

On the Indian Supreme Court's Guidance-Laden Approach to Answer Hard Questions of Free Speech Law

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Jurisprudence of Convenience

Last month, in *Nipun Malhotra v. Sony Pictures Film India Private Ltd*, the Indian Supreme Court delivered an opinion on the limits of protected speech under Article 19(1) of the Indian Constitution. While the opinion touched upon several important aspects of the free speech right, such as the recognized underlying values, the grounds and standards for restricting speech acts, and how the harm-based approach helps the courts in devising such restrictions, it remains an unclear and uncertain exposition of the law due to the manner in which the Court approached the question and its writing style. The opinion is replete with behavioral guidance, and its language makes it hard to discern the binding legal principles. However, the Court's engagement with the arguments advanced, existing jurisprudence, and philosophical works make it an important development to be discussed.

In the paragraphs to follow, after setting the factual background of the case, I argue that courts should approach cases involving hard questions of constitutional law with extreme caution in terms of their potential implication on the growth (or absence) of a consistent doctrine. A guidance-laden approach does not serve legal doctrine well; it comes with the potential of introducing uncertainties and unwanted judicial discretion.

Background: The derogatory portrayal of people with disability

The case dealt with the portrayal of people with disabilities in a movie called *Aankh Micholi*. It revolves around a family that attempts to arrange a marriage while actively trying to conceal various disabilities that different members of the family suffer from, including the protagonist. The movie paints disabilities as deficiencies and impairments. The dialogues tend to imply that disabilities negatively impact one's human worth. Efforts must be made to keep them secret during social engagements. Further, in making attempts to inject laughter, derogatory phrases are used to refer to disabilities. For instance, speech impairment is referred to as 'soundproof system'.

The appellant approached the Delhi High Court, registering concerns against such a choice of words used to describe disabilities and the way the characters are portrayed. It was argued that ridiculing people with disabilities is offensive, reinforces a sense of unequalness, encourages stereotypical behavior against them in society, and contributes to an exclusionary environment for them. Having denied relief by the High Court, the appellant approached the Supreme Court. At its core, the case was about the limits of an individual's freedom of speech—artistic freedom in particular—and how the state should treat offensive speech that could potentially have exclusionary impacts. The unique facts of the case also called upon the Court to opine on whether the elements of 'vulnerability' or 'historical marginalization' would impact the limits of the free speech right.

Opinion of the Supreme Court

Substantively, the Court did not extend any relief to the appellant, nor did it call for any changes to the legal regime around the movie certification process, noting that the field is sufficiently occupied by existing laws and policies. It, however, recognized the social model of disability and laid down a set of prescriptions in the form of sensitization guidance about how individuals, particularly content creators, should depict people with disabilities and how the institutions involved in this process must undertake their statutory duties. Sarthak Gupta explores this aspect of the judgment [in greater detail here](#).

In answering the question about the limits of the free speech right under the Indian Constitution, the Court considered democracy as the central value that the right to free speech seeks to pursue. Therefore, while interpreting the coverage of permissible grounds of reasonable restrictions as enlisted under Article 19(2), such as public order, decency, and morality, the courts must adopt such an interpretation that furthers the values of democracy. While the word 'democracy' appears only in one paragraph, its essence binds the entire opinion together. The Court observed,

“62. Article 19(1)(a) has been termed as '*perhaps the most precious of all the freedoms guaranteed by our Constitution*'. Speech and expression form a crucial part of the democratic give and take and serve as a corrective check on public policy. Overall, they promote the discursive health of democracy. Social debate must be enriched by diverse voices and wide participation from across the social spectrum.”

The Court scaffolds its opinions on the value of democracy because it chooses to undertake a content-context analysis. It finds that certain dialogues and references to persons with disabilities in the movie could potentially have a discriminatory impact on similarly situated people in the real world and result in their further marginalization. For the Court, the Constitution does not protect one's right to speech at the cost of another's dignity:

“27. ... Derogatory speech and stereotypes usually target the marginalized. The impact of the speech on human dignity; the identity of the speaker and the target; and the linguistic connotations of the speech may be considered in deciding issues around stereotypical speech. The standard of the ‘overall message’ of a film, in some ways, furthers this emphasis on the importance of context and manner of portrayal in visual media.”

The constitutional values of anti-discrimination and dignity, therefore, feed into the Court’s focus on placing democracy at the center of its free speech analysis. However, despite being verbose in discussing the international human rights jurisprudence and the steps taken by the state towards alleviating the difficulties faced by people with disabilities and ensuring the ‘creation of an environment conducive to the above-mentioned rights including substantive equality and opportunity to participate in society’ (¶58), the Court stops short of laying down a concrete rule. In fact, it made irreconcilable observations at different points in the judgment. It’s an issue that ails judgment writing in India—there is a tendency to write long opinions rather than laying down clear laws by following a set doctrine. Consider ¶70, where the Court noted,

“70. ... we are of the view that the freedom under Article 19(1)(a), that is the creative freedom of the filmmaker cannot include the freedom to lampoon, stereotype, misrepresent or disparage those already marginalized. ... if the overall message of the work infringes the rights of persons with disabilities, it is not protected speech, obviating the need for any balancing.”

