]

> Because of local regulations which prohibit the positive portrayal of LGBTs in Singapore, clips such as these are routinely censored. This is unfortunate because it deprives the average Singaporean of opportunities to understand and discuss LGBT issues. If it is indeed true that President Obama's words were censored, it is another lost opportunity to engaging with the public on the misconceptions surrounding LGBT people.[152]

In Singapore, positive portrayals of homosexuals or homosexual relationships are still subject to censorship in the local media, and outlets are penalized if they are seen to be promoting homosexuality. Singapore's Media Development Authority's (MDA) free-to-air television program code also prohibits the promotion or justification of a homosexual lifestyle. Clause 6.4 of the *Subscription Television Programme Code* states 'Programmes that depict a homosexual lifestyle should be sensitive to community values. They should not promote or justify a homosexual lifestyle.'[153] Therefore, the US President's remarks failed to survive the censorship board's regulation. However, with greater access to information, younger generations in Singapore are more open and less discriminatory toward LGBT people; censorship is no longer as great a hurdle as it was in the past.

A new law the *Administration of Justice (Protection) Bill* was passed 72 to 9 in Singaporean Parliament on 15 August 2016.[154] The Act aims to 'state and consolidate the law of contempt of court for the protection of the administration of justice, to define the powers of certain courts in punishing contempt of court and to regulate their procedure in relation [thereto]'.[155] The intention of the law is said to be to maintain public confidence in the legal and judicial system.

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[151] Same-sex marriages are not recognized in Singapore.
[152] Tan, above n 150.
[153] See the *Subscription Television Programme Code* (Singapore).
[154] The *Administration of Justice (Protection) Act* (Singapore), No. 23/2016.
[155] See the *Administration of Justice (Protection) Act* (Singapore), No. 23/2016, intituled section. See also http://www.channelnewsasia.com/news/singapore/new-bill-to-provide/2947422.html.

However, the new Act has grave implications for Singaporean society: it may not only impose another undue restriction on freedom of speech, but also may further entrench self-censorship in Singapore, preventing the society from benefitting from in-depth, open discussions of matters of great public interest. The new law threatens to criminalise people (includes punishments of up to three years in jail and $100,000 (US) in fines) for criticising the administration of justice or the courts in Singapore.[156] The new law also may grant the authorities far-reaching powers to crack down on any debate, criticism and discussion of cases under review by the judiciary.[157]

Section 11 of the Act widens the scope of already stifling restrictions on what can be written or said in cyberspace. All material that can be accessed by people in Singapore can be subjected to the new legislation, regardless of whether it originated from there:

> Without prejudice to the jurisdiction and power conferred under this Act or any other written law, a court has jurisdiction to try any contempt of court and to impose the full punishment under this Act in the circumstances specified in subsections (2) to (5).
>
> (2) Where the publication in relation to contempt of court was published through the Internet or other electronic media (regardless of whether it was first published in Singapore or elsewhere), the publication is taken to be published in Singapore if it was accessed by members of the public in Singapore.
>
> (3) Where the publication in relation to contempt of court was published otherwise than in subsection (2) (regardless of whether it was first published in Singapore or elsewhere), if the publication was published in Singapore.[158]

Section 11 may have a chilling effect on cyberspace users. It threatens to diminish the limited space the mainstream media has and denies people's access to information. This section also raises concerns about the use of legislation to restrict the right to free speech in cyberspace. The robust public discussion to cultivate consensus and forge mutual understanding may be blocked, because the Act inadvertently encourage groups or individuals to self-censor.

6.4.2.1 Conclusion: Singapore

[156] See the *Administration of Justice (Protection) Act* (Singapore), No. 23/2016, section 12.
[157] See response of the Ministry of Justice to criticisms: https://www.mlaw.gov.sg/content/minlaw/en/news/announcements/administration-of-justice--protection--act-2016---separating-fac.html.
[158] See the *Administration of Justice (Protection) Act* (Singapore), No. 23/2016, section 11.

Singapore has a relatively strict censorship scheme, which gives priority to public order and threatens freedom of speech, more or less. However, Singapore has improved conditions for public approval in censorship, by enhancing public education efforts on media literacy and cyber-wellness; the public is equipped with updated information and knowledge of media regulations. Defamation, sedition and contempt of courts laws are used to manage dissent, but not as a means of restricting political speech. There is still room for Singapore to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens. Singapore is a party to neither the *Universal Declaration of Human Rights* (UDHR), nor ratified the *International Covenant on Civil and Political Rights* (ICCPR).

6.4.3 India's Current Censorship Scheme

In India, the Supreme Court strongly supported freedom of speech in democratic society. In the case of *S. Rangarajan v. P. Jagjivan Ram*, the Supreme Court upheld freedom of speech:

> The democracy is a Government by the people via open discussion. The democratic form of government itself demands of its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value.[159]

In India, film-censorship is well known to the world. The film industry in India is the largest in the world; every year it produces around a thousand films. However, the film industry in India reflects a serious political and legal problem which spreads to the Internet, in that any sensitive opinion or serious matter against the State or which may not be palatable to certain power holders will face the possibility of being censored or politically banned.[160]

Films can be publicly exhibited in India only after they have been certified by the Central Board of Film Certification (CFBC). CFBC is a statutory body under the Ministry of Information and Broadcasting, regulating the public exhibition of films under the

[159] *S. Rangarajan v. P. Jagfivan Ram*, (1989) 2 S.C.C. 574, 592.
[160] Sarkar, above n 17, 62.

provisions of the *Cinematograph Act* 1952.[161] The existing censorship system throughout the film history in India demonstrates another fact — 'the despotic and arbitrary nature of the authorities, various groups or political parties and their die-hard efforts to curb the freedom of speech and expression through films which fell out of their taste.'[162]

The Indian *Constitution* conferred on all citizens the right to free speech.[163] Nevertheless, the protection of freedom of speech did not suddenly begin with the Indian *Constitution*. It has been a long and conflicted process before freedom of speech became a fundamental right in the Constitution after rigorous campaigns — 'political trends and groups critical of each other and often at opposite ends of political and ideological spectrum vigorously defended each other's civil rights.'[164]

Conflict[165] also occurred on the issue of restricting freedom of speech. The liberal view called for the deletion of all the restrictive clauses in the Constitution. However, Article 19(2)[166] in the Constitution, a restrictive clause on freedom of speech, was eventually passed. Therefore, the constitutional guarantee of freedom of speech is restricted in India as in almost all countries by reasonable restrictions. Article 19 (2) permits the State to make laws of reasonable restriction on freedom of speech:

> In the Interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[167]

India is a party to the *Universal Declaration of Human Rights* (UDHR) and has ratified the *International Covenant on Civil and Political Rights* (ICCPR). India is bound by those international treaties. In other words, those international treaties have a significant legal bearing on India's commitment to freedom of speech: for example, any restriction on

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[161] Central Board of Film Certification, *About CBFC* (22 March 2016) <http://cbfcindia.gov.in/>.
[162] Sarkar, above n 17, 70.
[163] See *Indian Constitution*, Art 19 (1) (a). For a discussion of the doctrine of free speech and hate speech in India, please see 3.4 above.
[164] Sarkar, above n 17, 70.
[165] See 7 Constitutional Assembly Debates (C.A.D.) at 786.
[166] Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. See *Indian Constitution*, Art 19 (2).
[167] *India Constitution*. art. 19, cl. 2. 'Article 19 places a lesser burden on the State to justify restrictions on speech when compared to the more libertarian First Amendment.' See Banerjee, above n 11, 593.

freedom of speech must be provided by law and be necessary for legitimate purposes — protection of the rights, reputation of others, the protection of national security and public order and morals.[168] International laws 'have to be transformed in to domestic law enacted by a legislative act of the Parliament'[169] before they can successfully implemented in the Indian domestic legal system.

The attitudes of Indian lawmakers and judges on freedom of speech were influenced by functionalist liberal thought (see 6.2 for discussion on functionalist liberal thought).[170] And conversely, Hindu laws have 'occasionally been invoked to justify functionalist liberal approaches towards free speech':[171] 'The concept of *satya* (truth) is central to Hindu philosophy, and speech is seen as a vehicle through which truth can be spread.'[172] The Hindu concept of truth is intertwined with that of *dharma* (duty).[173] To some extent, the idea of duty which is included in truth provided a reasonable justification to censorship and the restrictions on freedom of speech in India. The reasonable restriction on freedom of speech implied that the founders of independent India attempted to incorporate the possibility of citizens of criticizing the government, but also were afraid of violent rebellion advocated by this liberty.[174]

India had 302 million internet users by mid-2016 and becomes the world's second-largest internet user after China and knocked the United States into the third slot in terms of the number of connected users, according to the annual Internet Trends Report from Mary Meeker, a partner at the Silicon Valley venture capital firm Kleiner Perkins Caufield Byers.[175] Nearly 283 million of India's total 302 million internet users were

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[168] See *International Covenant on Civil and Political Rights*, art 20. Para 3.
[169] Sarkar, above n 17, 82. 'Legislation for giving effects to international agreements — Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.' See *India Constitution*, art. 253.
[170] Banerjee, above n 11, 568. Functionalism is a theory of the mind in contemporary philosophy, developed largely as an alternative to both the identity theory of mind and behaviorism. Its core idea is that mental states (beliefs, desires, being in pain, etc.) are constituted solely by their functional role.
[171] Ibid 570.
[172] William Kirkwood, 'Truthfulness as a Standard for Speech in Ancient India ' (1989) 54 *S. COMM.J.* 213, 213.
[173] Banerjee, above n 11, 571.
[174] See also Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford Scholarship Online, 2003). See also Aparajita Baruah, *Preamble of the Constitution of India: An Insight and Comparison with Other Constitutions* (Deep & Deep 2007).
[175] Mary Meeker, *Internet Trend 2016* (1 June 2016) Kleiner Perkins Caufield Byers <http://www.kpcb.com/internet-trends>.

accessing the web through mobile devices.[176] India has positive developments in cyberspace regulatory framework in current years with burgeoning digital access. However, intimidation of cyber users and increased cyberspace censorship threatened to hamper India's steadily improving cyber freedom, as demonstrated below.

The Indian government does not routinely block cyber tools that allow for person-to-person and instant communication; nevertheless, the government sometimes limits cyber usage and connectivity during times of unrest. For example, in September 2014 in the city of Vadodara, authorities in India's Gujarat state arrested at least 40 people after late-night clashes between Muslims and Hindus. The trouble started with a posting on Facebook that some Muslims deemed offensive. Mobile phone text messages and other social media had been used to spread messages about rioting and to inflame religious tensions. As a result, mobile phone, internet and bulk text messaging services were suspended for four days.[177]

The principal institution in India for the Information and Communication Technology (ICT) sector is the Ministry of Communications and Information Technology, which consists of two departments: the Department of Electronics and Information Technology (DeitY) and the Department of Telecommunications (DoT). DoT is responsible for the grant of licenses for various telecom services, frequency management in the field of radio communication in close coordination with the international bodies and also responsible for enforcing wireless regulatory measures by monitoring wireless transmission of all users in the country.[178] DeitY manages more specific cyber matters, such as making policies relating to information technology, electronic and internet; dealing with matters relating to cyber laws, and administration of the IT related laws.[179] The Telecom Regulatory Authority of India (TRAI) is an independent regulator created in 1997 to regulate the telecom, broadcasting and cable TV sectors.[180]

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[176] See Telecom Regulatory Authority of India, *Annual Report* 2014-2015.
[177] Reuters, *Communal riots erupt in Gujarat; 40 arrested* (29 September 2014) DAWN <http://www.dawn.com/news/1135027/communal-riots-erupt-in-gujarat-40-arrested>.
[178] Department of Telecommunications, *Profile* (26 September 2016) Department of Telecommunications, Ministry of Communications & IT, Government of India <http://www.dot.gov.in/profile>.
[179] Ministry of Electronics & Information Technology, *Functions of Ministry of Electronics and Information Technology* (2 November 2016) Ministry of Electronics & Information Technology , Government of India <http://meity.gov.in/content/functions-deit>.
[180] Telecom Regulatory Authority of India, *History* (1 November 2016) <http://www.trai.gov.in/Content/History.aspx>.

Blocking of websites takes place under Section 69A of the *Information Technology Act* (2000). Section 69A is about power to issue directions for blocking for public access of any information through any computer resource:

> (1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
>
> (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed. [181]
>
> (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

However, the constitutionality of Section 69A was challenged on the basis of its opaque procedure by the petitioners during the coverage period in the landmark case *Shreya Singhal v Union of India*. However, in the judgment for that case on 24 March 2015, the Supreme Court upheld Section 69A, saying safeguards within the section were adequate, narrowly constructed, and not in contravention of the provisions of the *Constitution of India*. [182]

Another piece of legislation, the *Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules* (2009), empowers the central government to direct any agency or intermediary to block access to information in cases of emergency:

> (1) Notwithstanding anything contained in rules 7 and 8, the Designated Officer, in any case of emergency nature, for which no delay is acceptable, shall examine the request and printed sample information and consider whether the request is within the scope of sub-section (1) of section 69A of the Act and it is necessary or expedient and justifiable to block such information or part thereof and submit the request with specific recommendations in writing to Secretary, Department of Information Technology.

[181] See the *Information Technology Act* (2000), Section 69A.
[182] *Shreya Singhal v Union of India* (2015) 5 SCC.

> (2) In a case of emergency nature, the Secretary, Department of Information Technology may, if he is satisfied that it is necessary or expedient and justifiable for blocking for public access of any information or part thereof through any computer resource and after recording reasons in writing, as an interim measure issue such directions as he may consider necessary to such identified or identifiable persons or intermediary in control of such computer resource hosting such information or part thereof without giving him an opportunity of hearing.[183]

Then the blocking procedure is followed up by the Designated Officer, who may respond to defend it within 48 hours and Secretary of the Department of Information Technology:

> (3) The Designated Officer, at the earliest but not later than forty-eight hours of issue of direction under sub-rule (2), shall bring the request before the committee referred to in rule 7 for its consideration and recommendation.
>
> (4) On receipt of recommendations of committee, Secretary, Department of Information Technology, shall pass the final order as regard to approval of such request and in case the request for blocking is not approved by the Secretary, Department of Information Technology in his final order, the interim direction issued under sub-rule (2) shall be revoked and the person or intermediary in control of such information shall be accordingly directed to unblock the information for public access.[184]

In 2011, the Ministry of Communications and Information Technology issued cyber cafe rules, which state that 'All the computers in the cyber cafe may be equipped with the commercially available safety or filtering software so as to avoid as far as possible, access to the websites relating to pornography including child pornography or obscene information.'[185]

The number of blocked Uniform Resource Locators (URLs) subsequently increased in India. In a submission before the Supreme Court, the government said 2,455 URLs were blocked from January through 6 December 2014, of which 2,162 were blocked by court order and 293 through the committee constituted under Section 69A.[186] On 17 December 2014, DeitY blocked 32 websites based on a court order for spreading anti-India messages by the ISIS terrorist group. The blocks affected large platforms including

[183] See the *Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules* (2009), Section 9 (1)-(2).
[184] See the *Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules* (2009), Section 9 (3)-(4).
[185] *Information Technology (Guidelines for Cyber Cafe) Rules* (India, 2011), Rule 6(5).
[186] See Submission by the Union of India in the matter of PUCL v. Union of India W.P.(Crl) No. 199 of 2013.

Github, the ubiquitous platform that software writers use for sharing and working on open-source code and also Archives.org, Dailymotion, Weebly, Vimeo.[187]

6.4.3.1 Conclusion: India

Similar to Australia, India is a party to the *Universal Declaration of Human Rights* (UDHR) and has ratified the *International Covenant on Civil and Political Rights* (ICCPR). However, India is limited in obtaining public approval to censorship, because the Indian government sometimes limits cyber usage and connectivity during times of unrest. The consideration of the application of censorship in India could be further expanded to include national security, protection of minors, and protection of human dignity, information security and privacy. Freedom of speech will be under threat if censorship in India is becoming more strict and complicated. Therefore, there is also room for India to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens.

6.5 Conclusion

In order to establish a flexible and harmonious environment for censorship of speech, the requirements of legitimacy, public approval and transparency should be met. The regulation of cyberspace censorship (e.g. internet, smartphones, Facebook, Twitter, YouTube) should be subject to specific laws and needs the cooperation of international and national laws to deal with the issues. Public approval is imperative in a democratic nation, in order to widen the potential to increase the effectiveness of a censorship policy. Public approval ensures citizens' confidence in censorship proposals. In addition, transparency in censorship in a democratic government offers the participation that citizens are entitled to. The existence of those three elements makes the harmonisation of cyberspace censorship regarding free speech possible. While freedom of speech is not absolute, people may enjoy abundant freedom within the lawful frontiers in cyberspace to seek, receive and impart information and ideas of all kinds.

Identity used in cyberspace, whether authenticity or anonymity is in question, is not a matter of invasion of freedom of speech. Rather it seems to be more a matter for self-

[187] QUARTZ India, *A threat from ISIL prompted India to block Github and 31 other sites* (17 December 2014) <http://qz.com/319866/a-threat-from-isis-prompts-india-to-block-github-and-a-handful-of-other-sites/>.

regulation. Law leaves to social sites considerable discretion in managing speech; the wants and needs of society require individuals to manage themselves. Statistics from 99 New Social Media Stats (a website established by Cara Pring dedicated to social media and website optimization strategy so as to provide simple, jargon-free tips and updates for users) for 2012 worldwide may tend to prove this as a truth: 62% of adults worldwide with internet connections now use social media, with 22% of time online spent on channels like Facebook and Pinterest.[188] 42% of mobile users share multimedia via Facebook. Google+ is the second-most used social network for sharing multimedia content from a mobile device (10%):[189]

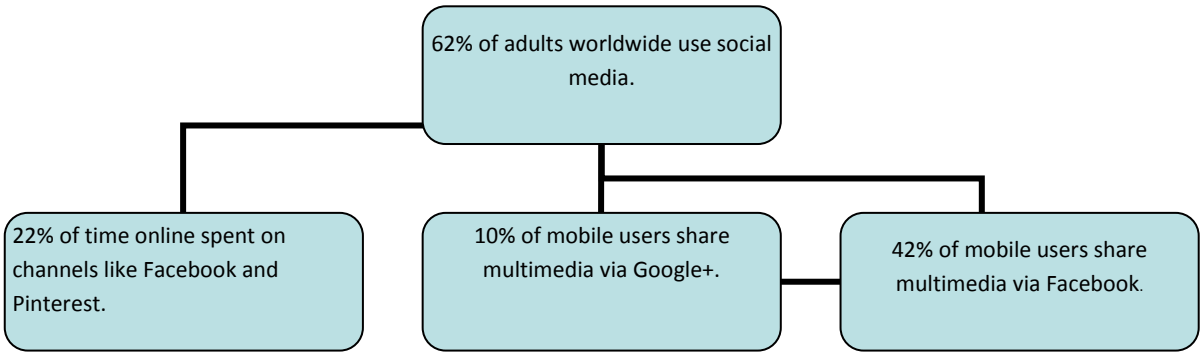

Figure 6.1: 99 New Social Media Stats for 2012

Even though many social sites may request registration using an authentic identity, the right or freedom lies in an individual's own hands to choose whether to register or not. If an individual dislikes the authentic way, there is the freedom to play with other social sites, which allow only anonymous identity. Nevertheless, once an individual chooses to be bound by an authentic identity, there is no choice but obey all the rules and regulations that social sites established. Now that actions on the web are more public, there is a need to make sure individuals manage the personal information they publish going forward, so that they can control what others see when looking back.[190]If individuals have lived a squeaky clean and responsible life, both online and offline, then they have nothing to worry about when using their real identity in cyberspace.

[188] Pinterest is a web and mobile application company that offers a visual discovery, collection, sharing, and storage tool. Users create and share the collections of visual bookmarks (boards).
[189] Cara Pring, *99 New Social Media Stats for 2012* (10 May 2012) The Social Skinny <http://thesocialskinny.com/99-new-social-media-stats-for-2012/>.
[190] Masters, above n 63.

Australia, Singapore and India all enjoy the benefits that cyberspace produced and censorship is applied to cyberspace by all three to regulate the activity of users. However, there are many differences between India, Singapore and Australia in regulating censorship in cyberspace: such as extent of government intervention; community values; involvement of community members in censorship regimes; purposes of censorship; censorship penalties; extent of censorship, public approval, whether accord to international instruments.

The Comparison of Australia, Singapore and India in Balancing Censorship and Freedom of Speech (Table 6.1)

Issue	Australia	Singapore	India
Rank of Internet Users in the World (July 2016)	32 (20,679,490)	73 (4,699,204)	2 (462,124,989)
Cyberspace Free Status	Free. Australia enjoys a much freer cyber environment (less government intervention and smaller extent of censorship). However, recent years have been pivotal years of change, with Australia's cyber freedom declining slightly from previous years. Australia's states and territories have their own admixture of cyberspace content regulatory laws. From 1 January 2000, two levels of internet filtering have been identified by the Commonwealth government. There are strong political, ideological and	Partially Free. Singapore has much more rigorous blocking mechanism than Australia. In Singapore, the government retains its power to ban websites on the grounds of national security but aims to ensure transparency and accountability of such government actions.	Partially Free. India has much more rigorous blocking mechanism than Australia. In India, the Supreme Court strongly supported freedom of speech in India's democratic society. Nevertheless, in India conflict occurred on the issue of restricting freedom of speech. The reasonable restriction on freedom of speech implied that the founders of independent India attempted to incorporate the possibility of citizens of criticizing the government, but also were afraid of violent rebellion advocated by this liberty.

	technical criticisms against the implementation of mandatory internet content regulation and government intervention in internet content control.		
Extent of Government Intervention	Less. In general, Australians have enjoyed more affordable, higher-quality access to cyberspace, fewer limits on contents and fewer violations of user rights.	Though Singaporeans enjoy rising and high level of digital connectivity, the government restrains online freedom based on public order reasons. The emergence of some new Acts represents the arrival of a chilling censorship era.	The degree of censorship increased in recent years with a large number of URLs blocked from time to time. The Indian government also sometimes limits cyber usage and connectivity in times of emergency.
Free Speech as Community Values	Freedom of speech is considered as an important value in the community.	Not as highly valued as in Australia.	
Whether Accord to International Instruments	Australia accords with international instruments (UDHR, ICCPR). Australia has signed and ratified the ICCPR.	Singapore is neither a party to the *Universal Declaration of Human Rights* (UDHR) nor ratified the *International Covenant on Civil and Political Rights* (ICCPR).	India has ratified the ICCPR and accords with UDHR.
Balance Between Free Speech and Other Concerns	Australia strikes an appropriate balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens. However, recent years have been pivotal years of change, with Australia's cyber freedom declining slightly from previous	There is still room for Singapore to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens.	There is also room for India to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens.

	years.		
Legitimacy, Public Approval and Transparency	Australia possesses better conditions in achieving public approval to censorship than Singapore and India by clearly articulating the objectives of the government and is effective in accomplishing its intended purpose. However, there is criticism as to the transparency of the censorship regime.	Singapore has good conditions for public approval in censorship, by enhancing public education efforts on media literacy and cyber-wellness; the public is equipped with updated information and knowledge to media regulations.	India is limited in obtaining public approval to censorship, because the Indian government sometimes limits cyber usage and connectivity during times of unrest.

While not disagreeing that there should be restrictions on free speech when there is a need to balance other significant concerns, such as social order, public safety and individuals' rights, the excessive exercise of censorship in one nation may ruthlessly ruin the right to free speech that individuals enjoy and unnecessarily affect the understanding of democracy. The best way to test the feasibility and moderation of the censorship is by applying the principles of legitimacy, public approval and transparency, as has been outlined above, which allow the participation of citizens and obtain inherent support from them.

Chapter 7 — International Law, Human Rights and Freedom of Speech

7.1 Introduction

Cyberspace, more than any other technological advance, makes possible the implementation of the international instruments concerning free speech due to its wide recognition as the newest frontier for the exercise of the freedom of speech. Also, cyberspace remains a relatively new terrain in terms of the questions it raises about human rights. In the present age, it has become a necessity for States to have a substantial participation in and engagement with international law. The approaches States take, and the attitudes they hold with respect to the implementation of international law, affects the extent of protection of freedom of speech in cyberspace in these national law regimes. Many expert contributors now are examining the application of fundamental international law principles to cyberspace.[1] Therefore, it is both difficult and unrealistic to examine freedom of speech or cyberspace without surveying relevant international law.

