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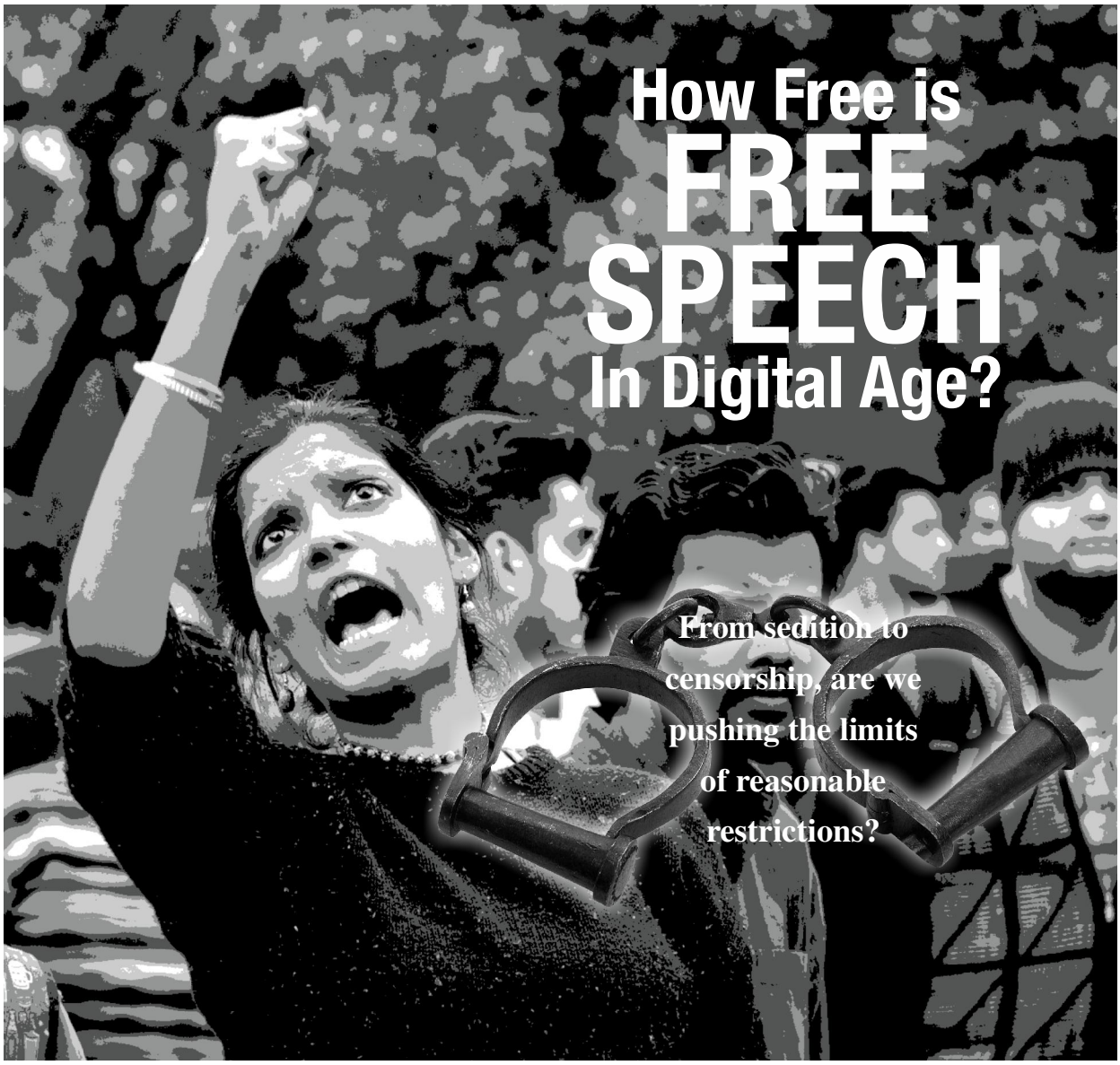

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COMMON CAUSE VISION

An India where every citizen is respected and fairly treated

MISSION

To champion vital public causes

OBJECTIVES

To defend and fight for the rights and entitlements of all groups of citizens

FREE SPEECH NEEDS WATCHDOGS AND INSTITUTIONS

Democracy is not a Spectator Sport; it is a Participatory Event

Is free speech under threat? Can the establishment control my lawful liberty of thought, expression, belief, faith or worship? The spirit of 'reasonable' restrictions is well taken by the citizens but there is no doubt that all governments stretch the idea beyond absurdity.

