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PEN International, PEN Canada, and the International Human Rights Program at the University of Toronto Faculty of Law (IHRP)

Contribution to the 27th session of the Working Group of the Universal Periodic Review

Submission on the Republic of India

22 September 2016

1. PEN International, PEN Canada, and IHRP (the stakeholder coalition) welcome the opportunity provided by the Office of the High Commissioner for Human Rights to comment on the climate for free expression in India since the last Universal Periodic Review (UPR) on 24 May 2012. This submission is based on a joint PEN International, PEN Canada and IHRP report, entitled *Imposing Silence: The Use of India's Laws to Suppress Free Speech*,¹ published in May 2015, and a follow-up field mission conducted by PEN International, PEN Canada and IHRP between 19 and 30 January 2016² and corresponding report³.
2. The stakeholder coalition notes with regret that during the second cycle of the UPR, the State of India merely noted all recommendations pertaining both directly and indirectly to Freedom of Expression, of which there were 19. Recommendations were made by Sweden, Austria, the Czech Republic, Spain, Norway, Iraq, Nicaragua, the United Kingdom, Portugal, Viet Nam, Slovakia, Switzerland, France, Germany, the Russian Federation, and Thailand.
3. The coalition welcomes recent legislative reform and judicial action positively affecting the right to free expression, such as
 - a. The Supreme Court of India's March 2015 decision to strike down s.66A of the *Information Technology Act, 2000* (ITA) on the grounds that it "arbitrarily, excessively and disproportionately invades the right

¹ Amy Tang, Evan Rankin, Brendan de Caires, Drew Beesely, *Imposing Silence: The Use of India's Laws to Suppress Free Speech* (May 2015), online at <http://www.pen-international.org/wp-content/uploads/2015/05/Imposing-Silence-FINAL.pdf> [PEN-IHRP India Report]

² Researchers met with writers, journalists, lawyers, human rights activists and members of civil society in Jaipur, Hubli and New Delhi.

³ Evan Rankin, Brendan de Caires, *Fearful Silence: The Chill on India's Public Sphere* (September 2016), online at <http://www.pen-international.org/wp-content/uploads/2016/09/Fearful-Silence-The-Chill-on-Indias-Public-Sphere.pdf>

of free speech.⁴ However, the stakeholder coalition remains concerned by a report of the Parliamentary Standing Committee on Home Affairs dated 7 December 2015 that recommends that the deleted section be replaced by a problematic hate speech provision;⁵

4. While recognising the steps made by the Indian authorities, this submission shall address the following key freedom of expression concerns:

- a) **India's commitments to freedom of expression**
- b) **Legal limitations affecting the right to freedom of expression**
- c) **Attacks on freedom of expression**
- d) **Surveillance and the right to privacy**
- e) **Recommendations**

a) India's international legal commitments to freedom of expression

5. Article 19(1)(a) of the Constitution of India⁶ guarantees freedom of speech and expression as a fundamental right, subject to "reasonable restrictions"⁷ in Article 19(2). These restrictions, however, exceed the scope of the permissible restrictions described in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), to which India is a State Party.⁸ When invited to clarify its position by the United Nations Human Rights Council (UNHRC),⁹ India responded by claiming that the ICCPR's articulation of freedom of expression should be applied so that it conforms with India's constitutional

⁴ See *Shreya Singhal vs. Union of India (UOI)*, MANU/SC/0329/2015; Surabhi Agarwal and Aman Sharma, "In bid to fight terror on social media, draconian Section 66A may be back in a softer form," *The Economic Times*, (26 February 2016), online: http://economictimes.indiatimes.com/articleshow/51146719.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁵ Parliament of India, Department-Related Parliamentary Standing Committee on Home Affairs, "One Hundred Eighty Ninth Report: Action Taken by the Government on the Recommendations/Observations Contained in the 176th Report on the Functioning of Delhi Police" (7 December 2015), online: <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/189.pdf> [Parliament of India Report]

⁶ Constitution of India, Ministry of Justice, online at: <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> (accessed: 29 July 2016)

⁷ According to Article 19(2), freedom of expression is subject to "reasonable restrictions" 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.

⁸ Reasonable restrictions on public morals "must be based on principles not deriving exclusively from a single tradition" (Human Rights Committee, General Comment No 22: Freedom of Thought, Conscience and Religion (30 July 1993), CCPR/C/21/Rev.1/ Add.4 at para 8) and should be compatible with religious and ideological pluralism (UN Human Rights Committee, 102nd Sess, General Comment No. 34, Article 19, Freedoms of Opinion and Expression (12 September 2011) CCPR/C/GC/34 at para 32). Meanwhile, international human rights bodies have asserted that certain legal restrictions cannot be justified in reference to local tradition, cultures, or values (Joint Declaration on Universality and the Right to Freedom of Expression (6 May 2014), online: <http://www.osce.org/fom/118298?download=true> at para (1)(f)). Seen in this light, India's blasphemy laws and other laws which aim to protect the religious sensitivities of believers are incompatible with the ICCPR.

⁹ Human Rights Committee, Summary record (partial) of the 1606th meeting (21 November 1997), CCPR/C/SR.1606 at para 6.

provisions, despite these being more restrictive.¹⁰ India has not reported on its compliance with the ICCPR since 1996.¹¹

6. The stakeholder coalition remains deeply concerned by India's reservation to Article 19(3) of the ICCPR.
7. In order to comply with Article 19 of the ICCPR, restrictions on freedom of expression must not be overbroad or vague. Further, according to General Comment 34, a law that validly restricts freedom of expression "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."¹² Many provisions in Indian statutes – particularly criminal statutes – fail this test. Exacerbating this problem, inconsistent rulings by the Supreme Court of India have led to conflicting interpretations as to what constitutes a "reasonable restriction" under Article 19(2). This is particularly the case in what may be deemed "public order" offences.¹³
8. The Submitting Organisations note that several legal provisions currently in force in India are either impermissibly vague or overbroad, or both. This enables abuse by private citizens as well as the State Party. Some of these provisions are described below.
9. To date, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has not been invited to visit India.

b) Legal limitations on freedom of expression

Administration of justice

10. The Indian criminal justice system is marked by clogged courtrooms and unreasonable delays due to a heavy backlog of cases.¹⁴ Even after a case makes it to court, proceedings can take several years.¹⁵ Such delays disproportionately affect the poor and marginalised groups.¹⁶

¹⁰ "At the time of its accession to the Covenant, India explained its position that this provision should be applied in India in conformity with article 19 of the Indian Constitution. Since the consideration of the last report, there has been no change in India's position to the application of this article in India" in Human Rights Committee, Consideration of reports submitted by state parties under article 40 of the Covenant (17 June 1996), CCPR/C/76/Add.6, at para 102

¹¹ Reporting Status for India, Office for the High Commissioner for Human Rights, online at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=IND&Lang=EN (accessed: 29 July 2016)

¹² UN Human Rights Committee, 102nd Sess, General Comment No. 34, Article 19, Freedoms of Opinion and Expression (12 September 2011) CCPR/C/GC/34 at para 25.

¹³ PEN-IHRP India Report, supra note 1, p11.

¹⁴ PEN-IHRP India Report, supra note 1, p32

¹⁵ PEN-IHRP India Report, supra note 1, p35

¹⁶ PEN-IHRP India Report, supra note 1; Freedom House: Freedom in the World 2016 – India, online: <https://freedomhouse.org/report/freedom-world/2016/india> (accessed 31 July 2016) [Freedom in the World 2016 Report].