The role of international law in the governance (or otherwise) of speech in cyberspace, has already been discussed.[2] The objective of this Chapter is to determine how international law as an external element influences national freedom of speech law. The Chapter is organised as follows: a brief overview of the operation of international human rights in the context of democracy (respecting for human rights is an essential element of democracy); an examination of the interaction and tension between international obligations and domestic law; an examination of the differing approaches towards international treaties; and an analysis of the phenomenon of convergence of domestic constitutional law and international law. The last part of the Chapter will take Australia, Singapore and India as examples among democratic nations to analyse the way they deal with international human rights and related domestic practices.

7.2 International Treaties and Freedom of Speech

7.2.1 Freedom of Speech under International Human Rights Law

[1] See Nicholas Tsagourias and Russell Buchan, *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015).
[2] Please see above, paragraphs 4.2; 4.4.1; 4.4.2.5 (International governance).

Every new technology[3] brings opportunities as well as challenges, which 'frighten people with power, and empower people without power'.[4] Cyberspace, more than any other technology, makes possible the implementation of the international instruments concerning free speech. See, for example, Article 19 of *Universal Declaration of Human Rights* —'to seek, receive, and impart information and ideas through any media and regardless of frontiers',[5] and the *International Covenant on Civil and Political Rights* — '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.'[6]

Freedom of speech is a fundamental international human right. Technological development is always accompanied by human rights and free speech issues, either by enhancing communication and human rights or by restricting communication rights. For example, in the 1990s, the Singaporean government blocked any internet message that violated government policies.[7] In India, 'exorbitant licensing fees have operated as a barrier to many people's participation in the Internet'.[8] Also in the 1990s, Lamarche, Associate Director of Human Rights Watch, the International Human Rights Monitoring Organization, mentioned free speech as having a critical role in cyberspace:

> Freedom of expression principles are key decision points on the development of cyberspace on the state, national, and global levels. If those critical decisions are made in a way that enhances freedom of expression, the promises of this extraordinary technology can be fulfilled.[9]

It has become a necessity for States to have a substantial participation in and engagement with international law — it has become a trend that many States have expressed an interest in promoting domestic implementation and acceptance of

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[3] 'Everything we now take for granted was a radical new technology when it first appeared.' It was true of the printing press, telegraph, telephone, the radio, television, cable television, and now it is true of cyberspace. See Gara Lamarche, 'International Free Expression Principles in Cyberspace ' (1995) 17 *Whittier Law Review* 279, 279.

[4] Lamarche, above n 3, 279.

[5] *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), art. 19, 3 U.N. GAOR, at 71, U.N. Doc. A/810 (1948). Please refer to Chapter 6 for the discussion of these articles.

[6] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 19. Please refer to Chapter 6 for the discussion of these articles.

[7] Nina Hachigian, 'The Internet and Power in One-Party East Asian States ' (2002) 52 <http://www.rand.org/content/dam/rand/www/external/international_programs/capp/pubs/washquarterly.pdf>.

[8] Lamarche, above n 3, 281.

[9] Ibid 284.

international human rights law.[10] However, in the practice of States, not all human rights treaties possess identical status. Some may be signed but not ratified; some may be both signed and ratified but have not been implemented through domestic legislation; and some treaties may be signed, ratified and implemented by States.

Apart from *Universal Declaration of Human Rights* (UDHR)[11] (the first international document to be adopted by the newly formed United Nation in the human rights field and which had a widespread acceptance and an unprecedented level of influence on State practice and international norms), international human rights have also been declared and widely ratified in the *International Covenant on Civil and Political Rights* (ICCPR)[12] as well as in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[13]. The success of these treaties has shown that 'freedom of expression is considered to be a cornerstone in a democratic society in international law'.[14]

While those instruments express the free speech right in a slightly different ways, they have similarities. For example, the guarantee of free speech is relatively uniform and shows substantial consensus — an individual right to hold opinion without interference co-existing with the legitimate restrictions on free speech;[15] and the instruments have been widely accepted by the majority of the countries around the world.

The restrictions to free speech are specified as follows. Under UDHR Article 29, limitations on the exercise of rights must meet 'just requirements of morality, public

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[10] Johanna Kalb, 'The Persistence of Dualism in Human Rights Treaty Implementation ' (2011) 30 *Yale Law & Policy Review* 71, 75.

[11] *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), art. 19, 3 U.N. GAOR, at 71, U.N. Doc. A/810 (1948).

[12] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. ICCPR shared many of the provisions included in the UDHR but elaborated more fully on them. UDHR is not sufficiently specific to bind nations and does not contain any enforcement or interpretive mechanisms. Thus, the Commission created the ICCPR. See Scott Carlson and Gregory Gisvold, 'Practical Guide to the International Covenant on Civil and Political Rights ' (2003) *Transnational* 1, 1-2.

[13] *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), Dec. 16, 1966, 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

[14] Lene Johannessen, 'Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards ' (1994) 10 *South African Journal on Human Rights* 216, 239.

[15] See *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), art. 29, 2 U.N. GAOR, at 71, U.N. Doc. A/810 (1948); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), Dec. 16, 1966, 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Art. 19.

order and the general welfare in a democratic society'.[16] Under ICCPR Articles 21 and 22, no restrictions might be imposed on the exercise of rights unless it is 'in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'[17] Article 19 (3) states that the exercise of the rights may only be subject to certain restrictions: for respect of the rights or reputations of others; for the protection of national security or of public order (*ordre public*), or of public health or morals.[18]

Multiple reasons may exist to explain the failure of some States to implement ratified rights treaties. In the first place, States' avoidance of making revisions to domestic law to comply with treaty obligations could result from political resistance to the imposition of international human rights norms.[19] The second reason is weaker and less persuasive than the first: that the absence of State-level engagement with human rights treaties may show a general lack of expertise or interest in international law.[20] Before domesticating certain treaties, States will make sure they are comfortable with them. Therefore, whenever treaties have become contested sites in domestic disputes, 'subnational resolutions of support may be a way of expressing a position in these national disputes through the lens of a treaty commitment. In other words, the battle over treaty acceptance is just another front in the war over the federal standard.'[21]

Human rights are regularly seen as universally applicable and hold a very powerful institutional position — they are central arms to the international arena and in the

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[16] *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), art. 19, 3 U.N. GAOR, at 71, U.N. Doc. A/810 (1948). 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

[17] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 21-22. 'No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

[18] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 19 (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.'

[19] Kalb, above n 10, 89-90.

[20] Ibid 91.

[21] Ibid 92-93.

machinery of the United Nations.[22] However democracy is not necessarily seen as the most appropriate form of government for all people and has no such equivalent ideological standing.[23] A possible reason is the fear that any legal link between democracy and freedom of speech 'will be harmful for the further acceptance of human rights within the international society'.[24] The reason to oppose the separation of human rights and democracy was that 'human rights without democracy are standards or norms, but not rights as such':[25]

> Human rights and democracy are inseparable in the sense that they both share the same philosophical ontology of liberalism, and in the sense that the observance of human rights is implicit within the idea of a properly functioning democracy.[26]

Freedom of speech is intrinsically necessary and valuable for the healthy functioning of democracy and civil society. Democracy is a necessary and prerequisite environment for human rights:

> … Only within a democracy are human rights standards or norms transcended such that the values articulated by these norms or standards are genuine rights... [27] Democracy should remain on the agenda of human rights proponents the world over, because without it human rights cease to be rights, they become attractive but ultimately optional norms or standards … Without democracy, human rights are at the discretion of the sovereign, and thus not rights at all. With democracy, the sovereign must serve the rights of the people.[28]

Both international human rights and political democracy have become inextricably intertwined and revealed significant similarities — 'each body of thought and ideals draws on the other. Both today are intimately related to individual freedom and equality, and deeply part of the liberal political tradition.'[29] Democracy is 'a collective enterprise,

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[22] 'The United Nations adoption of the Universal Declaration of Human Rights in 1948 as a statement of the central values and normative objectives of the organization was a major coup.' See Anthony Langlois, 'Human Rights without Democracy? A Critique of the Separationist Thesis ' (2003) 25 *Human Rights Quarterly* 990, 995.

[23] Ibid. See also C.H. Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level ' (2001) 23 *Human Rights Quarterly* 483, 483-535.

[24] Langlois, above n 22, 990.

[25] Ibid.

[26] Ibid 1013.

[27] Ibid 1014.

[28] Ibid 1019.

[29] Henry Steiner, 'Two Sides of the Same Coin?: Democracy and International Human Rights ' (2008) 41(3) *Israel Law Review* 445, 445-446. 'Together with human rights, its structure, institutions, and processes constitute the fundamental framework in which individual choice is exercised in political and other life. It rests on popular sovereignty based in tradition, evolving practice or foundational documents like a constitution- that is , on the consent and will of the people as formally and most dramatically expressed through elections but as evidenced in countless everyday features of the modern democratic state.' 'Each,

a way of organizing political power within a community so as to achieve self-determination'.[30] They have different functions in society: Rights so as to empower and encourage people to direct their lives, while democracy draws people into a deeper participation.[31]

However, rights are not an all-or-nothing proposition, since even non-democratic states can accept and protect certain human rights,[32] but democracy, 'was more readily understood as all-or-nothing, as an internally coherent and complete system of government meeting certain criteria that a state would fully accept or reject'.[33]

Democracy has been considered by many countries as a guiding principle in general international law. 'International law has made a great deal of progress in the improvement of human welfare, most notably through international human rights law. An international law of democracy will aid in the progress of international law.'[34] Frank set out his famous argument in 1992 that in international law a right to democratic government was emerging.[35] 'The foundation for this argument was the observation of three developments in international affairs: specifically, the continued support amongst States for the principle of self-determination, the level of protection that has come to be afforded free political expression in key international instruments, and the more recent move by a majority of States to the practice of periodic free and fair elections'.[36]

However, though 'international law appears to have embraced the idea of democracy, it has not yet articulated a detailed normative framework or an extensive body of practical rules defining the meaning of democracy'.[37] Democracy grew in Western countries (UK, US and Europe) over hundreds of years, and now to expect an enormous number of

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unaccompanied by the other, can realize only part of its potential and survives at its peril. Together, the two complement and fortify each other.' See Steiner, above n 29, 447, 476.

[30] Ibid 447.

[31] Ibid 456-457.

[32] 'Like judicial independence and due process in non-political trials, equal protection in fields like employment, or freedom of religion… Many rights declared in the UDHR and the treaties following it could be understood as universal.' See Ibid 448.

[33] Ibid.

[34] Richard Burchill, 'The Developing International Law of Democracy ' (2001) 64 *The Modern Law Review* 123, 134.

[35] Thomas Frank, 'The Emerging Right to Democratic Governance ' (1992) 86 *American Journal of International Law* 46, 46.

[36] See Matthew Saul, 'The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone ' (2012) 13 *Melbourne Journal of International Law* 1, 3.

[37] Same Varayudej, 'A Right to Democracy in International Law: Its Implications for Asia' (2006) 12 *Annual Survey of International & Compatative Law* 1, 179.

newer states, and/or developing states, or deeply entrenched traditional or theocratic states (e.g. some Muslim and/or Arab states) to accept democracy quickly is misguided.[38]

There are a few elements determinative of the universal recognition of human rights, such as the recognition of human rights treaty bodies by States; this element is related to the duty of good faith of State parties to recognise a treaty body's competencies and cooperate with it. Human Rights Treaty Bodies are the bodies 'in whom had been vested the authority to review state parties' implementation of the obligations set forth in human rights treaties.' [39] The primary purpose of human rights treaty bodies is the review of the state parties' fulfilment of treaty obligations pursuant to their remits as indicated by their respective treaties.[40]

Examples of treaty bodies include: Human Rights Committee, Committee on the Elimination of All forms of Racial Discrimination, Committee Against Torture, Committee on Economic, Social and Cultural Rights, Committee on the Rights of the Child, Committee on the Elimination of Discrimination Against Women, Committee on the Rights of All Migrant Workers and Members of their Families and, also, the Committee on the Rights of Persons with Disabilities. All these bodies are established pursuant to the relevant international conventions and/or protocols in force.[41]

The Universal Declaration on Human Rights celebrated its sixtieth anniversary in December 2008. The UN General Assembly considered the reasons for the failure of the realisation of universal recognition of human rights to date. The discussion started from the debate between human rights treaty bodies and sovereign States during the previous four decades. Their relationship was described as a 'pernicious crisis of lack of political will'[42] and a 'gap in human rights protection under the international system'.[43]

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[38] Please refer to 2.2 for historical overview of democratization.

[39] See Kasey Lowe, 'Human Rights Treaty Bodies as Mechanisms of Review ' (2009) 1 *Edinburgh Student Law Review* 53, 53.

[40] 'In the first instance, all of the treaty bodies examine states parties' periodic reports. Additional quasi-judicial functions have been established and widely accepted as part of the UN human rights regime in an effort to further realise the rights set forth in the Universal Declaration which precipitated the adoption of the core UN human rights treaties.' See ibid 54-55.

[41] United Nations Human Rights Ofiice of the High Commissioner, *Monitoring the core international human rights treaties* (23 March 2016) <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

[42] M I Uhomoibhi, President of the Human Rights Council, 'Statement to the UN General Assembly at its 65 plenary meeting', UN Doc A/63/PV.65, 10 December 2008 at 4.

Historically, human rights treaty bodies were viewed only as bodies capable of reviewing periodic reports and evaluating whether a State party was compliant with its obligations, but having no real power. However, the powers of human rights treaty bodies have been recognized when States begin giving effect to the agreements made between them.[44] A State party has to recognise the relevant body established by the Convention; and also if it has signed various optional protocols (e.g. to ICCPR) that enable the oversighting bodies to consider applications from individuals in a State, then the State also had to recognise (but not necessarily accept) finding of those bodies. The function of such treaty bodies is that 'without the treaty bodies supervising implementation, human rights treaties would be merely aspirational and without a compelling legal reason to act.'[45] The necessity for such a function should not be undervalued because it is the avenue for the dialogue with State parties.[46] However, reports of those bodies are just that, reports, and do not bind nation States to accept of implement them, absent a UN resolution.

However, despite the increasing level of consent to treaty body practice and overview, there may still be detractors who oppose such treaty bodies. One reason for such doubts and detractors can be seen from the events regarding the election of Libya to the presidency of the Human Rights Commission: some who were on these committees were representatives of countries with appalling human rights records. As a result of such criticism, the UN Human Rights Commission on 15 March 2006 was replaced by the UN Human Rights Council.[47] The doubts raised by detractors are that human rights treaty bodies do not lay down the law but must still apply the rule of law; the aim of the human rights treaty bodies has never been to establish a world government which is an adjudicator above the States.[48] Nevertheless, their purpose is to 'ensure that there is a rights-centric forum that can serve as a check system to ensure all states are abiding by

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[43] N Pillay, United Nations High Commissioner for Human Rights, 'Statement to the UN General Assembly at its 65th plenary meeting', UN Doc A/63/PV.65, 10 December 2008 at 6.
[44] Lowe, above n 39, 54.
[45] Ibid 60.
[46] Ibid.
[47] See The Guardian, *Libyan takes chair of UN human rights commission* (21 January 2003) The Guardian <http://www.theguardian.com/world/2003/jan/21/3>. For current membership of the HR Council see United Nations, *Current Membership of the Human Rights Council, 1 January - 31 December 2015* (1 June 2015) United Nations Human Rights <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>. For basic background on the UNHRC see United Nations, *United Nations Human Rights Council* (1 June 2015) United Nations Human Rights <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.
[48] Lowe, above n 39, 58.

their human rights commitments'.[49] However, they have no enforcement capacity, other than if there is a supporting UNGA or Security Council resolution.

Another essential factor is determined by the approach to interpretation of the treaty taken by the relevant treaty bodies. To decide whether the treaty obligations have been effectively implemented by the State party, the treaty bodies need to interpret the relevant State's obligations within the context of the whole of that State's existing domestic law, and any new implementing legislation.[50]

7.2.2 The Convergence of International and Domestic Law Affects Freedom of Speech

Freedom of speech is protected both by international law and domestic law. How individual States deal with tensions between international obligations and domestic law has become increasing crucial and will influence the protection of freedom of speech in domestic practice. Each party to the convention must alter its laws and policies to conform with the convention by incorporating the convention into domestic law. There is also legislative restriction on the implementation of treaty obligations into domestic law in order to maintain a reasonable balance between international treaty practice and domestic legislative power; and to ensure harmonization and uniformity in the national legal system.

In order to gain a comprehensive analysis, not only a broader perspective on the relationship is required, but also a tolerant understanding of the ways various States attempt to reconcile the national constitutional order and international commitments in their domestic situation. The discussion of the monist and dualist approaches[51] to the question of the incorporation into domestic law of international law still has ongoing value in the world. In addition, both of these theories provide important linkages between international law and domestic law.

Global public order at an international level is one of the considerations for the globalised world. With globalisation, some domestic legal issues such as the protection

[49] Ibid.
[50] Ibid 60.
[51] See J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 66.

of human rights are becoming the focus of international concern with a view to being controlled by international regulation.[52] The position of international law in the domestic legal order is another consequently hotly debated topic.

International treaties have different status and legal effect in different countries. Not all treaties will be incorporated into domestic law, and the ways of how to implement treaty obligations vary at the domestic level—they depend on the legal system of each contracting State and the pattern of their dealing with the relationship between domestic law and international law.[53] Strictly speaking, the majority of States do not automatically consider the legal effect of international treaties on domestic law even after ratification, accession or approval, especially with respect to the treaties with substantive obligations.[54]

International law and domestic law have a subtle relationship with each other. It is a necessity that international law must have the ability and potential to influence domestic law under new legal challenges, where 'the processes of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years'.[55] Therefore, in order to adapt to these new challenges and offer an effective response to them, 'the international legal system must be able to influence the domestic policies of States and harness national institutions in pursuit of global objectives.'[56] The methods to increase the influence of international law are as follows:

> To create desirable conditions in the international system, from peace, to health to prosperity, international law must address the capacity and the will of domestic governments to respond to these issues at their sources. In turn, the primary terrain of international law must shift — and is already shifting in many instances — from independent regulation above the national state to direct engagement with domestic institutions. The three principal forms of such engagement are

[52] See Hisashi Owada, 'Singapore Academy of Law Annual Lecture 2010-"The Problems of Interaction between International and Domestic Legal Orders" ' (2011) 23 *Singapore Academy of Law Journal* 1, 1.
[53] Qian Jin and Hanqin Xue, 'International Treaties in the Chinese Domestic Legal System ' (2009) 8(2) *Chinese Journal of International Law* 229 , 300.
[54] Ibid 300, 305. According to Jin and Xue, treaties with substantive obligations usually require special internal legislation to be transformed into domestic law and applied indirectly.
[55] Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327 , 328.
[56] Ibid.

> strengthening domestic institutions, backstopping them, and compelling them to act.[57]

The increasing intensity in the relationship between international and domestic law should be a matter of serious discussion within each State. International law has now a closer interaction with domestic law than before and has extended its regulating scope:

> It is clear that international law is no longer limited to the regulation of diplomatic relations between States, the allocation of space, and the jurisdiction of diverse countries. International rules today aim at regulating matters which used to belong exclusively to the domestic jurisdiction of States, matters that range from the way a State deals with its own population, to the emission of greenhouse gases, the last of which places almost all economic activity under the eye of international law.[58]

It is true that there is a clear demarcation between domestic and international law. However, it is no exaggeration to say that the success or the effectiveness of international law depends on its enforcement and implementation by States. The implementation of international law needs the sincere efforts and good faith of individual States. On the other hand, the development of international law and its active participation in the law-making process at the global level benefits the rule of law within a nation.[59] More recently, 'international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between governments and their own citizens, particularly through the growing bodies of human rights law and international criminal law.'[60]

Both international law and domestic law are relevant to international affairs. International law 'consists of norms embodied in treaties, custom, general principles, and judicial decisions that purport to provide rules for state and individual behaviour that do not derive from the domestic law of an individual state';[61] domestic law consists in the laws of each individual State. International law can be defined as 'the law that

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[57] Ibid.

[58] Ximena Torrijo, 'International and Domestic Law: Definitely an Odd Couple ' (2008) 77 *Revista Juridica UPR* 483 , 483.

[59] See also Keyuan Zou, 'International Law in the Chinese Domestic Context ' (2009) 44 *Valparaiso University Law Review* 935 , 935.

[60] Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment ' (2002) 43 *Harvard International Law Journal* 1, 1. See also Slaughter and Burke-White, above n 55, 327.

[61] Adam Muchmore, 'International Activity and Domestic Law' (2012) 1(2) *Penn State Journal of Law & International Affairs* 363 , 363-364.

regulates the conduct of all states within the community of states',[62] which means it imposes duties on States. Similarly, the definition to international law can also be 'a system of rules which sovereign states accepted or consented to be binding on them through conventional or customary law.'[63]

Though international customary law heavily depends on States' practice, it is different from treaties, which are generated from intergovernmental negotiations. International customary law is developed 'through the cumulative practice of states in accordance with what is perceived as a governing legal obligation'.[64] In Canada, customary international law is a direct source of domestic legal rules unless Canada has taken explicit measures to avoid a particular customary rule to have force in domestic law.[65] In Australia, customary international law is not a direct source of domestic legal rules, except with regard to peremptory norms/ *jus cogens*, such as no piracy or no slavery.[66]

However, treaties are the most used means of rule-making for contemporary international law through ratification — a formal process of acceptance by States, which indicates that the States are not only able but also willing to fulfil their obligations under the treaty. As to the State party, consent is the most basic requirement and key to engaging duties pursuant to the treaty obligation. The consent, or indication of an intention to be bound, is manifested first by signature, which in turn produces further steps of becoming a State party through ratification, which in turn binds the State to fulfil the obligations in the treaty text.[67]

Implementation is the next step to ensure compliance with the treaty. Nevertheless, at present due to the lack of international executive power, and there being no general international rule stipulating how States should incorporate international law into domestic legal systems, implementation depends upon the willingness of States to take appropriate measures to put the treaty into operation in its domestic law, thereby

[62] Sarah Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights ' (1999) 5 *Journal of International Legal Studies* 57, 64.
[63] Same Varayudej, 'A Right to Democracy that in International Law: Its Implications for Asia ' (2006) 12 *Annual Survey of International and Comparative Law* 1, 2.
[64] Armand Mestral and Evan Decent, 'Rethinking the Relationship Between International and Domestic Law ' (2008) 53 *McGill Law Journal* 573, 583.
[65] See *R. v. Hape,* 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385 *[Hape].*
[66] See Mestral and Decent, above n 64, 577, 574.
[67] See Lowe, above n 39, 57.

ensuring that domestic legislation and public institutions are in a position to give full effect to the rules enshrined in the treaty.[68] There is no general obligation on States to perform incorporations of international law into domestic law. For States that ratify and implement treaties into domestic law, implementation is not the last procedure. Any compulsory dispute settlement included in the treaty provisions may be invoked if a dispute arises; such dispute settlement procedures usually occur in commercial treaties.[69]

States have been long recognized as the primary actors in dealing with international affairs. However, this role began to erode after the end of the Second World War when the Nazi regime perpetrated crimes upon its own citizens. For the first time, the idea of protecting the rights of individuals within a nation State started to change, which expected international law to gain traction in legal circles to protect fundamental human rights within States, not just as between States.[70] 'Suddenly, individual rights ascended to the level of international law, but the long-held principles of inviolable state sovereignty remained'.[71] In many States, protecting citizens' freedom of speech has a long and respected jurisprudence.

The primary purpose of domestic law is to regulate its own citizens. Nevertheless, domestic law also has significant international ramifications though it applies domestically. For example, it can also apply to foreign citizens in light of human rights commitments and may extend to foreign transactions which cannot be deemed as merely domestic, because it is common that in some transactions, relevant parties may from different countries.[72] Consequently, the domestic law of one or more of the various States relevant to the transaction governs the vast of these multinational (especially

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[68] See also Mestral and Decent, above n 64, 588-589.

[69] See *United Nations Convention on the Law of the Sea* of 10 December 1982, Part XV, Section 2. See also Jacqueline Peel, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under *UNCLOS* in the Aftermath of the Southern Bluefin Tuna Arbitration ' (2002) 3 *Melbourne Journal of International Law* .

