Notes & Comments

Offend, Shock or Disturb: Free Speech under the Indian Constitution

Abstract

According to the prevailing currents, books are no longer harboured safely in the docks of our collective wisdom. It seems our imagination is no longer afloat on their hardbound vessel, no longer seeking newer shores. No longer are we yearning for the companionship of a familiar sailor whose pen can plunge us into the ephemeral only to spring up something eternal.

Yet there is one place, one institution which seems to be aware of the potency of ideas which birth and shape books. We are talking about the Indian judiciary. This was apparent from the recent observations read out by a single judge bench of the Bombay High Court. The judge had been piqued by a book, whose possession by some activists was deemed seditious by the police. The media misunderstood and misquoted him and decried his denunciation of a literary marvel. What escaped everyone's attention was whether books can so possess individuals, making them a pawn in a devious plot to shred the fabric of the state? Whether the wider perception of a book's potential to radicalize is sufficient in implicating a reader as indoctrinated by its sermons? Or are they docile creations which can only stir impulses, which need to be acted upon by individuals? Thus is it the observer or the reader and not the book or its creator who is responsible for his actions? Since hard-bound covers have given way to pixilated screens and podcasts house the best prose, these inquiries can no longer be restricted

to booksalone.

To even attempt to answer these questions we need to re-examine the jurisprudence behind the right to freedom of speech and expression. This endeavour would be incomplete if one were to forgo an analysis of Gautam Bhatia's seminal contribution to this field, his book entitled: Offend, Shock or Disturb? In the book Bhatia utilizes two primary techniques to outline the fundamental right to freedom of speech and expression in our polity. The first involves a comparison between the protections afforded to the right in various countries, especially those following the common law tradition. Notable examples include the first Amendment in the American Constitution as a benchmark on how to expand the reach of this freedom. The Canadian Constitution is also referenced as a guide for framing speech protective laws in a welfare state. While the South African Constitution serves as a barometer for measuring the progress made by post-colonial states in preserving civil liberties, including the freedom to express one-self freely. The second approach involves differentiating between the philosophical and doctrinal study of free speech jurisprudence. This includes an examination of how the courts have carved doctrines which depart from the philosophical basis for the existence and exercise of the concerned right in our polity. The author's eventual aim behind writing this book is to see the state furthering the fundamental rights (including freedom of speech and expression) of its citizens and only restricting them after adducing sufficient and justifiablereasons.

Monitor Without Control: Reasonable Restriction Over Complete Silencing

Throughout the book our attention is drawn to the provisos contained within Article 19(2) of the Constitution of India. The author does not believe that they control (or should control) the exercise of the right. Instead they are to determine the extent to which the government can regulate the right. The author constantly analyses the necessity and extent of abridgment of the right upon the various features of speech.

The first feature is the content of the speech. The author is not an absolutist and believes that speech can be curbed on the basis of what it conveys. While the examples that he quotes (like stopping a nihilist from expressing a desire to murder being reasonable) are extreme in nature, they nonetheless point to an understanding that some forms of expression (not restricted to speech) should be outlawed. While unrestrained venting of one's thoughts is vital for self-fulfillment of an individual,[1] the author does concede that this argument cannot be bought without reservations. Were this to become a reality then the state would be prohibited from checking vices like gambling, which despite providing a plausible path to fulfillment may have a nefarious impact on the

[1]Union of India v. Naveen Jindal and Another, (2004) 2 SCC 510.

wider society.

To probe the extent to which this regulation can be permitted, the author proposes two frameworks. The first model is the liberal autonomous one under which the state desists from making any moral judgments on the utterances of any citizen. Here the citizens are allowed great latitude by the state which only inhibits their speech if it is bound to cause an obvious harm.

The second model is based on a paternal state under which the state either prescribes or enforces the citizen's conduct for fulfilling its conception of what is moral or righteous. An interesting scenario for understanding the difference between the workings of these models would be the case in which the Supreme Court had read 'his' under Section 123(3) of Representation of People's Act, 1951 to include the listener.[2] This was meant to stop candidates from appealing to religious sentiments while canvassing for votes. An interesting inquiry would be whether seeking vote on any other personal characteristic of the electorate (like gender) can be similarly curtailed. The second feature is the nature of the speech and its purpose. Here the author ventures into examining the difference between political and economic democracy. He discusses the significance of the degree of autonomy to be granted to the individual to consume information and express themselves in the aforesaid spheres. He draws a distinction between the citizen (individual) and the consumer in the extent to which they should have access to and the ability to disseminate information. He concludes that the former's needs require prioritization over the latter's. He further advocates for the state's tolerance towards unpopular opinions so that citizens can vote after being armed with as much information as possible which would strengthen democracy as a whole. However this doesn't mean that consumers need not be protected in the economic sphere which is imperative due to the unequal bargaining power between them and the corporations. Hence consumers also need to be protected from making rash decisions on being misled by false advertisements.