11. Concerns have been raised that some lower court judges may lack relevant experience and knowledge.¹⁷ Consequently, inexperienced lower court judges may yield to social pressure or defer to seasoned lawyers' arguments, to the government if it is one of the parties, or strategically issue adjournments to buy themselves more time.¹⁸

Vaguely-worded and overbroad legislation

12. Potential censors in India can choose from an array of vaguely-worded, broad and sometimes overlapping¹⁹ laws if they wish to attack artists, writers, journalists, public figures, and other communicators. Laws that are vague or overbroad are vulnerable to selective interpretation and enforcement. They therefore become favourite weapons of both citizens and the government for silencing opponents. India has several laws particularly criminal laws that are vague and overbroad, and which are currently being used to silence legitimate expression. The stakeholder coalition believes that these laws breach India's obligations under the ICCPR.
13. Additionally, Indian courts have an inconsistent record in protecting freedom of expression. While the higher courts will generally rule to defend freedom of expression, the lower courts often issue poorly-reasoned speech-limiting decisions.²⁰ This lack of consistency paves the way for abuse. Any ambiguity in the judiciary's interpretation of a law effectively gives discretion to the police to misapply the law. Violations of the right to freedom of expression also arise more broadly when existing laws are selectively interpreted or enforced by the State to crack down on specific forms of media content.²¹
14. The lack of consistency in interpretation of the law emboldens plaintiffs to pursue lawsuits that might otherwise be dismissed.²² Although magistrates have powers to throw out frivolous and spurious cases, they often err on the side of caution and give a complaint a hearing.²³ As such, the current legal system does not provide any disincentive for frivolous prosecutions. When

¹⁷ Jayanth Krishnan et al., "Grappling at the Grassroots: Access to Justice in India's Lower Tier," (2014) 27 Harvard Human Rights Journal 151 at 168.

¹⁸ PEN-IHRP India Report, supra note 1, p35

¹⁹ Several laws may apply to a single act, which often leads to legal proliferation as it is the police's job to ensure that every applicable provision is used (Gautam Bhatia Interview (In person interview, New Delhi, 27 January 2016) [Gautam Bhatia interview]). For example, sections 153A (promoting enmity between groups) and 153B (imputations prejudicial to national integration) of the IPC overlap with section 505, which prohibits expression intended to cause mutiny in the army, public alarm whereby a person may be induced to commit an offence, incite any class of people to commit any offence against any other class of people, or promote enmity between different classes of people. Perhaps the most notable difference between s.505 and ss. 153A/153B is the presence of the "intent" requirement in the former. Furthermore, there is frequently an overlap between medium-specific legislation, such as the Information Technology Act (ITA), and more general legislation, such as the IPC (Apar Gupta interview (In person interview, New Delhi, 26 January 2016) [Apar Gupta interview]).

²⁰ Human Rights Watch, *Stifling Dissent: The Criminalization of Peaceful Expression in India* (May 2016), pp2, 8, online: https://www.hrw.org/sites/default/files/report_pdf/india0516.pdf [Human Rights Watch Stifling Dissent]

²¹ PEN-IHRP India Report, supra note 1, p41.

²² PEN-IHRP India Report, supra note 1, p. 10

²³ PEN-IHRP India Report, supra note 1, p.33

combined with the slow court processes described above, these frivolous cases ó enabled by vague and overbroad legislation ó discourage individuals from exercising their right to free expression. The Submitting Organisations refer to this as "the chilling effect." Few journalists have the funds to fight these protracted legal battles.²⁴

Criminal defamation

15. Criminal defamation is defined in section 499 of the *Indian Penal Code* (IPC) as making or publishing any statement "intending to harm, or known or having reason to believe that such imputation will harm, the reputation" of another person (living or dead), company or association.²⁵ According to Section 500, it is punishable by imprisonment of up to two years and/or a fine.
16. Criminal defamation legislation is used as a weapon by individuals, businesses and social groups, often as convenient way to obtain pre-publication injunctions in order to suppress unwanted content.²⁶ Even if a defendant wins a case, the censored material has often lost its relevance after being silenced for years, irrespective of the substantive merit of the initial complaint.
17. As defamation cases are inexpensive to bring about and lead to protracted legal proceedings that are costly to defend, the threat of the use of legislation can often be enough to intimidate critical voices into silence.²⁷ Writers and journalists often lack the resources to fight either the government or wealthy plaintiffs.²⁸
18. Of particular concern is the fact that proving that actual harm has been caused is not a requirement of the law. Intent to cause harm or the knowledge that harm would likely result from the expression is a sufficient condition to be convicted of criminal defamation; neither malice nor intent need to be proven. Similarly, the truth of the statement in question is only a defence to the extent that it was a statement made "for the public good" ó a vague guideline left to the interpretation of the courts.²⁹
19. In May 2016, the Supreme Court upheld the constitutionality of India's criminal defamation legislation stating that a person's right to freedom of

²⁴ Rajeev Dhavan interview (In person interview, New Delhi, 29 January 2016) [Rajeev Dhavan interview]

²⁵ The IPC includes 10 exceptions to defamatory speech, including comments made in good faith about court proceedings and public servants, chastising people over which a speaker has authority, and comments intended to caution third parties about the behaviour of another.

²⁶ PEN-IHRP India Report, supra note 1, p14.

²⁷ *Ibid*

²⁸ Anirudh Burman "Defamation: who should you fear more Big Govt. or Big Corporate" (31 May 2013), PolityIndia, online: <http://polityinindia.wordpress.com/tag/criminal-defamation-in-india/> (accessed 30 July 2016).

²⁹ Indian Penal Code, s. 499, online: <http://indiankanoon.org/doc/1041742/> (accessed 30 July 2016) "Exception 1 - It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact"

speech has to be balanced with the other person's right to reputation.³⁰ The decision has been widely criticised as the two-justice bench failed to offer a compelling rationale as to why civil remedies are insufficient.³¹

20. Investigative journalists are at particular risk of prosecution under s.499 due to their criticism of public figures.³² Criminal defamation legislation is frequently used in Tamil Nadu state, where between 2001-2016 the Tamil Nadu government has reportedly filed some 200 cases.³³ They include cases against Tamil-language magazines *Ananda Vikatan* and *Junior Vikatan*, which face several counts of criminal defamation in connection with a series of articles assessing the performance of each cabinet minister.³⁴

Sedition

21. Section 124A of the IPC criminalises expression that attempts to incite hatred or excite disaffection towards the government.³⁵ The maximum penalty is life imprisonment and may also include a fine. The term 'disaffection' is defined to include 'disloyalty and all feelings of enmity.'

22. Although the scope of the provision was narrowed in 1962³⁶ to clarify that speech must have 'tendency or intention to create disorder, or disturbance of law and order, or incitement to violence,' there is a noticeable disparity between the Supreme Court's judgement and the implementation of the provision at the lower court level.³⁷

³⁰ 'The right to reputation is an inherent right guaranteed by Article 21 and hence, the right to freedom of speech and expression under Article 19(1)(a) has to be balanced with the right under Article 21 and cannot prevail over the right under Article 21.' In *Subramanian Swamy vs Union of India, Ministry of Law and ORs*, full judgement: http://supremecourtindia.nic.in/FileServer/2016-05-13_1463126071.pdf, p 62 (accessed 8 September 2016); PTI, 'SC upholds constitutional validity of defamation law' (13 May 2016), *New Indian Express*, online: <http://www.newindianexpress.com/nation/SC-upholds-constitutional-validity-of-defamation-law/2016/05/13/article3430780.ece> (accessed 30 July 2016); Bhairav Acharya, 'The Supreme Court's Loss of Reputation,' (14 May 2016), online: <https://notacoda.net/2016/05/14/the-supreme-courts-loss-of-reputation/> (accessed 31 July 2016).

³¹ PEN International holds that criminal defamation laws are pernicious and widely used by those in positions of power to silence critics. Such laws 'and the disproportionate penalties that they introduce' have a chilling effect on writers and journalists who uncover corruption, malfeasance and abuse of power and who are conscious of the possibility of serving lengthy prison sentences and the possibility of being left with a criminal record. The result is the stifling of reporting and public debate and difficulty in holding power to account (see PEN International resolution 2015, online: <http://www.pen-international.org/wp-content/uploads/2014/10/19.RESOLUTION-Criminal-defamation.pdf>).

³² Rajeev Dhavan interview, supra note 24.

³³ Human Rights Watch Stifling Dissent, supra note 23, p5.

³⁴ Ibid; Dharani Thangavelu, (18 January 2016) 'Defamation Cases Filed by AIADMK', *Live Mint*, online: <http://www.livemint.com/Politics/EFoNU1WiGbnWNI93DXKBrI/Defamation-cases-filed-by-AIADMK.html>

³⁵ Indian Penal Code, s. 124A, online: <http://indiankanoon.org/doc/1641007/>

³⁶ In *Kedar Nath Singh vs. State of Bihar*, 1962 AIR 955, the Supreme court found that s. 124A infringed the Constitutional guarantee of free expression, but was nevertheless 'within the ambit of permissible legislative restrictions.'

