Judicial Paternalism and Free Speech in India

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In one of my contributions to Verfassungsblog last year, I analyzed the decision of the Indian Supreme Court in *Nipun Malhotra v. Sony Pictures Film India Pvt Ltd* to show how, among other things, the Court tends to 'assume the seat of a social reformer' by adopting a 'guidance-laden approach' while deciding free speech cases, which results in 'creeping paternalism'. Two decisions of the Court, issued in late February, are a testament to how this approach is deeply ingrained institutionally (or as Gautam Bhatia will call it, it is a part of the 'constitutional commonsense'), wherein, despite being a polyvocal Court, different judges tend to approach free speech matters in the same fashion. The two cases pertain to the speech acts of two different individuals—a podcaster and a legislator of the Legislative Council of the State of Bihar—and in both cases, the Court chose to reprimand the individuals for their 'indecent' and 'unparliamentary conduct' and also

sanctioned punishments upon them, without any a priori determination of whether their speech acts, in any manner, violated the limits of the right to free speech as guaranteed under the Indian Constitution. The reprimand and the sanction, I argue, emerged from the Court's false belief that it is tasked to school the citizens on the *appropriate* and *correct* ways of using their speech rights. In the paragraphs to follow, I will briefly discuss the factual backdrop of the two cases before proceeding to the general and free speech-related implications of the Court's approach.

Background

The first case concerned a podcaster—Ranveer Allahbadia—who made a joke with overt sexual and pervert overtone that some may find to be offensive, and perhaps even obscene, by way of a question at a YouTube comic show. Criminal proceedings began in multiple states, and Allahbadia approached the Supreme Court to seek protection from arrest and the need to respond to multiple state police at the same time. The Supreme Court extended some of the reliefs sought, though not before passing a moral judgment on Allahbadia's actions in open Court by way of oral remarks and indicating its disapproval, which was reported and widely circulated by the media. Reprimand followed a legal sanction, and, by way of an unreasoned order, the Court barred Allahbadia *and his associates* from 'air[ing] any show on YouTube or any other audio/video visual mode of communication *till further orders.*' YouTube also blocked the *entire* episode, and the public and state backlash compelled the owner of the channel to remove *all the previous episodes* of the show from YouTube as well, despite no connection to Allahbadia. One speech act (whose illegality is still unproven), therefore, significantly hurt the free speech right and potential to earn a livelihood in the immediacy and the future of a whole lot of individuals, all on account of 'manifest judicial overreach'.

In the second hearing of the case, which took place on March 3, 2024 (approximately two weeks after the first order), the Court took an about-turn and allowed the podcaster to resume his personal show on the condition that it 'will maintain the *desired standards* of decency and morality so that *viewers of any age group can watch it*.' Not only is this condition absurd, but the fact that the Court lifted the sanction within two weeks of its initial order without any material change in the circumstances of the case proceedings shows how the Court has been prefacing discretion (or perhaps, better to call it an 'abuse of discretion') in the judicial process. The guarantee of one's rights is hinged—at least when the Court thinks it legitimate to approach judicial function in this manner—not to the legal system and its procedural boundaries but to the likings of the specific judges who happen to hear the case.

The second case concerned a member of the Opposition in the Bihar Legislative Council, who, during the session of the Council, mocked and name-called the state chief minister for switching his political affiliation multiple times during his political career, all to save his post. Among other things, he remarked that the chief minister 'just like a snake sheds its skin every year'. The Ethics Committee of the House initiated proceedings against the member and after seeking the approval of the House, he was expelled from the

membership of the House. Upon analyzing the matter, the Supreme Court found the punishment to be 'harsh and disproportionate', though it agreed with the disciplinary authority that some form of punishment must ensue from the conduct of the legislator. Rather than compensating the member for his wrongful expulsion, the Court noted that the period of suspension already undergone by him 'constitutes sufficient punishment for the misconduct displayed by him.' Like the Allahbadia case, the Court's relief in this case was, therefore, qualified, and it adorned the roles of the protector, prosecutor, and reformer, all at the same time. The Court made it a point to note, very clearly, that:

