Free Speech Policy in India:
Community, Custom, Censorship, and the Future of Internet Regulation

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Preliminary

There has been legitimate happiness among many in India at the Supreme Court's recent decision in the *Shreya Singhal* case to strike down section 66A of the Information Technology Act, 2000 ("IT Act") for unconstitutionally fettering the right to free speech on the Internet. The judgment is indeed welcome, and reaffirms the Supreme Court's proud record of defending the freedom of speech, although it declined to interfere with the government's stringent powers of website blocking. As the dust settles there are reports the government is re-grouping to introduce fresh law, allegedly stronger to secure easier convictions, to compensate the government's defeat.

Case law and government policy

India's constitutional courts have a varied history of negotiating the freedom of speech that justifiably demands study. But, in my opinion, inadequate attention is directed to the government's history of free speech policy. It is possible to discern from the government's actions over the last two centuries a relatively consistent narrative of governance that seeks to bend the individual's right to speech to its will. The defining characteristics of this narrative – the government's free speech policy – emerge from a study of executive and legislative decisions chiefly in relation to the press, that continue to shape policy regarding the freedom of expression on the Internet.

India's corpus of free speech case law is not uniform nor can it be since, for instance, the foundational issues that attend hate speech are quite different from those that inform contempt of court. So too, Indian free speech policy has been varied, captive to political compulsions and disparate views regarding the interests of the community, governance and nation-building. There has been consistent tension between the individual and the community, as well as the role of the government in enforcing the expectations of the community when thwarted by law.

Dichotomy between modern and native law

To understand free speech policy, it is useful to go back to the early colonial period in India, when Governor-General Warren Hastings established a system of courts in Bengal's hinterland to begin the long process of displacing traditional law to create a modern legal system. By most accounts, pre-modern Indian law was not prescriptive, Austinian, and uniform. Instead, there were several legal systems and a variety of competing and complementary legal sources that supported different interpretations of law within most legal systems. J. Duncan M. Derrett notes that the colonial expropriation of Indian law was marked

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by a significant tension caused by the repeatedly-stated objective of preserving some fields of native law to create a dichotomous legal structure. These efforts were assisted by orientalist jurists such as Henry Thomas Colebrook whose interpretation of the *dharmasastras* heralded a new stage in the evolution of Hindu law.

In this background, it is not surprising that Elijah Impey, a close associate of Hastings, simultaneously served as the first Chief Justice of the Supreme Court at Fort William while overseeing the Sadr Diwani Adalat, a civil court applying Anglo-Hindu law for Hindus, and the Sadr Faujdari Adalat, a criminal court applying Anglo-Islamic law to all natives. By the mid-nineteenth century, this dual system came under strain in the face of increasing colonial pressure to rationalise the legal system to ensure more effective governance, and native protest at the perceived insensitivity of the colonial government to local customs.

Criminal law and free speech in the colony

In 1837, Thomas Macaulay wrote the first draft of a new comprehensive criminal law to replace indigenous law and custom with statutory modern law. When it was enacted as the Indian Penal Code in 1860 ("IPC"), it represented the apogee of the new colonial effort to recreate the common law in India. The IPC's enactment coincided with the growth and spread of both the press and popular protest in India. The statute contained the entire gamut of public-order and community-interest crimes to punish unlawful assembly, rioting, affray, wanton provocation, public nuisance, obscenity, defiling a place of worship, disturbing a religious assembly, wounding religious feelings, and so on. It also criminalised private offences such as causing insult, annoyance, and intimidation. These crimes continue to be invoked in India today to silence individual opinion and free speech, including on the Internet. Section 66A of the IT Act utilised a very similar vocabulary of censorship.

Interestingly, Macaulay's IPC did not feature the common law offences of sedition and blasphemy or the peculiar Indian crime of promoting inter-community enmity; these were added later. Sedition was criminalised by section 124A at the insistence of Barnes Peacock and applied successfully against Indian nationalist leaders including Bal Gangadhar Tilak in 1897 and 1909, and Mohandas Gandhi in 1922. In 1898, the IPC was amended again to incorporate section 153A to criminalise the promotion of enmity between different communities by words or deeds. And, in 1927, a more controversial amendment inserted section 295A into the IPC to criminalise blasphemy. All three offences have been recently used in India against writers, bloggers, professors, and ordinary citizens.

Loss of the right to offend

The two amendments of 1898 and 1927, which together proscribed the promotion of inter-community enmity and blasphemy, represent the dismantling of the right to offend in India. But, oddly, they were defended by the colonial government in the interests of native sensibilities. The proceedings of the Imperial Legislative Council reveal several members, including Indians, were enthusiastic about the amendments. For some, the amendments were a necessary corrective action to protect community honour from subversive speech. The 1920s were a period of foment in India as the freedom movement intensified and communal tension mounted. In this environment, it was easy to fuse the colonial interest in strong administration with a nationalist narrative that demanded the retrieval of Indian custom to protect native sensibilities from being offended by individual free speech, a right derived

from modern European law. No authoritative jurist could be summoned to prove or refute the claim that native custom privileged community honour.

Sadly the specific incident which galvanised the amendment of 1927, which established the crime of blasphemy in India, would not appear unfamiliar to a contemporary observer. Mahashay Rajpal, an Arya Samaj activist, published an offensive pamphlet of the Prophet Muhammad titled *Rangeela Rasool*, for which he was arrested and tried but acquitted in the absence of specific blasphemy provisions. With his speech being found legal, Rajpal was released and given police protection but Ilam Din, a Muslim youth, stabbed him to death. Instead of supporting its criminal law and strengthening its police forces to implement the decisions of its courts, the colonial administration surrendered to the threat of public disorder and enacted section 295A of the IPC.