³⁷ PEN-IHRP India Report, supra note 1, p21; Gautam Bhatia interview, supra note 19; K. Satchidanandan interview (in person interview, Jaipur, 22 February 2016) [K. Satchidanandan interview]

23. In a context of growing public discourse around nationalism, there has been a considerable rise in the number of sedition cases filed.³⁸ The increased use of the provision raises concern that sedition has become an all-encompassing offence in India, used to distort public discourse of what is patriotic and what is anti-national.³⁹
24. Section 124A has been used by successive governments as a tool to silence political dissent and create a chill on freedom of expression. In 2010, Dr Binayak Sen, a vocal critic of the Chhattisgarh state government's policies against Maoist rebels was convicted of sedition and sentenced to life imprisonment.⁴⁰ He was granted bail by the Supreme Court in 2011.⁴¹ On 30 October 2015, Kovan, a folk singer, was arrested from his home in Tiruchirappalli district, Tamil Nadu, and charged with sedition and several other offences,⁴² in connection with two songs in which Kovan criticised the state government.⁴³ Kovan was released on bail on 16 November 2015.
25. The sedition provision is often paired with hate speech provisions and the *Unlawful Activities (Prevention) Act, 1967*,⁴⁴ which criminalises membership of in unlawful associations.⁴⁵ This legislation is disproportionately used against those who disagree with the economic policies of the State,⁴⁶ religious minorities, and marginalised groups.⁴⁷

³⁸ In 2013, only two cases were filed; in the following year that number rose to five (Index on Censorship, 'Free speech in India: Uptick in defamation, attacks on media cause for concern' (19 December 2014), online: <https://www.indexoncensorship.org/2014/12/free-speech-india-uptick-defamation-attacks-media-cause-concern/>). Fourteen sedition cases related to freedom of expression were recorded in 2015, according to *the Hoot* 'Free speech in India, 2015' (31 December 2015), *The Hoot*, online: <http://www.thehoot.org/research/special-reports/free-speech-in-india-2015-9091>). In the first three months of 2016 alone, 11 cases of sedition were filed (Nandita Jha, 'Free speech: a dire three months' (5 April 2016), *The Hoot*, online: <http://www.thehoot.org/research/special-reports/free-speech-a-dire-three-months-9272>); Gautam Bhatia interview, supra note 19.

³⁹ Teesta Setalvad interview (Telephone, 24 February 2016) [Teesta Setalvad interview]

⁴⁰ Sen was alleged to have passed letters to imprisoned Maoists. Used in evidence against him was the possession of Maoist pamphlets. *The Times of India Now*, 'SC grants bail to Binayak Sen' (15 April 2011), online: <http://www.timesnow.tv/SC-grants-bail-to-Binayak-Sen/articleshow/4370495.cms> (accessed: 30 July 2016)

⁴¹ *Binayak Sen vs. State of Chhattisgarh* (2011), [unreported, Supreme Court of India], online: <http://courtnic.nic.in/supremecourt/temp/sr%20205311p.txt>

⁴² The additional charges were: promoting enmity between social groups, criminal intimidation and insulting the state government.

⁴³ S. Sivadas (stage name: Kovan) is a member of the Makkal Kalai Ilakkiya Kazhagam (People's Art and Literary Association), which has long used art, music and theatre to educate marginalised communities and raise issues of corruption. In his recent songs, Kovan blamed the government for choosing revenue from liquor sales over people's welfare (see PEN Case List 2015, online: <http://www.pen-international.org/wp-content/uploads/2016/05/CASE-LIST-January-December-2015.pdf> [PEN Case List 2015]).

⁴⁴ Gautam Bhatia interview, supra note 19

⁴⁵ Unlawful Activities (Prevention) Act, online: <http://indiankanoon.org/doc/1389751/>. The law defines an unlawful association as those that have for their object any unlawful activity or the encouragement of persons to undertake an unlawful activity, which could include any action that supports a secession of territory from India, or which disrupts the sovereignty and territorial integrity of India, or is intended to cause disaffection against India. Such broad phrasing could cover a variety of forms of legitimate expression such as political comment or dissent against the government.

⁴⁶ Gautam Bhatia interview, supra note 19; K. Satchidanandan interview, supra note 37.

⁴⁷ Human Rights Watch Stifling Dissent, supra note 23, p7.

Blasphemy

26. Section 295A of the IPC criminalises expression intended to outrage religious feelings of any class by insulting its religion or religious beliefs.⁴⁸ The offense is punishable with up to four years imprisonment and/or a fine. In order to find an individual guilty, prosecutors need only prove an intention to insult, regardless of whether another person is actually insulted.
27. In February 2014, Penguin Books India capitulated to demands to withdraw and pulp all unsold copies of *The Hindus: An Alternative History* (2009) as a best-selling non-fiction title as part of an out-of-court settlement with Dinanath Batra and other complainants,⁴⁹ who argued that the book was offensive to Hindus and therefore violated Section 295A.⁵⁰
28. On 14 February 2014, Penguin Books India reiterated concerns over the use of section 295A and its implications for freedom of expression, stating: "The Indian Penal Code, and in particular section 295A of that code, will make it increasingly difficult for any Indian publisher to uphold international standards of free expression without deliberately placing itself outside the law."⁵¹
29. Although the book has subsequently found a new publisher, publishers and proponents of free speech have indicated that the case has led publishers to be more cautious regarding what they publish in order to avoid confrontations.⁵² Indeed, Orient Blackswan is reported to have placed several publications on a list for review, after it received a legal notice from Dinanath Batra claiming that the classic history textbook, *From Plassey to Partition: A History of Modern India* by Sekhar Bandyopadhyay, was defamatory and derogatory to the Hindu nationalist group Rashtriya Swayamsevak Sangh (RSS).⁵³

Obscenity

30. Section 292 of the IPC defines as "obscene" anything that is "lascivious or appeals to the prurient interest" or whose effect "tend[s] to deprave and corrupt" those that are likely to read, see or hear it.⁵⁴ The provision

⁴⁸ Indian Penal Code, s. 295A, online: <http://indiankanoon.org/doc/1803184/> (accessed 23 April 2015).

⁴⁹ *Dinanath Batra & Others vs. Wendy Doniger & Others* (2014), consent order dated 4 February 2014; Soutik Biswas, "Why did Penguin recall a book on Hindus?" (12 February 2014), BBC News, online: <http://www.bbc.com/news/world-asia-india-26148875> (accessed 31 July 2016)

⁵⁰ PEN-IHRP India Report, supra note 1, pp15-16; see also: <http://www.pen-international.org/newsitems/india-pen-protests-withdrawal-of-best-selling-book/>

⁵¹ Krista Mahr, "Penguin India Issues Statement on 'The Hindus' Recall" (14 February 2014), *Time*, online: <http://time.com/7328/penguin-india-issues-statement-on-the-hindus-recall/> (accessed 31 July 2016)

⁵² Urvashi Butalia Interview (in person interviews: New Delhi, 28 January 2016; London, 4 July 2016) [Urvashi Butalia interview]; Chinmayi Arun interview (In person interview, New Delhi, 27 January 2016) [Chinmayi Arun interview]

⁵³ Malini Nair, "Under pressure: publisher puts books under review" (4 June 2014), *Times of India*, online: <http://timesofindia.indiatimes.com/india/Under-pressure-publisher-puts-books-under-review/articleshow/36024216.cms>

⁵⁴ Indian Penal Code, s. 292, online: <http://indiankanoon.org/doc/1704109/> (accessed 23 April 2015)

criminalises the creation, sale, distribution, exhibition, import or export of obscene material. Offences are punishable by imprisonment of up to two years and a fine for first-time offenders; repeat offenders are subject to imprisonment of up to five years and a higher fine.⁵⁵ Private individuals are known to invoke section 292 to silence one another.⁵⁶

31. The broad definition of what may be deemed obscene grants significant discretion to judges to impose their own personal morality when considering problematic speech. In addition, the 14 May 2015 ruling by the Supreme Court of India in the case of *Devidas Ramachandra Tuljapurkar vs State of Maharashtra*,⁵⁷ in which offensive words were attributed to Gandhi in a poem,⁵⁸ could lead to confusion at a lower court level as it creates conflicting precedents about which legal test should be applied to ascertain if an expression could be deemed obscene.⁵⁹ The Court held that words that would otherwise not be deemed obscene, when placed in the fictionalised mouths of historically respected personalities may be deemed so, however it failed to define who might be considered respected historical figure⁶⁰ or explain in what way the threshold would be higher.⁶¹

Promoting enmity

32. Section 153A of the IPC attempts to preserve harmony between a variety of enumerated groups by barring speech and several other acts.⁶² Violations of s. 153A are punishable by imprisonment of up to three years and/or a fine.
33. Section 153A(1)(a) criminalises words, either spoken or written, or by signs or by visible representation or otherwise, [that] promot[e] or attempt[t] to promote, on grounds of religion, race, place of birth, residence, language, caste or community, or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities.
34. The provision has been used to silence satirical poetry, including in the case of Devidas Ramachandra Tuljapurkar cited above, and is commonly invoked in combination with other IPC provisions, by operation of section 95 of the Code of Criminal Procedure (discussed below).