At Common Cause, we believe that the citizens' rights to Justice, Liberty, Equality and Fraternity are non-negotiable. But ideologies apart, authorities try to use every pretext -- from decency to morality and from patriotism to public order -- to restrict individual freedoms.

This is not to say that there are no challenges before free speech or that bigotry or hate speech should be condoned. Most citizens are busy coping with the pressures of daily lives; they delegate the rest to their elected representatives who are mostly unworthy of that trust. And for this reason alone, mature democracies rely on public institutions and evolve their own corpus of values enshrined in the constitutions. These values are meant to defend the weak against the tyrannies of the powerful and majoritarianism.

However, in real practice, values and institutions do better in the presence of watchdogs and public-spirited citizens. After all, democracy is not a spectator sport, it's a participatory event, to quote American author and activist Michael Moore. The civil society and activists need to jump into the arena because a tug of war is always on between institutions that strive to deepen democracy and a variety of vested interests which work to weaken it.

The mandate of Common Cause is to defend democratic values and integrity of institutions. In recent times we stood for the freedom of expression -- more specifically against the state's attempts to stifle dissent -- through our PILs concerning the freedom of expression on the Internet and misapplication of the sedition law. But our experience was mixed.

In the first instance, Common Cause filed a petition (heard along with petitions by PUCL, student activist Shreya Singhal, and others) which challenged the extremely vague and ambiguous provisions of the Information Technology Act 2000, as amended in 2008. The petition had pleaded that many cases of abuse of the Act had a chilling impact on the exercise of the fundamental rights by the people. Just to illustrate the point, a university professor in West Bengal was arrested for forwarding a cartoon perceived to be critical of the Chief Minister of the state. A young man was arrested for tweeting text disagreeable to the son of the then Finance Minister, and in yet another case, a class IX student in Uttar Pradesh was arrested for sharing a Facebook post criticising a senior minister.

The immediate backdrop of the petition was the shocking arrest of a young woman who had, in her Facebook post, questioned Mumbai's shutdown in the wake of a politician's death along with her friend who had simply "liked" it. Section 66A of the IT Act empowered the police to arrest a person (and eventually jail her for three years) for sending an email that could cause "annoyance or inconvenience" to others. The controversial Section applied equally to all forms of electronic messages including on mobile phones.

The Common Cause petition questioned if causing of annoyance or inconvenience to a person by the legitimate online free speech of another should be a ground for limiting the freedom of speech online. The petition led to the Supreme Court striking down Section 66A as unconstitutional. The bench observed that the public's right to know was directly affected by the Section. Common Cause position on the constitutionality of the case has been explained by Swapna Jha in this issue (See pages 23-25).

However, another one of our equally significant petitions, regarding abuse of the sedition law by police officers and politicians in power, was unfortunately disposed of. The petition sought the Supreme Court's urgent intervention to address the misuse and misapplication of Section 124 A (sedition) by successive governments. This, according to the petition, led to the unfair prosecution of students, activists and intellectuals. The petition quoted National Crime Records Bureau statistics that 47 sedition cases had been registered in 9 states of India in 2014 alone.

One hardly needs to be a lawyer to see the absurdity of the misuse of sedition laws by politicians in power, cutting across party lines. Cases were slapped on a Mumbai cartoonist who used the national emblem in support of the anti-corruption movement, two Karnataka policemen who demanded better wages, and a Tamil poet who criticised the state's liquor policy. Common Cause position on sedition is explained by Pallavi Sharma in this issue (See pages 26-27).

However, Kannada actor Ramaya's case is particularly striking. She faced sedition charges for saying Pakistan is not hell and that the people there are also like us. Having inherited the same colonial laws, Pakistan's reasonable restrictions include a clause about the "glory of Islam" and the victims are mostly activists and intellectuals. Pakistan could well be a few degrees worse than us because the dissenters often 'disappear' in the thin air, but the idea of restricting speech in the name of religion has many takers in India.

