Issue 41

July, 2015

Ensouth

The E-magazine brought to you by

N South

Advocates

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At a Glance

Managing Partner's message

Ensouth is in our eleventh year of publication yet the issues we butt heads with have not changed very much. Is it because as a society, we do not change very much? I would like to think not. More likely, the core issues that humanity faces remain the same, regardless of epochs, cultures, language or religion. Among these core issues is the one of personal liberty. How far do you really want your individual to be free? Free to follow a profession of his choice, live where he likes or marries who he likes? And free to think what he likes, say what he likes and abuse who he likes? Maybe even be free to murder who he dislikes?

Yes, we can all agree that there are limits to individual freedom because at some point, the cost to society far outweighs the benefit to the individual.

In **India's Silenced Daughters**, we examine the limits to free speech in the context of the documentary on the Nirbhaya rape case and argue that whatever the else the criterion may be, the limit to free speech cannot be defined by the reaction of the audience to that piece of free speech.

Next, since Justice Nariman of the Supreme Court so sagaciously struck down Section 66A of the Information Technology Act, we ask ourselves if our **Freedom to Offend** is any the wider for the judgment.

This brings us to another core issue confronting our society: institutions that promote the interests of the service providers, rather than the consumers. The Government is of course a brilliant example. In **Striking Disservice**, we examine how this is equally true of the lawyer community.

Happy Reading!

Ranjeev Dubey

Print Media

Comment-1

Fine Print: India's Silenced Daughters

Unless we can find a reasonable way to extract ourselves out of the Audience Reaction Test and the compulsions of public order, it may be RIP, Indian Freedom of Speech

Ranjeev C. Dubey

We may not have noticed but India seems to be having a Charlie Hebdo moment. Given the rioting in Rajpath in December 2012 following the horrific Nirbhaya Rape case, the Government has moved to pre-empt public outrage over Leslee Udwin's documentary "India's Daughter" by banning it. I dislike bans, be they books, movies, taxi services or even BT Brinjal. That doesn't mean I like murdered journalists, nor do I think that widespread rioting and violence is a necessary sacrifice to secure an extreme form of perfect personal liberty. Blowing still in the wind is that frustrating question again: how far do you want your freedom of speech to go?

Our founding fathers who framed our Constitution thought they had a very clear answer when they constituted us into a democratic republic. Article 19(1)(a) therefore gave us 'freedom of speech and expression' but restricts this right "in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." In the years since we adopted this constitution, we have framed an awful lot of laws to restrict this right. These laws have taken their share of judicial scrutiny.

Judicial thought on this critical aspect of modern liberalism is echoed in a succession of Supreme Court decisions. **K.A. Abbas v. Union of India** [AIR 1971 SC 481] arose when a lefty pioneer of neo-realistic cinema made a documentary called 'Tale of Two Cities' juxtaposing shots of buildings with the squalid slum-side lives of those who built these edifices. He threw in images of prostitutes for good measure. The Censor Board approved the movie for adult viewing only and Abbas went to court to claim a "U" certificate. Did pre-censorship violate his fundamental right to speech and expression? The court did not agree. It ruled that movie censorship had been established by law and it set out a very precise criteria of acceptability, placing limits on issues around 'seduction,' 'immoral traffic in women,' 'soliciting, prostitution or procuration (sic),' 'indelicate sexual situation' and scenes suggestive of immorality,' 'traffic and use of drugs,' 'class hatred,' 'blackmail associated with immorality', etc. That said, the court also observed that the artistic merit of what is presented ought to be in the mind of the censors as they made their decision.

The court's view had evolved a great deal in the four decades since K.A.Abbas. When **Ajay Goswami** [2007(1) SCC 143] complained to the court that the newspaper industry was distributing material harmful to children, especially photographs, the court refused to intervene, making several points. It said a free press was central to our democracy and news items should not be read in isolation. It said to ban certain photos would mean that all journalism would be for children only. The Court also observed that a "fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. Any hypersensitive person can subscribe to many other Newspaper of their choice". It called instead for a culture of 'responsible reading'! The same culture of liberal plurality informed the Supreme Court three years later in **S.Khushboo v Kannaimmal** [(2010) 5 SCC 600] when the well-known actress faced a spate of criminal cases because she publicly stated that pre-marital sex was okay. Shorn of the technical issues thrown at the court, it basically took the view that "it is not the task of the criminal law to punish individuals merely for expressing unpopular views" and "we must lay stress on the need to tolerate unpopular views in the socio-cultural space". It also observed that those who disagreed with Khushboo could have "contested her views through the news media or any other public platform".