Protest and community honour

The amendment of 1927 marks an important point of rupture in the history of Indian free speech. It demonstrated the government's policy intention of overturning the courts to restrict the individual's right to speech when faced with public protest. In this way, the combination of public disorder and the newly-created crimes of promoting inter-community enmity and blasphemy opened the way for the criminal justice system to be used as a tool by natives to settle their socio-cultural disputes. Both these crimes address group offence; they do not redress individual grievances. In so far as they are designed to endorse group honour, these crimes signify the community's attempt to suborn modern law and individual rights.

Almost a century later, the *Rangeela Rasool* affair has become the depressing template for illegal censorship in India: fringe groups take offence at permissible speech, crowds are marshalled to articulate an imagined grievance, and the government capitulates to the threat of violence. This formula has become so entrenched that governance has grown reflexively suppressive, quick to silence speech even before the perpetrators of lumpen violence can receive affront. This is especially true of online speech, where censorship is driven by the additional anxiety brought by the difficulty of Internet regulation. In this race to be offended the government plays the parochial referee, acting to protect indigenous sensibilities from subversive but legal speech.

The censorious post-colony

Independence marked an opportunity to remake Indian governance in a freer image. The Constituent Assembly had resolved not to curb the freedom of speech in Article 19(1)(a) of the Constitution on account of public order. In two cases from opposite ends of the country where right-wing and left-wing speech were punished by local governments on public order grounds, the Supreme Court acted on the Constituent Assembly's vision and struck down the laws in question. Free speech, it appeared, would survive administrative concerns, thanks to the guarantee of a new constitution and an independent judiciary. Instead Prime Minister Jawaharlal Nehru and his cabinet responded with the First Amendment in 1951, merely a year after the Constitution was enacted, to create three new grounds of censorship, including public order. In 1963, a year before he demitted office, the Sixteenth Amendment added an additional restriction.

Nehru did not stop at amending the Constitution, he followed shortly after with a concerted attempt to stage-manage the press by de-legitimising certain kinds of permissible speech.

Under Justice G. S. Rajadhyaksha, the government constituted the First Press Commission which attacked yellow journalism, seemingly a sincere concern, but included permissible albeit condemnable speech that was directed at communities, indecent or vulgar, and biased. Significantly, the Commission expected the press to only publish speech that conformed to the developmental and social objectives of the government. In other words, Nehru wanted the press to support his vision of India and used the imperative of nation-building to achieve this goal. So, the individual right to offend communities was taken away by law and policy, and speech that dissented from the government's socio-economic and political agenda was discouraged by policy. Coupled with the new constitutional ground of censorship on account of public order, the career of free speech in independent India began uncertainly.

How to regulate permissible speech?

Despite the many restrictions imposed by law on free speech, Indian free speech policy has long been engaged with the question of how to regulate the permissible speech that survives constitutional scrutiny. This was significantly easier in colonial India. In 1799, Governor-General Richard Wellesley, the brother of the famous Duke of Wellington who defeated Napoleon at Waterloo, instituted a pre-censorship system to create what Rajeev Dhavan calls a "press by permission" marked by licensed publications, prior restraint, subsequent censorship, and harsh penalties. A new colonial regime for strict control over the publication of free speech was enacted in the form of the Press and Registration of Books Act, 1867, the preamble of which recognises that "the literature of a country is…an index of…the condition of [its] people". The 1867 Act was diluted after independence but still remains alive in the form of the Registrar of Newspapers.

After surviving Indira Gandhi's demand for a committed press and the depredations of her regime during the Emergency, India's press underwent the examination of the Second Press Commission. This was appointed in 1978 under the chairmanship of Justice P. K. Goswami, a year after the Janata government released the famous White Paper on Misuse of Mass Media. When Gandhi returned to power, Justice Goswami resigned and the Commission was reconstituted under Justice K. K. Mathew. In 1982, the Commission's report endorsed the earlier First Press Commission's call for conformist speech, but went further by proposing the appointment of a press regulator invested with inspection powers; criminalising attacks on the government; re-interpreting defamation law to encompass democratic criticism of public servants; retaining stringent official secrecy law; and more. It was quickly acted upon by Rajiv Gandhi through his infamous Defamation Bill.

The contours of future Internet regulation

The juggernaut of Indian free speech policy has received temporary setbacks, mostly inflicted by the Supreme Court. Past experience shows us that governments with strong majorities – whether Jawaharlal Nehru's following independence or Indira Gandhi's in the 1970s – act on their administrative impulses to impede free speech by government policy. The Internet is a recent and uncontrollable medium of speech that attracts disproportionately heavy regulatory attention. Section 66A of the IT Act may be dead but several other provisions remain to harass and punish online free speech. Far from relaxing its grip on divergent opinions, the government appears poised for more incisive invasions of personal freedoms.

I do not believe the contours of future speech regulation on the Internet need to be guessed at, they can be derived from the last two centuries of India's free speech policy. When section

66A is replaced – and it will be, whether overtly by fresh statutory provisions or stealthily by policy and non-justiciable committees and commissions – it will be through a regime that obeys the mandate of the First Press Commission to discourage dissenting and divergent speech while adopting the regulatory structures of the Second Press Commission to permit a limited inspector raj and forbid attacks on personalities. The interests of the community, howsoever improperly articulated, will seek precedence over individual freedoms and the accompanying threat of violence will give new meaning to Bhimrao Ambedkar's warning of the "grammar of anarchy".