Common Cause is also concerned about 'un-freedoms' built into the system for a vast majority of the poor and vulnerable people who are unable to speak up, or be heard, beyond elections. Free speech also includes the citizens' right to articulate their grievances (and get them redressed), right to ask questions and the right to blow the whistle in matters of public interest. Regrettably, successive governments are trying every trick in the book to dilute the RTI Act. The Whistle-blower Protection Act, which provides a mechanism for inquiring into public interest disclosures or a wilful misuse of power by public servants, is stuck in amendments to exclude certain 'sensitive' departments even before implementation.

The idea of free speech, like most other fundamental rights, is yoked to the survival of democracy with the free and competent judiciary, independent public institutions and rights-based citizenship. As articulated by Achen and Bartels in 'Democracy for Realists' (2016, Princeton Univ Press) that ills of democracy are unlikely to be cured by the rhetoric of "more democracy" but by removing power imbalances and by providing a greater degree of economic and social equality to all.

This issue of Common Cause is dedicated to the freedom of speech. Like always, we are eager to know your views and comments. Please write in to us at commoncauseindia@gmail.com.

Vipul Mudgal

HATE SPEECH WILL ALWAYS BE A SERIOUS CONCERN

'Public Order' and the Indian Constitution

Sarvjeet Singh and Parul Sharma

The right to freedom of speech and expression is one of the most fundamental human rights. Over the years, scholars have offered various theories for protecting and guaranteeing this right, including its necessity for attainment of truth, for individual fulfilment and for participating in public discourse[1].

It has been recognised that free speech best serves its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger[2]. This right has been considered a cornerstone of democracy in India[3], and protects a wide range of speech including ideas that offend, shock or disturb[4], unpopular opinions[5], public criticism[6] and advocacy[7].

However, even the most liberal democracies, with strong traditions of preserving speech, agree with the need for restricting speech in certain contexts. Unregulated speech can have potential dangers[8]. Therefore the right is not absolute. One of the categories of speech that is curbed across a majority of states is hate speech[9].

Hate speech is a serious concern in India[10]. In the Indian context, the state's concern in hate speech having a real danger of breaking out into large scale violence may have some justification. In 2015, 751 recorded incidents of communal violence killed 97 people and injured 2,264[11]. This concern has increased recently with online fora, particularly social media being used as a means for the dissemination of hate speech. Recent incidents, including the North East exodus, the Muzaffarnagar riots, and the Pune lynching

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[1] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877 (1963).

[2] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[3] Union of India v. Naveen Jindal and Anr, (2004) 2 S.C.C. 510.

[4] Handyside v. United Kingdom, (1976) 1 *E.H.R.R.*737 quoted in S. Rangarajan v. P. Jagjivan Ram, 1989 SCC (2) 574.

[5] S. Khushboo v. Kanniamal & Anr., (2010) 5 S.C.C. 600.

[6] Bennett Coleman & Co. & Ors. v. Union of India & Ors., [1973] 2 S.C.R. 757.

[7] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1.

[8] Kevin Boyle, *Overview of a Dilemma: Censorship Versus Racism*, in Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination 1 (Sandra Coliver et al. eds., 1992).

[9] There is no clear or universally accepted definition of hate speech. *See* Anne Weber, *Manual on Hate Speech*, 5 (2009); http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf; Freedom of Speech, Stanford Encyclopedia of Philosophy (July 1, 2012), http://plato.stanford.edu/entries/freedom-speech/; Andrew F. Sellars, *Defining Hate Speech*, Research Publication No. 2016-20 Berkman Klein Centerfor Internet and Society at Harvard University (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882244.

[10] Chinmayi Arun and Nakul Nayal, *Preliminary Findings on Online Hate Speech and the Law in India,*Research Publication No. 2016-19 Berkman Klein Centerfor Internet and Society at Harvard University, 5 (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238.