⁵⁵ PEN-IHRP India Report, supra note 1, p19

⁵⁶ Gautam Bhatia Interview, supra note 19;

⁵⁷ *Devidas Ramachandra Tuljapurkar vs State of Maharashtra*, MANU/SC/0612/2015

⁵⁸ Charges under s. 292 of the IPC were brought against Devidas Ramachandra Tuljapurkar by the State of Maharashtra regarding the poem, "Gandhi Mala Bhetala (I met Gandhi)", published in the July-August 1994 issue of *Bulletin* magazine of the in-house magazine of the All India Bank Association Union of which offensive words are attributed to Gandhi.

⁵⁹ Rajeev Dhavan interview, supra note 24; Gautam Bhatia, "No dirty poems on Mahatma Gandhi: SC obscenity ruling is a big blow to free speech" (15 May 2015), *First Post*, online: <http://www.firstpost.com/india/no-dirty-poems-mahatma-sc-obscenity-ruling-big-blow-free-speech-2245416.html>

⁶⁰ Indeed, the Supreme Court expressly stated that it did not intend to provide a catalogue of such individuals because this was not an issue in this case. (*Devidas Ramachandra Tuljapurkar vs State of Maharashtra*, MANU/SC/0612/2015 at para 2.)

⁶¹ Gautam Bhatia Interview, supra note 19.

⁶² Indian Penal Code, s. 153A, online: <http://indiankanoon.org/doc/345634/> (accessed 23 April 2015).

Assertions prejudicial to national-integration

35. Section 153B of the IPC complements s. 153A (discussed above) by criminalising 'imputations, [and] assertions [that are] prejudicial to national-integration.'⁶³ Violations of section 153B are punishable by up to three years' imprisonment and/or a fine.
36. The provision catches a large variety of expressive acts, including 'imputations that any class of persons cannot, by reason or their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to Constitution of India,' 'encouraging or advising that members of a class be deprived of their rights as citizens, or otherwise making an assertion about a class that is likely to cause disharmony or 'feelings of enmity' between classes. The breadth of the provision risks catching legitimate commentary about ethnic or inter-state political problems.⁶⁴

Cyber offences

Information Technology Act, 2000 (ITA)

37. Section 69A of the ITA permits central government to take down a website or censor its content in the interests of the 'sovereignty of India,' 'security and defence of the country,' 'friendly relations with foreign states,' 'public order' or to 'prevent incitement to the commission of cognizable offence.'⁶⁵ Intermediaries who fail to comply with the government's take-down requests are liable to seven years' imprisonment and/or a fine.
38. In July 2016, mobile internet services were shut down in Jammu and Kashmir in a context of political tension in the region.⁶⁶ The shutdown represented the 14th known shutdown in the country this year.⁶⁷
39. In March 2016, the Supreme Court of India struck down section 66A of the ITA.⁶⁸ Concerns have grown following a December 2015 report of the Parliamentary Standing Committee on Home Affairs, which proposed that section 66A be replaced by a provision which imports the wordings of sections

⁶³ Indian Penal Code, s. 153B, online: <http://indiankanoon.org/doc/771276/> (accessed 23 April 2015).

⁶⁴ PEN-IHRP India report, supra note 1, p 17.

⁶⁵ Information Technology (Amendment Act), 2008, act 10 of 2009, ITA (amended) s. 69A

⁶⁶ Centre for Communication Governance at National Law University, Delhi, 'Internet Shutdowns: An Update' (14 July 2016), online: <https://ccgnludelhi.wordpress.com/2016/07/14/internet-shutdowns-an-update/> (accessed 31 July 2016).

⁶⁷ Centre for Communication Governance at National Law University, Delhi, 'Incidents of Internet Shutdowns in India (2012 Onwards)', online: https://drive.google.com/file/d/0BycAZd9M5_7NZi1FMU5oV2VtT1k/view; Chinmayi Arun interview, supra note 52

⁶⁸ The section gave extremely broad powers to the police to censor online expression, penalising the electronic communication of information that was deemed 'grossly offensive or has a menacing character,' 'intended to cause 'annoyance or inconvenience,' and/or is known to be false, but is sent for the purpose of 'causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, [and] hatred or ill will' -

153A and 153B of the IPC.⁶⁹ Due to these laws, lack of compliance with international law, the duplication of such laws within the online regulatory framework would not only lead to duplicative charging, but also deepen the chilling effect.

Information Technology (Intermediaries Guidelines) Rules, 2011

40. The Information Technology Rules,⁷⁰ have effectively allowed private actors to censor content on the internet. Over the course of 2015, Facebook received over 10,500 requests for user data and blocked some 30,000 pieces of content in India in response to legal requests from government agencies, including law-enforcement agencies, along with material brought to its attention by non-government organisations and Facebook users.⁷¹ According to the Facebook report, the majority of the content was blocked as alleged anti-religious and hate speech that could cause unrest and disharmony within India. The number of requests for user data was second only to the United States of America.⁷²

Contempt of Court

41. The *Contempt of Court Act, 1971* punishes "criminal contempt" including expression that scandalises or "tarnishes" the image of the court.⁷³
42. Contempt of court proceedings occur by way of summary procedure, meaning that accused persons do not receive the same due process protections as they would if they were charged criminally.⁷⁴ Contempt charges are also adjudicated by judges from the same court in which the matter has arisen.⁷⁵ The combination of judges examining alleged offences against their colleagues, and tasked with interpreting vague terms such as "scandalise," "tarnish" and "public interest" provide the opportunity for misuse.⁷⁶ Indeed, the law in its current form provides no safeguards against those who might misuse it to silence legitimate critics of the judiciary.⁷⁷

⁶⁹ Parliament of India Report, supra note 5.

⁷⁰ *Information Technology (Intermediaries guidelines) Rules, 2011*, online:

http://deity.gov.in/sites/upload_files/dit/files/

⁷¹ Facebook government requests report <https://govtrequests.facebook.com/country/India/2015-H2/> (accessed 30 July 2016)

⁷² Newley Purnell, "Facebook Receives Highest-Ever Number of Requests for Indian User Data," *The Wall Street Journal* (29 April 2016), online: <http://blogs.wsj.com/indiarealtime/2016/04/29/facebook-receives-highest-ever-number-of-requests-for-indian-user-data/> (accessed 30 July 2016);

<https://govtrequests.facebook.com/#> (accessed 30 July 2016)

⁷³ Contempt of Courts Act, 1971, online: <http://indiankanoon.org/doc/1396751/> (accessed 30 July 2016).

⁷⁴ Rajeev Dhavan, *Publish and Be Damned: Censorship and Intolerance in India* (New Delhi: Tulika Books, 2008), p75, 77-78.