I do note that much of the Supreme Court's pronouncements ride on the premise that the law is being used to throttle free speech. Naturally, the issue gets obscured when the throttling is done by the police. Were the police justified in stopping Salman Rushdie from addressing the Jaipur Littfest back in 2012 (see **The Joust In Jaipur**)? Should college professors go to jail for circulating cartoons about politicians (see **Dour Desis & Diabolical Diatribes**)? In both cases, the police acted peremptorily, and that kept the spotlight squarely on administrative discretion. That same spotlight now focuses on the banning of 'India's Daughters'. The dominant discourse though seems to have taken a substantial new turn. It seems to me that following the Charlie Hebdo massacre, the right to free speech is increasingly being debated in the context of its impact on the subject of the speech. Call it the Audience Reaction Test. This is a particularly difficult argument because now, there remains no objective standard by which the limits to freedom of speech can be judged. Let me explain.

You don't need the great Japanese director Kurosawa or his movie "Roshoman" to tell you that each of us contextualises and interprets events, even life, in the light of our personal perspective. There is indeed no objective reality: all of us process data differently to come to entirely different conclusion about what is going on out there. I saw "India's Daughters" and I thought it was a fitting portrayal of the cultural challenge India has to meet if it's to evolve into a society that respects its women. My business partner and lawyer Rakesh Ojha does not agree. He saw it as a species of post-colonial poverty porn leering at deprivation in slums edited like a B movie and said nothing about the pace with which India radically changed its Rape Law to address the issue, to say nothing of the lightning speed with which the Judiciary moved to convict the perpetrators of this crime. He didn't spot its redeeming features, if indeed it had any. Nirbhaya's friend Avanindra Pandey who fought with the rapists to save his friend

doesn't see it like either of us. He reportedly told IBN Live that "The documentary is unbalanced as the victim's viewpoint is missing. The facts are hidden and the content is fake."

My take-away from these diametrical conflicting conclusions is simply that the Audience Reaction Test is deeply problematic because no two subjects will ever understand your free speech in quite the same way. To add to the difficulty, we live in a plural society where cultural contexts are radically varied. Not only do people understand the same speech differently, the context in which they interpret its meaning varies widely. Within the one square kilometre area that is my colony, we have house owners who are working to develop technologies that will rule our lives in 2020 and construction labour from rural Jharkhand who Haryana's famed Khap Panchayats would consider ridiculously backward. When you make a generic movie about rape, which exactly is the standard for your Audience Reaction Test?

At the end of the day, it inevitably comes down to the police limiting the freedom of speech in order to maintain "public order", exactly as Article 19 (2) had foreseen. The court has had many occasions to rule on this power, and generally in favour of maintaining public order. They have also specifically noted that the power to restrict free speech "in the interest of public order" is much wider than if it had been a power to restrict speech only for the "maintenance of public order" [**Ramjilal Modi v State of UP** 1957 SCR 860]. So, whether you like it or not, the bottom line in India is public order, not freedom of speech. You have freedom of speech only so long as no one wants to get rent a mob, torch a truck or two on the highway, and decimate your freedom. This is worrying because in a country of 1.25 billion souls, if only 1 per cent are outraged over anything, you are looking at an awful number of cranial haemorrhages unfolding in full public view to the hysterical excitation of frontline reporters frothing at the mouth as they whip up the TV ratings. Just this morning, a Chennai news channel has had a crude bomb thrown at it for questioning the relevance of a Mangal Sutra to modern life. Thus, my fundamental rights are controlled not by the rule of law, but by the ability of a mindless mob - politically motivated or not - to set fire to city streets. In practice then, the compulsions of public order come down to never saying anything that could possibly offend anyone anywhere anytime. The only way to achieve that is to never say anything at all. So, unless we can find a reasonable way to extract ourselves out of the Audience Reaction Test argument and the compulsions of public order, I must reluctantly conclude: RIP, Indian Freedom of Speech.