[11] Chinmayi Arun and Nakul Nayal, *Preliminary Findings on Online Hate Speech and the Law in India,*Research Publication No. 2016-19 Berkman Klein Centerfor Internet and Society at Harvard University, 6 (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238.

have been attributed to online hate speech[12]. In the past two years, 12 states have had Internet shutdowns 39 times[13]. In most of these instances, the justification provided was to prevent caste and communal clashes or incitement to violence[14].

Freedom of Expression and the Legal Framework for Hate Speech in India

Article 19(1)(a) of the Constitution of India guarantees the right to freedom of speech and expression. Any restriction on this right is permissible only if the speech falls under one of the eight grounds listed in Article 19(2) of the Constitution. An additional requirement for curbing speech is that any such restriction must be reasonable[15]. The Indian legal framework that constitutes hate speech restrictions is spread across multiple legislations and self regulatory mechanisms[16]. However, the majority of the law is covered by the Indian Penal Code (IPC). The relationship between hate speech laws and the right to freedom of expression under Article 19(1)(a) of the Constitution is complex. The law governing hate speech in India has been criticized for being simultaneously inadequate and restrictive, limiting the freedom of expression[17].

This perplexing contradiction is brought out by two different cases before the Supreme Court. While in *Pravasi Bhalai Sangathan*[18], the petitioner found the existing legal framework inadequate and wanted stricter regulation of hate speech, *Subramanian Swamy*[19] argued that half a dozen sections of the Indian Penal Code[20] should be declared unconstitutional for violating Article 19(1)(a).

Interpretation of the 'Public Order' Restriction Under Article 19(2)

The right to freedom of speech and expression as enshrined in Article 19(1) can only be restricted under one of the restrictions provided by Article 19(2). Out of the eight different grounds listed on Article 19(2) of the Constitution, the majority of hate speech laws are saved by the 'public order' exception.

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[12]Nakul Nayak, Parliamentary Standing Committee on a New Online Hate Speech Provision, CCG-NLUD Blog (13 January, 2016), https://ccgnludelhi.wordpress.com/2016/01/13/parliamentary-standing-committee-on-a-new-online-hate-speech-provision; *Concept Note for the Symposium on Hate Speech and Online Extremism*, Centre for Communication Governance at National Law University, Delhi (November 2016),https://drive.google.com/open?id=0BycAZd9M5_7NbWttTldyMXRWRGc.

[13] Sarvjeet Singh, *Incidents of Internet Shutdowns in India (2012 onwards)*, Centre for Communication Governance at National Law University, Delhi, https://drive.google.com/ open?id=0BycAZd9M5_7NOExCRnQ3Q1pqcm8.

[14] Chinmayi Arun and Nakul Nayal, *Preliminary Findings on Online Hate Speech and the Law in India,*Research Publication No. 2016-19 Berkman Klein Centerfor Internet and Society at Harvard University, 6 (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238; Sarvjeet Singh, *Incidents of Internet Shutdowns in India (2012 onwards)*, Centre for Communication Governance at National Law University, Delhi, https://drive.google.com open?id=0BycAZd9M5_7NOExCRnQ3Q1pqcm8.

[15] Chintaman Rao v. State of Madhya Pradesh, (1950) 1 S.C.R. 759; State of Madras v. V.G. Row, (1952) 1 S.C.R. 597.

[16] Pravasi Bhalai Sangathan v. Union of India, (2014) 11 S.C.C. 477, ¶10; Siddharth Narrain, The Constitution of Hurt: The Evolution of Hate Speech Law in India 10-14 (2001) (unpublished L.L.M. thesis, Harvard Law School) (on file with author); Chinmayi Arun and Nakul Nayal, *Preliminary Findings on Online Hate Speech and the Law in India,*Research Publication No. 2016-19 Berkman Klein Centerfor Internet and Society at Harvard University, 7-8 (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238; *See* Siddharth Narrain, *Hate Speech, Hurt Sentiment, and the (Im)Possibility of Free Speech*, 51(17) EPW 119 (2016).

[17]*Concept Note for the Symposium on Hate Speech and Online Extremism*, Centre for Communication Governance at National Law University, Delhi (November 2016),https://drive.google.com/open?id=0BycAZd9M5_7NbWttTldyMXRWRGc.

[18]Pravasi Bhalai Sangathan v. Union of India & Others, (2014) 11 S.C.C. 477.