⁷⁵ *Ibid*, pp.74-75

⁷⁶ Indeed, the Supreme Court has described the court's contempt powers as "a vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor." *Baradakanta Mishra v Registrar of Orissa High Court* (1973), 1974 SCR (2) 282 at para 68

⁷⁷ PEN-IHRP India report, supra note 1, p28

43. Former Supreme Court Justice Ruma Pal called the law a 'great silencer', acknowledging that any public discussion of questionable judicial conduct has been suppressed through it.⁷⁸
44. In January 2015, the Meghalaya High Court registered a contempt of court case against two newspapers and a local District Council chief for making derogatory, defamatory and contemptuous comments about a recent judgement.⁷⁹

Publication restrictions

Customs Act, 1962

45. The State often bans the import of books rather than banning them in-country, thereby favouring the use of prior restraint over prosecution.⁸⁰ To do this they utilise Section 11 of the Customs Act, which permits central government to prohibit the import of goods for the purpose of maintaining security, public order, standards of decency and morality of India, or other purpose conducive to the interests of the general public.⁸¹
46. The vague nature of Section 11 of the Customs Act allows for too much discretion on the part of customs officials to determine which items might be contrary to the interests of the general public and whether an item would violate other laws, such as those in the IPC, which are in themselves frequently vaguely-worded.
47. The Customs Act was used in 1988 to ban the import of Salman Rushdie's novel, *the Satanic Verses*.⁸²

Section 95 of the Code of Criminal Procedure, 1973

48. Section 95 of the Code of Criminal Procedure empowers state governments to seize and prohibit any publication that appears to violate sections 124A (sedition), 153A (promoting enmity between groups), 292 (obscenity), 293 (sale of obscene material) or 295A (blasphemy) of the IPC. Although the government must explicitly state the grounds upon which it issues a forfeiture declaration,⁸³ the underlying offence alleged need not be proven.⁸⁴

⁷⁸ Justice Ruma Pal, 'An Independent Judiciary' (10 November 2011), 5th VM Tarkunde Memorial Lecture, online:

http://theradicalhumanist.com/index.php?option=com_radical&controller=article&cid=431&Itemid=56

⁷⁹ The judge who filed the complaint is reported to have stated 'if anyone is not satisfied with any judgement, he has the right to make an appeal but he has no business to challenge the Judiciary or to give any kind of derogatory or defamatory statement against any Judge in particular or against the institution in general.' HC registers case against Nongrum (15 January 2015), *The Shillong Times*, online: <http://www.theshillongtimes.com/2015/01/15/hcregisters-case-against-nongrum/>

⁸⁰ Gautam Bhatia Interview, supra note 19.

⁸¹ *Customs Act, 1962*, online: <http://indiankanoon.org/doc/1059693/>

⁸² 'Salman Rushdie: India banned Satanic Verses hastily' (12 September 2012), BBC News, online: <http://www.bbc.com/news/world-asia-india-19566894> (accessed 30 July 2016)

⁸³ *State of Maharashtra and Ors vs. Sangharaj Damodar Rupawate and Ors.* (2010) 7 SCC 398 at para 25 (Supreme Court of India)

⁸⁴ PEN-IHRP India Report, supra note 1, p 13

49. The breadth of the provision was sanctioned by the Delhi High Court, which ruled that, because of India's diversity, it is reasonable to restrict freedom of expression in order to preserve amity between many different groups.⁸⁵
50. In August 2015, the government of Tamil Nadu ordered the forfeiture of two books⁸⁶ owing to allegations that the books were "likely to cause disharmony, feeling of enmity, hatred and ill-will between different communities thereby promoting communal tension and affecting public peace and tranquility."⁸⁷ The veracity of this claim is questionable given that one of the books involved, *Venthar Kulathin Iruppidam Ethu?*⁸⁸ by E Senthil Mallar, was first published in 2013 and does not appear to have led to any disorder at that time.

c) Attacks on Freedom of Expression and Writers

51. The period under review has seen a rise in attacks on dissent and press freedom. In 2015, PEN International recorded 21 cases of writers and journalists being persecuted for their use of the written word;⁸⁹ whereas between January and June 2016, the total number of cases recorded by PEN in India rose to 26.⁹⁰
52. A culture of intolerance has taken root in India and has grown more menacing since Narendra Modi became Prime Minister in May 2014.⁹¹ Dissent – whether political, religious, cultural or social – now entails greater risks. India has become a battleground on which the definition of what is national or, indeed, anti-national is fought.
53. Critics of the status quo are dismissed as "pseudo-secularist," "anti-national" or unpatriotic, among other labels,⁹² in order to make their viewpoints seem

⁸⁵ *R.V. Bhasin vs. State of Maharashtra and Marine Drive Police Station*, (2010), (112) BOMLR 154 (Bombay High Court) at para 56; PEN-IHRP India Report, supra note 1, p 13

⁸⁶ T Muruganandham, "State Government Bans Two Books of SC Authors Citing Inflammatory Content" (27 August 2015), *The New Indian Express*, online: <http://www.newindianexpress.com/cities/chennai/State-Government-Bans-Two-Books-of-SC-Authors-Citing-Inflammatory-Content/2015/08/27/article2995431.ece>.

⁸⁷ Ibid.

⁸⁸ In English: *What is the place of the Venthar community?*

⁸⁹ PEN Case List 2015, supra note 48. The number included the murders of five writers, academics and journalists: Raghavendra Dubey, owner and editor of *Khushboo* Ujala, a local weekly in Mumbai, killed on 17 July 2015; Dr. Malleshappa Madivalaapa Kalburgi, epigraphist and former Vice Chancellor of the Hampi University in Karnataka, killed 30 August 2015; Sandeep Kothari, journalist for the *Hindi Daily* newspaper, killed on 18 June 2015; Mithilesh Pandey, journalist for the *Dainik Jagran*, killed on 24 October 2015; Jagendra Singh, freelance journalist, killed on 8 June 2015. In the same period, the organisation continued to monitor the cases of six other cases of journalists killed.

⁹⁰ They include the murders of two journalists: Karun Misra, Ambedkarnagar bureau chief of *Jan Sandesh Times*, a Hindu Daily, killed on 13 February 2016; Rajdev Ranjan, bureau chief for Siwan of the Hindi national daily newspaper *Hindustan*, killed on 13 May 2016

⁹¹ Publisher Urvashi Butalia described how the situation has led to a twin fear: "fear of the state and fear of the lunatic fringe" (Urvashi Butalia interview, in person interview, New Delhi, 28 January 2016)

⁹² In September 2015, Shyamsundar Sonnar, a journalist with the Marathi-language daily newspaper *Pahaar*, was labelled "anti-Hindi" in an article published by Sanatan Sanshta – a Mumbai-based Hindu group. See also: Satyabrata Pal, "Where every human rights activist is labelled a Maoist: Chhattisgarh"

less relevant,⁹³ and linguistic, religious and social minorities ó which, given India's size, often comprise tens of millions of people ó face an increasingly hectoring public sphere.

54. The growing prominence of nationalist rhetoric has prompted a rise in attacks on dissent and press freedom by right-wing⁹⁴ and vigilante groups.⁹⁵ In this context, the perception of a deteriorating climate for freedom of expression is compounded by a sense of impunity for attacks as the government fails to come forward to condemn them ó providing a form of tacit approval ó or delays its response.⁹⁶ By permitting unlawful vigilantism against writers and artists, or else failing to intervene to put an end to criminal harassment and threats, the State violates its obligation to uphold freedom of expression under the ICCPR.⁹⁷

55. Individuals or groups offended by speech often invoke or threaten to invoke legislation such as that designed to prevent hate-speech in order to silence speech they do not like.⁹⁸ Writers writing in particular languages ó and thereby associated with particular groups ó are particularly vulnerable to retaliation as they are often accused of having misrepresented their own culture or to have insulted another group's culture.⁹⁹ The government often capitulates to demands of offended parties on the grounds that there is a need to protect public order, due to a risk of violent protests or communal violence.

(24 February 2016), Sabrang, online: <https://www.sabrangindia.in/article/where-every-human-rights-activist-labelled-maoist-chhatisgarh>.

⁹³ óFighting for justice is anti-national, fighting for minorities is anti-national, raising issues of inadequate jurisprudence by the Supreme Court is anti-national, so basically any questioning is anti-national,ö in Teesta Setalvad Interview, supra note 39; Kannan Sundaram Interview (In Person Interview, Jaipur, 23 January 2016) [Kannan Sundaram interview]; K Satchidanandan interview, supra note 37.