The next feature is the public reception of a form of expression. Here the author explores the significance of the endorsement of a speech by a majority within the polity. What is its bearing on speech which can't either be supported or shunned, but acts as a window into how society is organized?[3] To probe these questions the author leans on Habermas' concept of egalitarian democracy which hinges on inclusive dialogue amongst members of a society. Habermas

[2] Abhiram Singh v. C.D. Commachen, (2017) SCC 9.

[3] SUJATHA GIDHLA, ANTS AMONG ELEPHANTS: AN UNTOUCHABLE FAMILY AND THE MAKING OF MODERN INDIA (Farrar, Straus and Giroux: 2017).

emphasizes on accessibility to a public sphere replete with ideas rather than on protecting speech that's considered publicly important.[4] Hence even if one believes that free markets discriminate against those who are destitute by preventing them from expressing their opinion (or choices), an advocacy for their adoption shouldn't itself be muffled. To buttress this claim he cites *Marsh v Alabama*[5], in which the Supreme Court of USA had allowed the residents of a private gated town to display banners on street corners. The court reasoned that towns were places where public discourse should be allowed to flourish regardless of whether it was a public property or a private concern.

The fourth feature involves a discussion on what constitutes morality when it is read as a restriction under Article 19(2) of the Constitution of India. It can either be interpreted as public, individual or constitutional morality. Public morality is subjective and the aversion of its custodians to open dialogue may perpetuate biases. If the state were to defer to notions of morality which owe their legitimacy to mere popular approval, then individuals not conforming to them would be left at the mercy of a hostile majority.

We now come to a constitutional morality which is heavily influenced by the principles woven so exquisitely in the Preamble of the Constitution of India. Constitutional morality presupposes that the individual is the basic unit of the state and that no individual can be discriminated against by the state. It also aims to secure the liberty of the citizens while fostering a fraternal bond between members of the society. Then the author clarifies that constitutional morality will not always promote unfettered speech. For instance, it can be used to curtail obscene content like violent pornography which treats women as unthinking objects to be toyed with for male pleasure.

He concludes by saying that the term public preceding order, morality and dignity in Article 19(2) of the Constitution of India should only qualify the first expression, i.e., public should only be attached to order while testing the constitutionality of speech. However constitutional morality by itself will not help us in deciding which value amongst liberty and equality has to be prized more when it comes to either protecting or probing speech. An illustration showing how these values can be arrayed against each other is the *Sakal Chand Papers*[6]case. The proprietors of some newspapers had filed a case

---

[4]Douglas Kellner, Habermas, *The Public Sphere, and Democracy: A Critical Intervention* (2020), https://pages.gseis.ucla.edu/faculty/kellner/papers/habermas.html.

[5]326 U.S. 501 (1946). (last accessed on 24/04/2021)

[6]Sakal Papers (P) Ltd. And Others And B. N. Sarpotdar and Another v. Union of India and Others, (1962) 3 SCR 842.

challenging a notification through which the government had wanted to price newspapers according to their number of pages. The government had also placed restrictions on the amount of space that a newspaper could devote for advertising. The intention behind these measures was to allow newer entrants (with lesser resources) to compete with existing giants of the industry. The government surmised that this would lead to more curators in the markets which would enhance circulation of diverse opinions keeping the citizenry adequately informed. The court struck down the regulation by deeming it to be an infringement of the freedom of expression of the extant publications. Thus liberty of the existing publishers was valued more than the equality between them, for promoting awareness amongst the citizens.

As for where the author's allegiance lies when it comes to balancing between these values one can guess that he prefers preserving equality if it's in conflict with the liberty of those seeking to benefit from the imbalance of power. This can be evinced from his distinguishing between offence (a subjective and communitarian concept) and insult (more akin to objective ridicule) to disparage hate speech. He further uses this distinction to show that hate speech insults minorities and further widens the gulf between them and their deprecators which justifies their proscription.