[70] William Magnuson, 'The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law ' (2010) 43(2) *Vanderbilt Journal of Transnational Law* 255, 257.

[71] Ibid. 'Treaties promised certain rights to individuals, but at the same time, states were granted sole control over their internal matters.' 'The rule held that individual states have a responsibility to ptotect their citizens from genocide, ethnic cleansing, or other large-scale loss of life, and if a country were unabe or unwilling to do so, the responsibility would fall upon the broader community of states.' See ibid 257-258.

[72] Muchmore, above n 61, 364.

commercial) transactions.[73] Thus, in certain areas of international law, international legal rules give effect to regulating States' conduct that is not merely domestic with its international prescriptive jurisdiction, arising from relevant bilateral or multilateral treaties.[74]

In practice, international agreements frequently lead to the enactment of domestic legislation. Therefore, voices seeking congruence between international and domestic rules become ever louder. 'In light of the increased significance of public international law since 1945, the proliferation of international treaties, and the basic obligation of all states to perform their international legal obligations in good faith, states have good reason to seek a measure of congruence between their domestic legal orders and international law.'[75]

The idea of a unity of international and domestic law can be found in a collection of essays. Dyzenhaus proposed the idea of the unity of public law in his book in 2004.[76] Mestral and Decent are followers of this idea; they developed the conception of unity on the basis of Dyzenhaus's writings and aimed to recast the relationship between the two legal orders as a unity. Their understanding of such 'unity' is that the relationship between international and domestic law requires the two legal orders to incorporate one another as a coherent and unified set of legal principles and rules; and the unity of both legal rules follows from overarching and shared commitment to public accountability, which means public and private bodies can be held publicly accountable.[77]

But there is a tension between both legal rules. Nevertheless, not many scholars recognised that potential dangers exist in current international legal trends. The dangerous trend is 'domestic politicians can manipulate international legal institutions and mandates to serve their own purposes, such as jailing political dissidents as part of complying with a Security Council resolution requiring domestic action against

[73] For example, the multinational regulatory enforcement activities of the United States and the European Union, as well as the emerging regulatory activities of China.
[74] See also Muchmore, above n 61, 368.
[75] Mestral and Decent, above n 64, 575. For example, obligations arising from membership of the WTO (World Trade Organisation), or multilateral or bilateral free-trade or 'most favoured nation' agreements.
[76] David Dyzenhaus, *The Unity of Public Law* (Oxford: Hart 2004).
[77] See Mestral and Decent, above n 64, 575.

terrorism.'.[78] In order to solve the potential dangers, international law may step in to prohibit certain government behaviour and enhance domestic government action.[79]

Respecting and fulfilling its international obligations are what international law demands of each State. However, international law leaves to each State a large degree of latitude as to how it will respond to or achieve goals. When it comes to enforceability, due to the absence of any world government or hegemony, States are to enforce international agreements themselves without any central oversighting or enforcing authority.

> In such a situation, authority, status, and the distribution of resources are determined not only by strict rule-following, but also by actions that push, bend, and even violate existing rules. Powerful states use domestic law as a tool for these purposes, and back it with an enforcement apparatus that dwarfs that available for enforcement of international law. Yet, the ability of states — even powerful ones — to apply domestic law extraterritorially is limited.[80]

International law has the striking characteristic of influencing and shaping legal rules and domestic outcomes[81] within sovereign States (depending upon the attitude of the State in question). However, currently, it is domestic choices that decide the stability and the objectives of international law. International law has a far more active role in national governments' pursuit of collective global aims of the following nature: social, economic, policy, technology, politics or culture. For those nations who are slow in responding to international law, there may be several reasons: 'a lack of domestic governance capacity, a lack of domestic will to act, and new problems that exceed the ordinary ability of states to address'.[82] Or, of course, they may just not accept it, if they are not parties to the relevant international convention, covenant or treaty. Since it is a nation's free choice as to how to behave, international law has weak leverage to compel States to respond.

Traditionally, State constitutions include references to foreign affairs and international law. Domestic constitutional law and international law are converging. To some extent,

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[78] Slaughter and Burke-White, above n 55, 329.
[79] See ibid, 331, 334-346.
[80] See also Muchmore, above n 61, 387.
[81] 'International law is coming to influence domestic outcomes-strengthening domestic institutions, backstopping national governance, and compelling domestic action-is spreading beyond the Continent.' See Slaughter and Burke-White, above n 55, 329.
[82] Ibid 333.

national constitutional principles can be upgraded to the international level. For example, the international law principle of self-determination was transferred and developed from the national principle of democracy.[83] Similarly, international standards such as human rights protection and good governance are incorporated into some national constitutions.[84] This bilateral integration was described as 're-importation':

> Because the origins of those standards frequently lie in domestic constitutional law, the integration of international standards into domestic constitutional law is to some extent the 're-import' of a product which has been modified (sometimes diluted) and which has become more or less universalized in a global discourse.[85]

There are two reasons for States to integrate their national constitutional law with international law. On the one hand, States have strong political motives to reform and amend their constitutions so as to become a member of certain international organizations. On the other hand, international actors are increasingly evaluating a national constitution by using norms of international law as a point of reference.[86]

International law can have an indirect impact on national constitutional law via the practice of interpretation. For example, many States' constitutions explicitly demand them to be interpreted in conformity with international human rights law, including the South African Constitution of 1996,[87] the Spanish Constitution of 1978[88] and the

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[83] 'The link between democracy and the self-determination of a people is manifest. For example, in the Resolution of the UN-General Assembly on the 2005 World Summit Outcome, UN-Doc A/RES/ 60/1 of 24 October 2005, para. 135: 'We reaffirm that democracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems ...'' See Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law ' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170, 173.

[84] Ibid.

[85] Ibid 174.

[86] Ibid 175. See also Didier Maus, *The Influence of Contemporary International Law on the Exercise of Constituent Power,* National Constitutions in the Era of Integration (Kluwer The Hague 1999), 50.

[87] *Constitution of South Africa* of 8 May 1996: Section 233 (Application of international law):
'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' Section 39 on Interpretation of Bill of Rights: '(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.' (Emphasis added).

[88] Art. 10(2) of the *Spanish Constitution* of 29 December 1978: 'The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.'

Portuguese Constitution of 1976.[89] This however is not true of the Australian, India and Singaporean constitutions. Interpretation to some extent can contribute to constitutional harmonization and facilitate harmonious international relations.[90]

Not surprisingly, there will be situations when the treaty provisions contradict the provisions of the basic rules of the Constitution. Can such treaty provisions still be enforceable? Advocates of the theory of supremacy of the Constitution argue that the ratification of a treaty cannot alter the mechanics of a Constitution.[91] However, the attitude varies from State to State with regard to the question of whether the States recognize the primacy of international law over domestic law — few constitutions sweepingly and explicitly recognize the primacy of international law over domestic law.[92] The claim that international law has supremacy over domestic constitutional law has never been fully accepted,[93] but some constitutional systems considered international law and domestic constitutional law have a formally equal rank.[94]

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[89] Art. 16(2) of the *Portuguese Constitution* of 2 April 1976: 'The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights.'

[90] See also Jordan Paust, *International Law as Law of the United States* (Carolina Academic Press Durham 2nd ed, 2003), 99.

[91] Osvaldo Marzorati, 'Enforcement of Treaty Awards and National Constitutions (the Argentinian Cases)' (2006) 7(2) *Business Law International* 226 , 244.

[92] The Russian Constitution sweepingly and explicitly recognizes the primacy of international law over domestic law. See Art. 15(4) of the *Russian Constitution* of 12 December 1993: 'The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply.' See also Peters, above n 83, 171. In the contemporary practice, only very few state constitutions seem to accept some International Law to supremacy over domestic constitutional law. For example, the Constitution of Belgium (1994) and the Constitution of the Netherlands (1983) grant international law precedence over national constitutional law. See Peters, above n 83, 184.

[93] For example, the Constitution of Belarus and the South African Constitution explicitly claim the superiority of state constitutional law over international law (or parts of it): Constitution of Belarus of 1 March 1994, Art. 128(2): 'Other enforceable enactments of state bodies and public associations, international treaty, or other obligations that are deemed by the Constitutional Court to be contrary to the Constitution, the laws or instruments of international law ratified by the Republic of Belarus shall be deemed invalid as a whole or in a particular part thereof from a time determined by the Constitutional Court.' (Emphasis added); Constitution of South Africa of 8 May 1996, Section 232 on customary international law: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' (Emphasis added).

[94] 'Some state constitutions grant (some) international instruments a status equal to the state constitution. This appears to be the case for Austria and Italy.' See Peters, above n 83, 185. 'In those constitutional systems where international law and domestic constitutional law have a formally equal rank, the resolution of potential conflicts is entirely left to the constitutional actors.' See Peters, above n 83, 186.

The proponents of pluralism denied the assertion of supremacy concerning the competing claims to authority raised by the domestic constitutional and international actors:

> Pluralism here refers first of all to perspectives and denies the existence of an absolute external observation standpoint ('God's eye-view'). The consequence is that there is no absolute vantage point from which to decide where the rule for deciding a conflict sits and what its content is. The plurality of perspectives is accompanied by a plurality of legal orders, a plurality of legal actors claiming ultimate authority, and a plurality of rules of conflict. In this intellectual framework, there is no legal rule to decide which norm should prevail, in other words there is no supremacy.[95]

Treaty interpretation is a critical part in the process of treaty implementation. The expectations of how treaties would be interpreted are an essential element of the Constitution's overarching design.[96] Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) set forth some basic rules of treaty interpretation. Article 31 (1) articulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.'[97]

There are at least three commonly acknowledged approaches to treaty interpretation, including textualist, intentionalist and teleological theory.[98] Textualism insists on interpreting the words of a provision itself and thus seeks to illuminate the original understanding of the proper interpretation of treaty commitments. For example, article 31 of VCLT calls for an examination of the terms of the treaty in its ordinary meaning. Intentionalism asserts a focus on the intention of the drafters. The intentionalist approach (also be called purposivism) can be used when the plain meaning of the text is ambiguous. The third method, teleological, seeks to effectuate the purpose of a treaty rather than following the original meaning of the text or the intent of the drafters.[99] According to teleological method, 'treaties were meant to be interpreted broadly and

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[95] Ibid 196.
[96] Andrew Tutt, 'Treaty Textualism ' (2014) 39 *The Yale Journal of International Law* 283, 289.
[97] *The Vienna Convention on the Law of Treaties* (with annex). Concluded at Vienna on 23 May 1969, art 31 (1).
[98] International Judicial Monitor, *Treaty Interpretation* (September, 2006) The American Society of International Law and the International Judicial Academy <http://www.judicialmonitor.org/archive_0906/generalprinciples.html>.
[99] See also ibid.

flexibly, with more of an eye to their purposes, drafting history, and the circumstances in which they were ratified than to their text.'[100]

Treaty interpretation may be involved in constitutional design. Given the tensions in constitutional design, the national implementation of treaty obligations gives rise to certain difficulties. As mentioned above, in some States, the framers of the Constitution may refer to treaties by virtue of textualism and interpret the treaties in a certain way in order to embed them in the Constitution. Since the primary approach of treaty interpretation is based on textualism, the design of such Constitutions will take textual interpretation as priority.[101]

However, not all countries will treat treaties as if they were equivalent to a Supremacy Clause. In the practice, this question remains open to the States to decide whether they choose to treat treaties differently from an interpretive perspective:

> States can be part of the international legal system to the degree they choose by consenting to particular rules. Likewise, they can choose to remain apart, asserting their own sovereignty and eschewing international involvement. Formally, Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference. But it is also the right to be recognized as an autonomous agent in the international system, capable of interacting with other states and entering into international agreements. With these background understandings of sovereignty, an international legal system, consisting of states and limited by the principle of state consent, emerged.[102]

Take ratification of ICCPR for example. The stipulated rights guaranteed by international treaties require the commitment of the States. Many countries in the world have incorporated the rights stipulated in international documents such as ICCPR into their own constitutions. Several countries have not yet implemented legislation to enforce it nor passed laws to further protect free speech. The questions of what is the legal effect of the ratification of the ICCPR and how to elucidate gaps between rights in international law and domestic law have become key issues in many countries.

[100] Tutt, above n 96, 292.
[101] See ibid 354, 355.
[102] Slaughter and Burke-White, above n 55, 328.

The Human Rights Committee (HRC) was established under Article 28 of ICCPR,[103] and in turn the ICCPR is monitored by the HRC. The HRC has three enforcement mechanisms in relation to the ICCPR for binding State parties. The first is under Article 40, which requires States to submit reports on the measures they have adopted to implement the ICCPR obligations.[104] The second is a State Party may claim another State Party is not fulfilling its obligations under the Covenant, if both States have recognised the competence of the Committee.[105] The third is individuals may submit complaints to the HRC about violations of their rights in the ICCPR by the State (but this is only with respect to States that have signed the Optional Protocol).[106] Australia has signed and ratified the ICCPR and the Protocol; India has ratified the ICCPR, while Singapore neither signed nor ratified.[107]

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[103] Article 28 1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided. 2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. 3. The members of the Committee shall be elected and shall serve in their personal capacity. See *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 28.

[104] Article 40 1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests. 2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant. 3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence. 4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant. 5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article. See *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 40.

[105] Article 41 1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. See *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 41, 1.

[106] Joseph, above n 62, 66.

[107] United Nations Treaty Collection, *Status of International Covenant on Civil and Political Rights* (23 March 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en>.

Unlike international judicial bodies like the International Court of Justice (ICJ), HRC findings are not legally binding. However, according to Joseph, the HRC's decisions are still highly persuasive because the HRC is the pre-eminent interpreter of the ICCPR.[108] She argued that the ICCPR obligations are enforceable.[109] However, 'the methods of enforcement are admittedly defective, as the sanctions for breach in international law are weak.'[110] And of course, the HRC itself is only a political body. The ICCPR, as an international law regulates relations between State parties; however, it is not universally accepted by all the States.

Upon ratification of the ICCPR, certain provisions will not bind the State if the State makes a reservation. Crawford stated that a reservation is a means by which the international community accepts diversity amongst its members.[111] *The Vienna Convention on the Law of Treaties*, art 2(1) (d) states that a reservation to a treaty is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'[112] 'Reservations reduce a state's duties and increase its liberties in the arena of ICCPR rights. They also allow states to retain more power within the area of the reservation.'[113] However, reservation rights are apparently limited, and reservations can only be entered before ratification. After ratification States have little instrumental control.

Australia made reservations to ICCPR on Article 10, 14 and 20:

> Article 10 — In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned. Article 14 — Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision. Article 20 — Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20;

[108] Joseph, above n 62, 66.
[109] Ibid 68.
[110] Ibid 67.
[111] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 6th ed, 2012).
[112] *The Vienna Convention on the Law of Treaties*, art 2(1)(d).
[113] Joseph, above n 62, 85.

> accordingly, the Common wealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.[114]

India made a declaration that:

> With reference to Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that, consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993, the words "the right of self-determination" appearing in this article do not apply to a section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.[115]

Singapore has not ratified ICCPR.

In order to enforce the free speech provisions of the International Covenant, Kumar (original Kumar's source as referred to by Magnussen) proposed to use national courts to serve both strategic and normative goals. The solution by legislative process is both inconsistent with ICCPR guarantees and too rigid.[116] There are three preeminent reasons to support this argument:

> Foremost, courts may be uniquely positioned to enforce the ICCPR by relying on its language and reading an inherent right to political speech into many countries of their respective governments. In addition, judges, who in many countries receive life tenure and guaranteed salaries, do not face the same political pressure as legislators. Finally, courts have traditionally been instrumental in guaranteeing individual freedoms that might be politically contentious or amorphously defined.[117]

The problem with such court solution is that judges, like everyone else, are bound by the rule of law, and are bound by national laws. Such argument is opposed to both any democratic principles (by ignoring domestic law) and also by denying the rule of law.

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[114] United Nations Treaty Collection, above n 107.
[115] Ibid.
[116] Magnuson, above n 70, 361.
[117] Ambika Kumar, 'Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights ' (2006) 7(1) *Chicago Journal of International Law* 351, 351.

Freedom of speech is still regarded as an issue internal to a State, although protected by a number of important international treaties.[118] It is not the international community's responsibility to protect freedom of speech. Instead, 'states may invoke the principle of non-intervention[119] when confronted with criticisms of the suppression of speech inside their borders'.[120]

However, respect for State sovereignty does not necessarily contradict the respect for the right to free of speech within a State.[121] But some scholars state that 'The characteristics of traditional international law — based the concept of sovereignty and sovereign equality — have been described as fundamentally undemocratic': and went on to suggest that 'the principles of sovereign equality and non-intervention in domestic affairs thus constitute significant obstacles to the development of the principle of democracy into the corpus of international law.'[122]

On the other hand, 'the right of state sovereignty had to be balanced against the competing claims of individuals to their own rights'.[123] But 'international intervention to preserve individuals' free speech rights should not be regarded as an impermissible interference or an assault on state sovereignty'.[124]

7.3 International Human Rights and Domestic Practices in Australia, Singapore and India

7.3.1 Australia

Australia is the only Western democratic country without a constitutionally or legislatively enshrined charter of human rights. In other words, Australia has no

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[118] Sheila Mclean, 'The Right to Reproduce ' in Tome Campbell (ed), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986), Part IV.
[119] 'The non-intervention rule is a principle of international law that restricts the ability of outside nations to interfere with the internal affairs of another nation.' See Carolyn Dubay, *A Refresher on the Principle of Non-Intervention* (Spring 2014) International Judicial Monitor <http://www.judicialmonitor.org/archive_spring2014/generalprinciples.html>
[120] Mclean, above n 118, notes 204-205, as cited in Magnuson, above n 70, 259.
[121] 'The essential problem with the pre-World War II legal regime was that it acknowledged state sovereignty as the building block of international relations and therefore treated it as inviolable.' See Magnuson, above n 70, 288.
[122] Varayudej, above n 63, 3. 'The characteristics of traditional international law – based the concept of sovereignty and sovereign equality- have been described as fundamentally undemocratic'. See Varayudej, above n 63, 3.
[123] Magnuson, above n 70, 289.
[124] Ibid 291.

constitutional protections of individual rights akin to the US Bill of Rights.[125] Even though Australia has ratified the major international human rights treaties, it has not automatically or fully incorporated provisions into domestic law.[126] However, many fundamental common law rights and freedoms are recognised by the courts through the 'principle of legality' sometime known as the 'common law bill of rights' (see also 2.4.1.1).

The international human rights treaties [127] that Australia ratified include the *International Covenant on Civil and Political Rights* (ICCPR),[128] the *Convention on the Rights of the Child* (CRC),[129] the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[130] *Social and Cultural Rights* (ICESCR),[131] *Convention against Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* (CAT),[132] the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[133] and also *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[134]

In 2006 the Victorian Court of Appeal handled a case named *Royal Women's Hospital v Medical Practitioners Board of Victoria*.[135] In the case, Maxwell P argued that the development of an Australian jurisprudence drawing on international human rights law was still in its early stages.[136] There is a significant deficiency in Australia's framework

[125] But see the discussion of the 'common law Bill of Rights' in Australia at 2.4.1.1.
[126] See also Jim Kennan, 'The Role of International Human Rights Law in Australian Law' (2010) 44 *Valparaiso University Law Review* 895, 895-896.
[127] Australian Human Rights Commission, *Chart of Australian Treaty Ratifications as of May 2012* (27 March, 2015) Australian Human Rights Commission <https://www.humanrights.gov.au/chart-australian-treaty-ratifications-may-2012-human-rights-your-fingertips-human-rights-your>.
[128] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[129] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[130] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[131] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[132] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[133] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[134] Ratified by Australia on 10 December 1975.
[135] *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85. Case abstract: In 2001, the Medical Practitioners Board of Victoria received a complaint from an Australian Government Senator regarding a late-term abortion carried out in February 2000 at the Royal Women's Hospital, Melbourne. Five years later, the complaint of professional misconduct was finally dismissed by the Board as being frivolous and vexatious. The action highlights a number of deficiencies in the way medical practitioner boards deal with complaints against medical practitioners; in particular, the Board's lack of discretion to deal with complaints lacking substance. Early mediation of the dispute between the Royal Women's Hospital and the Medical Practitioners Board could have avoided a great deal of suffering and expense. As a result of this case, it is likely that the Victorian Medical Practitioners Board will be given additional powers in the future to deal with complaints without merit.
[136] *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 (Unreported, Warren CJ, Maxwell P and Charles JA, 20 April 2006) [71].

of human rights protection — relatively limited expertise and capacity of lawyers with regard to the reference of international human rights law in Australian domestic advocacy and litigation.[137] Based on this comment, in order to develop a common expertise in international human rights in Australia, further progress will necessarily involve judges and practitioners working together.[138]

There were, however, further developments in the Australian State of Victoria in 2006 — *The Charter of Human Rights and Responsibilities Act 2006* (Vic). On behalf of the people of Victoria, the Victorian Parliament enacted the Charter, recognising that all people are born free and equal in dignity and rights. The Charter is founded on four principles:

> Human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom; human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community; human rights come with responsibilities and must be exercised in a way that respects the human rights of others; human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.[139]

It has been emphasized incisively with respect to the importance of respecting, protecting and fulfilling the international human rights:

> It is clear that the provision and availability of legal services to monitor, assess and advocate the implementation of human rights, to take steps to ensure that they are respected, protected and fulfilled, and to seek redress and remedies for violations, are important and necessary components of federal and state obligations in relation to the realisation of these rights. Particularly in the absence of a constitutionally or legislatively entrenched bill of rights, human rights-focused legal services can and should play a crucial role in developing the institutional framework necessary for the realisation of human rights and the full implementation of federal and state obligations under international human rights law.[140]

The *Human Rights Act 2004* (ACT) was the first Charter of Human Rights enacted within Australia, which came into force on 1 July 2004. It is an ordinary Act of the Legislative

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[137] Philip Lynch, 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre ' (2006) 7 *Melbourne Journal of International Law* 225 ,228.
[138] Ibid 225, 227.
[139] *The Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble.
[140] Lynch, above n 137, 243-244.

Assembly of the Australian Capital Territory (one of Australia's internal territories). The majority of human rights enshrined in Part 3 of that Act are based on the ICCPR, a treaty which Australia ratified in 1980. The relevant rights are:

> Recognition and equality before the law; right to life; protection from torture and cruel, inhuman or degrading treatment; protection of the family and children; privacy and reputation; freedom of movement; freedom of thought, conscience, religion and belief; peaceful assembly and freedom of association; freedom of expression; taking part in public life; right to liberty and security of person; humane treatment when deprived of liberty; children in the criminal process; right to a fair trial; rights in criminal proceedings; compensation for wrongful conviction; right not to be tried or punished more than once; freedom from retrospective criminal laws; freedom from forced work; rights of minorities.[141]

The Australian Human Rights Commission (AHRC) has worked on a range of human rights issues connected with cyberspace, including access and accessibility for people with disability; access and online safety for older Australians; racial discrimination and vilification in online environments; sexual harassment over cyberspace; cyber safety for children and cyber-bullying and online safety in indigenous communities.[142]

Australia holds to the view of dualism. In terms of the relationship between international treaties and customary international law with the domestic legal system, Australia accepts them as separate legal spheres; international law has no direct effect on the national law unless Parliament legislates accordingly — 'The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law'.[143] The possible advantages of holding a dualist view — 'it is precisely not the international law norm that as such becomes part of domestic law but a norm of domestic law that reflects the content of the international norm. The difference is important because if the international norm disappears, the domestic norm still remains unless it too is rescinded.'[144]

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[141] *The Human Rights Act 2004* (ACT), part 3.
[142] Australian Human Rights Commission, *Human rights and the Internet*, http://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/human-rights-and-internet (17 October 2013).
[143] *Tajjour v NSW* (2014) 254 CLR 508, 567 [96] (Hayne J).
[144] Jurgen Brohmer, 'The External Affairs Power in Australia and in Germany: Different Solutions, Similar Outcome? ' (2012) 24 *Journal of Constitutional History* 49, 51.