⁹⁴ An April 2016 Freedom House report notes that òa wave of threats and physical attacks in recent months, particularly from right-wing groups, [have added] to doubts about press freedom under the current Hindu nationalist government.ö See Jennifer Durham, òPress Freedom in 2015: The Battle for the Dominant Messageö (2016), online: https://www.freedomhouse.org/sites/default/files/FH_FT0P_2016Report_Final_05152016.pdf.

⁹⁵ A February 2016 *New York Times* editorial refers to a òlynch-mob mentalityö⁹⁵ within the country; Local filmmaker, Pankaj Butalia spoke of an atmosphere in which òvigilantism has been given the implicit go-ahead.ö (Pankaj Butalia interview (In person interview, New Delhi, 26 January 2016) [Pankaj Butalia interview]); Journalist and activist Teesta Setalvad explained that interview òa kind of vigilante atmosphereí is prevalentö (Teesta Setalvad interview, supra note 39).

⁹⁶ Urvashi Butalia interview, supra note 52; Pankaj Butalia interview, supra note 95

⁹⁷ In the ICCPR the protection of Article 19 is coupled with Article 2(1), which states that òEach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenantö (*International Covenant on Civil and Political Rights*, adopted 16 December 1966, General Assembly Resolution 2200A (XXI), entered into force 23 March 1976, acceded to by India on 10 April 1979, Article 2(1), online: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>).

Additionally, General Comment 34 states that Article 19, combined with Article 2(1) *requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.* (UN Human Rights Committee, 102nd Sess, *General Comment No. 34, Article 19, Freedoms of Opinion and Expression* (12 September 2011) CCPR/C/GC/34 at para 7).

⁹⁸ PEH-IHRP India Report

⁹⁹ Anjum Hasan interview (In Person Interview, Jaipur, 23 January 2016) ; Teesta Setalvad interview, supra note 39; Kannan Sundaram interview, supra note 98

56. In January 2015, novelist **Perumal Murugan** announced his own 'death' as a writer on Facebook.¹⁰⁰ The announcement followed a campaign to censor his novel, *Mathorubagan* (2010), in which he mentions a religious ceremony that permits couples to conceive a child out of wedlock.¹⁰¹ Members of the Kongu Vellala Gounder community launched the original protests provoked by Murugan's perceived slight against the town, its temple and its women.¹⁰² The protests were reportedly later reinforced by the RSS¹⁰³ and led to a book burning in Tamil Nadu.¹⁰⁴
57. In response to the protests, Murugan was asked by police to leave his hometown of Thiruchengode,¹⁰⁵ and made to sign an undertaking written by members of the community in which he agreed to withdraw the novel and avoid controversial topics in the future.¹⁰⁶
58. Despite a recent Madras High Court ruling in Murugan's favour,¹⁰⁷ his case highlights a failure by the Indian authorities to protect artists' right to freedom of expression, and to shield them from an increasingly intolerant culture.¹⁰⁸ Indeed, the same community is reported to have targeted another author in 2015.¹⁰⁹

¹⁰⁰ 'Perumal Murugan, the writer is dead,' he wrote. 'As an ordinary teacher, he will live as P Murugan. Leave him alone.' (Soutik Biswas, 'Why Indian author Perumal Murugan quit writing' (January 15, 2015) *BBC News*, online: <http://www.bbc.com/news/world-asia-india-30808747>)

¹⁰¹ Kannan Sundaram interview, supra note 93

¹⁰² Samiha Nettikkara, 'Who killed Indian author Perumal Murugan?' (14 January 2015), *BBC News*, online: <http://www.bbc.com/news/blogs-trending-30785930>

¹⁰³ Kannan Sundaram, 'It started with Perumal' (15 November 2015), *The Indian Express*, online: <http://indianexpress.com/article/opinion/columns/it-started-with-perumal/>; Kannan Sundaram interview, supra note 93.

¹⁰⁴ Mridula Chari, 'Writers condemn RSS burning of Tamil author Perumal Murugan's book' (28 December 2014), *Scroll.in*, online: <http://scroll.in/article/697505/writers-condemn-rss-burning-of-tamil-author-perumal-murugans-book>.

¹⁰⁵ AR Venkatachalapathy, 'In defence of the chronicler of Kongu' (12 January 2015), *The Hindu*, online: <http://www.thehindu.com/opinion/op-ed/in-defence-of-the-chronicler-of-kongu/article6778031.ece>

¹⁰⁶ G. Sampath, 'The importance of being Perumal Murugan' (20 March 2015), *LiveMint.com*, online: <http://www.livemint.com/Opinion/jGHIWMroXL1b7hs9ZY4VcK/The-importance-of-being-Perumal-Murugan.html>

¹⁰⁷ On 5 July 2016 Chief Justice Sanjay Kishan Kaul wrote 'Let the author be resurrected to what he is best at. Write.' The Judge rejected the idea that Murugan's book should be censored, stating 'all writings, unpalatable for one section of the society, cannot be labelled as obscene, vulgar, depraving, prurient and immoral.' (*The New York Times*, 'In India, a Spirited Defence of Writers' (10 July 2016), online: http://www.nytimes.com/2016/07/10/opinion/in-india-a-spirited-defense-of-writers.html?_r=0)

¹⁰⁸ Murugan's publisher, Kannan Sundaram, believes that part of the problem is a wider failure by the political establishment to grasp what freedom of expression means: 'Very few have clarity on the issue of freedom of expression. When they talk about freedom of expression, many think that it is the right of others to say what they agree with... In Perumal Murugan's case the local administration did not consider the fact that there is something called freedom of expression in this country which is also their duty to defend. They only took care of one aspect. Order has to be maintained, peace has to be maintained. And therefore the writer must be asked to yield to the angry mob.' (Kannan Sundaram interview, supra note 93).

¹⁰⁹ In February 2015, novelist Puliyur Murugesan was reportedly abducted from his home in Karur, Tamil Nadu, and attacked. Murugesan had reportedly recently received a telephone call from a leader of the Kongu Vellalar Gounder community asking him to meet and explain his work. Three days before the attack, charges were brought against him under five separate sections of the IPC relating to

59. Vigilantism is also apparent in the digital sphere, where social media trolls attack and threaten voices of dissent¹¹⁰ and where complaints about online threats are frequently ignored by law enforcement.¹¹¹ Women are particularly vulnerable online,¹¹² and rape threats are commonplace.¹¹³ Non-writers expressing their thoughts online can also receive abuse.¹¹⁴ There is also evidence that this harassment is condoned by those in government. On 1 July 2015, Prime Minister Modi stirred up controversy after meeting privately with ultra-nationalist social media activists accused of online abuse.¹¹⁵
60. The closing space for freedom of expression has led many to self-censor¹¹⁶ and/or made them closely examine what they choose to write and publish for fear of retaliation.¹¹⁷ This is compounded by doubts that the police will either take complaints seriously¹¹⁸ or protect them from harm.¹¹⁹ Additionally, some

obscurity, defamation and provocation of breach of peace, among other charges, in connection with his collection of short stories *Balachandran Enroru Peyarum Enaku Undu* (December 2014), which featured a story dealing with incest, forced marriage, sexual harassment, and transgender issues. Anticipatory bail was granted on the condition that he signs in daily with the local authorities. (*First Post*, "The tragedy of Puliur Murugesan: Tamil writer first beaten, then slapped with obscenity case" (2 March 2015), online: <http://www.firstpost.com/india/the-tragedy-of-puliur-murugesan-tamil-writer-first-beaten-then-slapped-with-obscenity-case-2131145.html>).

¹¹⁰ K. Satchidanandan interview, supra note 37; Freedom in the World 2016 Report, supra note 18; Apar Gupta interview, supra note 19; Nikhil Pahwa interview (In person, New Delhi, 26 January 2016) [Nikhil Pahwa interview].

¹¹¹ Anja Kovacs et al. "Don't Let it Stand!" (2013), Internet Democracy Project at 46, online: <https://internetdemocracy.in/wp-content/uploads/2013/12/Internet-Democracy-Project-Women-and-Online-Abuse.pdf>; Shelly Walia, "The brutal, sexist harassment Bollywood actresses face on Twitter" (10 September 2015), Quartz India, online: <http://qz.com/498555/the-brutal-sexist-harassment-bollywood-actresses-face-on-twitter/>.