Comment-2

Fine Print: Freedom To Offend

Getting rid of 66A doesn't allow citizens to assume that we've lost our criminal laws on defamation or obscenity. This free speech one is unlikely to go much further

Ranjeev C. Dubey

The valedictory flag marches around the Supreme Court's striking down Section 66A of the Information Technology Act greatly exaggerates the immediate benefit that will flow to those with a passion for free speech. While it will surely keep kids who disapprove of traffic stopping political funerals out of jail, it won't necessarily allow us to celebrate a greater diversity of opinion without serious risk to ourselves. In sum, there may be more deception than deliverance here. Allow me to explain why I say this.

The main thing to understand about *Shreya Singhal v Union of India* is that it leaps across several oceans to draw inspiration as never before from the American vision of personal liberty (as opposed to the more conservative Indian evolution of it). This means that the Supreme Court is comfortable with the idea that liberty must be valued "both as a means and as an end"; also that "liberty is the secret of happiness and courage the secret of liberty". It approves the idea that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth". It endorses the idea that "to justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." These are not Indian ideas, not thus far anyway. Naturally, these words have created the hope for liberal deliverance.

These words have also paved the way for what appears to be a great paradigm shift to enter stage left. The Supreme Court has now proceeded to divide speech of which freedom is sought into one of three categories: discussion, advocacy and incitement. The court does not dwell long on these distinctions but it does go on to set a great new rule: the law cannot restrict speech unless it reaches the level of incitement. That's a leap of faith every liberal democrat will welcome with delight.

But then, what does incitement mean, and incitement against what? Article 19(2) of our Constitution sets limits to our freedom of speech "in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." Clearly, the incitement has to squarely address one of these restrictions. Let's look at the implications of this. A professor posting ironic cartoons about Didi, or children complaining about bandhs for funerals, do not threaten the sovereignty of India, the security of the state, friendly relations with foreign states, decency or morality, nor do their actions pertain to contempt of court, defamation or incitement to an offence. All you then have left to bang heads with is this dangerous beast called 'public order'. That's exactly where the arguments before the Supreme Court ended up. All that the Government of India could argue was that Section 66A of the IT Act promoted public order. The Supreme Court was seriously underwhelmed with this ingenuity because to buy into that formulation, it wanted to see another American test apply: "clear and present danger".

So what is "clear and present danger"? At the end of the day, it comes down to this. Not the world's most extreme protection of free speech will allow a man to falsely scream 'fire!' in a house full movie theatre. That is the point at which the liberal celebration after the pronouncement of the Supreme Court judgment comes to a grinding halt. In the context of Section 66A, the court reached back to the *Rangarajan test* [(1989) 2SCC 574] and put it thus. Freedom of speech is protected "unless the situations created by allowing the freedom are pressing and the community interest is endangered". What we have then is freedom of speech hanging in the balance with a clear and present danger of public disorder. Reasonable as this may sound on the face of it, it's true and inevitable effect in a politically aggressive society such as ours is as chilling as the one the court tried to avert by holding Sec 66A unconstitutional.

We have already experienced the problem with this paradigm last month in a different context (see **India's Silenced Daughters**). I called it the Audience Reaction Test. If I am granted freedom only to the point where you are not incited, I have no freedom at all because there is no predicting what will incite you. I may say there is no real evidence that Lord Rama was born in the Babari Masjid and your religious sensibilities could be hurt enough to want to burn the town down. I didn't hear too many people in my social circle take the view that Charlie Hebdo should be allowed to incite Islamic fundamentalists because freedom of speech matters. Nor did I hear too many people argue that the radical Muslim politician Asadudin Owaisi should be allowed his hate speech rants.

The point is easy to see when it's someone religion we are talking about. What about someone's wife, child, career, or hobby? In our fractured polity, anyone can rent a mob and pelt stones on the street, smashing shop windows and heads because someone says an Italian head of an Indian political party is easier to accept than a Nigerian one. Indians? Racists? How dare you? How hard is it for a set of goons to set Chennai aflame because someone thinks Stalin is a sillier name for a Hindu Indian to have than let's say a seven foot surd called Pinky? It's a view point, okay - I may not agree - but if it has a potential to start a riot, goodbye free speech.