[19] Subramanian Swamy v. Union of India & Ors., Writ Petition (Criminal) No. 69/201, Supreme Court of India (ongoing).

[20] The petition challenges sections 153, 153A, 153B, 295, 295A, 298 and 505 of the Indian Penal Code, 1860.

However, there is no clear mapping of the scope of the public order restriction provided under Article 19(2). 'Public order' was not one of the restrictions provided under Article 19(2), when the Constitution was enacted. It was added by the first amendment to the Constitution[21] subsequent to the decisions by the Supreme Court in *Romesh Thappar*[22] and *Brij Bhushan*[23]. In both these cases the Supreme Court struck down laws which restricted speech. In its observation in both these cases, the Court stated that 'public order' or safety does not meet the threshold for lawfully restricting speech under the Constitution and was not one of the grounds for restricting speech in Article 19(2)[24].

Subsequent to the passage of the first amendment, the Supreme Court in *Ramji Lal Modi*[25] held that Section 295A[26] of the IPC was constitutional because it fell within the 'public order' exception[27]. The Court held that the restriction on the grounds of 'public order' was to be read widely and while a law may not directly deal with 'public order', it can be read to be "in the interests of public order"[28]. It stated that 'public order' restriction protected any activity that had a *tendency* to cause public disorder irrespective of whether there was any actual breach of public order[29]. This reasoning was also used by the Court in the case of *Virendra*[30]. Thus, the jurisprudence that emanated from the Court subsequent to the passage of the first amendment was that even if an act had a mere tendency to cause public disorder and a law was enacted to prevent such an act, it will be constitutional.

The Apex Court provided a different interpretation of the 'public order' exception in *Ram Manohar Lohia*[31]. The Court held that speech could not be restricted in cases where there was no 'proximate and reasonable nexus between the speech and 'public order'. There has been a series of cases[32] subsequent to *Lohia*, where the Court applied the *proximity test* to determine the constitutionality of an act. In *O.K. Ghosh,*[33] the Court held that "indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order'".

The next phase in the Court's jurisprudence on 'public order' started with the case of *Rangarajan v. Jagjivan Ram*[34]. In this case, the Court held that the 'Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or

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[21] *See* Granville Austin, Working a Democratic Constitution 40-50 (1999); Arudra Burra, *Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951* (December 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052659.

[22] Romesh Thappar v. State of Madras, (1950) 1 S.C.R. 594.

[23] Brij Bhushan and Anr. v. State of Delhi, (1950) 1 S.C.R. 605.

[24] Romesh Thappar v. State of Madras, (1950) 1 S.C.R. 594; Brij Bhushan and Anr. v. State of Delhi, (1950) 1 S.C.R. 605.

[25] Ramji Lal Modi v. State of UP, (1957) 1 S.C.R. 860.

[26] *See* Neeti Nair, *Beyond the 'Communal' 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of section 295A of the Indian Penal Code*, 50 Ind. Eco. Social History Rev.317 (2013).

[27] Ramji Lal Modi v. State of UP, (1957) 1 S.C.R. 860.

[28] Ramji Lal Modi v. State of UP, (1957) 1 S.C.R. 860, ¶9.

[29] Ramji Lal Modi v. State of UP, (1957) 1 S.C.R. 860.

[30] Virendra v. State of Punjab, (1958) 1 S.C.R. 308.

[31] Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 S.C.R. 821.

[32] Kameshwar Prasad v. State of Bihar, (1962) 3 S.C.R. Supl. 369; O.K. Ghosh v. E.X. Joseph, (1963) 1 SCR Supl. 789.

[33] O.K. Ghosh & Anr. v. E. X. Joseph, (1963) 1 SCR Supl. 789.

[34] S. Rangarajan & Ors. v. P. Jagjivan Ram & Ors., (1989) 2 S.C.C. 574.

far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to public interest. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg"[35].