¹¹² Nikhil Pahwa interview, supra note 110; Chinmayi Arun interview, supra note 52.

¹¹³ Kovacs et al. "Don't Let it Stand!" (2013), Internet Democracy Project at 23, online at: <https://internetdemocracy.in/wp-content/uploads/2013/12/Internet-Democracy-Project-Women-and-Online-Abuse.pdf> [Don't Let it Stand!]; Teesta Setalvad interview, supra note 39

¹¹⁴ Shoikat Roy, a government employee in Rajasthan, described the chill this sort of harassment can have on young professionals stating, "there are lots of stray cases of random students and professors being beaten up here and there because of a tweet or [Facebook] post" often involving tacit police complicity. Shoikat Roy Interview (Email, 26 February 2016)

¹¹⁵ For example, PM Modi met with Tajinder Pal Bagga, leader of the Bhagat Singh Kranti Sena (BSKS), which rose to notoriety after its members violently assaulted a Supreme Court lawyer on film after he made controversial statements about Kashmir. See "Twitter Trolls among #Super150 Invited by PM Modi" (6 July 2015), The Quint, online: <http://www.thequint.com/india/2015/07/06/twitter-trolls-among-super150-invited-by-pm-modi>.

¹¹⁶ "Literary Censorship in the Era of the Internet," *Times of India*, (21 February 2015), online: <http://timesofindia.indiatimes.com/city/chandigarh/Literary-censorship-in-the-era-of-internet/articleshow/46319279.cms> (accessed: 31 July 2016)

¹¹⁷ Urvashi Butalia interview, supra note 52; Kannan Sundaram Interview, supra note 93; Anonymous Interviewee (In person interview, Jaipur, 24 January 2016); Malini Subramaniam interview (Telephone, 27 July 2016) [Malini Subramaniam interview]; Teesta Setalvad interview, supra note 39.

¹¹⁸ In 2015, journalists with the newspaper *Khabar Lahariya* a publication run by 15 women in Banda, Uttar Pradesh reported the police's failure to take action for nine months after they were subjected to a campaign of stalking and subjected to rape threats (see Kavita, "More Updates* The Policeman Said: Why Don't You Tell Me What Gaalis He Whispers in Your Ear?" (14 September 2015), *The Ladies Finger*, online: <http://theladiesfinger.com/the-policeman-said-why-dont-you-tell-me-what-gaalis-he-whispers-in-your-ear/> (accessed 31 July 2016)). The subject was eventually apprehended, following public outcry in response to the abovementioned article ("Is one case cracked meant to pacify us, and redeem you from a greater, graver responsibility?" *Khabar*

fear that many lawyers lack training on how to advocate along the lines of freedom of expression.¹²⁰

61. In the current climate, publishers report rising fear of facing legal proceedings, as well as concerns for the safety of staff and their families who might be put at risk of violence in retaliation for their choice of publications.¹²¹ Such concerns have led publishers to become increasingly cautious in their selection of titles and how they are marketed.¹²² Subjected to particular scrutiny are writings on religious icons ó that could lead to blasphemy lawsuits or reprisals from religious groups ó works related to conflict zones, such as Jammu and Kashmir, or manuscripts that could lead to anti-national questioning.¹²³
62. Investigative journalists outside metropolitan areas, who write on sensitive issues, are at increased risk of attack or harassment.¹²⁴ In areas of conflict, journalists often find themselves caught in the middle. Journalists in these regions face reprisals for their coverage, both on the part of state actors ó in terms of threats and legal action ó and non-state actors.¹²⁵ In both cases, journalists are assumed to be taking sides and are retaliated against accordingly.¹²⁶
63. Journalistic reports perceived to differ from the official account could result in accusations of sympathising with insurgents¹²⁷ and in charges being laid under the *Unlawful Activities (Prevention) Act, 1967*,¹²⁸ the IPC's sedition provision, or other region-specific national security statutes, among others. Further to

Lahariya's Open Letter to CM Akhilesh Yadav, (21 September 2015), The Ladies Finger, online: <http://theladiesfinger.com/a-congratulatory-note-tinged-with-regret-khabar-lahariyas-open-letter-to-the-cm-of-uttar-pradesh/> (accessed 31 July 2016); Teesta Setalvad interview, supra note 39

¹¹⁹ Teesta Setalvad interview, supra note 39; Apar Gupta interview, supra note 19; Prasanto K Roy, 'Why online harassment goes unpunished in India' (17 July 2015), BBC, online: <http://www.bbc.com/news/world-asia-india-33532706>

¹²⁰ Pankaj Butalia interview, supra note 95

¹²¹ Urvashi Butalia interview, supra note 52; Chinmayi Arun interview, supra note 52; Seema Chisti, 'Batra again: Book on sexual violence in Ahmedabad riots is set aside by publisher' (4 August 2014), *The Indian Express*, online: <http://indianexpress.com/article/india/india-others/its-batra-again-book-on-sexual-violence-in-ahmedabad-riots-is-set-aside-by-publisher/99/> (accessed 31 July 2016).

¹²² Rajeev Dhavan interview, supra note 24; Urvashi Butalia interview, supra note 52; Chinmayi Arun interview, supra note 52

¹²³ Urvashi Butalia interview, supra note 52

¹²⁴ Rajeev Dhavan interview, supra note 24; Malini Subramaniam interview, supra note 117

¹²⁵ Such as was found to be the case by a recent fact-finding team of the Editors' Guild of India who travelled to the state of Chhattisgarh, where the security forces continue to be embattled with Maoist insurgents. ('Challenges to journalism in Bastar: Report by the fact finding team of the Editors Guild of India,' (13-15 March 2016), available online through Scroll.in: <http://scroll.in/article/805866/not-a-single-journalist-working-without-fear-or-pressure-editors-guild-on-bastar> [Editors Guild Report])

¹²⁶ Editors Guild Report, supra note 130

¹²⁷ Malini Subramaniam interview, supra note 117; Teesta Setalvad interview, supra note 39; Freedom in the World Report 2016 Report, supra note 18.

¹²⁸ In October 2015, a colonel with the Assam Rifles reportedly wrote to the editors of five newspapers warning them off reporting on a recent statement made by the National Socialist Council of Nagaland (Khalpang) (NSCN-K). In the letter, the colonel pointed out that that any article which projected and publicized the demands of the NSCN K was a violation of the Unlawful Activities (Prevention) Act and should not be published. (The HOOT, 'Unlawful to report militant statements' (10 November 2015), online: http://www.thehoot.org/story_popup/unlawful-to-report-militant-statements-9015 (accessed 31 July 2016))

this, journalists' ability to fully investigate a story and report in an unbiased manner is hampered by authorities' restrictions on access to certain areas.¹²⁹

64. In Chhattisgarh, journalists face a stifling climate: several journalists in the region have been killed by rebels in the course of their duties;¹³⁰ meanwhile several journalists and stringers have been arrested, suspected of having connections to and sympathies with Maoists.¹³¹ In addition, at least three journalists have faced harassment at the hands of private individuals and vigilante groups such as the Samajik Ekta Manch.¹³² Indeed, the Editors Guild of India revealed that they could not find a single journalist in the region that could say that they were working without fear.¹³³

65. In the absence of credible efforts to clamp down on threats, writers and others will continue to steer clear of certain sensitive topics, fearful for their safety. As freedom of expression suffers, so too does freedom of information. The impact extends beyond curtailing writers' everyday freedom of speech. It affects their work, and the harm done to their work impacts society at large.

d) Surveillance and the right to privacy

¹²⁹ Malini Subramaniam interview, supra note 117; Teesta Setalvad interview, supra note 39

¹³⁰ Sai Reddy was killed in 2013. Maoist rebels reportedly suspected him of being loyal to the security forces. In the same year, Nemi Chand Jain was also killed by Maoist who thought that he was passing messages to the security forces (see: PEN Case List 2015, supra note 48; Editors Guild Report, supra note 130).