> "87. … the indulgence extended by this Court in reducing the punishment imposed on the Petitioner should not be misconstrued as condonation of his conduct. This Court has exercised its discretion squarely in the interests of proportionality and fairness. Consequently, the Petitioner is expected to uphold the dignity of the House and adhere to the standards of discipline befitting its members. Henceforth, it is incumbent upon the Petitioner to conduct himself with decorum and responsibility in legislative proceedings. Any deviation from this expectation or recurrence of misconduct will not be viewed lightly, and the concerned authority shall be at liberty to take appropriate action in accordance with law."

Implications of Judicial Paternalism

Prosecution of artists (including comedians, podcasters, etc.) and members of the political opposition has become commonplace in India. A sense that any activity that has the possibility to irk the ruling dispensation or its voting block could invite state sanction prevails. In this environment, one would expect the courts to be extra vigilant and quick to act as the first-level guardians of people's rights against the state's might. However, the reality, as noted above, is far from the ideal.

First, the very fact that the petitioners chose the Supreme Court as the first forum to seek a resolution of their grievances and that the Court also admitted the claims speaks volumes about the structure and functioning of the Indian legal system. It raises important questions about the people's confidence in the lower judiciary (including the High Court, which is equally empowered by the Constitution to decide such cases) and the ease with which the Supreme Court exercises its appellate jurisdiction in an expansive manner, pushing the parties to, therefore, approach the Supreme Court directly to avoid the delay caused due to multi-level resolution.

Second, to speak directly on the Supreme Court's approach in the two cases, the Court virtually punished the two individuals without first following the due process to prove their guilt. It seems that the Court started with the prima facie understanding that the two individuals are guilty (if not legally, then morally) and, therefore, deserve state sanction. As the Supreme Court functions as the court of last resort and there exists no further appellate body to check the Court's short-circuiting of the entire judicial process, it feels empowered to dispense justice like a *panchayat* or a village council that observes no procedural restraints on its functioning. In the case of Allahbadia, as the Court has virtually gagged his speech (to emphasize again, without a priori determination of guilt) by

behaving like an advance censor, the state sanction continues for the foreseeable future. This not only introduces uncertainties in the legal system but also empowers future judges to reach the 'just' decision even when the law is absolutely clear. Judges stop accounting for the implications of the subjectivities that they introduce by allowing their personal moralities to guide the application of the law and become the law in themselves.

Apart from these general implications for the legal system, this approach of the Supreme Court also comes with several implications for India's free speech doctrine.

First, as I argued in the previous post mentioned in the introduction, it concretizes a 'jurisprudence of convenience', wherein the judges tend to decide cases before them by following their personal moralities or that of the majority (in other terms, introduce the idea of moral populism as defined by Gargarella) and then use the free speech theories to mask their subjectivities.

Second, the continued legitimacy of a 'jurisprudence of convenience' has the potential to give way to the institutionalization of 'judicial paternalism' (perhaps for being consciously or unconsciously guided by the Burkean idea of ordered liberty), wherein the Court self-appropriates the role of a moral conscience-keeper of the society and believes that it is its duty to use the law and the coercive power of the state to push the individuals towards the 'right conduct'. Such a judicial approach goes against every version of free speech philosophy that could be argued to have supported the design of Article 19(1)(a) of the Indian Constitution. Most importantly and beyond the implications it will have on our notions of democracy and the idea that free speech empowers people to contribute to public discourse, it negates the Scanlonian idea of justifying free speech on the grounds of autonomy and individual decision making, which argues that listeners are capable enough to decide for themselves..

Commentators have identified how the approach of the Supreme Court, as adopted in Allahbadia's case, is in total contrast to the one it adopted previously in the case of a journalist, wherein it clearly stated that 'gag orders have a chilling effect on the freedom of speech' and denied any order of blanket prior restrict. The only way to explain this difference in approach is to study the cases from the lens of judicial paternalism.