However, the dualist perspective posed a barrier to States participating in implementing the treaties and thus threatens their ability to reach full compliance with international obligations. A deeper understanding of the range of possible cooperative international-domestic relationships is necessary in order to move beyond the dualist orientation.[145]

In Australia, the fact is that agreeing to be bound by a treaty is the responsibility of the Commonwealth Executive in the exercise of its prerogative power, while law-making is the responsibility of the parliament. Under the Australian *Constitution* s.61,[146] the power to enter into treaties rests on the Commonwealth executive and the several States and Territories have no such power. It is a traditional feature of Westminster based systems. It is a matter only for the executive branch of the Commonwealth to negotiate, sign and ratify international treaties.

The term ratification in Australia is different from other countries such as the United States. In the United States, its Constitution regulates that the US-Senate must consent to any treaty entered into by the Executive with a two-thirds majority — 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...'[147] However, in Australia, the term ratification does not have an additional constitutional meaning of parliamentary assent to the treaty.[148] The role of Australian Parliament in treaty making remains limited but it does not equal to no role at all. It is for the Parliament to act when performance of an international treaty obligation demands legislation to be passed domestically.[149] Section 51(xxix) of the Australian *Constitution*, the 'external affairs' power, gives the Commonwealth Parliament the power to enact legislation that implements the terms of those international agreements to which Australia is a party.[150]

7.3.2 Singapore

[145] Kalb, above n 10, 74.
[146] 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' See *Australian Constitution* s 61.
[147] *The United State Constitution* Article II Section II.
[148] See also Brohmer, above n 144, 54.
[149] See *Bradley v. The Commonwealth* (1973) 128 CLR 557. See also ibid 55.
[150] See *Commonwealth v Tasmania* (Tasmanian Dam Case) (1983) 158 CLR 1.

Paramount national development goals prioritizing economic growth and social order shape the contours of Singapore's legal policy and framework towards human rights.[151] The mode of interpreting and implementing international human rights is qualified by reference to Asian values and economic development.

Singapore adopts a dualist rather than a monist view of law; public international law rules are not part of domestic law and cannot be enforced by the courts unless they have first been incorporated into domestic law in some way.[152] Unless an international treaty entered into by the Singapore Government has been given effect through an Act of Parliament, it cannot be enforced as domestic law by the courts. An example is the *Geneva Conventions Act* (Cap. 117, 1985 Rev. Ed.),[153] which was enacted in 1973 to give effect to the Geneva Conventions in Singapore.

In 1995, Singapore became party to the *Convention on the Prevention and Punishment of the Crime of Genocide*,[154] the *Convention for the Elimination of All Forms of Discrimination against Women*,[155] and the *Convention on the Rights of the Child*,[156] subjecting itself to the minimal state reporting obligations under them. It was the first time that Singapore has indicated a willingness to engage in international human rights discourse and allow some international scrutiny of domestic practices.

Singapore's human rights record tended to be impugned primarily in the issue of civil and political rights. Before UN Charter-based bodies such as the Commission of Human Rights, Singapore has been accused of restricting free speech and assembly infringing Jehovah's Witnesses' religious freedom rights by penalizing refusals to perform national military service and discriminating against foreign nationals tried for murder.[157] In 2011, the Special Rapporteur of the UN Human Right Councils recommended the Singaporean government to 'remove legislative provisions which unduly restrict the rights to freedom of expression and assembly and which prevent individuals living in Singapore from holding open and fruitful public debate on matters related to

[151] Li-ann Thio, 'Taking rights seriously? Human rights law in Singapore ' in Randall Peerenboom, Carole Petersen and Albert Chen (eds), *Human Rights in Asia* (Routledge 2006) , 158.
[152] *Chung Chi Cheung v. R* [1938] UKPC 75, [1939] A.C. 160 at 167–168, P.C. (on appeal from Hong Kong).
[153] *Geneva Conventions Act* (R.S.C., 1985, c. G-3).
[154] *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277.
[155] *Convention for the Elimination of All Forms of Discrimination against Women*, UN Doc A/34/46.
[156] *Convention on the Rights of the Child*, UN Doc A/44/49.
[157] Thio, above n 151, 160.

ethnicity.'[158] Also, the Human Rights Council recommended Singapore to 'accede to international human rights instruments containing provisions reaffirming the fundamental human rights principles of non-discrimination and equality.'[159]

However, despite recommendations, Singapore asserts the sovereignty of domestic laws and seeks to preserve this through treaty reservations, which designs to protect Singapore's multi-religious/racial cultural setting.[160] Singapore has chosen to engage with the international community in the realm of human rights by its limited participation in the UN human rights treaty based regime. Singapore is wary in reserving the right to interpret and protect human rights according to State discretion. Human rights in Singapore remain a 'compelling ideal in an imperfect world' and much remains to be done,[161] though Singapore acknowledges the need to improve and has undertaken to review its reservations regularly.

7.3.3 India

In general, the Indian experience narrates conflicting notions of democratic governance that negotiate trade-offs of promotion and protection of human rights against the preservation of national security and economic development.[162] The whole varieties of institutional practices in the promotion and protection of human rights were spawned after more than five decades of the working of Indian constitutionalism.

India also follows the dualist approach in respect of implementation of international law at the domestic level. Therefore, in India, international treaties do not automatically form part of national law, but must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament.[163]

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[158] Human Rights Council, AA/HRC/17/40/Add.2, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai – Mission to Singapore* (seventeenth session, 2011).
[159] Human Rights Council, AA/HRC/17/40/Add.2, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai – Mission to Singapore* (seventeenth session, 2011).
[160] Initial report of the *Convention on the Rights of the Child*, paragraph 3.1.
[161] Vienna Statement, *supra* note 5, p 605.
[162] Upendra Baxi, 'Protection of human rights and production of human rightlessness in India ' in Randall Peerenboom, Carole Petersen and Albert Chen (eds), *Human Rights in Asia* (Routledge 2006) , 386.
[163] Duncan Hollis, *The Oxford Guide to Treaties* (Oxford University Press 2012), 370.

In 1993, The National Human Rights Commission of India was established. It is an autonomous public body constituted under the *Protection of Human Rights Ordinance*[164] and was given a statutory basis by the *Protection of Human Rights Act*.[165] The National Human Rights Commission was responsible for the protection and promotion of human rights. India has since the 1980s established other human-rights-specific institutions such as the National Commission for Women, the Minorities Commission, and a Child Rights Commission.

India is a member of the Human Rights Council. The Human Rights Council holds a pertinent attitude toward human rights in India. It acknowledges that India has a long tradition of promoting and protecting human rights, and that human rights protection was in the forefront of India's freedom struggle.[166] India's position reinforces the inter-relationship between development, human rights, democracy and international cooperation. India advocates a holistic and integrated approach that emphasizes the inter-dependence, inter-relatedness, indivisibility and universality of human rights.[167]

In the Voluntary Pledges and Commitments to the UN by India in 2006, India asserted itself as a committed supporter of the UN human rights system and that the promotion and protection of human rights is ingrained in its domestic and foreign policy.[168] India has been active in deliberations on human rights in international fora and in the development of widely accepted international norms. India not only took active part in drafting of the *Universal Declaration on Human Rights*,[169] but also fully committed to the rights proclaimed in the Universal Declaration.

India also has actively participated in all sessions of the UN Human Rights Council, in a constructive and inclusive manner. India is party to the six core human rights covenants/conventions, namely, the *International Covenant on civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the*

[164] *Protection of Human Rights Ordinance* (India, 28 September 1993).
[165] *Protection of Human Rights Act*, (India, 08 January 1994).
[166] Human Rights Council, *India in the Human Rights Council* (20 October 2016).
[167] Human Rights Council, *India in the Human Rights Council* (20 October 2016).
[168] Voluntary Pledges and Commitments by India, No. NY/PM/161/1/2006.
[169] Dr. (Mrs). Hansa Mehta, a Gandhian political activist and social worker who led the Indian delegation, had made important contributions in drafting of the Declaration, especially highlighting the need for reflecting gender equality. See Human Rights Council, *India in the Human Rights Council* (20 October 2016).

Elimination of All Forms of Discrimination against Women, the *Convention on the Rights of the Child* (and its two Optional Protocols) and the *Convention on the Rights of Persons with Disabilities*. In 2007, India became one of the earliest countries to ratify the *UN Convention on the Rights of Persons with Disabilities*. In 2011, India ratified the *UN Convention against Transnational Organized Crime* and its three Protocols and the *United Nations Convention against Corruption*.

However, there are still human rights problems in India. The problems were addressed in a letter to Prime Minister Manmohan Singh from the Human Rights Council on India's human rights commitments from the Geneva director in 2011;[170] the letter also asked Indian government to implement several changes in India's laws and policies to better protect and promote human rights: ensuring accountability for human rights abuses; strengthening civil society and freedom of expression; protecting the rights of women and other vulnerable groups.[171]

In order to strengthen freedom of expression, Human Rights Council suggested the Indian government act on the current infringement upon civil society's ability to freely engage in public discourse and upon individuals' right to free expression, such as protecting citizens' right to freedom of expression by repealing archaic sedition laws that are being used to silence dissent and taking immediate steps to strengthen and reduce politicization of the National Human Rights Commission by requiring a transparent appointments process that includes public hearings and participation from civil society groups.[172]

7.4 Conclusion

[170] For example, (a) the current culture of impunity that protects public officials from prosecution for violating human rights stands in the way of fully realizing that commitment. Indian law requires government permission to initiate prosecutions against any government official, under the Criminal Code and several other laws. This has prevented proper accountability for human rights violations such as arbitrary arrests, torture, and extrajudicial killings by the police, paramilitary, and the army; (b) certain legislation and legal codes currently infringe upon civil society's ability to freely engage in public discourse and upon individuals' right to free expression. See Human Rights Council, *Letter to Prime Minister Singh on India's Human Rights Commitments* (3 June 2011).

[171] Human Rights Council, *Letter to Prime Minister Singh on India's Human Rights Commitments* (3 June 2011).

[172] Human Rights Council, *Letter to Prime Minister Singh on India's Human Rights Commitments* (3 June 2011).

Cyberspace gives new opportunities and challenges to the implementation of the international instruments with respect to human rights and free speech issues. But there is little action to date in the international arena to establish any universal approach to speech in cyberspace. Regulation of speech in cyberspace, to the extent that such regulation exists, remains largely the province of individual States.

International human rights have a close relationship with democracy. Democracy has been considered by many countries as a guiding principle in general international law. They have become inextricably intertwined and revealed significant similarities. The recognition of human rights treaty bodies by nation States plays an important role in the universal recognition of human rights. The existence of treaty bodies and their function not only provide human rights treaties a compelling legal reason to act, but also provide an avenue for the dialogue with other State parties.

There is both interaction and tension between international and domestic law. The implementation of international law needs the sincere efforts and good faith of individual States. However, international law leaves to each State a large degree of latitude as to how they will respond to or achieve the treaty goals. The precise position of international conventional law in the national legal order differs from State to State. It is true that with the development of globalization, many States have adjusted the attitude toward international law in their constitutions, such as integrating their national constitutional law with international law. The way domestic law responds to international law influences the domestic policies of States and shapes legal rules within sovereign States.

The Comparison of Australia, Singapore and India in Balancing International Law, Human Rights and Freedom of Speech (Table 7.1)

Issue	Australia	Singapore	India
International Human Rights	Australia, Singapore and India all realise the importance of protecting and promoting international human rights.		
Approach to the Reception of Treaties	With regard to the reception of treaties in their internal law, Australia, Singapore and India all hold the view of dualism. When it comes to the relationship between international treaties and customary international law with the domestic legal system, each country accepts them as separate legal spheres; international law has no direct effect on the national law unless Parliament legislates		

	accordingly. Australia accepts international law as a separate legal sphere, unless Parliament legislates accordingly. Similarly, an international treaty entered into by the Singapore Government has to be given effect through an Act of Parliament. In India, international treaties also must be incorporated into the legal system by legislation made by the Parliament.		
General (the protection of international human rights)	Australia, Singapore and India protect human rights in slightly different ways, including their reservations to the international conventions they are party to; the obligations regarding freedom of speech and communication undertaken as a result of those treaties; their specific commitments to freedom of speech in accord with the treaties through domestic law (including the common law).		
Reservations to ICCPR	Australia made reservations to ICCPR on Article 10, 14 and 20.	No (not even a party).	India made a declaration to Article 1 of the ICCPR
The Status of Human Rights Protection	Australia is the only Western democratic country without a constitutionally or legislatively enshrined charter of human rights. Nevertheless, it has ratified the major international human rights treaties. The Australian Human Rights Commission has worked and continues to working on a range of human rights issues connected with cyberspace.	For Singapore, the paramount national development goals prioritizing economic growth and social order shape the contours of Singapore's legal policy and framework towards human rights. The mode of interpreting and implementing international human rights is qualified by reference to Asian values and economic development.	In general, the Indian experience narrates conflicting notions of democratic governance that negotiate trade-offs of promotion and protection of human rights against the preservation of national security and economic development.

Freedom of speech is regarded as an issue internal to a State. However, free speech also protected by a number of important international treaties. The approaches the States used and the attitude they hold with the implementation of the international law affect the extent of protection of freedom of speech in the regime of national law. But the way in which each individual State may choose to implement treaties concerning free speech, should the State be a party to them, will also be affected by each State's concept of

democracy, [173] freedom of speech, especially political speech, [174] its approach to diversity and tolerance,[175] and finally, the attitude and transparency it has towards censorship.[176]

[173] Please see Chapter 2.
[174] Please see Chapter 3.
[175] Please see Chapter 5.
[176] Please see Chapter 6.

Chapter 8 — Conclusion

8.1 Introduction

This final Chapter recaptures the main points raised in the thesis with view to discerning a way forward for freedom of speech in cyberspace. The Chapter begins by providing an overview of the significance of the research. It was argued that research regarding freedom of speech and democracy are not only a necessity in the digital world but also important for clarifying what is at stake and what are the best ways forward. The discussions in the thesis are necessary for giving orientation for countries grappling with cyberspace issues.

Next, this Chapter makes conclusions based on the preceding seven chapters' analysis, with emphasis placed on giving an account of the internal and external matters that influence the protection of freedom of speech within the three countries chosen as comparisons. With the rise of cyberspace, the fundamental right to freedom of speech is challenged in new ways. These challenges are not only technological, but also legal, political, social, cultural and economic. This is the reason the thesis has placed emphasis on freedom of political speech, cyber-governance, cyber-sovereignty, the issues of diversity and tolerance, censorship and international law rather than only on infrastructure and technology. Implications that may be drawn from the study are included in each relevant chapter.

In addition, this part of the thesis was designed to draw lessons that emerge from this study after investigating the differences and commonalities among Australia, Singapore and India in balancing the relationship between freedom of speech and democracy in cyberspace. It has shown that cautious consideration is required when establishing any rules for the flow of information in cyberspace and there is a need to balance legal paternalism and autonomy.

8.2 Research Contribution

For a field as dynamic, new and open-ended as cyberspace, benefits as well as challenges and threats are rapidly emerging and complex, touching on many facets of everyday life. The debate on freedom of speech in cyberspace does not take place in a vacuum.

Cyberspace holds great potential as a resource for the creation of dialogue across borders and cultures and free distribution and reception of information. Research regarding freedom of speech and democracy is not only a necessity in the digital world but also important for clarifying what is at stake and what are the best ways forward. Cyberspace is a 'robust, flexible and resourceful invention and is allied with human ingenuity and creativity and the human instinct for freedom';[1] 'the quality that is most disturbing to some governments — the way that the Internet permits an unprecedented empowerment of the individual — is likely to prove very resilient.'[2] The characteristic of cyberspace of providing the chance for all to participate regardless of frontiers is inseparable from ensuring freedom of speech.

Freedom of speech is universal amongst democratic nations and it is central to the Information Society.[3] Freedom of speech is especially essential for democracy and good governance. Matsuura argued that 'In both developing and industrialized countries, digital technologies have great potential to strengthen the institutions of representative government and civil society, to enable citizens to gather information and mobilize coalitions around policy issues, and to improve government efficiency and transparency through better communication with citizens.'[4]

The analyses relating to freedom of speech and democracy in cyberspace have been based upon comparative studies drawn from Australia, Singapore and India, and have drawn upon theories relating to democracy, speech, and law. Such an analysis, using different nation States in different stages of development and theoretical approaches relevant to speech in cyberspace, is, it is argued, necessary for giving orientation to countries which in this area struggle with many unresolved issues. The discussion in the thesis tried to be interactive, balanced and wide ranging, debating possible responses to various cyber issues. It is part of the thesis's purpose to provide a platform for open

[1] Koichiro Matsuura, 'United Nations Educational, Scientific and Cultural Organization ' (Paper presented at the Freedom of Expression in Cyberspace 3 February 2005) 1, 3.
[2] Ibid.
[3] The 4th principle of the *Geneva Declaration* (Geneva, 2003) has appropriately stated that 'Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.' See *World Summit on the Information Society*, Document WSIS-03/GENEVA/DOC/4-E (12 December 2003) Part A, 3. See also 4.4.1.
[4] Matsuura, above n 1.

discussion and to promote the flow of opinions. The thesis highlighted the current window of opportunity to enhance regional, national and international measures to establish a secure, open, peaceful and cooperative cyberspace for freedom of speech. I am confident that the thesis may contribute to explaining some of the complex issues that have to be addressed in order to ensure an open environment for free speech.

8.3 Similarities and Differences among Three Countries

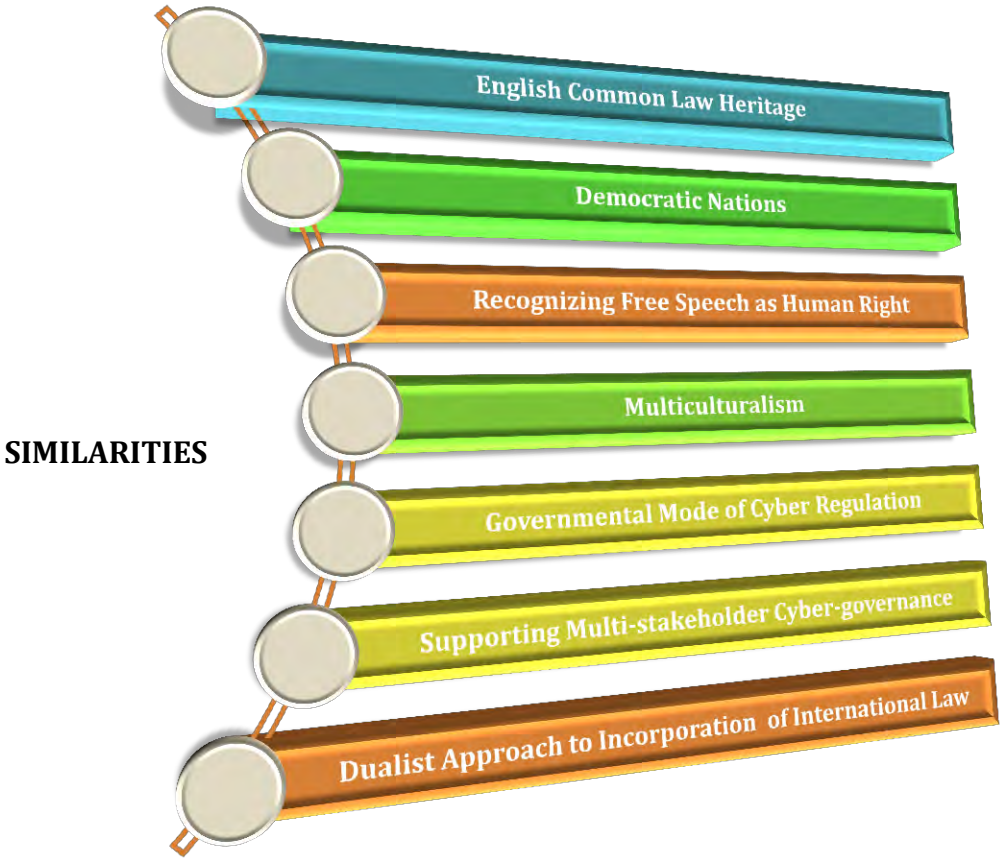

Figure 8.1: Similarities between Australia, Singapore and India in Balancing Freedom of Speech, Democracy and Cyberspace

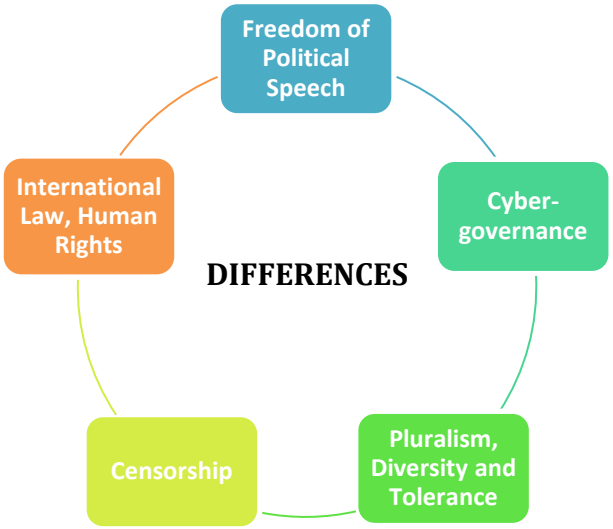

Figure 8.2: Differences between Australia, Singapore and India in Balancing Freedom of Speech, Democracy and Cyberspace

Commonalities of Australia, Singapore and India

in Balancing Freedom of Speech, Democracy and Cyberspace (Table 8.1)

No.	Issue	Commonalities
1	English Common Law Heritage	Australia, India and Singapore share the heritage of the common law derived from England as part of their constitutional foundations.
2	Democratic Nations	Australian, Singaporean and Indian systems of governance are all democracies.
3	Free Speech	They all recognize freedom of speech as human right.
4	Government Mode of Cyber Regulation	Australia, Singapore and India are mainly under the governmental model of cyberspace management. Parliament or related government institutions are in charge of promulgating laws to regulate cyberspace. Governmental governance has played an essential role over the course of time.
5	Multi-stakeholder Mode of Cyber Governance	Australia, Singapore and India are now all committed to supporting an open cyberspace which is administered by the multi-stakeholder approach to cyber-governance, which means the private sector, governments and users all participate in shaping the evolution and use of cyberspace to ensure that cyberspace remains stable, free and resilient and continues to be a powerful platform for freedom around the country.
6	Multiculturalism	Australia, Singapore and India all describe themselves as multicultural. They all have accepted multiculturalism as meaning at a minimum that a diversity of cultural identities and practices is acceptable within the State and should be recognised by the State.
7	Cyber Censorship	Australia, Singapore and India all enjoy the benefits that cyberspace produced and censorship is applied to cyberspace by all three to regulate the activity of users.
8	International Human Rights	Australia, Singapore and India all realise the importance of protecting and promoting international human rights.
9	Approach to the Reception of Treaties	With regard to the reception of treaties in their internal law, Australia, Singapore and India all hold the view of dualism. When it comes to the relationship between international treaties and customary international law with the domestic legal system, each country accepts them as separate legal spheres; international law has no direct effect on the national law unless Parliament legislates accordingly. Australia accepts international law as a separate legal sphere, unless Parliament legislates accordingly. Similarly, an international treaty entered into by the Singapore Government has to be given effect through an Act of Parliament. In India, international treaties also must be incorporated into the legal system by legislation made by the Parliament.

Differences of Australia, Singapore and India

in Balancing Freedom of Speech, Democracy and Cyberspace (Table 8.2)

No.	Issue	Australia	Singapore	India
1	General (free speech)	Australia, Singapore and India are all different, responding to the nature of their culture and each individual policy on freedom of speech. Each country's own historical and cultural factors have a long-term and deep-rooted influence on the development of freedom of speech.		
2	Bill of Rights	No (implied freedom of political communication; 'common law bill of rights')	Yes	Yes
3	Freedom of Speech	Freedom of speech is highly recognized and valued by Australians.	Singapore and India place heavy emphasis on social order, social harmony and respect for the authority. Asian-style democratic countries like Singapore and India need to give a priority to balancing Asian values with characteristics of true democracy. Imbalanced heavy emphasis on social order, social harmony and respect for the authority, to a certain extent, cannot perfectly co-exist with the guarantee for freedom of speech in cyberspace.	
4	Political Speech	The development of the implied freedom of political communication in Australia, a constitutional democracy, has gone through a gradual but steady evolution. Australia not only reaffirmed the existence of implied freedom of political communication but also secured its position by the unanimous decision of the High Court in *Lange's* case.	Governance in Singapore is authoritarian, where the authorities limit basic civil liberties such as freedom of speech, partly because the political culture and political participation in Singapore are restricted, which discourages citizens from directly influencing political decision-making. The ruling People's Action Party (PAP) government in Singapore endorsed the idea of having a 'Speakers' Corner' as a free-speech venue.	India has put much more effort into restricting individuals' hate speech than on political speech expressed by electoral parties. The dilemma in regulating political hate speech has revealed Indian's legal and political tension on political speech.