Seen from this perspective, free speech then isn't about human rights and civil liberties; it's about the budgetary limits of those who claim to be incited. If you have Rs. 500 per head per day to spare for the 200 guys it takes to set up a mob, my freedom of speech is comes at a price of Rs 500 x 200 people = Rupees One Lakh. Come to think of it, why don't I auction my free speech on EBay and see if someone will pay more than that?

So does that mean that all of the Supreme Court's efforts add up to nothing? Of course not! At the very least, we have gotten rid of that damn Section 66A. We are also free to offend the sensibilities of individuals so long as there is no threat to public order. To exercise this right, we need to offend people who don't have the money to rent a mob, or don't know how to. So while you may complain about the disruptive quality of

your average wedding procession, you would do well not to complain about a political wedding because the groom's dad's ability to create a clear and present danger is only a phone call away. That apart, this judgment is also 'sort of' great for people like AIB and their roasted hosts because now, you can't create laws that prevent adults from paying through their noses to watch sundry stand-up comics take truly tasteless swipes at the alleged multitudes who have unlawful carnal knowledge of Karan Johar's rear orifice.

At one level, this changes nothing in our drawing rooms. I don't get too many Friday night dinners when no one updates the gathering with the latest in robust Punjabi ribaldry. The real question is whether the liberal use of four letter words for instance in say print media 'incites' public immorality or erodes public order. Given the view the Supreme Court has taken, I would much doubt it. I would assume that as time goes by, this judgment will allow mainstream newspapers to spew four letter words and add profanity to their half-naked babe repertoire of explicit content as never before. There would be a limit to this of course: thee Supreme Court has been quick to state that getting rid of 66A doesn't allow citizens to assume that we've lost our criminal laws on defamation or obscenity. That is the next frontier in personal liberty, because this free speech one is unlikely to go much further.

Comment-3

Fine Print: Striking Disservice

For 5000 years, we have believed that the individual is defined, not by his rights, but by his duties. How this has transformed into an environment of rights and entitlements is quite the untold story

Ranjeev C. Dubey

On most days of the week, the Supreme Court of India undoubtedly does very brave things. Let's face it; outside the gate of the court building, any judge howsoever high is very vulnerable. He has no dedicated administrative machinery to enforce his will and no screaming hoard of rented supporters to 'protect' him from those he acts against. Still, the Supreme Court manages to regularly confront and defeat the forces of evil, so to speak, some of whom make the laws that he interprets. Curiously, that same bravery frequently fails the judiciary when it comes to dealing with its own. Consider the grim facts.

When I joined law practice in 1980, Delhi's trial courts could not try cases of a value greater than Rs. 50,000. Over the thirty five years since, this limit has progressively been pushed up till it has in recent years stood at Rs. 20 lakhs. In 2014, the government proposed to increase it to Rs 2 Crores, but did not leave lawyers breathless with the speed of its legislative progress. Finally, after a succession of muscle flexing one-day strikes, district lawyers struck work indefinitely on 22nd April,

2015 demanding action on the issue asap, complete with dozens of sms messages to every lawyer extolling calls to action to the sound of rousing metaphorical bugles [As an aside, no one spams my phone like my brother lawyers. Generally I get about three or four invitations to funerals and uthalas every day]. This strike continued till 8th May 2015, when the Lok Sahba obliged by passing the amending legislation. That didn't mean the end of the strikes though. It meant the High Court lawyers went on strike instead!

Now, you may ask why the litigant, who is the consumer of this service, would care where his case is conducted. It is true that trial courts decide cases somewhat faster than the High Court but conversely, the sagacity of the judge may well be superior in the High Court. At the end of the day though, these strikes aren't about improving systems, or speeding up processes, or providing more effective justice. To put it bluntly, this little battle within the legal community is all about who gets to seize the revenue stream of cases valued between Rs 5 Lakhs and 2 Crores. But guess who the first victim of this family war is? More's the pity because every service industry ought to be structured around quality of service, and not the enrichment of the service provider. For sure, that is more or less the unstated premises on which the Bar Council of India Rules were set up under Section 49(1)(c) of the Advocates Act 1961.