Third, it introduces the idea of civility norms as part of the free speech doctrine and, therefore, has the potential to create a doctrine wherein the courts reserve the role of the final arbiter to determine the right manners in which one should use their free speech right. This could, by extension, have implications, particularly for symbolic speech acts, where the essence of the exercise of one's free speech is in the portrayal or performance of certain symbolic acts meant to communicate an idea to their target that may 'offend, shock, or disturb' the latter.

Fourth, it results in the restriction of the space available to citizens to air their opinions as they start self-censoring their speech in fear of losing their liberties, work, and livelihood.

Lastly, beyond the courts, this approach equally emboldens the executive to use majority morality as the ground for the exercise of their power rather than limit their actions in accordance with the law (this, of course, demands the law is, in the first place, drafted in recognition of the individual-centric free speech philosophies). This feeds into the confidence that the executive feels in drafting laws and rules that effectively restrict free speech rights and expand the executive control of public spaces (including online spaces). As is reported by several media houses, the Court has already asked the executive to regulate social media to ensure that creators cannot produce such 'obscene' content. This remark was made in the backdrop of the Allahbadia case, and it shows how the Court *presumed* that Allahbadia's comments were indeed 'obscene'—when judged against the legal definition of obscenity—without any final determination on this point following the due process of law. The level of disgust felt by the Court—which also went on to control their decision-making—is aptly clear by this remark by one of the justices:

> "There was this case of so-called YouTubers … We would like the government to take action. If the government is willing to regulate, we are happy. Otherwise, we will not leave this space unregulated the way these YouTube channels are misusing it."

During the second hearing of the case, and in a concerning turn of events, the Court further emphasized this aspect and specifically directed the government to draft regulations to check that content that is '*offensive to the well-known moral standards of our society*' is not broadcasted over the internet. Not only would one fail to find any support for such a law in the free speech regime as envisaged in the Indian Constitution, but, as Gautam Bhatia righty suggested, such orders also put the Court in the position of a super-regulator, muzzles the idea of separation of power, and could prejudice the legal challenge that one may want to bring against the future regulation owing to the preemptive legitimacy extended to it by the Court.

Conclusion

YouTube or online social media is a humongous industry, and what would not be indecent if one were to start assessing the content using personal moralities? As is clear from the reading of the Indian Constitution and the relevant jurisprudence developed by the courts, aspects such as perversity are not the standard for determining whether the speech act was obscene. This approach allows the Court to protect the individuals (because legal sanction would be impossible due to high standards) but still impose enough penalties on them so that their actions can be policed from outside the permissible limits using the discretionary powers that the Indian legal system affords them. It is true that the courts get the confidence and a sense of legitimacy in pursuing these actions owing to the presence of political (the BJP is a part of the ruling coalition in Bihar, and the legislator in the second case belonged to an opposition party) and social reasons (high social backlash in the case of Allahbadia), but, as I have noted above, this results in the

entrenchment of a *panchayat*-like decision-making process, wherein the standard to be followed is not the bounds of the law but that of appeasement, discretion, and personal conceptions of reform.

There is much more that could be said about the two cases, the *passionate* approach of the Indian Supreme Court, and its implications on the Indian free speech doctrine. However, given the limited space, I will conclude with this. Given that Ranveer Allahbadia is a big name in the Indian social media space—he also hosted several Union ministers in the run-up to the 2024 general elections—there has been a lot of popular commentary on the approach of the Court and its oral remarks. However, it needs to be emphasized that the Court's attitude in this case is not an outlier; in fact, this case is just another exposition of how the Court understands its role. Beyond what I have mentioned above, these words by Saurabh Kirpal perfectly summarize the larger implications of this approach:

> "Rather than being a neutral umpire in questions relating to the extent of free speech, the Court has become a participant. When the protector turns prosecutor, the delicate balance of power between different institutions of the state falls apart. The ultimate price for this breakdown is paid by citizens through their loss of liberty. Instead of turning to the Court for redress against an overbearing executive, they have to barter some of their freedom to ensure protection. Rights are surely not transactional—the loss of freedom should not be the price for the pursuit of liberty."

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