5	Model of Cyberspace Management	Australia balances its the cyber-governance between two competing key visions: one is of a globally interconnected and open system subject to multi-stakeholder governance where states participate but do not dominate; the other seeks to put the state at the forefront of cyberspace, upholding the concept of state sovereignty in cyberspace. Australia is committed to supporting an open cyberspace which is administered by the existing multi-stakeholder approach to cyber-governance that has evolved organically, and successfully. The Australian government is working to ensure that cyberspace remains stable, free and resilient and continues to be a powerful platform for freedom around the country.	In Singapore, the government is, on the one hand, trying to promote this technology while, on the other hand, policing it as vigorously as possible to ensure that no one communicates any message that is not acceptable to the government via the Internet. Singapore supports a multi-stakeholder model of cyber-governance. At the opening ceremony of Internet Corporation for Assigned Names and Numbers (ICANN)'s 52nd Public Meeting (9 Feburary 2016), Singapore's Minister of Communications and Information, Dr Yaacob Ibrahim, and former Senior Advisor to President Bill Clinton, Ira Magaziner, talked about the success of the multi-stakeholder model of Internet governance.	The Indian government will continue to have supreme right and control on matters relating to national security. In India, exorbitant licensing fees have operated as a barrier to many peoples' participation in the Internet. However, India supports a multi-stakeholder approach in matters of cyber-governance based on its industry and human resources, which would involve all stakeholders and help to preserve the character of cyberspace as a unified, dynamic engine for innovation, and which encourages equity and inclusion. A series of multi-stakeholder consultations/ roundtable meetings are being organized by Department of Electronics & Information Technology in collaboration with National Internet Exchange of India. There have been 9 multi-stakeholder consultation meetings up till December 2015.
6	Pluralism, diversity, tolerance and Free Speech	Australia has, by and large, tended to give priority to individuals' freedom. However, the positive environment for free speech and cultural tolerance in Australia has slightly changed in	The traditions extant in Asian countries such as Singapore and India differ among themselves, but nevertheless may share some common characteristics. Singapore and India are faithful to their own system of political priorities (e.g., harmony and public order). Asian values do not give freedom of speech the same importance as it is accorded in Australia. The defence of authoritarianism in Singapore and India on grounds of the	

		the recent decades. The merits of cultural tolerance and diversity in Australia have been going downwards and the right to free speech has been challenged.	special nature of Asian values calls for historical scrutiny, though it is in the interest of economic development. Therefore, Singapore and India also share the common feature of being sceptical of freedom of speech, while emphasizing discipline and order. Positive attitudes toward diversity and tolerance assist the development of free speech. Asian values are less supportive of freedom and more concerned with discipline and order, which prevented people from enjoying a large scale of free speech based on toleration.	
7	Rank of Internet Users in the World (July 2016)	32 (20,679,490)	73 (4,699,204)	2 (462,124,989)
8	Cyberspace Free Status	Free. Australia enjoys a much freer cyber environment (less government intervention and smaller extent of censorship). However, recent years have been pivotal years of change, with Australia's cyber freedom declining slightly from previous years. Australia's states and territories have their own admixture of cyberspace content regulatory laws. From 1 January 2000, two levels of internet filtering have been identified by the Commonwealth government. There are strong political, ideological and technical criticisms against the	Partially Free. Singapore has much more rigorous blocking mechanism than Australia. In Singapore, the government retains its power to ban websites on the grounds of national security but aims to ensure transparency and accountability of such government actions.	Partially Free. India has much more rigorous blocking mechanism than Australia. In India, the Supreme Court strongly supported freedom of speech in India's democratic society. Nevertheless, in India conflict occurred on the issue of restricting freedom of speech. The reasonable restriction on freedom of speech implied that the founders of independent India attempted to incorporate the possibility of citizens of criticizing the government, but also were afraid of violent rebellion advocated by this liberty.

		implementation of mandatory internet content regulation and government intervention in internet content control.		
9	Extent of Government Intervention	Less. In general, Australians have enjoyed more affordable, higher-quality access to cyberspace, fewer limits on contents and fewer violations of user rights.	Though Singaporeans enjoy rising and high level of digital connectivity, the government restrains online freedom based on public order reasons. The emergence of some new Acts represents the arrival of a chilling censorship era.	The degree of censorship increased in recent years with a large number of URLs blocked from time to time. The Indian government also sometimes limits cyber usage and connectivity in times of emergency.
10	Free Speech as Community Values	Freedom of speech is considered as an important value in the community.	Not as highly valued as in Australia.	
11	Whether Accord to International Instruments	Australia accords with international instruments (UDHR, ICCPR). Australia has signed and ratified the ICCPR.	Singapore is neither a party to the *Universal Declaration of Human Rights* (UDHR) nor ratified the *International Covenant on Civil and Political Rights* (ICCPR).	India has ratified the ICCPR and accords with UDHR.
12	Balance Between Free Speech and Other Concerns	Australia strikes an appropriate balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens. However, recent years have been pivotal years of change, with Australia's cyber freedom declining slightly from previous years.	There is still room for Singapore to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens.	There is also room for India to strike a balance between maintaining freedom of speech, and the safety and security and privacy, of its citizens.
13	Legitimacy, Public	Australia possesses better conditions in achieving public	Singapore has good conditions for public approval in censorship, by	India is limited in obtaining public approval to censorship, because

	Approval and Transparency	approval to censorship than Singapore and India by clearly articulating the objectives of the government and is effective in accomplishing its intended purpose. However, there is criticism as to the transparency of the censorship regime.	enhancing public education efforts on media literacy and cyber-wellness; the public is equipped with updated information and knowledge to media regulations.	the Indian government sometimes limits cyber usage and connectivity during times of unrest.
14	General (the protection of international human rights)	Australia, Singapore and India protect human rights in slightly different ways, including their reservations to the international conventions they are party to; the obligations regarding freedom of speech and communication undertaken as a result of those treaties; their specific commitments to freedom of speech in accord with the treaties through domestic law (including the common law).		
15	Reservations to ICCPR	Australia made reservations to ICCPR on Article 10, 14 and 20. 'Article 10 — In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned. Article 14 — Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of	No (not even a party).	India made a declaration that: 'With reference to Article 1 of the ICCPR, the Government of the Republic of India declares that, consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993, the words "the right of self-determination" appearing in this article do not apply to a section of people within a sovereign independent state and cannot be construed as authorizing

		article 14 may be by administrative procedures rather than pursuant to specific legal provision. Article 20 — Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Common wealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.'		or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.'
16	The Status of Human Rights Protection	Australia is the only Western democratic country without a constitutionally or legislatively enshrined charter of human rights. Nevertheless, it has ratified the major international human rights treaties. The Australian Human Rights Commission has worked and continues to working on a range of human rights issues connected with cyberspace.	For Singapore, the paramount national development goals prioritizing economic growth and social order shape the contours of Singapore's legal policy and framework towards human rights. The mode of interpreting and implementing international human rights is qualified by reference to Asian values and economic development.	In general, the Indian experience narrates conflicting notions of democratic governance that negotiate trade-offs of promotion and protection of human rights against the preservation of national security and economic development.

8.4 Lessons Learnt

It is not only difficult but also unrealistic to expect exactly the same model of democracy as a uniform context for free speech throughout the world. However, there are many lessons that can be learnt, both for democratic nations and non-democratic nations.

8.4.1 Free speech grows well under democratic environments

Democracy serves the people within that nation and guarantees that they have the right to freedom as human beings. Therefore, free speech grows well under a democratic environment, which provides sufficient nutrient through free discussion and argument. A certain capacity for reasoning and a certain elementary knowledge of facts by every citizen in the nation are requisite for any democratic advancement. The culture of accepting diversity is a solid foundation and fertile soil for freedom of speech to sprout and blossom into beautiful flowers.

Asian-style (democratic/non-democratic) countries need to give a priority to balancing Asian values with characteristics of true democracy. Imbalanced heavy emphasis on social order, social harmony and respect for authority cannot, to a certain extent, perfectly co-exist with the guarantee for freedom of speech. The attitudes of tolerance, understanding and appreciation are required; readjustment and sacrifice are demanded in achieving human rights. In addition, the constitutional guarantee of the protection of freedom of speech in India and Singapore needs to be put into practice and to apply equally to all.[1]

8.4.2 The cooperation of government and private actors would be an appropriate means of furthering appropriate cyber-governance

Even though cyberspace has a key role in promoting and protecting freedom of speech and democracy in both normal space and cyberspace, the extent of its activity can be monitored and limited by national governments. Governments are becoming more and more influential in exercising power in and through cyberspace: they have the authority to establish the laws in cyberspace, and also have the right to determine harmful actions

[1] Please refer to 2.4 for the discussion concerning the constitutional guarantees in India and Singapore, and 3.2 the implied freedom and the principle of legality in Australia.

which are adversely impacting individuals or entities within their territories and prevent the flow of detrimental information, including blocking access to the Internet.[2]

However, in the long run, government-governance needs the complement of private actor governance, which would improve democratic participation in cyberspace, since people and organisations who are affected would have the opportunity to participate in the decision-making process. This principle of collaboration and cooperation combines self-governance and traditional law. It can take advantage of the benefits of each model: Government has an important role to play, online as much as elsewhere, in developing clear rules and ensuring that even informal regulation of online conduct reflects the interests of all those affected, not just of large corporations. At the same time, private parties can help smooth the workings of the regulatory regime by developing online self-governance mechanisms that allow for flexibility, cooperation, and the leveraging of new technologies.[3]

Engagement with private actors still needs plenty of time to progress to a mature level. Indeed, cyber governance will still remain an ongoing research work in progress. Before any such desired goal could be achieved, national governments still need to play their current role. It is hardly to be expected that it would have its final manifestation in the immediate future.

8.4.3 Free speech works at its best under conditions of diversity

It is important to accept multiculturalism as meaning at a minimum that a diversity of cultural identities and practices is acceptable within the State and should be recognised by the State. Protecting cultural diversity is a part of human rights. Free speech works at its best under conditions of diversity. An effective free speech environment demands government to preserve diversity in speech. However, there is a need for all cultures within a society to accept national laws, and also to accept that there are some instances of cultural diversity (such as that of supporters of the so-called Islamic State) that cannot be tolerated when it seeks to overthrow good governance; indeed all international instruments recognise this.

[2] Please see 4.4.2.2 for the discussion of government-governance.
[3] Please refer to 4.4.2.4 for detailed information.

In addition, the operation of freedom of speech is also determined by the national attitude toward the degree of toleration. The larger the extent of tolerance the freer atmosphere speech has, because toleration makes a harmonious environment where differences can coexist. Tolerance is not only able to make a society continue to diversify, but also is an essential method to foster diversity. Freedom of speech can be fully enjoyed when a nation has an open and advanced attitude toward tolerance. Welcoming different opinions, even opposite ideas being expressed in the political forum, represents the highest quality speech atmosphere one nation may have.

8.4.4 The harmonization of diversity and tolerance to censorship needs legitimacy, public approval and transparency

Cyberspace censorship represents a denial or oppression of complete freedom of speech. Freedom of speech not only signifies speaking freely but also involves a vigorous and healthy dialogue between governments and citizens (and between citizens). In order to establish a flexible and harmonious environment for censorship concerning free speech, the requirements of legitimacy, public approval and transparency in any censorship regime should be met. In each of the three countries, a degree of censorship in cyberspace exists.

The regulation of internet censorship should be subject to specific laws and needs the cooperation of international and national laws to deal with the issues. Public approval is imperative in a democratic nation, in order to widen the potential to increase the effectiveness of a censorship policy. Public approval ensures citizens' confidence in censorship proposals. In addition, transparency in censorship in a democratic government offers the participation that citizens are entitled to. The existence of those three elements makes the harmonisation of cyberspace censorship regarding free speech possible.

While freedom of speech is not absolute, people may enjoy abundant freedom within the lawful frontiers in cyberspace to seek, receive and impart information and ideas of all kinds. However, when it stands in opposition to other individuals' interests or public interests, such as privacy, reputation or national security, restrictions and limitations of freedom of speech should be taken into account and this requires a delicate balance.

Freedom and responsibility are intertwined; they are the two sides of the one coin. Unlimited and unrestricted freedom leads only to ruin.

8.4.5 A reasonable balance needs to be maintained between international treaty practice and domestic legislative power

Free speech is also protected by a number of important international treaties. Cyberspace gives new opportunities and challenges to the implementation of international instruments with respect to human rights and free speech issues. There is both interaction and tension between international and domestic law. The approaches nation States use and the attitudes they hold toward the implementation of international law affect the extent of protection of freedom of speech in the regime of national law. The way domestic law responds to international law influences the domestic policies of States and shapes legal rules within sovereign States. The implementation of international law needs the sincere efforts and good faith of individual States. However, international law leaves to each State a large degree of latitude as to how they will respond to or achieve goal established in international treaties.

The dualist and monist approaches each has its advantages and disadvantages; both of these theories provide important linkages between international law and domestic law. The precise position of international conventional law in the national legal order differs from State to State. The most important issue is to maintain a reasonable balance: not only a broader perspective on the relationship is required, but also a tolerant understanding of the ways in which other States attempt to reconcile the national constitutional order and international commitments is called for. It is true that with the development of globalization, many States have adjusted their attitudes toward international law in their domestic law, such as integrating their national constitutional law with international law.[4]

8.4.6 Cautious consideration is required when establishing rules for the flow of information in cyberspace

Cyberspace's great potential for universal access and being fast and simple to use, together with its global character, has made governments hesitant in granting users the

[4] See 7.3 for detailed information.

same right to freedom of speech as the broadcast media and print have in democratic societies. Even in democratic countries, violations of freedom of expression in cyberspace are growing, and consequently demands to discuss how to prevent undesired side effects of new techniques have become urgent, while concerns as to the restrictions for regulating cyberspace are increasing. Therefore, the United Nations proposed in 2015 that 'a degree of restriction is needed on freedom of expression, to regulate each individual's immense power of online publication and prevent harm to other cultures and societies.'[5] For example, restrictions on free speech are regulated when public order, privacy or reputation are taken into account.

However, free speech is crucial for an open liberal democracy and an open society. The free flow of information is a fundamental premise of democratic societies where individual freedom is honoured and respected. Being able to think and speak freely goes to the heart of individual autonomy and dignity. Furthermore, inappropriate restrictions on freedom of speech will not only hinder the free flow of ideas but may also cause risk that ideas which could enhance the open debate on controversial issues will be silenced, or force such ideas to be expressed underground only, making it impossible to openly counter arguments.

8.4.7 There is a need to balance 'Legal Paternalism' and 'Autonomy'

Generally, there are no strict definitions of autonomy and paternalism. The definitions used may provide an indication of a particular author's own views. Autonomy was defined as 'the fundamental right of individuals to shape their own future through voluntary action' which is opposed to legal paternalism — 'instances in which legislation or the courts interfere with the individual's decision-making process on the grounds that otherwise decisions will not be made in the individual's own best interests.'[6] Also, autonomy is the freedom of the will to choose (but of course the right to choose was restricted: see the comments on extra-marital sex and homosexuality at 5.4.1) — the capacity to act on rational principles and freely to exercise moral reasoning, through

[5] Scientific and Cultural Organization United Nations Educational, (Paper presented at the International Conference on Freedom of Expression in Cyberspace France 3-4 February 2015), 7.
[6] Willem H. van Boom and Anthony Ogus, 'Introducing, Defining and balancing 'Autonomy v. Paternalism'' (2010) 3(1) *Erasmus Law Review* 1, 1.

freedom of choice.[7] Autonomy is at the heart of contemporary politics and morality. The ideal of autonomy is to choose freely between alternative ways of acting and living.[8] The principle of personal autonomy is understood to militate in favour of more freedom rather than less.[9] Paternalism is where the government plays a strong role in directing citizens towards personal responsibility.[10]

There are no better ways to make a conclusion than borrowing those concepts and extending them to freedom of speech in cyberspace. Legal paternalism on free speech in cyberspace exists as there is governmental interference on citizens' right to freedom of speech in cyberspace. It can be concluded that it is the different attitudes toward legal paternalism and autonomy that makes a key difference among Australia, Singapore and India in treating freedom of speech in cyberspace. Compared to Australia, Singapore and India are more paternalistic in regulating freedom of speech in cyberspace. In other words, there is more governmental interference to citizens' free speech.[11] However, there is a need to carve a path between the two sides.

When it comes to the regulation of freedom of speech — a fundamental right of human beings — weak paternalism or autonomy is a more appropriate measure than strong paternalism. The costs of strong paternalism are evident: individuals' ability to make alternative choices will be diminished, and there is the possibility that the government will make errors in its decisions.[12] There is a distinction between 'strong paternalism' and 'weak paternalism':

> Weak paternalism refers to soft state intervention aimed at educating and informing and influencing the decision-making process, thus 'nudging' individuals towards what are perceived to be better outcomes. Law is often used as an instrument to this end …
>
> Strong paternalism by nature is more interventionist. Its mission is not merely to inform or even to persuade but to ensure that individual behaviour that leads to adverse consequences is altered or stopped if necessary. It focuses on changing

[7] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Thomas Kingsmill Abbott trans, Cambridge University Press, 2 nd ed, 2012), 65-66, 88-89.
[8] John Kekes, 'The Dangerous Ideal of Autonomy ' (2011) 30(2) *Criminal Justice Ethics* 192, 192.
[9] Adam J. Macleod, 'The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law ' (2011) 59 *Cleveland State Law Review* 589, 589.
[10] Ibid 591.
[11] Please refer to 2.4 for detailed information.
[12] Boom and Ogus, above n 10, 3.

> preferences rather than informing individuals of the pros and cons of their preferences. As such, it is associated with mandatory law.[13]

The concept of autonomy has an important place in Western liberal thought and culture. Its root can be traced back to Aristotle and Plato — Aristotle's idea of identification of choice and rational deliberation as elements of the virtues and the good life;[14] Plato's idea of the capacity of the philosophical soul for rational self-rule.[15] Liberty, in the sense of political freedom, is often considered together with autonomy while also being a prerequisite to the exercise of autonomy.[16] Democracy means rule by the people, and promotes individual autonomy.[17] Furthermore, autonomy is a form of liberty:

> Individual autonomy stresses that one should be able to control his life, while individual liberty emphasises that one should be free to do whatever one chooses … Autonomy is thus a form of liberty. Because individual liberty is commonly thought as intrinsically good, it provides a source of value for autonomy.[18]

Autonomy is a core constitutional value necessary for securing constitutional democracy and must be protected to secure constitutional democracy. In the book *Securing Constitutional Democracy*, Fleming elaborates a theory of connecting autonomy with constitutional democracy — 'firmly connects privacy or autonomy to the substance and structures of constitutional democracy';[19] 'deliberative autonomy is rooted ... in the language and overall design of the Constitution … has a structural role to play in securing and fostering our constitutional democracy'.[20] Fleming provides a list of fundamental rights that can have a place of deliberative autonomy in the *Constitution*; freedom of thought is one of them:[21]

> Liberty of conscience and freedom of thought; freedom of association, including both expressive association and intimate association, whatever one's sexual orientation; the right to live with one's family, whether nuclear or extended; the right to travel or relocate; the right to decide whether to bear or beget children,

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[13] Ibid 1.
[14] Aristotle, *The Nichomachean Ethics of Aristotle* (M.A. F.H. Peters trans, London: Kegan Paul, Trench, Truebner & Co., 5 th ed, 1893), 29-31.
[15] Plato, *The Republic* (Benjamin Jowett trans, 360 B. C. E), 129-138.
[16] Kim Treiger-Bar-Am, 'In Defense of Autonomy: An Ethic of Care ' (2008) 3 *NYU Journal of Law & Liberty* 548 , 556-557.
[17] Albert Chau, 'Democracy and Individual Autonomy ' (2007) 13 *UCL Jurisprudence Review* 237, 237.
[18] Ibid 240.
[19] James E. Fleming, *Securing Constitutional Democracy* (The University of Chicago Press, 2006), 3.
[20] Ibid 4.
[21] Ibid 92.

> including the rights; to procreate, to use contraceptives, and to terminate a pregnancy; the right to direct the education and rearing of children; the right to exercise dominion over one's body, including the right to; bodily integrity and ultimately the right to die.

Those rights 'reserve to persons the power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over the course of a complete life (from cradle to grave) … [these are] 'basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and spanning a complete lifetime'.[22] Similarly, autonomy should be taken seriously when it comes to fundamental rights.[23]

Within democracy, the value of autonomy should extend to free speech. The paradox is that, all ideas are not only equal but also deserve equal respect; all ideas equally reflect the autonomy of speakers.[24] However, there is a possibility that the autonomy of a speaker may conflict with the autonomy of an audience, such as defamation, invasion of privacy.[25] Autonomy is usually partial because choices and alternatives may be imperfect and fallible.[26] The widespread pursuit of the autonomy ideal is dangerous.[27] Increasing autonomy increases the frequency of crimes.[28] Over-emphasized autonomy produces irresponsible citizens;[29] personal autonomy cannot be protected in all cases and is reasonably curtailed when exercised to cause harm.[30]

Therefore, many problems are not easily resolved simply by invoking or rejecting a principle of personal autonomy. In order to solve the paradox, an autonomy-based approach which both entails a mutuality of obligation and requires care is needed to be established. The enjoyment of autonomy on freedom of speech in cyberspace should not only be correlative with self-conscious obligation, but also consist in care on the part of the autonomous individual. In other words, the autonomy of expression relates to the

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[22] Ibid 93.
[23] Youngjae Lee, 'Valuing Autonomy ' (2006-2007) 75 *Fordham Law Review* 2973, 2977.
[24] Robert Post, 'Participatory Democracy and Free Speech ' (2011) 97(3) *Virginia Law Review* 477, 479.
[25] Ibid 480.
[26] Kekes, above n 12.
[27] Ibid 193.
[28] Such as torture, rape, prolonged physical or psychological cruelty, humiliating the weak, exploiting the needy, sexually abusing young children, malfeasance by public officials, extorting money or services, punishing innocent people, and defrauding the elderly of their life-savings are some examples of serious harm. See ibid.
[29] Macleod, above n 13.
[30] Ibid 621.

capacity of the treatment to others with care and also must be understood to require consideration of the other. A proper view of autonomy recognizes the necessary relationship between rights and responsibilities.[31] The rules for obligation and care are:

> Autonomy is a norm of civility … The autonomous self must act, rationally, in a way that considers others on two levels: both considering how they themselves would reason in their actions (as rational beings), and also how that action treats others … requires one to act in a manner that respects other individuals' existences as ends in themselves, rather than merely as means to an end. A familiar concept similar to the categorical imperative is the adage: "do unto others as you would have them do unto you."
>
> Care can be understood in two different senses. Care signifies the feelings of affection, or love, shown from one to another. Yet care also is shown by treatment that is demonstrated in actions and conduct. [32]

The bases of the arguments relate to dignity and respect for dignity: 'Autonomy thus grounds both the dignity of autonomous beings and their obligation to respect the dignity of others.'[33] Being free to choose is an essential component and a central capacity of human dignity.[34] The same principle of limitation on autonomy is: the criteria of public reason — limitation that 'all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'[35] Each individual ought to be free to 'lead a life that makes use of her distinctive abilities and satisfies her particular aspirations and desires'.[36]

8.5 Limitations to the Research

On a final note, several limitations to this thesis need to be acknowledged. The most important limitation lies in the fact that research with regard to Singapore and India was limited by the small number of available sources. There are fewer regulations and laws that could be used in the thesis relating to freedom of speech in cyberspace in Singapore and India than in Australia. Furthermore, there are not many recently written bibliographies or research papers that relate to the topic such as democracy and free

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[31] Treiger-Bar-Am, above n 20, 552.
[32] Ibid 550.
[33] Ibid 567.
[34] Macleod, above n 13, 604.
[35] John Rawls, 'The Idea of Public Reason Revisited ' in *Political Liberalism* (1993), 217, as cited in Edward C. Lyons, 'Reason's Freedom and the Dialectic of Ordered Liberty ' (2007) 55 *Cleveland State Law Review* 157, 189.
[36] Edward Rubin, 'Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause' (2010) 63 *Vanderbilt Law Review* 763 , 778.

speech in India and Singapore. This posed a limitation on comprehensive analysis regarding those two countries in the thesis. Nevertheless, there are significant lessons to be drawn from comparative studies.