Two recent judgments by the Supreme Court have tried to examine the 'tendency' and the 'proximity' tests. In *Arup Bhayan*[36], while applying the "imminent violence test"[37], the Court held that a mere act cannot be punished unless one resorted to violence or incited people to violence[38]. In *Shreya Singhal*[39], the Court stated that in deciding any violation of 'public order', it must decide whether an act disturbed the entire community or merely affected an individual. The Court made a distinction between discussion, advocacy, and incitement[40] and held that the first two, i.e. discussion and advocacy were at the 'heart of Article 19(1)(a)' and only when the speech takes the form of incitement will Article 19(2) kick in[41]. The Court also affirmed proximity test of *Lohia* and equated[42] the 'spark in a powder keg' test with the 'clear and present danger'[43] test propounded by the US Supreme Court.

To summarize the discussion in this part, the Indian Supreme Court has two different threads of cases relating to 'public order'. The first one uses the *tendency test*, according to which the mere tendency to cause public disorder is enough to restrict speech. The second is the *proximity* test (evolved further in *Rangarajan*) in which speech can only be restricted if such speech leads to a public disorder. If we examine the standards laid down by the Court in *Shreya Singhal*, the '*spark in a powder keg*' standard will meet the incitement threshold[44] and the standard of '*calculated tendency*' will only meet the threshold of advocacy.

'Public Order' as a Tool to Uphold Hate Speech Offences

The consequence of the 'public order' exception in protecting hate speech laws is apparent from the fact that section 153A of the IPC was found unconstitutional in a case decided before the ground was added with the 1951 amendment[45]. Various provisions criminalizing hate speech including Sections 153A, 295A and 505 of the IPC and Section 95 of the CrPC have been challenged for unreasonably restricting legitimate speech. However, their constitutionality has been upheld by the Courts[46]. These laws criminalizing hate speech have been justified on the grounds of the 'public order' exception under Article 19(2).

However, as observed in the previous part, the interpretation of 'public order' has undergone tremendous transformation since independence. It is essential that the constitutionality of hate speech provision is

[35] S. Rangarajan & Ors. v. P. Jagjivan Ram & Ors., (1989) 2 S.C.C. 574, ¶ 45.

[36] Arup Bhuyan v. State of Assam, (2011) 3 S.C.C. 377.

[37] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[38] Arup Bhuyan v. State of Assam, (2011) 3 S.C.C. 377, ¶¶ 9-12.

[39] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1.

[40] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1, ¶ 13.

[41] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1, ¶ 13.

[42] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1, ¶¶ 39-41.

[43] Schenck v. U.S., 249 U.S. 47 (1919).

[44] Arup Bhuyan v. State of Assam, (2011) 3 S.C.C. 377.

[45] Tara Singh Gopi Chand v The State, A.I.R. 1951 P&H 27.

[46] *See* Debi Soren and Ors. v. State, 1954 (2) B.L.J.R. 99; Sagolsem Indramani Singh snd Ors. v. State of Manipur, 1955 Cri.L.J. 184; Sheikh Wajih Uddin v. State, A.I.R. 1963 All. 335; Gopal Vinayak Godse v. Union of India and Ors., A.I.R. 1971 Bom. 56; Ramji Lal Modi v. State of U.P., (1957) 1 S.C.R. 860; Piara Singh v. State of Punjab, 1977 A.I.R. 2274.

examined against these evolving standards. Consequently, this part examines the understanding of 'public order' used to justify the hate speech offences by the different courts. It also evaluates whether the interpretation of 'public order' used by the courts resonates with the more liberal interpretations adopted in *Rangarajan*[47] and *Shreya Singhal*[48].

The constitutionality of section 153A of the IPC was first challenged in 1950 before the Punjab High Court in *Tara Singh Gopi Chand*[49]. This case came up before the Court before the first amendment incorporated the 'public order' exception under Article 19(2). In the absence of the 'public order' exception, the Court found section 153A to be an unwarranted restriction on the freedom of speech, examining it on the anvil of 'security of state'. Consequently, the Court declared it to be unconstitutional.

Subsequently, in 1953 the constitutionality of Section 153A was again challenged before the Patna High Court in *Debi Soren*[50]. Differing from the judgment by the Punjab High Court, the Court observed that the exceptions under Article 19(2) had been expanded to include 'public order' and upheld section 153A of the IPC[51]. While this case precedes the '*tendency test*' and *'proximity test'*, it examined the scope of the expression "in the interests of public order" under Article 19(2) and accorded it a wider connotation leaning towards the '*tendency test*'. The Court found that even in the absence of incitement to violence, certain actions may seriously affect public order. Consequently, it held that the term 'public order' should not be confined to 'incitement to violence or tendency to violence'[52].