Make no mistake, Chapter II, Part VI of the Rules make it clear that lawyers are expected to "uphold the interest of the client" and not "misuse or takes advantage of the confidence reposed in him by his client". Even the courts have had no feelings of ambiguity on this subject. In **UP Sales Tax Service Association v. Taxation Bar Association, Agra**[(1995)5 SCC 716], Agra's Tax lawyers went on strike demanding the transfer of the Deputy Commissioner (Appeals), Sales Tax, Agra, who they claimed was corrupt. The issue wound its way up to the Supreme Court which ruled that "lawyers should not resort to the strike or boycott the court or abstain from court except in serious, rarest of rare cases; instead, they should resort to peaceful demonstration so as to avoid causing hardship to the litigant public."

That didn't work. Within five years, the Supreme Court was compelled to reiterate its message. In **Ramon Services (P) Ltd. v. Subhash Kapoor** [(2001) 1 SCC 118], a trial court decreed a case without hearing the defence because its lawyer was on strike that day and did not show. Could an appeal court wind the case back to the status on the day before the strike? The court said that "strikes by professionals including advocates cannot be equated with strikes undertaken by the industrial workers in accordance with statutory provisions." It said that the relationship between lawyer and client was one of trust and confidence and besides abstaining from work hampers justice too. It ruled that striking lawyers "fail in their contractual and professional duty to conduct cases for which they are engaged and paid."

Even this didn't make the slightest difference. Two years later, the issue was up before the Supreme Court again in **Ex. Capt Harish Uppal v. Union of India**[(2003)

2 SCC 45] compelling the court to repeat itself. It said that "It is the duty of every Advocate who has accepted a brief to attend trial, even though it may go on day to day for a prolonged period. …a lawyer who has accepted a brief cannot refuse to attend Court because the Bar Association gives a boycott call." It also said that "lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews carrying out of the Court premises banners and/or placards, wearing black or white or any colour arm bands, peaceful protest marches outside and away from Court premises, going on dharnas or relay facts etc. That was by no means the last of it. It added for good measure that "no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored." It warned defaulters of dire consequences thus: "if a lawyer… abstains from attending Court due to a strike call, he shall be personally liable to pay costs which shall be addition to damages which he might have to pay his client for loss suffered by him. Can any message be clearer than this?

Significantly, the court made one exception. It condoned strikes "only in the rarest of rare cases where the dignity, integrity and Independence of the Bar and/or the Bench are at stake". It said that only the court could decide whether any issue fit this category of rarity, for which purpose, the President of the Bar must first consult the Chief Justice before the call to strike can be given.

Given the forthright nature of the ruling, we could have expected the reality on the ground to change. No such luck. Strikes continued from time to time, till PIL activists Common Cause decided to do something about it. The facts were plain enough. The Bar Association called a strike. Some lawyers said they would not abstain from work. Bar Association officers threatened these lawyers with suspension of their memberships to the Bar. Was this contempt of court? The Supreme Court had its opportunity to change the history of India's Bar.

In **Common Cause v. Union of India** [(2006) 9 SCC 295], the Supreme Court reiterated the legal position, but did not then pull the trigger. Instead it passed the buck, ruling that it is for the Bar Council of India (which regulates lawyers) to take disciplinary action against lawyers. It said it was the duty of every advocate to bodily ignore a call for a strike. Finally, it ordered that "a committee be constituted in that behalf to suggest steps to be taken to prevent such boycott or strike". I need not tell you why commissions of inquiry and committees are appointed or what happens to their recommendations, if such recommendations ever do get made. A potentially defining moment ended in a tragic damp squib. The cynic could credibly argue that the legal community is considerably better at delivering honour-and-probity homilies to other than it is at putting its house in order.

For my money though, what leaves me most flummoxed is the radical transformations that has occurred in our society in the way we view our relationship to

our fellowmen. For 5000 years, we have believed that the individual is defined, not by his rights, but by his duties, or more properly his path of righteousness a.k.a dharma. How this has transformed in less than 50 years into an overwhelming environment of rights and entitlements is quite the untold story. Perhaps our quest for a society grounded in liberal humanism is at the heart of it. When we wrote our constitution, we conferred rights on individuals, rights that we had thus far never publicly acknowledged. Laudable as these goals were, what we have actually achieved is a kind of "transfer of traditional paradigms" into our new liberal landscape. All at once, the caste based war for privilege we have witnessed throughout our long history has manifested itself in the attitudes of these new communities our constitutional structure has helped created. Lawyers are merely one such powerful community. But then, that is another train of thought, with its own devil in the Fineprint.

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