¹³¹ Journalists Santosh Yadav and Somaru Nag were imprisoned 2015 for alleged connections to Maoists (see: Editors Guild Report, supra note 130; *oPEN Delhi & PEN All-India condemn the harassment of Chhattisgarh journalists* (12 February 2016), online: <http://www.pen-international.org/centresnews/pen-delhi-pen-all-india-condemn-the-harassment-of-chhattisgarh-journalists/>). In 2016, journalists Prabhat Singh and Deepak Jaiswal were also detained (Geeta Seshu, *oBastar Journalists and Jail, a year on*, (14 July 2016), *The Hoot*, online: <http://www.thehoot.org/free-speech/media-freedom/bastar-journalists-and-jail-a-year-on-9489>).

¹³² On 26 March 2016, a crowd of almost a hundred people marched through the village of Parpa, where Chhattisgarh-based researcher and journalist Bela Bhatia resides, shouting slogans against her, circulating pamphlets labelling her a *oMaoist* and demanding she leave Bastar. The group is thought to have been led by police and their supporters, including the Samajik Ekta Manch, and to be connected to her February report in *Outlook* magazine, which exposed alleged rapes of and assaults by police and security forces on indigenous people in Bastar *o* allegations that they have denied. (Committee to Protect Journalists (CPJ), *oSecond Indian journalist arrested in Chhattisgarh in one week*, (28 March 2016), online: <https://cpj.org/2016/03/second-indian-journalist-arrested-in-chhattisgarh-.php>); According to CPJ, Alok Prakash Putul *o* a journalist with the BBC's Hindi Service *o* fled Bastar, Chhattisgarh, on 20 February 2016, after residents warned him about his safety (CPJ, *oPress Freedom Crisis in India's Chhattisgarh state deepens as two journalists flee Bastar* (29 February 2016), online: <https://cpj.org/2016/02/press-freedom-crisis-in-indias-chhattisgarh-deepen.php>); Contributor to the independent, online news website scroll.in, Malini Subramaniam, felt forced to flee Chhattisgarh on 18 February 2016 following a campaign of harassment on the part of the police and their supporters, including the Samajik Ekta Manch, which though forced to disband after pressure, continues to operate under a different name with the active support of the authorities (Malini Subramaniam interview, supra note 117; *oPEN Delhi & PEN All-India condemn the harassment of Chhattisgarh journalists* (12 February 2016), online: <http://www.pen-international.org/centresnews/pen-delhi-pen-all-india-condemn-the-harassment-of-chhattisgarh-journalists/>; PEN International, *oIndia: Chhattisgarh journalist must be protected from further harassment*, (12 February 2016), online: <http://www.pen-international.org/newsitems/india-chhattisgarh-based-journalist-must-be-protected-from-further-harassment/>).

¹³³ Editors Guild Report, supra note 130

66. Several pieces of legislation permit the use of surveillance in order to protect defence, national security, sovereignty, friendly relations with foreign states, public order, and prevent incitement of a cognisable offence; they include, but are in no way limited to the Telegraph Act, 1885 and the ITA, 2000. Further, a 2008 amendment to section 69A broadens the scope of permissible surveillance by allowing it to be used during the investigation of any offence.¹³⁴
67. Section 69A of the ITA provides for mass surveillance, permitting the authorities to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource. The government's roll-out of the Central Monitoring System (CMS) raises concerns of digital surveillance and its corollary, digital censorship.
68. There is little opportunity for anonymity on the internet in India; the 2011 Information Technology (Guidelines for Cyber Cafe) Rules¹³⁵ introduced under section 79 of the ITA require cybercafés to register their customers and retain copies of a government-issued ID, logs of user information and browsing history for a period of one year.¹³⁶ In addition, mobile telephone customers – the most frequent form of accessing the internet in India – must have their identities verified before their connections can be activated.¹³⁷
69. The Constitution of India does not specifically guarantee the right to privacy; however, it has been interpreted by the courts to exist through other rights, such as the right to life and liberty.¹³⁸ The failure of the Indian State to enshrine the right to privacy as a fundamental right means that the right remains weak and subject to ill-defined restrictions. Currently, there is no statutory redress mechanism that an individual can resort to for illegal interception.
70. The stakeholder coalition understands that a draft privacy bill is currently being drafted, which would recognise the right to privacy as a fundamental right under Article 21 of the Indian Constitution, establish a Data Protection Authority, among other welcome reforms. However, concerns have been raised that law enforcement agencies are seeking exemption.¹³⁹ Such exemptions would place the scope and effectiveness of the bill under question.

¹³⁴ Freedom House, Freedom on the Net 2015, p21, online: https://freedomhouse.org/sites/default/files/resources/FOTN%202015_India.pdf [Freedom on the Net 2015 report]

¹³⁵ Department of Information Technology, Information Technology (Guidelines for Cyber Cafe) Rules, 2011, [http://deity.gov.in/sites/upload_files/dit/files/GSR315E_10511\(1\).pdf](http://deity.gov.in/sites/upload_files/dit/files/GSR315E_10511(1).pdf)

¹³⁶ Ibid.

¹³⁷ Freedom on the Net 2015 report, p21.

¹³⁸ Privacy International, *State of Surveillance* (6 March 2016), online: <https://privacyinternational.org/node/738> (accessed 31 July 2016); Apar Gupta interview, supra note 19.

¹³⁹ Freedom on the Net 2015 Report, supra note 139.

71. Freedom of expression and an individual's privacy are inextricably linked.¹⁴⁰ To make original contributions to public discourse, writers must be confident that their privacy is protected. The freedom to communicate with whomsoever one chooses, away from the prying eyes of the state, is an essential condition for creativity and critical writing, and especially for the expression of dissent.

e) Recommendations

- Accept all recommendations pertaining to freedom of expression noted in the second cycle of the UPR;
- Amend Article 19(2) of the Constitution to remove restrictions on freedom of expression note provided for under international law, withdraw reservations and declarations made to Article 19(3) of the ICCPR and bring all legislation into line with the ICCPR and international legal standards;
- Submit overdue reports in India's implementation of the ICCPR to the UN Human Rights Committee without further delay;
- Extend an invitation to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;
- Repeal all laws that unnecessarily restrict freedom of expression, including s. 153B of the IPC; s. 295A of the IPC; s. 499 of the IPC; s. 124A of the IPC; s. 505 of the IPC; those provisions of the ITA that unduly limit speech and which are inconsistent with Article 19 of the ICCPR, in particular s. 69A; Contempt of Court Act, 1971;
- Amend vague and overbroad laws that threaten freedom of expression, including s. 153A of the IPC to ensure that it only captures speech which advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, consistent with Article 20 of the ICCPR; s. 292 of the IPC to only limit speech that is truly obscene, that is, having a dominant purpose related to the undue exploitation of sex, or which combines sex and crime, horror, cruelty, or violence; s. 95 of the Criminal Code of Procedure to require a hearing and judicial authorisation, as well as reasonable grounds to believe that publications or materials violate a particular provision of the IPC, prior to seizure; the Customs Act to only allow seizure of items alleged to violate the IPC, and include a process of re-determination and appeal by the importer and/or creator; eliminate provisions of the ITA duplicative of existing IPC provisions such as s. 67 (Punishment for publishing or transmitting obscene material in electronic form);
- Enact legislation to combat Strategic Lawsuits Against Public Participation (SLAPP);
- Institute a screening mechanism to review complaints against authors and artists before allowing complaints to proceed to prevent vexatious and groundless trials, as recommended by the People's Union for Civil Liberties in the case of Perumal Murugan;

¹⁴⁰ Article 17 of the ICCPR protects the international human right to privacy, and Article 19 protects the rights to freedom of expression and freedom of information. These rights are also protected by the Universal Declaration of Human Rights, under Articles 12 and 19 respectively. The Human Rights Committee, which oversees states' implementation of the ICCPR, has elaborated on the interrelationship between the right to privacy and the right to freedom of expression in its General Comment 34.

- Train more police to recognise and investigate attacks and abuse, including online threats, against writers and journalists;
- Ensure that any measures limiting freedom of expression on the internet are based on clearly defined criteria in accordance with international human rights standards and are clearly prescribed, necessary and proportionate.
- Provide more accountability and transparency in content blocking;
- Adopt a comprehensive privacy law providing effective protection of individuals' communications and other personal data and effective redress against abuses.