This interpretation of 'public order' adopted by the Court in this case is at odds with the interpretation laid down by the Supreme Court in recent cases including *Shreya Singhal*[53] that only speech that is 'inciting' could be prohibited. In 1962, post *Ramji Lal Modi*[54] and *Lohia*[55], the Allahabad High Court again examined the constitutionality of Section 153A of IPC in *Sheikh Wajih Uddin*[56]. The High Court upheld Section 153A according a wide connotation to the term 'in the interest of public order'. Relying on *Ramjilal Modi*[57], the court found that even if a law was not designed to directly maintain public order it was protected under Article 19(2) by virtue of use of phraseology in the 'interest of public order' which accords a much wider ambit of protection. Examining Section 153A, the Court found that if people were permitted to promote enmity or hatred, there may be riots or commission of offences[58]. Accordingly, the Court found that '*it must be held that the provision is in the interest of public order*', reiterating that it was necessary for Section 153A to be directed at maintaining public order[59]. The Allahabad High Court firmly adopts the broader interpretation of 'public order' laid down in *Ramjilal Modi.* It does not incorporate the *'proximity*

[47] S. Rangarajan & Ors. v. P. Jagjivan Ram & Ors., (1989) 2 S.C.C. 574.

[48] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1.

[49] Tara Singh Gopi Chand v. The State,1951 Cri.L.J. 449.

[50] Debi Soren and Ors. v. The State,1954 (2) BLJR 99.

[51] Debi Soren and Ors. v. The State, 1954 (2) BLJR 99, ¶ 10.

[52] Debi Soren and Ors. v. The State, 1954 (2) BLJR 99, ¶ 12.

[53] Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1.

[54] Ramji Lal Modi v. State of U.P., (1957) 1 S.C.R. 860.

[55] Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 S.C.R. 821.

[56] Sheikh Wajih Uddin v. State, A.I.R. 1963 All. 335.

[57] Ramji Lal Modi v. State of U.P., (1957) 1 S.C.R. 860.

[58] Sheikh Wajih Uddin v. The State, AIR 1963 All 335, ¶ 4.

[59] Sheikh Wajih Uddin v. The State, AIR 1963 All 335, ¶ 4.

test' as laid down in *Lohia* and does not require any 'nexus' or 'proximity' between the restriction and 'public order'.

The Parliamentary Standing Committee on Home Affairs has recommended addition of a provision in the Information Technology Act to cover all cases of online hate speech.[60] A perusal of the suggested provision reveals that it is substantially similar to the provisions under sections 153A and 153B of the Indian Penal Code.[61] However, these sections have been held constitutional using the speech restrictive interpretation of 'public order'. Similarly, recently the Supreme Court dismissed a petition that sought to declare Section 295A of the IPC as unconstitutional holding that this issue has been decided in *Ramji Lal Modi* in 1957.[62] The Court stated that in *Ramji Lal Modi* the Court held that the law prohibiting activities which have a 'tendency' to cause public disorder falls squarely under a law imposing reasonable restriction "in the interests of public order", even if those activities do not lead to a breach of 'public order'. This broad understanding of 'public order' has been narrowed through subsequent decisions[63] which require a strong nexus between the restriction and 'public order'. The *'tendency test'* as laid down in *Ramji Lal Modi* has undergone tremendous transformation, making it imperative that the constitutionality of the hate speech provisions including Sections 153A and 295A be adjudged on the higher threshold. Thus the understanding of 'public order' used to justify these hate speech provisions is distinct from the speech protective interpretation adopted in the more recent cases like *Rangarajan* and *Shreya Singhal.*

Conclusion

The jurisprudence on 'public order' under Article 19(2) has evolved over the past six decades. It has moved from a very broad understanding of the term 'public order' to a narrower understanding that requires a strong nexus between the restriction placed and public order. Recent cases have set a higher threshold for justification of restrictions on speech made in the 'interest of public order'. However, the cases that had upheld hate speech provisions like Section 153A and Section 295A had done so based on the broad understanding of 'public order' using the *tendency test* propounded in *Ramji Lal*. As of today, there is no clarity on the test which should be used and different courts and benches use different tests, without even clarifying why a particular test was used. In the wake of growing instances of online hate speech and various hate speech incidents being attributed to social media, it is important that the court clarifies this. The question of the constitutional validity of hate speech provisions in *Subramanium Swamy* is an opportunity for the Apex Court to determine a consistent standard of 'public order', which is speech protective.