8.6 Conclusion

Australia, Singapore and India share a common legal heritage (the common law), democracy, a wide diversity of ethnic groups among their people, and a global region (the Asian Indian Ocean), but have vastly different cultural practices and religions. Commonalities and differences are ascertained among those States in their approaches to maintenance of free speech, with their similar but different jurisdictions and pluralistic cultures, in their attempts to maintain a balance between free speech, democracy, and the challenges of cyberspace.

Common denominators in protection of free speech in the new democracy of cyberspace have been drawn from comparisons of the three nation States, having regard also to the diversity and plurality of customs, culture, religion, and traditions in those States.

These commonalities lead to the following conclusions:

- free speech grows well under democratic environments;
- the cooperation of government and private actors would be an appropriate means of furthering appropriate cyber-governance;
- free speech works at its best under conditions of diversity;
- the harmonization of diversity and tolerance to censorship needs legitimacy, public approval and transparency;
- a reasonable balance needs to be maintained between international treaty practice and domestic legislative power;
- cautious consideration is required when establishing rules for the flow of information in cyberspace; and
- there is a need to balance 'Legal Paternalism' and 'Autonomy'.

Those conclusions, while general, are of considerable significance to the development of free speech, democracy and cyberspace, and may well prove useful to all nations, but particularly to developing countries, or non-democratic countries.

There is still a need for ongoing development and implementation in cyberspace of an approach to free speech in democratic nations such as Australia, Singapore and India, while recognising that such development is a long-term endeavour that will not yield immediate practical results. Understanding on how to promote democracy further in those three countries by using freedom speech in cyberspace requires further study.

Nowhere is speech absolutely free, not even in cyberspace. Nevertheless, it does seem, from the examples drawn and history to date, that the wider the degree of freedom of speech within a nation State, the better the governance of the people. Cyberspace is, however, a new and different frontier, that requires greater exploration and mapping, so that clear guidelines as to speech may be defined.

In the end, I sincerely hope the discussion in the thesis can be challenging, interesting and meaningful, and that it will prompt more scholars to contribute to the important debate about freedom of speech, democracy and cyberspace.

Bibliography

Cases

APLA Limited v Legal Services Commissioner (NSW) (2005) 224 CLR

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109

Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR

Australian Capital Television v Commonwealth (1992) 177 CLR

Branzburg v Hayes (1972) 408 U.S.

Bradley v. The Commonwealth (1973) 128 CLR

Bonnard v Perryman [1891] 2 Ch 269

Chung Chi Cheung v. R [1938] UKPC 75, [1939] A.C.

Coleman v Power (2004) 220 CLR

Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR

Davis v Commonwealth (1988) 166 CLR

Derbyshire County Council v Times Newspapers Ltd [1993] AC

Dow Jones Publishing Co v. AG [1989] 2 MLJ

Dow Jones Publishing Co v. AG, (1998) Sing. L. R. 70, 89 E-H

Evans v State of New South Wales [2008] FCAFC

Ex rel McKinlay v Commonwealth (1975) 135 CLR

Galella v Onassis (1972) 353 F. Supp.

Goh Chok Tong v. Jeyaretnam Joshua Benjamin & Anor, 3 Sing. L. Rep. 337 (1998)

Hogan v Hinch (2011) 243 CLR

Jeyaretnam Joshua Benjamin v Lee Kuan Yew, 2 Malayan L. J. 282 (1979)

Lange v. Atkinson, (2000) 3 N.Z.L.R.

Lange v Australian Broadcasting Corporation (1997) 189 CLR

Lee Kuan Yew v. Jeyaretnam Joshua Benjamin, 1 Malayan L. J. 281 (1979)

Lee Kuan Yew v. Seow Khee Leng, 1 Malayan L. J. 172 (1989)

Lee Kuan Yew v. Vinocur, 3 Sing. L.Rep. 491 (1995)

Levy v Victoria (1997) 189 CLR

Maloney v The Queen (2013) 252 CLR

McClure v Australian Electoral Commission (1999) 163 ALR

Momcilovic v The Queen (2011) 245 CLR

Monis v The Queen (2013) 249 CLR

Mosley v. News Group Nespapers Ltd., (2008) E.M.L.R. 20 (U.K.)

Mulholland v Australian Electoral Commission (2004) 220 CLR

Nationwide News Pty Ltd v Wills (1992) 177 CLR

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

R v Commissioner of Metropolitan Police Ex parte Blackburn (No 2) [1982] 2 QB

R. v. Hape, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385 *[Hape].*

Roach v Electoral Commissioner (2007) 233 CLR

Robert v Bass (2002) 212 CLR

Rowe v Electoral Commissioner (2010) 243 CLR

Royal Women's Hospital v Medical Practitioners Board of Victoria [2006] VSCA

Smith v Daily Mail Publ'g Co. (1979) 443 U.S.

South Australia v Totani (2010) 242 CLR

Stephens v West Australian Newspapers Ltd (1994) CLR

Tajjour v NSW (2014) 254 CLR

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR

Unions NSW v New South Wales (2013) 304 ALR

Wainohu v New South Wales (2011) 243 CLR

Wheeler v Leicester City Council [1985] AC 1054

Wotton v Queensland (2012) 285 ALR

Wurridjal v The Commonwealth of Australia (2009) 237 CLR

Zheng v Cai (2009) 239 CLR

Other Primary Sources (including legislative materials, sources of international jurisdictions)

Administration of Justice (Protection) Bill (Singapore), No. 23/2016

Australian Government-Department of Social Services, *A Multicultural Australia* (2 April, 2015)

Australian Human Rights Commission, *Chart of Australian Treaty Ratifications as of May 2012* (27 March, 2015)

Australian Human Rights Commission, *Human rights and the Internet* (17 October 2013)

Australian Law Reform Commission, *Multiculturalism and the Law (ALRC Report 57)* (14 April, 1992)

Bangkok Declaration of 1993 (2 April 1993)

Broadcasting Act (Cap 28), revised edition 2012, 31st August 2012 (Singapore)

Broadcasting Services Amendment (Online Service) Act 1999, No. 90 (Amending Broadcasting Services Act, No. 110, 1992) (Australia)

Chairman of the Joint Chiefs of Staff, U.S. Department of Defense, National Military Strategy for Cyberspace Operation 3 (December, 2006)

Charter of the United Nations

Censorship Review Committee, 'Report of the Review Committee on Censorship ' (1981/1992/2003/2010)(Singapore)

Commonwealth of Australia Constitution Act 1900

Constitution of South Africa

Constitution of the Republic of Singapore (Singapore, 1999 reprint)

Convention for the Elimination of All Forms of Discrimination against Women, UN Doc A/34/46.

Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), at 174, U.N. Doc. A/810 (Dec.9, 1948)

Convention on the Rights of the Child, UN Doc A/44/49.*Criminal Procedure Code*, Act No. 2 of 1974 (Singapore)

Department of Telecommunications, Ministry of Communications & IT, Government of India, *Profile* (26 September 2016)

European Commission, *Action 98: Support the Internet Governance Forum* (2010)

Films Act (Cap 107), revised edition 1998, 15th December 1998 (Singapore)

Geneva Conventions Act (R.S.C., 1985)

Human Rights Council, *India in the Human Rights Council* (20 October 2016)

Human Rights Council, *Letter to Prime Minister Singh on India's Human Rights Commitments* (3 June 2011).

Human Rights Council, AA/HRC/17/40/Add.2, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai – Mission to Singapore* (seventeenth session, 2011).

Indian Constitution

Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules (India, 2009)

Information Technology Act (India, 2000)

Information Technology (Guidelines for Cyber Cafe) Rules (India, 2011)

International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 53, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966)

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), Dec. 16, 1966, 993 U.N.T.S. 3, entered into force Jan. 3, 1976

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 48, U.N. GAOR 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965)

Internal Security Act Cap 143 Statutes of the Republic of Singapore (1985 Rev Ed)

Island of Palmas (Neth. v. US) 2 R.I.A.A. 829, 838 (Perm, Ct. Arb. 1928)

Maintenance of Religious Harmony Act (Singapore, 31 July 2001)

Media Development Authority of Singapore Act (Cap 172), revised edition 2003, 31st July 2003

Media Development Authority, *Annual Reports* (2014/2015) (Singapore)

Media Development Authority of Singapore Act, No. S 182, Chapter 172

Media Development Authority Singapore, *About MDA* (07 January 2014)

Ministry of Electronics & Information Technology, Government of India, *Internet Proliferation & Governance* (21 October 2016)

Ministry of Home Affairs Government of India, *Data on Language* (2011)

Miscellaneous Offences (Public Order and Nuisance) Act (Singapore)

National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, UN Doc A/HRC/WG.6/10/AUS/1 (5 November 2010)

Newspaper and Printing Presses Act of 1974 Singapore Original Enactment

Office of Multicultural Affairs, Department of the Prime Minister and Cabinet, *National Agenda for a Multicultural Australia* (1989)

Parliament of Australian, *Search Hansard* (12 May 2015)

Penal Code (2013 Rev. Ed) (Singapore)

Portuguese Constitution

Protection of Human Rights Act, (India, 08 January 1994)

Protection of Human Rights Ordinance (India, 28 September 1993)

Public Entertainments and Meetings Act, (Cap. 257. Rev. ed. 2001) (Singapore)

Public Entertainments and Meetings (Speakers' Corner) (Exemption) Cap. 257(1st Sept., 2000) (Singapore)

Public Entertainments and Meetings (Speakers' Corner) (Exemption) Cap. 257(27th January 2013) (Singapore)

Public Order (Preservation) Act Cap 258 Statutes of the Republic of Singapore (1985 Rev Ed)

Racial Discrimination Act 1975 (Australia)

Report of the Constitutional Commission 1966 (Singapore)

Report of the Federation of Malaya Constitution Commission 1957 (Malaysia)

Report of the Working Group on Internet Governance (2005)

Russian Constitution

Sedition Act Cap 290 Statutes of the Republic of Singapore (1985 Rev. Ed)

Spanish Constitution

Subscription Television Programme Code (Singapore)

Telecom Regulatory Authority of India, *Annual Report* 2014-2015

The *Administration of Justice (Protection) Act* (Singapore), No. 23/2016

The Charter of Human Rights and Responsibilities Act 2006 (Vic)

The *Classification (Publications, Films and Computer Games) Act 1995* (Australia)

The Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10 1984)

The Convention on the Rights of the Child (CRC)

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. Doc. A/8028 (24 October 1970)

The Human Rights Act 2004 (ACT)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)

The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets, the White House, Washington, February 2003

The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015*

The United State Constitution

The Vienna Convention on the Law of Treaties

The White House, International Strateg for Cyberspace — Prosperity, Security, and Openness in a Newworked World (2011)

The World Summit on the Information Society, Tunis Agenda for the Information Society, 2005

Undesirable Publications Act (Cap 338), revised edition 1998, 15 December 1998 (Singapore)

United Nations Convention on the Law of the Sea of 10 December 1982, Part XV, Section 2

United Nations, *Current Membership of the Human Rights Council, 1 January - 31 December 2015* (1 June 2015)

United Nations Human Rights Ofiice of the High Commissioner, *Monitoring the core international human rights treaties* (23 March 2016)

United Nations Treaty Collection, *Status of International Covenant on Civil and Political Rights* (23 March 2016)

United Nations, *United Nations Human Rights Council* (1 June 2015)

United Nations Convention on the Law of the Sea (10 December 1982)

Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess, (Resolutions, pt. 1), at 71, art. 27 (1), U.N. Doc. A/810 (1948)

Universal Declaration on Cultural Diversity, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess, pmbl, article 1, UNESCO Doc. CLT. 2002/WS/9 (2002)

U.S. Department of Defence Dictionary of Military and Associated Terms, Joint Publication 1-02, 93. 8 November 2010 (As Amended Through 31 January 2011)

Vienna Statement

Voluntary Pledges and Commitments by India, No. NY/PM/161/1/2006.

World Summit on the Information Society, Document WSIS-03/GENEVA/DOC/4-E (12 December 2003)

Secondary Sources

Adams, John and Walter Neale, India: *The Search for Unity, Democracy, and Progress* (D. Van Nostrand Company, 2nd ed, 1976)

Alston, Senator Richard, *Minister for Communications and the Arts, Joint Media Release* (15 July 1997) <http://www.dca.gov.au>

Ambedkar, B.R., Thus Spoke Ambedkar: *A Stake in the Nation* (Navayana Publishers, 2011)

Anonymous, 'The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance ' (2008) 121 *Harvard Law Review* 1387

Anuja, *Existing laws sufficient to curb hate speech: Supreme Court* (March 12 2014) Live Mint & the Wall Street Journal <http://www.livemint.com/Politics/j65K3t2agISofDMajWEBbI/SC-asks-Law-Commission-to-look-into-issue-of-hate-speeches.html>

Aristotle, *Aristotle's Constitution of Athens* (London: Seeley and Co., Limited, 1891)

Aristotle, *The Nichomachean Ethics of Aristotle* (M.A. F.H. Peters trans, London: Kegan Paul, Trench, Truebner & Co., 5 th ed, 1893)

Arnon, Harel, 'Legal Reasoning: Justifying Tolerance in the U.S. Supreme Court' (2007) 2 *NYU Journal of Law & Liberty* 262

Aroney, Nicholas, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30 *Melbourne University Law Review* 605

Atherton, Ray, 'Democratic Perspectives' (1946) 6(2) *University of Toronto Law Journal* 301

Austin, Granville, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford Scholarship Online, 2003)

Australia, Arts Law Centre of, *Classification and Censorship* (28 May 2015) Arts Law Centre of Australia <http://www.artslaw.com.au/info-sheets/info-sheet/classification-and-censorship/>

Australia, Electronic Frontiers, *Labour's Mandatory ISP Internet Blocking Plan* (2006) (20 March 2009) <https://www.efa.org.au/censorship/mandatory-isp-blocking/>

Australia, Electronic Frontiers, *Labour's mandatory ISP Internet blocking plan* (26 October 2008) Australian Policy Online <http://apo.org.au/research/labors-mandatory-isp-internet-blocking-plan-0>

Authority, Australian Communications and Media, *'Closed Environment Testing of ISP-Level Internet Content Filtering — Report to the Minister for Broadband, Communications and the Digital Economy '* (2008) <http://www.acma.gov.au/webwr/_assets/main/lib310554/isp-level_internet_content_filtering_trial-report.pdf>

B, Mallikarjun, *Mother Tongues of India According to the 1961 Census* (5 August) <http://www.languageinindia.com/aug2002/indianmothertongues1961aug2002.html>

Bader, Veit, 'Post-Secularism or Liberal-Democratic Constitutionalism?' (2012) 5 *Erasmus Law Review* 5

Bailyn, Bernard, *The Ideological Origins of the American Revolution* (Harvard University Press, 1992)

BALAKINA, I. F. and K. M. DOLGOV, *Personalism* (2010) <http://encyclopedia2.thefreedictionary.com/personalism>

Baldwin, Peter, *Where the right to speak is howled down* (April 02, 2015) The Australian <http://www.theaustralian.com.au/opinion/where-the-right-to-speak-is-howled-down/story-e6frg6zo-1227288292791>

Balkin, Jack, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1

Balkin, Jack, 'The Future of Free Expression in a Digital Age' (2009) 36 *Pepperdine Law Review* 427

Balsekar, Ameya, *Seeking Offense: Censorship and the Constitution of Democratic Politics in India* (Cornell University, 2009)

Bambauer, Derek, 'Cybersieves' (2009) 59 *Duke Law Journal* 377

Bambauer, Derek, 'Filtering in OZ: Australia's Foray into Internet Censorship' (2009) 31(2) *University of Pennsylvania Journal of International Law* 493

Banakar, Reza, 'Power, Culture and Method in Comparative Law' (2009) 5 *International Journal of Law in Context* 69

Banerjee, Arpan, 'Political Censorship and Indian Cinematographic Laws: A Functionalist- Liberal Analysis ' (2010) 2 *Indian Cinematographic Laws* 557

Barendt, Eric, 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Sydney Law Review* 149

Barendt, Eric, *Freedom of Speech* (Oxford University Press 2005)

Barlow, John, *A Declaration of the Independence of Cyberspace* (February 8, 1996) <https://projects.eff.org/~barlow/Declaration-Final.html>

Barsh, Russel Lawrence, 'Democratization and Development' (1992) 14 *Human Rights Quarterly* 120

Baruah, Aparajita, *Preamble of the Constitution of India: An Insight and Comparison with Other Constitutions* (Deep & Deep 2007)

Barwick, Chief Justice Garfield 'Parliamentary Democracy in Australia' (1995) 25 *Western Australian Law Review* 21

Barzilai, Gad 'Beyond Relativism: Where is Political Power in Legal Pluralism?' (2008) 9 *Theoretical Inquiries in Law* 395

Battaa, E.D., 'The Theory and Practice of Negotiation: Mainstreaming the Human Rights-Based Approach in Conflict Situations ' (2011) 85 *Philippine Law Journal* 564

Baxi, Upendra, 'Protection of human rights and production of human rightlessness in India ' in Randall Peerenboom, Carole Petersen and Albert Chen (eds), *Human Rights in Asia* (Routledge 2006)

Bayefsky, Anne, *'International Human Rights in Canadian Courts'* in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997)

Bell, Gary, 'Multiculturalism in Law is Legal Pluralism-Lessons from Indonesia, Singapore and Canada ' (2006) *Singapore Journal of Legal Studies* 315

Benda-Beckmann, Franz and Keebet Benda-Beckmann, 'Why Not Legal Culture?' (2010) 5(2) *Journal of Comparative Law* 104

Benesch, Susan, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide ' (2008) 48 *Virginia Journal of International Law* 485

Berger, Benjamin, 'The Cultural Limits of Legal Tolerance' (2008) 21(2) *Canadian Journal of Law and Jurisprudence* 245

Berger, Benjamin, 'The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State ' (2002) 17 *Canadian Journal of Law and Society* 39

Berger, Benjamin, 'Religious Diversity, Education, and the "Crisis" in State Neutrality' (2014) 29 *Canadian Journal of Law and Society* 103

Berlin, Isaiah, *The Crooked Timber of Humanity* (Pimlico, 1998)

Bible, Holy, *Psalms 89: 14* (New International Version)

Blackshield, Tony and George Williams, *Australian Constitutional Law and Theory* (The Federation Press 5ed, 2010)

Boas, Franz, *'The Mind of Primitive Man'* (1901) 13(321) Science 281

Bogen, David, 'Comparing Implied and Express Constitutional Freedoms' (1995) 2 *James Cook University Law Review* 190

Bomse, Amy, 'The Dependence of Cyberspace ' (2001) 50 *Duke Law Journal* 1717

Boom, Willem H. van and Anthony Ogus, 'Introducing, Defining and balancing 'Autonomy v. Paternalism'' (2010) 3(1) *Erasmus Law Review* 1

Bork, Robert, 'Neutral Principles and Some First Amendment Problems' (1971) 47(1) *Indiana Law Journal* 27

Bright, Abigail, 'Hate Speech and Equality ' (2005) *UCL Jurisprudence Review* 112

Brohmer, Jurgen, 'The External Affairs Power in Australia and in Germany: Different Solutions, Similar Outcome? '(2012) 24 *Journal of Constitutional History* 49

Brown, Judith, *Modern India- The Origins of an Asian Democracy* (Oxford University Press, 1985)

Brownie, Ian, *Principles of Public International Law* (OUP, 6th ed, 20003)

Burca, Grainne and Joanne Scott, *'Introduction: New Governance, Law and Constitutionalism'* in Grainne Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (2006) 17

Burchill, Richard, 'The Developing International Law of Democracy' (2001) 64 *The Modern Law Review* 123

Buss, William 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication ' (2006) 34 *Federal Law Review* 421

Buss, William, 'Constitutional Words about Words: Protected Speech and "Fighting Words" under the Australian and American Constitution' (2006) 15 *Transnational Law & Contemporary Problems* 489

Campbell, Tom, *'Rationales for Freedom of Communication'* in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 37

Campbell, Tom and Stephen Crilly, 'The implied freedom of Political Communication, Twenty Years On ' (2011) 30(1) *University of Queensland Law Journal* 59

Canovan, Margaret, *'Friendship, Truth and Politics: Hannah Ardent and Toleration'* in *Justifying Toleration* (Cambridge University Press 1988)

Carlson, Scott and Gregory Gisvold, 'Practical Guide to the International Covenant on Civil and Political Rights ' (2003) *Transnational* 1

Carter, William, 'Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation' (2009) 69 *Maryland Law Review* 344

Castan, Melissa, *Constitutional Law* (Pearson Education Australia 2008)

Centre, China Internet Network Information, *CNNIC Introduction* (27 August 2013) <http://www1.cnnic.cn/AU/Introduction/Introduction/201208/t20120815_33295.htm>

Centre, Human Rights Law, *What We Do* (27 March, 2015) Human Rights Law Centre <http://hrlc.org.au/about/what-we-do/>

Cerar, Miro 'The Relationship between Law and Politics' (2009) 15 *Annual Survey of International & Comparative Law* 19

Chan, Stuart, 'Hate Speech Bans: An Intolerant Response to Intolerance' (2011) 14 *Trinity College Law Review* 77

Chau, Albert, 'Democracy and Individual Autonomy' (2007) 13 UCL *Jurisprudence Review* 237

Chesterman, Michael, *Freedom of Speech in Australia: A Delicate Plant* (Ashgate Dartmouth 2000)

Chowdhury, Probir Roy, *Outsourcing Biopharma R&D to India* (Woodhead 2011)

Christenson, Gordon, '"Liberty of the Exercise of Religion" in the Peace of Westphalia' (2013) 21 *Transnational Law & Contemporary Problems* 721

Christopher Stevenson, 'Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World' (2007) 30 *Boston College International and Comparative Law Review* 531

Chua, Beng Huat, *Communitarian Ideology and Democracy in Singapore* (London and New York 1995)

Cicero, Marcus, *'On the Laws' in On the Commonwealth and on the Laws* (Edmund Spettigue 1842)

Comley, Alexis Henry, 'The Principle of Legality: An Australian Common Law Bill of Rights?' (2013) *15The University of Notre Dame Australia Law Review* 83

Commission, Australian Human Rights, *Chart of Australian Treaty Ratifications as of May 2012* (27 March, 2015) Australian Human Rights Commission <https://www.humanrights.gov.au/chart-australian-treaty-ratifications-may-2012-human-rights-your-fingertips-human-rights-your>

Commission, Australian Law Reform, *Multiculturalism and the Law* (ALRC Report 57) (14 April, 1992) Australian Government - Australian Law Reform Commission <http://www.alrc.gov.au/report-57>

Cotterrell, Roger, 'Conscientious Objection to Assigned Work Tasks: A Comment on Relations of Law and Culture ' (2010) 31 *Comparative Labour Law & Policy Journal* 511

Council, China Scholarship, *China Scholarship Council-About Us* (17 April 2015) China Scholarship Council <http://en.csc.edu.cn/About/c309df7fb3fa40b3a179a7ad93f11988.shtml>

Dainow, Joseph, 'Teaching Methods for Comparative Law' (1951) 3 *Journal of Legal Education* 388

Dalziel, Elizabeth, *Obama Pushes China to Stop Censoring Internet* (16 November 2009) NPR <http://www.npr.org/templates/story/story.php?storyId=120450377>

Danchin, Peter, 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law ' (2008) 33 *The Yale Journal of International Law* 1

Daniel, Aharon, *Religions in India* (18 September 2015) Tripod <http://adaniel.tripod.com/religions.htm>

Datta, Saurav, *Political hate speech flourishes in India* (18 March, 2014) ALJAZEERA <http://www.aljazeera.com/indepth/opinion/2014/03/political-hate-speech-india-201431832847177887.html>

Deans, Council of Australian Law, *CALD Statement on the Nature of Research* (May and October 2005) <http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>

Deibert, Ronald and Crete-Nishihata Masashi, 'Global Governance and the Spread of Cyberspace Controls' (2012) 18 *Global Governance* 339