While the phrase ‘cannot include’ may not sound as assertive and prescriptive as ‘does not include’, when the paragraph is read as a whole, the implications are similar. However, the Court dilutes its opinion a few paragraphs later when it takes note of the specific scheme of the free speech right under the Indian Constitution, confusing the reader as to the true scope of the binding rule of the judgment. In ¶¶73-74, the Court observes,

“73. ... We are cognizant that Article 19(2) of the Constitution is exhaustive of the limitations that can be applied on the freedom guaranteed under Article 19(1)(a). ...

74. The language of our discourse ought to be inclusive rather than alienating. ... As long as the overall message of the film justifies the depiction of disparaging language being used against persons with disabilities, it cannot be subjected to restrictions beyond those placed in Article 19(2). However, language that disparages persons with disabilities, marginalizes them further and supplements the disabling barriers in their social participation, without the redeeming quality of the overall message of such portrayal must be approached with caution.”

Such contrasting statements seem to emerge from the Court’s confusion between the question of the standard to be followed while applying reasonable restrictions under Article 19(2)—perhaps the restriction on the grounds of decency and morality in the current case—with the question of the scope of protected speech itself under Article 19(1)

(a). The Court's earlier observation, the more assertive one, concerns the latter—it speaks to the scope of protected speech under Article 19(1). Once the Court has held that marginalizing speech is not protected under the Constitution, then there is no need to engage with the question of the standard to be applied to determine if a particular speech act falls under a given restriction. It is only protected speech that could be restricted on certain considerations. The fact that the Court chooses to engage with the question of standard further reflects that ¶70 must be treated as obiter, rather than binding law.

A few other aspects are worth mentioning here. India follows a pre-censorship regime for films that are released in movie theatres. The final directions by the Court, as contained in ¶¶72-74, are in the form of recommendations. While many of them concern the functioning and constitution of the Board of Film Certification, a few are also addressed generically to every entity engaged in the visual media space. It is ultimately left to the Board and concerned entities' discretion as to how they wish to use their platforms to create an inclusive space for people with disabilities and contribute to the sensitization of society. While there is a sense of rebuke by the Court against any form of derogatory portrayal of people with disabilities in visual media platforms in the future, there is still no concrete mechanism in place that could sufficiently address the situation if a similar use of derogatory language were to take place. This is particularly true for cases where the producer may use a platform other than cinematographic film, as these platforms are beyond the pre-publication censorship regime.

Expansive understanding of harm

Keeping the uncertainties of the law laid down by the Court aside, it is important to discuss the Court's approach in constructing the limits of the free speech right under the Constitution. The Court uses the harm-based approach and adopts an expansive understanding of the 'harms' that could push certain forms of speech acts beyond the protective regime of Article 19(1). Rather than focusing merely on the element of 'imminent violence' or elements that could hamper the dignified participation of people with disabilities in public debates, perhaps to present counter-perspectives to the people, the Court construes harm to even include elements such as social exclusion and negative attitudes by other members of society. The Court observed,

“28. ... Recurrent negative portrayals as illustrated above and frequent use of patronizing and offensive language such as ‘victim’, ‘differently abled’, or ‘unfortunate’ to describe individuals continue to perpetuate negative attitudes towards person with disabilities.

29. The problem with such portrayal is that it channels attention on the medical aspects of impairment rather than the social aspects that actually disable a person. This impacts persons with disabilities as individuals as well, subjecting them to stigma and social exclusion.

30. ... They shape and strengthen the already existing negative assumptions about their abilities. This resultantly exacerbates systemic inequalities, and inhibits their dignified participation in the public sphere for education or employment.”

For the Court, every process of society—not just the democratic processes—is relevant under the harm-based approach. Any speech act having the potential to harm an individual’s dignity or equal participation in society would be considered beyond the domain of protected speech. This broad understanding of harm carries forward the Court’s existing jurisprudence on hate and offensive speeches (see Amish Devgan v. Union of India), and when read in light of these cases, we find that even the standard followed to determine the existence or eventuality of harm is very low. Rather than requiring an element of imminency, the Court has held that the mere factum of *likelihood* will satisfy the standard.

Such a lower standard for labeling a speech act as derogatory, and thus, beyond the protected domain, seems to have emerged due to the involvement of vulnerable and historically marginalized communities of people in these cases. This has been a consistent theme in the Court’s jurisprudence in recent years, wherein one can witness the growth of a specialized free speech doctrine for cases involving marginalized communities. For instance, in Indibily Creative Private Ltd. v. Government of West Bengal (2019), the Court noted,

“13. ... However, we cannot ignore that like all forms of speech and expression, satirical expression may be restricted in accordance with the restrictions envisaged under Article 19(2) of the Constitution. For example, when satire targets society’s marginalized, it can have the power to confirm and strengthen people’s prejudices against the group in question, which only marginalizes and disenfranchises them more.”