Gatekeepers or Guardians:- How the Judiciary Views the Right to Freedom of Speech and Expression

Before discussing how the judiciary interprets the laws restricting the freedom of speech and expression it would be wise to analyze the nature of the laws themselves. An apt illustration (quoted widely by the author) would be Section 95 of the Code of Criminal Procedure, 1973, which puts the onus on the citizens to show that their speech is not offensive. The provision emphasizes on the words 'it appears' as opposed to 'its proven'. This gives greater leeway to the executive to clamp down on speech deemed annoying or unpleasant. This over-breadth and vagueness is also found in the wording of Article 19(2) of the Constitution of India itself. This Article states that speech can be reasonably restricted 'in the interest of' public order. A more appropriate terminology would have been to allow for reasonable restrictions 'for the maintenance of' public order'. This would make the state justify its action against the citizens rather than banning speech on the pretext of protecting them. Another issue identified by the author is that most of the legislation covering utterance of harmful speech make it a cognizable offence. This means that citizens can be immediately deprived of their physical liberty even before the content and effect of their speech can be thoroughly examined. The problem is compounded due to textual restrictions and judicial endorsement

of the heckler's veto by invoking tests like the contemporary community standard for assessing the harms associated with a speech. These factors combine to make the citizens overly cautious and chills their speech. It is in light of these observations that the following critique needs to be read and analyzed.

Firstly, the author implores the courts to disavow the 'pathological prescription' when interpreting laws restricting expression. Courts should not be unduly deferential to the state which over-estimates the extent to which speech and expression can subvert its functioning. The unjustness of the harsh restrictions is intensified because the state acts as a judge in its own cause. Thus the author asks the judiciary to use principles of natural justice to balance between the right of the individual to speak and the need to preserve public order. A judiciary that is supplicate to the executive is co-opted as part of a security state obsessed with order which leaves the citizens with no recourse in case of a transgression of their rights. Fortunately recent events do bear out that the fact that the judiciary is willing to affirm (if not apply) these salutary principles.[7]

Next, the author discusses the standards that should be adopted by the judiciary while determining whether a speech is dangerous. He notes the primary ones which dominate in common law jurisdictions: the 'tendency to incite' or the 'present and clear danger' test and the 'proximity to incitement or imminent lawlessness' test.[8] The former is discretionary while the latter makes it harder for the state to unilaterally curtail our rights. The tendency test gives rise to the heckler's veto and entails a subjective analysis of the harms arising from a speech. The proximity test is more concrete and operates when intention or motive to incite is palpable or the listeners' autonomy to process speech is vitiated. Here the author cites Scanlon,[9] who distinguished between giving people the means as opposed to a reason to do something. Under the imminent lawlessness test, it is the former that should be penalized while the latter can be depending on the context.

Coming to domestic case-laws the author mentions that the courts initially preferred the Hicklin Test, a variant to the tendency to incite test.[10] This test is used for shielding the gullible and the corruptible from indulging in violence on being incensed by an inflammatory speech. More recently, *Shreya*

[7]Anuradha Bhasin v. Union of India And Others, (2020) SCC Online SC 25.

[8]Brandenburg v. Ohio, 395 U.S. 444 (1969).

[9]T. M. SCANLON, WHAT WE OWE TO EACH OTHER (HUP: 2000).

[10]Ramji Lal Modi v. State of U.P. , (1957) SCR 860.

Singhal[11] has reconciled the observations in these cases, and so has *Lohia*[12] entrenched the imminent lawless paradigm. As an aside, *Shreya Singhal* was also instrumental in junking the notion that communication over the internet needs additional patrolling because of its ability to disseminate information instantly and to wider audiences. Here one can draw parallels between the internet and cinema as a medium of expression, the latter having been subject to strict scrutiny by the state since its inception for its cultural significance. The author concludes this segment with the hope that *Singhal* will make the government treat citizens as thinking, reflective beings to be left alone rather than as a horde of uncritical mass that needs shepherding. In his estimation, this would facilitate individuals in embellishing our culture through their artistic pursuits, rather than being pummeled into submitting to the prevailing norms.