Demaske, Chris, 'Modern Power and First Amendment: Reassessing Hate Speech' (2004) 9 *Common Law & Policy* 273

Dente, James, 'A Century of Case Method: An Apologia' (1974) 50 *Washington Law Review* 93

Dictionary, The Free, *Personalism* (2008) The Free Dictionary <http://www.thefreedictionary.com/personalism>

Doh, Chull Shin, *Confucianism and Democratization in East Asia* (Cambridge University Press 2012)

Donnelly, Jack, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400

Douglas, Neil, 'Freedom of Expression under the Australian Constitution' (1993) 16(2) *UNSW Law Journal* 315

Ducat, Craig, *Constitutional Interpretation* (Suzanne Jeans 10th ed, 2013)

Duffy, James, 'Toothless Tiger, Sleeping Dragon: Implied Freedoms, Internet Filters and the Growing Culture of Internet Censorship in Australia' (2009) 16(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 91

Dworkin, Ronald, *Ronald Dworkin on the right to ridicule* (23 March 2006) <http://www.cs.utexas.edu/~vl/notes/dworkin.html>

Dyzenhaus, David, *The Unity of Public Law* (Oxford: Hart 2004)

Eberle, Edward, 'The Methodology of Comparative Law' (2011) 16 *Roger Williams University Law Review* 51

Eck, Diana L., *What is Pluralism?* (22 May, 2015) Harvard University http://www.pluralism.org/pluralism/what_is_pluralism

Eliasoph, Ellen, 'Free Speech in China' (1981) *7 The Yale Journal of World Public Order 287*

Ert, Gib, 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 *Valparaiso University Law Review* 911

Fielding, Alex, 'When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada ' (2008) 13 *Appeal: Review of Current Law and Law Reform* 28

Fish, Eric, 'Is Internet Censorship Compatible With Democracy? Legal Restrictions of Online Speech in South Korea ' (2009) 2 *Asia-Pacific Journal on Human Rights and the Law* 43

Fisher, Talia, 'Nomos Without Narrative' (2008) 9 *Theoretical Inquiries in Law* 473

Fleming, James, *Securing Constitutional Democracy: The Case of Autonomy* (The University of Chicago Press, 2006)

Fleming, James E., *Securing Constitutional Democracy* (The University of Chicago Press, 2006)

Flint, David, 'Public Figures and the Press' (1995-1996) *Policy* 8

Folsom, Thomas, 'Defining Cyberspace (Finding Real Virtue in the Place of Virtual Reality)' (2007) 9 *Tulane Journal of Technology & Intellectual Property* 75

Foucault, Michael, *'The Ethic of Care For the Self As a Practice of Freedom*' in J Bernauer and D Rasmussen (eds), *The Final Foucault* 1954-1984 (London: Penguin Books 1988) vol 3, 11

Foucault, Michael, *'The Subject and Power*' in James Faubion (ed), *Power: Essential Works of Foucault* 1954-1984 (London: Penguin Books 1994) vol 3, 326

Frank, Thomas, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46

Franks, Mary, 'Unwilling Avatars: Idealism and Discrimination in Cyberspace' (2011) 20(2) *Columbia Journal of Gender and Law* 224

Franzese, Lieutenant Colonel Patrick W., 'Sovereignty in Cyberspace: Can it Exist?' (2009) 64 *Air Force Law Review* 1

French, Chief Justice Robert, 'Dialogue across Difference: Freedom of Speech and the Media in India and Australia ' (2008) 1 *LAWASIA Journal* 1

Friedman, Lawrence, 'Roads to Democracy ' (2005) 33 *Syracuse Journal of International Law and Commerce* 51

Fukuyama, Francis, 'The Future of History-Can Liberal Democracy Survive the Decline of the Middle Class?' (2012) 91(1) *Foreign Affairs* 53

Gadgets, Boredom, *Drives Trolling and Cyber-bullying on Facebok, Twitter: Report* (1 July 2013) Gadgets <http://gadgets.ndtv.com/social-networking/news/boredom-drives-trolling-and-cyber-bullying-on-facebook-twitter-report-386366>

Galeotti, Anna Elisabetta, *Toleration as Recognition* (Cambridge University Press 2002)

Gandhi, Indira, *The 'Emergency' and Indian Democracy* (New Delhi: Oxford University Press 2001)

Garnsey, Peter, *'Religious Toleration in Classical Antiquity'* in W. J. Shiels (ed), *Persecution and Toleration* (1984)

Gelber, Katharine, 'Distracting the Masses: Art, Local Government and Freedom of Political Speech in Australia ' (2006) 10 *Law Text Culture* 195

Gelber, Katharine, 'Freedom of Speech and Australian Political Culture ' (2011) 30(1) *University of Queensland Law Journal* 135

George, Cherian, '*Contentious Journalism and the Internet: Towards Democratic Discourse in Malaysia and Singapore'* (Singapore University Press and University of Washington Press 2006)

George, Cherian, 'Diversity around a democratic core: The universal and the particular in journalism' (2013) 14 (4) *Journalism: Theory, Practice and Criticism* 490

George, Cherian, *Freedom from the Press: Journalism and State Power in Singapore*. (National University of Singapore Press 2012)

George, Cherian. 'Journalism and the Politics of Hate: Charting Ethical Responses to Religious Intolerance' (2014) 29 (2) *Journal of Mass Media Ethics* 74

Gervais, Michael, 'Cyber Attacks and the Laws of War ' (2012) 1(8) *Journal of Law & Cyber Warfare* 8

Gibbons, Llewellyn, 'No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace' (1997) 6 *Cornell Journal of Law and Public Policy* 475

Gibson, William, *Neuromancer* (Ace Books, 2000)

Gilson, Etienne, *Dogmatism and Tolerance* (Rutgers University Press, 1953)

Girolamo, Debbie, 'Seeking Negotiated Order through Mediation: A Manifestation of Legal Culture? '(2010) 5(2) *Journal of Comparative Law* 118

Glanz, James and John Markoff, *U.S. Underwrites Internet Detour around Censors* (June 12, 2011) The New York Times <http://www.nytimes.com/2011/06/12/world/12internet.html?pagewanted=all&_r=0>

Goldsmith, Jack, 'The Internet and the Abiding Significance of Territorial Sovereignty' (1998) 5 *Indiana Journal of Global Legal Studies* 475

Good, Colleen, 'Human Rights and Relativism' (2010) 19(1) *Macalester Journal of Philosophy* 27

Goodroad, Scott, 'The Challenge of Free Speech: Asian Vlues v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order ' (1998) 9(1) *Indiana International & Comparative Law Review* 259

Government of India, *Ministry of Home Affairs Data on Language* (2011) <http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/data_on_language.aspx>

Gowland-Debbas, Vera, *Implementing Sanctions Resolutions in Domestic Law, National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijhoff, 2004)

Graham, Irene, *AU Gov't Mandatory ISP Filtering/Censorship Plan - Would ISP -level blocking prevent access to child pornography?* (18 April 2009) <http://libertus.net/ >

Grainger, Grainger, 'Freedom of Expression and Regulation of Information in Cyberspace: Issues Concerning Potential International Co-operation Principles for Cyberspace' (1999) *International Trade & Business Law* 93

Grainger, Gareth, 'Freedom of Speech and Regulation of Information in Cyberspace: Issues Concerning Potential International Co-operation Principles for Cyberspace' (1998) *International Trade & Business Law* 93

Gray, Anthony, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41 *Common Law World Review* 167

Gray, John, *Two Face of Liberalism* (New York: The New Press 2000)

Griffith, Chris, *Australians flock to VPNs to avoid data retention* (13 August 2014) The Australian http://www.theaustralian.com.au/business/technology/australians-flock-to-vpns-to-avoid-data-retention/story-e6frgakx-1227022957464

Groppi, Tania, Piergigli, Valeria , and Rinella Angelo (eds), *Asian Constitutionalism in Transition: A Comparative Perspective*, (Giuffrè Editore, 2008, English translation by G Gentili

Grubb, Ben, *'It's not a filter': Malcolm Turnbull's anti-piracy crackdown wordplay defies logic* (11 December 2014) The Sydney Morning Herald <http://www.smh.com.au/digital-life/digital-life-news/its-not-a-filter-malcolm-turnbulls-antipiracy-crackdown-wordplay-defies-logic-20141211-124xx1.html>

Guardian, *The Libyan takes chair of UN human rights commission* (21 January 2003) The Guardian <http://www.theguardian.com/world/2003/jan/21/3>

Guest, Stephen 'Why the Law is Just ' (2000) *Current Legal Problems* 31

Guo, Qin, 'Internet and Political Participation in China' (2011) 5(1) *Masaryk University Journal of Law and Technology* 83

Hachigian, Nina, *'The Internet and Power in One-Party East Asian States* ' (2002) 52 <http://www.rand.org/content/dam/rand/www/external/international_programs/capp/pubs/washquarterly.pdf>

Haley, John, 'Law and Culture in China and Japan: A Framework for Analysis ' (2006) 27 *Michigan Journal of International Law* 895

Hamilton, Vlee , Joseph Sanders and Yoko Hosoi, 'Punishment and the Individual in the United States and Japan ' (1988) 22 *Law and Society Review* 301

Hanson, Joan and Janet Douglas, *India's Democracy* (Weidenfeld and Nicolson, 1972)

Hantman, Daniel, 'Shaking Fists and Simmering Craniums: India's Tolerance for Restricting Socially Offensive and Emotionally Harmful Speech' (2013) *The Indonesian Journal of International & Comparative Law* 73

Head, Randolph, *'Introduction: The Transformations of the Long Sixteenth Century'* in John Laursen and Cary Nederman (eds), *Beyond the Persecuting Society: Religious Toleration Before the Enlightenment* (Springer, 1998)

Healey, Jason, 'The Five Futures of Cyber Conflict and Cooperation' (2011) 11 *Georgetown Journal of International Law* 110

Henderson, Gerard, *Radical tolerance for the Left but intolerance towards conservatives* (March 14, 2015) The Australian <http://www.theaustralian.com.au/opinion/columnists/radical-tolerance-for-the-left-but-intolerance-towards-conservatives/story-fnkqo7i5-1227261889875>

Heyman, Steven, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression ' (1998) 78 *Boston University Law Review* 1275

Heyns, C.H. and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level ' (2001) 23 *Human Rights Quarterly* 483

Hirschl, Ran, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *The American Journal of Comparative Law* 125

Hocking, Barbara Ann and Yega Muthu, 'Australasian Reflections on Modern Slavery' (2012) 5(4) *Journals of Politics and Law* 69

Hor, Michael and Collin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore ' (1991) 12 *Singapore Law Review* 296

Horton, John, *Toleration: An Elusive Virtue* (Princeton University Press, 1996)

Howard, John, *'Edited Extract from Speech to the Queensland Liberal Party Convention',* The Australian 25 September 1996, 13

Hume, David and George Williams, 'Australia Censorship Policy and the Advocacy of Terrorism ' (2009) 31 *Sydney Law Review* 381

Hutchinson, Terry, 'Defining And Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83

Hutchinson, Terry, *Researching and Writing in Law* (Reuters Thomson 3ed, 2010)

Idarklight, *Guo Jingjing and Kenneth Fok's wedding shoot, HK Tycoon style* (November 11, 2012) cfensi <https://cfensi.wordpress.com/2012/11/11/guo-jingjing-and-kenneth-foks-wedding-shoot-aka-too-freaking-rich/>

Inoguchi, Takashi and Edward Newman, *'Introduction: "Asian Values" and Democracy in Asia'* (Paper presented at The Future of the Asia-Pacific Region, Hamamatsu, Shizuoka, Japan, 28 March 1997)

International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press 2013)

Ikenberry, John 'The Rise of China and the Future of the West ' (2008) 87(1) *Foreign Affairs* 23

Jennings, Robert and Arthur Watts, *Oppenhim's International Law* (Longman, 9th ed, 1996)

Jentoft, Svein, 'Legal Pluralism and the Governability of Fisheries and Coastal Systems' (2011) 64 *Journal of Legal Pluralism* 149

Jin, Qian and Hanqin Xue, 'International Treaties in the Chinese Domestic Legal System' (2009) 8(2) *Chinese Journal of International Law* 229

Johannessen, Lene, 'Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards' (1994) 10 *South African Journal on Human Rights* 216

Johnson, David and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367

Jolly, Richard, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Federal Law Review* 41

Jones, Jessica, 'Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State ' (2009) 22 *National Black Law Journal* 1

Jones, Melinda, 'Free Speech and the 'Village Idiot'' (2000) *University of New South Wales Law Journal Forum (Internet Content Control)* 43

Jones, Melinda, *'The Fundamental Freedoms'* in Jude Wallace and Tony Pagone (eds), *Rights & Freedoms in Australia* (The Federation Press, 1990)

Joseph, Sarah, 'Free Speech, Racial Intolerance and the Right to Offend ' (2011) 36(4) *Alternative Law Journal* 225

Joseph, Sarah, 'A Rights Analysis of the Covenant on Civil and Political Rights' (1999) 5 *Journal of International Legal Studies* 57

Jyh, Anlee, Yiliu Ching and Weiping Li, 'Searching for Internet Freedom in China: A Case Study on Google's China Experience ' (2013) 31 *Cardozo Arts & Entertainment* 405

Kahn, Robert, 'The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret' (2009) 16 *University of Miami International and Company Law Review* 151

Kalb, Johanna, 'The Persistence of Dualism in Human Rights Treaty Implementation' (2011) 30 *Yale Law & Policy Review* 71

Kant, Immanuel, *Groundwork for the Metaphysics of Morals* (Thomas Kingsmill Abbott trans, Cambridge University Press, 2 nd ed, 2012)

Kant, Immanuel, *Lectures on Ethics* (Cambridge University Press, 1930)

Kaul, Mahima, *India's elections: Hate speech and the "greatest show on Earth"* (22 April, 2014) Index: The voice of Free Expression <http://www.indexoncensorship.org/2014/04/indias-elections-hate-speech-greatest-show-earth/>

Kausikan, Bilahari, 'An East Asian Approach to Human Rights' (1995-1996) 2 *Buffalo Journal of International Law* 263

Keating, Joshua, *The List: Look Who's Censoring the Internet Now* (4 March 2009) Foreign Policy <http://www.foreignpolicy.com/articles/2009/03/23/the_list_look_whos_censoring_the_internet_now>

Keating, Paul, *Global Cultural Diversity Conference* (26 April 1995) <http://www.multiculturalaustralia.edu.au/library/media/Audio/id/526.Global-Cultural-Diversity-Conference>

Keen, Renee, 'Untangling the Web: Exploring Internet Regulation Schemes in Western Democracies' (2011) 13 *San Diego International Law Journal* 351

Kekes, John, 'The Dangerous Ideal of Autonomy' (2011) 30(2) *Criminal Justice Ethics* 192

Kelsen, Hans, *Introduction to the Problems of Legal Theory* (Oxford Clarendon Press 1992)

Kemp, Richard, *Lynch's behaviour 'deeply shocking': Kemp* (March 15 2015) The Australian Jewish News <http://www.jewishnews.net.au/lynchs-behavior-deeply-shocking-kemp/41073>

Kennan, Jim, 'The Role of International Human Rights Law in Australian Law' (2010) 44 *Valparaiso University Law Review* 895

Kentridge, Sydney, 'Freedom of Speech: Is It the Primary Right? '(1996) 45 *International and Comparative Law Quarterly* 253

Kirby, Michael, 'Freedom of Expression-Some Recent Australia Developments' (1993) *Commonwealth Law Bulletin* 1778

Kirby, Michael, 'The Impact of International Human Rights Norms: A Law Undergoing Revolution ' (1995) *Western Australian Law Review* 130

Kirkwood, William, 'Truthfulness as a Standard for Speech in Ancient India' (1989) 54 *S. COMM.J.* 213

Kolesnikov, Ivan, *Democracy index 2012* (3 June, 2012) <http://cn.knoema.com/bhpllke/democracy-index-2012>

Kozinski, Alex and Josh Goldfoot, 'A Declaration of the Dependence of Cyberspace' (2009) 32(4) *Columbia Journal of Law & The Arts* 365

Kozrnsli, Thaddeus, *The Political Problem of Religious Pluralism: And Why Philosophers Can't Solve It* (Lexington Books, 2010)

Krasner, Stephen, *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press 2001)

Ku, Julian and John Yoo, 'Globalization and Sovereignty' (2013) 31(1) *Berkeley Journal of International Law* 210

Kumar, Ambika, 'Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights ' (2006) 7(1) *Chicago Journal of International Law* 351

Kyed, Helene, 'Legal Pluralism and International Development Interventions' (2011) 63 *Journal of Legal Pluralism* 1

Kyed, Helene, 'The Politics of Legal Pluralism: State Policies on Legal Pluralism and Their Local Dynamics in Mozambique ' (2009) 59 *Journal of Legal Pluralism* 87

Lacey, Wendy, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications 2008)

Lamarche, Gara, 'International Free Expression Principles in Cyberspace' (1995) 17 *Whittier Law Review* 279

Land, Molly, 'Protecting Rights Online ' (2009) 34(1) *The Yale Journal of International Law* 1

Langdell, Christopher, *A Selection of Cases on the Law of Contracts* (1871)

Langlois, Anthony, 'Human Rights without Democracy? A Critique of the Separationist Thesis ' (2003) 25 *Human Rights Quarterly* 990

Lee, Deputy Prime Minister Hsien Loong, *Building a Civic Society* (1 June 2004) <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan015426.pdf>

Lee, John and Kevin Stenson, 'Security, Sovereignty, and Non-State Governance "From Below" ' (2007) 22 *Canadian Journal of Law & Society* 9

Lee, Youngjae, 'Valuing Autonomy ' (2006-2007) 75 *Fordham Law Review* 2973

Leiter, Brian, 'Foundations of Religious Liberty: Toleration or Respect?' (2010) 47 *San Diego Law Review*

Leiter, Brian, 'Why Tolerate Religion?' (2009) 25 *Constitutional Commentary* 1

Lemmons, R. Mary, 'Tolerance, Society, and the First Amendment: Reconsiderations ' (2006) 3(1) *University of St. Thomas Law Journal*

Lessig, Lawrence, *Code and Other Laws of Cyberspace* (Basic Books, 1999)

Lessig, Lawrence, *'The Laws of Cyberspace* ' in Richard Spinello and Herman Tavani (eds), *Readings in Cyber Ethics* (Jones and Bartlett Publishers 2 ed, 2004)

Levey, Geoffrey, 'The Political Theories of Australian Multiculturalism' (2001) 24(3) *UNSW Law Journal* 869

Lewis, James, 'Sovereignty and the Role of Government in Cyberspace' (2010) 16 *The Brown Journal of World Affairs* 55

Li, Fang, 'The Methodology of Comparative Law' (1994) *Asia Pacific Law Review* 31

Li-ann, Thio, 'Between Eden and Armageddon: Navigating 'Religion' and 'Politics' in Singapore ' (2009) *Singapore Journal of Legal Studies*

Li-ann, Thio, 'Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy ' (2010) *Singapore Journal of Legal Studies*

Lipkin, Robert, 'Can Liberalism Justify Multiculturalism?'(1997) 45(1) *Buffalo Law Review* 1

Locke, John, *A Letter Concerning Toleration* (Black Swan 1689)

Loewy, Arnold, 'Freedom of Speech As a Product of Democracy' (1993) 27 *University of Richmond Law Review* 427

Lotrionte, Catherine, 'State Sovereignty and Self-Defense in Cyberspace: A Normative Framework for Balancing Legal Rights ' (2012) 26 *Emory International Law Review* 825

Lowe, Kasey, 'Human Rights Treaty Bodies as Mechanisms of Review' (2009) 1 *Edinburgh Student Law Review* 53

Lukasik, Stephen, 'Protecting the Global Information Commons' (2000) 24 *Telecommunications Policy* 519

Lynch, Philip, 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre' (2006) 7 *Melbourne Journal of International Law* 225

Lyons, Edward C., 'Reason's Freedom and the Dialectic of Ordered Liberty' (2007) 55 *Cleveland State Law Review* 157

Macleod, Adam J., 'The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law ' (2011) 59 *Cleveland State Law Review* 589

Magnuson, William, 'The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law' (2010) 43(2) *Vanderbilt Journal of Transnational Law* 255

Mahatma, Gandhi, *'Every Village a Republic* ' in R. K Prabhu (ed), *India of My Dreams* (Navajivan Publishing House, 1947) 83

Malcolm, Jeremy, 'The Space Law Analogy to Internet Governance' (2007) 18 *Journal of Law, Information and Science* 57

Malik, Maleiha, ''Progressive Multiculturalism': Minority Women and Cultural Diversity ' (2010) 17 *International Journal on Minority and Group Rights* 447

Manila, *Chronicle* 19 November 1992, 10

Mann, Trischa, *Australian Law Dictionary* (Oxford University Press 2010)

Margulies, Peter, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility ' (2013) 14 *Melbourne Journal of International Law* 1

Marzorati, Osvaldo, 'Enforcement of Treaty Awards and National Constitutions (the Argentinian Cases)' (2006) 7(2) *Business Law International* 226

Matsuda, Mari, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) *Michigan Law Review* 2320

Matsuura, Koichiro *'United Nations Educational, Scientific and Cultural Organization* ' (Paper presented at the Freedom of Expression in Cyberspace 3 February 2005)

Maus, Didier, *The Influence of Contemporary International Law on the Exercise of Constituent Power, National Constitutions in the Era of Integration* (Kluwer The Hague 1999)

Mayer, David, *'Letter from Thomas Jefferson to Joseph Cabell* (Feb. 2, 1816)' in David Mayer (ed), *The Constitutional Thought of Thomas Jefferson* (University of Virginia Press, 1994)

McCall, Brian 'Can a Pluralistic Commonwealth Endure? The Political Problem of Religious Pluralism and Why Philosophers Can't Solve It. By Thaddeus J. Kozinski ' (2013) *11The Georgetown Journal of Law & Public Policy* 45

McClain, Emlin, 'The Use of Cases in Teaching Law' (1893) Yale Law Journal 17McClain, Linda and James Fleming, 'Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights' (2011) 91 *Boston University Law Review*

McDonald, Susan, *Islamic State: Up to 40 Australian women, including 'jihadi brides', supporting terrorist activity in Syria and Iraq, Julie Bishop says* (26 February 2015) ABC News <http://www.abc.net.au/news/2015-02-25/40-australian-women-supported-terrorists-iraq-syria-bishop-says/6262452>

McGrath, Frank, *The Framers of the Australian Constitution: their Intentions* (Brighton-le-Sands, N.S.W 2003)

Mclean, Sheila, *'The Right to Reproduce*' in Tome Campbell (ed), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986)

McQuail, Denis, McQuail's Mass, *Communication Theory* (SAGE Publications Ltd, 6 ed, 2012)

Meagher, Dan, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication ' (2004) 28 *Melbourne University Law Review* 438

Mefford, Aron, 'Lex Information: Foundation of Law on the Internet' (1997) 5 *Indiana Journal of Global Legal Studies* 211

Meiklejohn, Alexander *'The First Amendment is an Absolute*' (1961) SUP. CT. REV. 245

Meiklejohn, Alexander, *'Free Speech and Its Rlation to Self-Government*' (1948) 11

Merry, Sally 'What is Legal Culture? An Anthropological Perspective' (2010) 5(2) *Journal of Comparative Law* 40

Mestral, Armand and Evan Decent, 'Rethinking the Relationship Between International and Domestic Law ' (2008) 53 *McGill Law Journal* 573

Mezey, Naomi, 'Law as Culture ' (2001) 13 *Yale Journal of Law & the Humanities* 35

Mill, John Stuart, *On Liberty* (Oxford World's Classics 1859)

Mill, John Stuart, *On Liberty* (Doubleday, Doran and Company 1935)

Mill, John Stuart, *On Liberty* (London: Longman, Roberts & Green 1859)

Miller, Duncan, 'Do politicians and other public figures have (moral) privacy rights which can be asserted against the media?' (1996) *UCL Jurisprudence Review* 149

Miyazawa, Setsuo, 'How Does Culture Count in Legal Change? A Review With a Proposal From a Social Movement Perspective ' (2006) 27 *Michigan Journal of International Law* 917

Moe, Louise Wiuff, *'Negotiating Political Legitimacy: the Case of State Formation in Post-conflict Somaliland*' (2009) Centre for International Governance and Justice <http://regnet.anu.edu.au/sites/default/files/CIGJ-IssuesPaper10-full.pdf>