Similar expositions can be found in Amish Devgan (2020) and Nipun Malhotra (2024). The development of differing free speech doctrines for speech acts—particularly those that are offensive—directed towards the historically marginalized/vulnerable communities and the majorities is significant. But more on this in the next section.

Problematic aspects of the opinion and its potential dangers

As noted above, the Court adopted a combination of two approaches to reach its decision. First, it opted for a content-context analysis, and second, it privileged the value of democracy along with a broad reading of potential social harms in determining the limits of protected speech. It would be interesting to contrast this approach of the Court with that of another case, *Indibily Creative*.

The factual backdrop of *Indibily Creative* was somewhat similar to that of *Nipun Malhotra*, with some crucial differences. The case involved a satirical movie that had been approved for screening by the Board of Film Certification. However, a few days before its scheduled release, police authorities demanded an advance screening on the grounds “that the contents of the film may hurt public sentiments which may lead to political law and order issues” (¶4). The petitioners resisted this demand, only to discover on the day of the release that the authorities had instructed the theatres to take the movie off screens.

The Court decided in favor of the petitioner and even recognized the affirmative aspect of the free speech right by mandating the state to provide protection to the theatres in case of any law-and-order situation. In reaching its decision, the Court privileged the value of self-expression and the notion that truth could only be discovered in a marketplace of ideas. It expressly chose to disregard the potentially offensive nature of the speech acts involved by noting that,

“13. ... Protection of the freedom of speech is founded on the belief that speech is worth defending even when certain individuals may not agree with or even despise what is being spoken. ... The reasons to defend free speech are both moral and instrumental. Moral arguments for the defense of free speech range from a conception of what it is to be a person, to the idea that curtailments of speech and expression are an infringement of an individual’s autonomy or dignity—either as a speaker or a listener, or both. ... The instrumental argument on the other hand is based on the notion that preserving free speech produces tangible benefits, whether in terms of increased personal happiness, a flourishing society, or even economic benefits.”

In contrast to *Nipun Malhotra*, note the content-neutral approach of the Court once it decides to privilege a different set of values. Interestingly, both the decisions are authored by the same judge, and the Court makes a reference to the works of Ronald Dworkin and JS Mill in both the decisions, only to quote them with approval in *Indibily Creative* and reject their theses in *Nipun Malhotra*. The only way to explain this difference in approach is by shifting the focus to the target of the impugned speech acts, and the impact such speech may have on them. While *Nipun Malhotra* involved the use of derogatory language against a historically marginalized community, *Indibily Creative* involved a plot revolving around attempts to rescue the marginalized. Its satire was targeted against the social and political elite.

For a multitude of reasons, I argue that this approach is not appropriate, and the Court must tread cautiously in developing this doctrine in future cases. First, the Court is choosing free speech values on the basis of convenience rather than as a matter of principle and consistent doctrinal developmental of the law. It seems that while approaching these cases, the Court holds a certain idea of society in mind, imagines a certain form of public order, and then enforces it using the most convenient value. This could allow future judges to pick and choose from a basket of values to justify their personalized understandings and opinions.

Second, privileging democracy as a value to design a broad idea of harm is an approach that necessarily involves an assessment of the impugned speech acts by the judges. It allows the Court to sit as an arbiter of the content of the speech. The protection of marginalized communities, therefore, comes at the cost of enhanced judicial discretion and the potential of creeping paternalism. There are benefits to adopting *Indibly Creative's* approach over the one adopted in *Nipun Malhotra*, even in cases involving marginalized communities. As the Court itself noted, "social debate must be enriched by diverse voices and wide participation from across the social spectrum." In the current time, access to audience and content creation over social media is easier than ever before in human history. People are proactive in using technology to not only engage with speech acts but also challenge them effectively. There is a genuine marketplace of ideas where every idea, opinion, and message is contested, reducing the significance of judicial intervention that comes with a set of potential dangers mentioned above. People have already used this space to produce movies with counter-perspectives. For instance, consider [Srikanth](#), a recent movie about how a visually impaired individual fights existing prejudices in society to claim their rightful space. These counter-narratives help develop newer perspectives and provide society with the opportunity to introspect and mend their attitudes.

Third, adopting differing standards depending on the target of the speech makes the free speech analysis community-centric, rather than individual-centric. While it is true that individuals belonging to a marginalized community may face severe and multi-faceted implications of being subject to derogatory speech, one must not dismiss the implication that individuals—irrespective of their social belonging—may suffer at a personal level when they are subject to offensive speech.

Concluding Remarks

The decision of the Supreme Court could perhaps be considered an excellent exposition of desired social conduct. It makes for a good resource for understanding the existing global legal structure and positive state actions being taken to support people with disabilities. However, there are concerns regarding the way the Court approaches the free speech questions involved. The guidance-laden path overshadows judicial exposition on legal doctrine, leaving the reader with more questions than answers. In its effort to

assume the seat of a social reformer, the Court fails to perform its judicial activities well. The judgment looks more like a policy opinion than a judicial opinion. I hope this approach to judgment writing is internally reflected upon.

References

↑1 Internal citations ignored.

↑2 Emphasis mine.

↑3 Emphasis mine.

↑4 Internal citations ignored.

References

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