The author also devotes a chapter to defamation as an offence. He cites various cases from foreign jurisdictions to show how its presence hasn't deflated the right of the press to comment on issues of public importance. First he mentions *NYT v. Sullivan*[13] in which the US Supreme Court had rejected the strict standard of no fault liability for testing the defendant's claims in defamation cases. This freed the press from the fear of mistaken reporting if done without malice. Next he quoted *Holomisa v. Argus*[14] in which the South African Supreme Court converted defamation from a tortuous offence to one subject to principles which could be located within a codified constitution. Hence now the burden lies on the aggrieved to show that the statements were made with the intention to injure reputation. Another important case was *Bogoshi*[15] in which it was held that privacy of public officials isn't protected to the same extent as ordinary citizens. This contention was also debated in depth in our realm in the *Rajagopal* (Auto Shankar)[16] case. In this case, court had opined that public officials cannot sue for defamation if comments are made on their official duties unless their dignity is being impaired. Also publications based on public records could not be prohibited under the garb of protecting the privacy of public officials. However, the court failed to define public record which did dilute the impact of this judgment.[17] It is also unclear whether the

[11]Shreya Singhal v. Union of India, 2015(5) SCC 1.

[12]Ram Manohar Lohia v. State of Bihar And Another, (1966) 1 SCR 709.

[13]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[14]Holomisa v. Argus Newspapers Ltd., 1996 (2) SA 588 (W).

[15]National Media Ltd v. Bogoshi, 1998 (4) SA 1196 (SCA).

[16]R. RajaGopal v. State of Tamil Nadu, 1995 AIR 264.

[17]Phoolan Devi v. Shekhar Kapoor And Ors, 57(1995) DLT 154.

Supreme Court of India settled on an undue malice standard *(NYT v. Sullivan)* or a reasonable restriction standard found in UK, Canada and South Africa when adjudicating disputes pertaining to defamation of public officials or their functions. The author goes on to mention that these gains were momentary since in *Petronet*[18] the court effaced the protections afforded to speech adverse to either public officials or the public function of corporations. Considering the spate of recent judgments which have expanded and improved our understanding of the topic, this section seems in need of revisiting.[19]

Finally the author examines the relationship between contempt of court and sedition. He notes that the former originates from disobedience, while the latter springs from disaffection. According to him both should not be punishable offences because the judges(in the former) and the state(in the latter) are consumed by the pathological problem while determining their existence. He then illustrates how this leads them to inflate the threat posed by speech, making them prone to abridge it in a disproportionate fashion.[20] In the aforementioned case, the court had held that acts which erode faith in the judiciary rather than those which impede justice constitute contempt. The author claims that this conflates the reputation of a judge with that of the judiciary, which shields the institution and the individual from public criticism. He also opines that sufficient safeguards exist in the Indian Penal Code,1860, for preventing someone from impeding the right to a fair trial for an accused which was the original and only justifiable intent behind promulgation and persistence of the offence.

Not My Tempo but You Can Voice Your Lyrics: A Non-Orchestrated yet Harmonious Code

Laws and the procedures that they prescribe are abused because they exist in the first place. Hence extant legislation (especially pre-constitutional enactments like the IPC) and ones to be promulgated in the future need to be constantly evaluated for their fitness for our times.[21] Here the legislature is responsible for the realization of our rights and has an even more important role than the judiciary entrusted with safeguarding them. However our legislatures abdicate their responsibility by drafting imprecise laws which allows the executive to use their vagueness for arbitrarily restricting our rights. Unfortunately the author has shown that even the courts aren't immune from shirking their duty

[18]Petronet v. Indian Petro Group, (2009) 95 SCL 207.

[19]Justice K.S. Puttaswamy (Retd.) and Another v. Union of India, (2017) 10 SCC 1.

[20]Dr D.C. Saxena v. Hon'ble The Chief Justice of India, (1996) 5 SCC 216 .

[21]Navtej Singh Johar v. Union of India, 2018(10) SCALE 386.

of canalizing these ambiguities to enhance the civil liberties of the citizens. Instead they choose to adopt an easier stance by deferring to the executive which cloisters the rights according to its own convenience. To overcome this apathy the author calls for our administrators (and courts) to use the doctrine of proportionality as a bedrock of the culture of justification before curtailing civil liberties of the citizens. This is necessary to ensure that our rights remain fundamental and their restrictions an aberration. To conclude, the book is a sterling addition to the canons on the freedom of speech and expression. It needs to be read widely for stirring and then anchoring debates for enlarging one of our many invaluable freedoms.

- Rahul Mohan Sharma*

*Advocate, Uttarakhand Bar.