Monitor, International Judicial, Treaty Interpretation (September, 2006) The American Society of International Law and the International Judicial Academy <http://www.judicialmonitor.org/archive_0906/generalprinciples.html>

Morgan, Edmund, 'The Case Method ' (1952) 4(4) *Journal of Legal Education* 379

Muchmore, Adam 'International Activity and Domestic Law' (2012) 1(2) *Penn State Journal of Law & International Affairs* 363

Muller, Lorenz, '*Cybersociety'* (2000) 2 Int'l L. F. D. 163

Mushkat, Roda, 'Non-Democratic State Learning of Universal Human Rights: Reconfiguring Chinese Patterns' (2013) 27(1) *Temple International & Competative Law Journal* 63

Nappinai, N.S., 'Cyber Crime Law in India: Has Law Kept Pace with Emerging Trends? An Empirical Study' (2010) 5(1) *Journal of International Commercial Law and Technology* 22

Nations, United, *Current Membership of the Human Rights Council*, 1 January - 31 December 2015 (1 June 2015) United Nations Human Rights <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>

Nations, United, *United Nations Human Rights Council* (1 June 2015) United Nations Human Rights <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>

Neher, Clark and Ross Marlay, *Democracy and Development in Southeast Asia* (Westview Press 1995)

Nelken, David 'Using Legal Culture: Purposes and Problems' (2010) 5(2) *Journal of Comparative Law* 1

Netanel, Neil, 'Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory ' (2000) 88 *California Law Review* 395

News, ABC, *Piracy: Malcolm Turnbull highlights role of ISPs in stopping illegal downloads as Government releases discussion paper* (31 July 2014) ABC News <http://www.abc.net.au/news/2014-07-31/discussion-paper-highlights-role-of-isps-in-piracy-fight/5637418>

NewsAsia, Channel, *Remaking Singapore Team Wants People to Speak Up without Fear* (13 June 2003) Channel NewsAsia <http://www.contactsingapore.sg/nm/oversea_sg/news/ngeneral_br_13062003_2.htm>

Nicholls, Sean, *Keating Explodes over Media* (November 2, 2009) The Sydney Morning Herold <http://www.smh.com.au/national/keating-explodes-over-media-20091101-hrkv.html>

Nolan, David, 'Religious Extremism' (2013) 34 (2) *Conscience*

Nonet, Philippe and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction 1978)

Norman, Richard, *Free and Equal- A philosophical Examination of Political Values* (Oxford University Press, 1987)

Oberdiek, Hans, *Tolerance: Between Forbearance and Acceptance* (Rowman & Littlefield Publishers 2001)

Ogletree, Charles, 'The Limits of Hate Speech: Does Race Matter?' (1996) 32 *Gonzaga Law Review* 491

Orentlicher, David, 'Diversity: A Fundamental American Principle' (2005) 70 *Missouri Law Review* 777

Otto, Dianne, 'Protecting Human Rights and Countering Terrorism: Australia's Contradictory Approaches to Implementing Its International Legal Obligations' (2010) 44 *Valparaiso University Law Review* 911

Owada, Hisashi 'Singapore Academy of Law Annual Lecture 2010-"The Problems of Interaction between International and Domestic Legal Orders"' (2011) 23 *Singapore Academy of Law Journal* 1

Palmer, Tom, 'Democracy and the Contest For Liberty' (2008) 102(1) *Northwestern University Law Review* 443

Parekh, Bhikhu, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2006)

Parker, Christine, 'The Pluralization of Regulation ' (2008) 9 *Theoretical Inquiries in Law* 349

Parker, John, 'Democracy and Constitutional Government' (1939) 27 *Indiana Law Journal* 27

Patmore, Glenn, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia-Three Possible Models ' (1998) 7(1) *Griffith Law Review* 97

Patrick, Stewart, 'The Unruled World-The Case for Good Enough Global Governance ' (2014) 93 *Foreign Affairs* 57

Paust, Jordan, *International Law as Law of the United States* (Carolina Academic Press Durham 2nd ed, 2003)

Pearce, D C and R D Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths 7th ed, 2011)

Pearce, Dennis, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service 1987)

Pedone, Joanne and Andrew Kloster, 'New Proposals for Human Rights Treaty Body Reform' (2012) 22 *Journal of Transnational Law & Policy* 29

Peel, Jacqueline, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration ' (2002) 3 *Melbourne Journal of International Law*

Peerenboom, Randall, 'Law and Development of Constitutional Democracy in China: Problem or Paradigm? '(2005) 19(1) *Columbia Journal of Asian Law* 185

Pell, George Cardinal, *The Dictatorship of Relativism* (September, 2005) Annals Australasia <http://jloughnan.tripod.com/relative.htm>

Penfold, Carolyn, 'Censorship Legislation - Wrecking the Internet?' (2000) *National Law Review* 1

Penney, Jonathon, 'Privacy and the New Virtualism' (2008) 10 *Yale Journal of Law and Technology* 194

Penney, Jonathon, 'Virtual Inequality: Challenges for the Net's Lost Founding Value' (2012) 10(3) *Northwestern Journal of Technology and Intellectual Property* 209

Perritt, Henry, 'Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?' (1997) 12 *Berkeley Technology Law Journal* 413

Perritt, Henry, 'Dispute Resolution in Electronic Networked Communities' (1993) 38 *Villanova law review* 349

Perritt, Henry, 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance ' (1997-1998) 5 *Indiana Journal of Global Legal Studies* 423

Perritt, Henry, 'Sources of Rights and Access to Public Information' (1995) 4 *William & Mary Bill of Rights Journal* 179

Peters, Anne, 'Supremacy Lost: International Law Meets Domestic Constitutional Law ' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170

Petersen, Niels, 'The Principle of Democratic Teleology in International Law ' (2008) 34(1) *Brook Journal of International Law* 33

Plato, *The Republic* (Benjamin Jowett trans, 360 B. C. E)

Plato, *The Republic* (Cambridge University around 380 BC)

Popnews, *Guo Jingjing and Kenneth Fok's 30 million Wedding* (November 12, 2012) asian pop news <http://asianpopnews.com/guo-jingjing-and-kenneth-foks-30-million-wedding/>

Posner, Richard, 'The Present Situation in Legal Scholarship' (1981) 90 *The Yale Law Journal* 1113

Post, David, 'Governing Cyberspace ' (1996) 43 *The Wayne Law Review* 155

Post, David, 'Governing Cyberspace: Law' (2008) 24 *Santa Clara Computer and High Technology Law Journal* 883

Post, Robert, 'Participatory Democracy and Free Speech' (2011) 97(3) *Virginia Law Review* 477

Preciado, Michael, 'If you Wish Cyber Peace, Prepare for Cyber War: The Need for the Federal Government to Protect Critical Infrastructure from Cyber Warfare ' (2012) 1(99) *Journal of Law & Cyber Warfare* 99

Rabkin, Jeremy and Ariel Rabkin, 'Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea ' (2013) 14 (1) *Chicago Journal of International Law* 197

Raboin, Bradley, 'Corresponding Evolution: International Law and the Emergence of Cyber Warfare' (2011) 31(2) *Journal of the National Association of Administrative Law Judiciary* 602

Ramdial, Saretta, 'Who Should Govern the Internet? '(2007) 18 *LBJ Journal of Public Affairs* 71

Rappaport, Kim, 'In the Wake of Reno V. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online ' (1998) *13The American University International Law Review* 765

Ravetz, Joe, *'The Internet, Virtual Reality and Real Reality*' in Brian Loader (ed), *Cyberspace Divide* (Routledge 1998) 116

Rawls, John, *'The Idea of Public Reason Revisited* ' in *Political Liberalism* (1993)

Reichert, Elisabeth, 'Human Rights: An Examination of Universalism and Cultural Relativism ' (2006) 22(1) *Journal of Comparative Social Welfare* 23

Reidenberg, Joel, 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 *Emory Law Journal* 911

Reitz, John, 'How to Do Comparative Law' (1998) 46 *The American Journal of Comparative Law* 617

Report, Summary, *'Towards a Peaceful, Secure, Open and Cooperative Cyberspace*' (Paper presented at the International Workshop on Information and Cyber Security Beijing, China 2013)

Reves, Emery, *Principles and Institutions A Democratic Manifesto* (Macmillan Company of Canada Limited 1942)

Rhodes, R.A.W., 'The new governance: governing without government' (1996) 44 *Political Studies* 4

Rogers, Kevin, 'The Digital Divide Revisited: The Grand Canyon of the Online Environment? '(2007) *Masaryk University Journal of Law and Technology* 157

Roland, Rich, *Dynamism of Democracy in Asia* <http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/asia_pacific/asia_downloads/Asia-PDemo_speech_Aug02.pdf>a

Roscini, Marco, 'World Wide Warfare Jus Ad Bellum and the Use of Cyber Force' (2010) 14 *Max Planck Yearbook of United Nations Law* 85

Rosen, Jeffrey, *The Web Means the End of Forgetting* (21 July 2010) The New York Times <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0>

Rosen, Lawrance 'Law as Culture ' (2006) 16(9) *Princeton University Press* 1

Rosenau, James and Ernst-Otto Czempiel, *Governance without Government: Order and Change in World Politic*s (Cambridge University Press 1992)

Rosenzweig, Paul, 'The International Governance Framework for Cyberspace ' (2012) 37(2) *Canada-United States Law Journal* 405

Rubin, Edward 'Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause' (2010) 63 *Vanderbilt Law Review* 763

Ryan, Daniel et al, 'International Cyberlaw: A Normative Approach' (2011) 42 *Georgetown Journal of International Law* 1161

Ryder, Rodney, 'Regulating 'India' Cyberspace - the Battle for 'Control' in the New Media Version ' (2009) 5(2) *Convergence* 250

Sadurski, Wojciech, *Freedom of Speech and Its Limits* (Kluwer Academic publishers, 1999)

Saldias, Osvaldo, 'Can We Explain the Emergence of Legal Cultures? A Methodological Approach Based on the Example of the Andean Community's Legal Culture ' (2010) 5 *Journal of Comparative Law* 232

Sarkar, Subhradipta, 'Right To Free Speech in A Censored Democracy ' (2008) 7 *Sports and Entertainment Law Journal* 62

Sassen, Saskia, 'On the Internet and Sovereignty' (1998) 5 *Global Legal Study Journal* 545

Saul, Matthew, 'The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone ' (2012) 13 *Melbourne Journal of International Law* 1

Schmidt, Eric and Jared Cohen, 'The Digital Disruption' (2010) 89(6) *Foreign Affairs* 75

Schmidt, Eric and Jared Cohen, '*The Digital Age'* (Vintage, 2014)

Schauer, Frederick, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982)

Schonberger, Viktor, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003f) 43 *Virginia Journal of International Law* 605

Seitenberg, Markus, *'Chaplinsky* v. New *Hampshire*, 315 U.S. 568 — Classifying Speech as a means of Regulating Freedom of Speech — A comparison to Art. 5 of the German Basic Constitutional Law and the Adjudication of the German Federal Constitutional Court, respectively ' (2007) *DAJV Newsletter* 58

Sek Keong, Cheif Justice Chan 'Multiculturalism in Singapore - The Way to a Harmonious Society ' (2013) 25 *Singapore Academy of Law Journal* 84

Sen, Amartya, *Human Rights and Asian Values*, Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy. 25 May 1997, at https://www.carnegiecouncil.org/publications/archive/morgenthau/254 .

Services, Australian Government-Department of Social, *A Multicultural Australia* (2 April, 2015) Australian Government-Department of Social Services <https://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia>

Seymour, Martin Lipset, 'The Expansion of Democracy' (1987) 60 *Temple Law Quarterly* 985

Shackelford, Scott and Amanda Craig, 'Beyond the New "Digital Divide": Analyzing the Evolving Role of National Governments in National Governance and Enhancing Cybersecurity ' (2014) 50(1) *Stanford Journal of International Law* 119

Shariff, Fauzia, 'Power Relations and Legal Pluralism: An Examination of 'Strategies of Struggles' Amongst the Santal Adivasi of India and Bangladesh' (2008) 57 *Journal of Legal Pluralism* 1

Shaw, Malcolmn, *International Law* (Cambridge University Press, 6th ed, 2008)

Sim, Cameron, 'The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law ' (2011) 20(2) *Pacific Rim Law & Policy Journal Association* 319

Simester, A. P. and Andrew von Hirsch, 'Rethinking the Offense Principle' (2002) 8(03) *Legal Theory* 269

Simmonds, N.E., 'Protestant Jurisprudence and Modern Doctrinal Scholarship' (2001) 60(2) *Cambridge Law Journal* 271

Sinks, Michael, *Cyber Warfare and International Law* (Air Command and Staff College, 2008)

Slane, Andrea, 'Democracy, Social Space, and the Internet' (2007) 57 *University of Toronto Law Journal* 81

Slaughter, Anne-Marie and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327

Slaughter, Anne-Marie and William Burke-White, 'An International Constitutional Moment ' (2002) 43 *Harvard International Law Journal* 1

Smith, Young, 'The Study of Law by Cases ' (1911) *The American Law School Review* 253

Society, Australian Computer, *'Technical Observations on ISP Based Filtering of the Internet* ' (2009) <https://www.acs.org.au/__data/assets/pdf_file/0013/2641/ispfilteringoct09.pdf>

Society, World Summit on the Information, *'Declaration of Principles - Building the Information Society: a global challenge in the new Millennium* ' (4 - E, World Summit Information Society 2003) <http://www.itu.int/net/wsis/docs/geneva/official/dop.html>

Sorabjee, Soli, 'Freedom of Expression and Censorship: Some Aspects of the Indian Experience' (1994) 45(4) *Northern Ireland Legal Quarterly* 327

Starke, J.G., 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 66

Steiner, Henry, 'Two Sides of the Same Coin? : Democracy and International Human Rights ' (2008) 41(3) *Israel Law Review* 445

Stellios, James, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government ' (2007) 31 *Melbourne University Law Review* 239

Stone, Adrienne, 'Freedom of Political Communication, the Constitution and the Common Law ' (1998) 26 *Federal Law Review* 219

Stone, Adrienne, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication ' (2001) 25 *Melbourne University Law Review* 374

Suzanne, Bernard F, 'An introductory essay on Plato and his dialogues' (1996) *Exploring Ancient World Cultures*

Tambini, Damian, Danilo Leonardi and Chris Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge, 2006)

Tan, Chwee Huat, 'Confucianism and Nation Building in Singapore' (1989) 16(8) *International Journal of Social Economics* 5

Tanase, Takao, 'Global Markets and the Evolution of Law in China and Japan' (2006) 27 *Michigan Journal of International Law* 873

Tarrant, Harold, 'Chronology and Narrative Apparatus in Plato's Dialogues' (1994) 1 (8) *Electronic Antiquity*

Tay, Alice, 'Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law ' (1996) 26(2) *Hongkong Law Journal* 194

Tejas, Aditya, *Australia Authorizes Data Retention Law, Requires Telecom Companies To Store Data For 2 Years* (26 March 2015) International Business Times <http://www.ibtimes.com/australia-authorizes-data-retention-law-requires-telecom-companies-store-data-2-years-1860100>

Telegraph, The Daily, *Michael Clarke finally breaks it off with Lara Bingle* (March 13, 2010) news. com. au <http://www.news.com.au/entertainment/celebrity-life/michael-clarke-finally-breaks-it-off-with-lara-bingle/story-e6frfmqr-1225840297022>

Telegraph, The Daily, *Why Michael Clarke couldn't take anymore of Lara Bingle mess* (March 11, 2010) The Daily Telegraph <http://www.dailytelegraph.com.au/news/national/why-michael-clarke-wants-to-call-it-off-with-lara-bingle/story-e6freuzr-1225839330744?nk=1a349b47e37a533e3aa23ec57cd7c6b2>

Telman, Jeremy, 'Plural Vision: International Law Seen Through the Varied Lenses of Domestic Implementation ' (2009) 44 *Valparaiso University Law Review* 759

Temple, James, *Trying to balance privacy, free speech on Internet* (10 February 2012) SFGate <http://www.sfgate.com/business/article/Trying-to-balance-privacy-free-speech-on-Internet-3202437.php>

Teubner, Gunther, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Rev* 239

Thio, Li-ann, 'Recent Constitutional Development: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) *Singapore Journal of Legal Studies* 328

Thio, Li-ann, 'The Right to Political Participation in Singapore: Tailor-making a Westminster-modelled Constitution to Fit the Imperatives of 'Asian' Democracy' (2002) 6 *Singapore Journal of International & Comparative Law* 181

Thio, Li-ann, 'Singapore: Regulating Political Speech and the Commitment 'to Build a Democracy Society'' (2003) 1 *International Journal of Constitutional Law* 516

Thio, Li-ann 'Taking rights seriously? Human rights law in Singapore ' in Randall Peerenboom, Carole Petersen and Albert Chen (eds), *Human Rights in Asia* (Routledge 2006)

Thio, Li-ann, 'The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore' (2008) *Singapore Journal of Legal Studies* 25

Tidey, John and Jackie Tidey, *History and Government* (Macmilian Library) 2008

Timofeeva, Yulia, 'Establishing Legal Order in the Digital World: Local Laws and Internet Content Regulation' (2006) 1(1) *Journal of International Commercial Law* 41

Todd, Major Graham, 'Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition ' (2009) 64 *Air Force Law Review* 65

Torfing, Jacob, *Interactive Governance Advancing the Paradigm* (Oxford University Press 2012)

Torrijo, Ximena, 'International and Domestic Law: Definitely an Odd Couple ' (2008) 77 *Revista Juridica UPR* 483

Trager, Robert and Dickerson, Donna L., *Freedom of Expression in the 21st Century* (Pine Proge Press, 1999)

Trager, Robert and Sue Turner, 'The Internet Down Under: Can Free Speech be Protected in a Democracy Without a Bill of Rights?' (2000) 23 *UALR Law Review* 123

Treiger-Bar-Am, Kim, 'In Defense of Autonomy: An Ethic of Care' (2008) 3 *NYU Journal of Law & Liberty* 548

Tripathi, Mani, Anshu Singh and Dipa Dube, 'Internet Governance: A Developing Nation's Call for Administrative Legal Reform' (2009) 37(3) *International Journal of Legal Information* 368

Tripathi, Pradyumna, 'Free Speech in the Indian Constitution: Background and Prospect' (1958) 67 *Free Speech- Indian Constitution* 384

Tsagourias, Nicholas and Buchan, Russell, *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015)

Tsagourias, Nicholas, 'Chapter 2: The Tallinn manual on the international law applicable to cyber warfare: A commentary on chapter II - The use of force' (2013) 15 (3) *Yearbook of International Humanitarian Law*

Tsesis, Alexander, 'The Boundaries of Free Speech' (2005) 8 *Harvard Latino Law Review* 141

Tsesis, Alexander, 'Dignity and Speech: The Regulation of Hate Speech in a Democracy' (2009) 44 *Wake Forest Law Review* 497

Turner, Bryan, 'Soft Authoritarianism, Social Diversity and Legal Pluralism: The Case of Singapore' in Adam Possamai, James Richardson and Bryan Turner (eds), *The Sociology of Shari'a: Case Studies from around the World* (Springer International Publishing, 2014)

Tushnet, Mark, *'Some Reflections on Method in Comparative Constitutional Law* ' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 71

Tully, Stephen, 'Protecting Australian cyberspace: Are our international lawyers ready?' (2012) 19 *Australian International Law Journal* 49

Tutt, Andrew, 'Treaty Textualism ' (2014) 39 *The Yale Journal of International Law* 283

Umar, Baba, *Getting Away with Hate Speeches in India* (24 April, 2014) ALJAZEERA <http://www.aljazeera.com/indepth/features/2014/04/getting-away-with-hate-speeches-india-201442474555948198.html>

Unit, The Economist Intelligence, *'Democracy index 2012: Democracy at a standstill'* (2013) <http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf>

Unit, The Economist Intelligence, *The Economist Intelligence Unit: Who We Are?* (12 May, 2014) <http://www.eiu.com/home.aspx#about>

United Nations Educational, Scientific and Cultural Organization (Paper presented at the International Conference on Freedom of Expression in Cyberspace France 3-4 February 2015)

Varayudej, Same 'A Right to Democracy that in International Law: Its Implications for Asia ' (2006) 12 *Annual Survey of International and Comparative Law* 1

Vermont, The University of, *Athenian Democracy* (17 September 2015) <http://www.uvm.edu/~jbailly/courses/clas21/notes/atheniandemocracy.html>

Vernon, Richard, *The Career of Toleration: John Locke, Jonas Proast, And After* (McGill-Queen's Press, 1997)

Voyce, Malcolm, 'The Vinaya and the Dharmasastra: Monastic Law and Legal Pluralism in Ancient India ' (2007) 56 *Journal of Legal Pluralism* 33

Wagner, Peter, *'The democratic crisis of capitalism: Reflections on political and economic modernity in Europe'* (2011) 44 <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper44.pdf>

Wait, Michael, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs ' (2008) 29 *Adelaide Law Review* 247

Walker, Kris, 'It's a Miracle! High Court Unanimity on Free Speech' (1997) 22(4) *Alternative Law Journal* 179

Walker, Mark, 'Censorship, Logocracy and Democracy ' (2008) 21(1) *Canadian Journal of Law and Jurisprudence* 199

Wallace, E. Gregory, 'Justifying Religious Freedom: The Western Tradition' (2010) 114(2) *Penn State Law Review*

Walliman, Nicholas, *Your Research Project* (SAGE Publications, 2nd ed, 2005)

Webber, Jeremy, 'Multiculturalism and the Australian Constitution ' (2001) 24(3) *UNSW Law Journal* 882

Werro, Franz, 'Notes on the Purpose and Aims of Comparative Law' (2001) 75 *Tulane Law Review* 1225

Wiarda, Howard, 'Political Culture and National Development' (1989) *The Fletcher Forum* 193

Williams, Bernard, *'Tolerating the Intolerable* ' in Susan Mendes (ed), *The Politics of Toleration in Modern Life* (Duke University Press 1999) 65

Williams, George, *Human Rights under the Australian Constitution* (Oxford University Press 1999)

Williams, Melissa and Jeremy Waldron, *Toleration and its Limits* (New York Press 2008)

Wingfield, Thomas, *The Law of Information Conflict: National Security Law in Cyberspace* (Aegis Research Corporation 2000)

Wong, Ronald, 'Evangelism and Racial-Religious Harmony: A Call to Reconsider Tolerance ' (2011) 29 *Singapore Law Review*

Wright, R George, 'Dominance and Diversity: A Risk-Reduction Approach to Free Speech Law' (1999) 34(1) *Valparaiso University Law Review* 1

Wright, R George, 'Self-Censorship and the Constriction of Thought and Discussion under Modern Communications Technologies ' (2011) 25 *Notre Dame Journal of Law, Ethics and Public Policy* 123

Xanthaki, Alexandra 'Multiculturalism and International Law: Discussing Universal Standards ' (2010) 32 *Human Rights Quarterly* 21

Zakaria, Fareed, *Culture Is Destiny A Conversation with Lee Kuan Yew* (March/April, 1994) *Foreign Affairs*, 73(2), 109-26; see also

<http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew>

Zhang, Constance, 'Regulation of the Internet- New Laws & New Paradigms ' (2006) 17 *Journal of Law, Information and Science* 53

Zhang, Weiyu, 'The Effects of Political News Use, Political Discussion and Authoritarian Orientation on Political Participation: Evidences From Singapore and Taiwan' (2012) 22(5) *Asian Journal of Communication* 474

Zhang, Zhongqiu, 'Human Being & Culture and Law ' (2005) 2(2) *US-China Law Reviews* 1

Zines, Leslie, *'The Present State of Constitutional Interpretation* ' in Adrienne Stone and George Williams (eds), *The High Court at the Cross Roads* (The Federation Press, 2000)

Ziolkowski, Katharina (ed.), *Peacetime Regime for State Activities in Cyberspace*. International Law, International Relations and Diplomacy, NATO CCD COE Publication, Tallinn 2013

Zou, Keyuan, 'International Law in the Chinese Domestic Context ' (2009) 44 *Valparaiso University Law Review* 935

Zweigert, K, 'Methodological Problems in Comparative Law' (1972) 7(4) *Israel Law Review* 465

Figures and Tables