

Beating down critical journalism, creative freedom

The curious deference of the judiciary is part of the precariousness of the rights to freedom in India today



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Rioting in India's capital city on a day reserved for the celebration of the Republic, was a new low in unravelling political concord. Within days of that trauma, points of entry into Delhi were barricaded with layers of concrete and steel, interwoven with vicious spools of concertina wire. Some locations had lethal iron nails embedded into the road and trenches dug deep to prevent the ingress of farmers long encamped around the capital city, protesting recent legislation that goes by the title of "agricultural reforms".

Media clampdown

A few days after the riots, expectations that public resentment would enable the forceful dispersal of protests seemed belied. Active efforts to deter critical reporting were by then under way. Nine senior journalists were charged under the law of sedition, for reporting the ambiguous circumstances of the sole fatality in the riots.

A young freelance journalist was arrested and charged with lacking appropriate media credentials. Even as he was granted bail, in a rare exception to what is becoming the general rule of denial, the Home Ministry decreed that only journalists with press credentials granted by the central government could legitimately report on the farmers' agitation.

A number of social media pages run by newspapers and websites were blocked by executive order. For media platforms that did not relent, the legal process of secur-

ing injunctions began, along with an unobtrusive threat that employees of the social media company, Twitter, could face arrest for failure to comply.

The tragedy of a government that remains deaf to the anxieties of a significant section of Indian citizens was transformed into farce, when formidable machines of propaganda were mobilised on February 3, to push back against two inconsequential Twitter posts, by a music artiste from the United States and an environmental campaigner from Sweden.

Imperfections made worse

Events since Republic Day constitute an unprecedented assault on three of the "rights to freedom" granted under Article 19 of the Constitution: free speech, free movement, and peaceful assembly. Like several other Articles in the Fundamental Rights chapter, Article 19 includes a *non obstante* clause: notwithstanding all its promises, each of the rights comes with certain conditions attached.

These clauses were in most part inserted by the First Amendment to the Constitution, when the government of a fledgling nation sought to negotiate the fine line between freedom and necessity. It was a manifestly imperfect job of resolving a conundrum that has defied the most determined philosophical inquiries. And those imperfections have been compounded by decades of judicial default and executive caprice.

The Supreme Court has spoken up in its lucid interludes, but often retreated rather than face down obvious abuses. In matters of sedition, the first impulse of the judiciary in the afterglow of the Republic's emergence, was to strike the law down. Article 13 of the Constitution annulled every law that was inconsistent with the fundamental rights chapter and the Patna High Court was on solid ground when it



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held the sedition clause in criminal law unconstitutional. A few years later, in a milieu more sensitive to possibilities of disorder, the Supreme Court reinstated the law, but held it applicable only to "activities as would be intended ... to create disorder or disturbance of public peace by resort to violence".

In 2012, the Gujarat High Court upheld this precedent in a matter involving the country's largest English language newspaper, *The Times of India*, after sedition charges brought by the Commissioner of Police in Ahmedabad city. It also added that the Constitution protected strong commentary on "measures or acts of the Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts by lawful means".

It took the newspaper and three employees, four years to secure full discharge. A luxury by the standards of the judicial system, this is one denied to most independent journalists and smaller media houses, entrapped in the coils of whimsical prosecution by police and other actors anxious to evade public scrutiny.

State's new weapon

The nine journalists charged after the violence at the Red Fort have been spared arrest, but that possibility will hang heavy over their practice for years, potentially inducing a "play-safe attitude". The

State government in Uttar Pradesh, inattentive to even these niceties, has used arrest as literally the first recourse against critical journalism.

Siddique Kappan, who works with a number of news organisations and is a member of the Kerala Union of Working Journalists, was arrested by the police while on his way to Hathras early in October, to report on the death after alleged sexual assault, of a young girl of the Dalit community. He was charged with sedition and other offences, and the statutes invoked, including the Unlawful Activities (Prevention) Act, could potentially result in indefinite detention.

Angle of religion

Politics of religious offence constitute another clear threat to freedom of speech and expression. The arrest of a stand-up comic, Munawar Faruqui, in Indore, for jokes that he did not crack, represents a particular depth of absurdity. He was denied bail in successive hearings and the Madhya Pradesh High Court was particularly severe in its strictures about an intent which remained unexpressed. He finally was granted bail after over a month in detention, by the Supreme Court.

In deciding the *S. Rangarajan versus Jagjivan Ram* case in 1989, the Supreme Court declined to embrace a doctrine of censorship. The benchmark for judging the potential for offence had to be a "reasonable" person and not someone of "weak and vacillating" mind. Yet, in the case of the TV serial, *Tandav*, whose producers and cast face charges despite multiple apologies, the Court has now chosen to underline the conditional nature of the free speech right. An actor seeking exemption from arrest because he was only a paid professional, was told that he should not "play a role which

hurts religious sentiments".

Another blow

In the matter of regulating the right to freedom of movement, the Supreme Court has encountered unanticipated turbulence. Last year, while hearing a petition seeking the dispersal of protests against the Citizenship (Amendment) Act in Delhi's Shaheen Bagh area, the Court ruled that expressions of dissent should take place in "designated places only".

When called upon to apply the same principle to ongoing farmers' protests, the Court balked. A ruling that the protests were unconstitutional would have been the legal basis for a coercive dispersal of the farmers. Hesitant about that, the Court sought to play problem solver, nominating a team of mediators to find the solution the government had set its face against. It did not end well for the parties involved, and least of all, for public perceptions of the integrity of judicial institutions.

Asymmetry in the application of the law, when charges are brought against partisans of the ruling party is another feature, widely commented on. While hearing a recent matter involving hate speech, the Chief Justice of India observed that the Court is trying to discourage litigation under Article 32, which enables any citizen to invoke the writ jurisdiction of the higher judiciary when fundamental rights are threatened. This ambivalence towards an article that B.R. Ambedkar called the "heart and soul of the Constitution", and the curious judicial deference to the political executive, are central parts of the story of how precarious the rights to freedom are today.

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