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[59] Sheikh Wajih Uddin v. The State, AIR 1963 All 335, ¶ 4.

[60] The Parliamentary Standing Committee on Home Affairs, Action taken by the Government on the recommendations/observations contained in the 176th Report on the Functioning of Delhi Police, One Hundred Eighty Ninth Report (December 2015), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/189.pdf.

[61] Nakul Nayak, Parliamentary Standing Committee on a New Online Hate Speech Provision, CCG-NLUD Blog (13 January, 2016), https://ccgnludelhi.wordpress.com/2016/01/13/parliamentary-standing-committee-on-a-new-online-hate-speech-provision/

[62] Ashish Khetan v. Union of India, Writ Petition (Criminal) No. 135/2016, Supreme Court of India (3 Octover, 2016).

[63] *See* Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 S.C.R. 821; S. Rangarajan & Ors. v. P. Jagjivan Ram & Ors., (1989) 2 S.C.C. 574; *Arup Bhuyan*v. State of Assam, (2011) 3 S.C.C. 377; Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1.

FREE SPEECH AND COMMUNAL APPEAL

Gag Order On Identity Politics May Prove Counterproductive

Manoj Mitta

Following the government's controversial move to fight corruption through demonetization, the Supreme Court came up with a redefinition of a "corrupt practice". This redefinition though has little to do with black money. It's about widening the ambit of one of the corrupt practices listed in the election law, Section 123(3) of the Representation of the People Act. Namely, the practice of an "appeal" made by a candidate or anyone authorized by him to vote or refrain from voting on the basis of "his" religion, race, caste, community or language. On January 2, a seven-judge bench of the Supreme Court delivered a 4-3 verdict on the meaning of the pronoun "his" used in the provision dealing with the excesses of identity politics[1]. Giving a "broad and purposive interpretation" to that single word, the majority judgments held that the bar on the appeal for votes was on the basis of any of the five listed identities of not just the candidates but also those of the voters. This means that a candidate is now barred from appealing on the basis of, for instance, not just his own religion but also that of the voters he is addressing. The implication is that a candidate belonging to one religion is not allowed any longer to appeal for votes on the basis of another religion to which the voters belong.

The justifications offered for going beyond the "literal" interpretation suggest that the four judges comprising the majority on the Bench believed that they were plugging a loophole. In the main judgment on behalf of Justice L Nageswara Rao and himself, Justice Madan Lokur said that this expansive reading was necessary "for maintaining the purity of the electoral process and not vitiating it". Since a candidate is prohibited from appealing to vote on certain grounds, Justice S A Bobde held, "The word 'his' therefore must necessarily be taken to embrace the entire transaction of the appeal to vote made to voters and must be held referable to all the actors involved i.e. the candidate, his election agent etc., and the voter." Justice T S Thakur added, "So interpreted, religion, race, caste, community or language would not be allowed to play any role in the electoral process and should an appeal be made on any of those considerations, the same would constitute a corrupt practice."

The pious sentiments expressed by the four judges are unexceptionable. But the idea that votes could be canvassed without referring to any of the five identities of the electors seems far too cut off from the complexities of India's plural society. This is exactly why three judges dissented: Justices D Y Chandrachud, A K Goel and U U Lalit. The minority judgment, authored by Justice Chandrachud on behalf of all the three, pointed out that voters "may have and in fact do have a legitimate expectation that the discrimination and deprivation which they may have suffered in the past - and which many continue to suffer - on the basis of their religion, caste, or language should be remedied." Since access to governance is a means of addressing social disparities, Chandrachud observed: "Social mobilization is a powerful instrument of bringing marginalized groups into the mainstream." Therefore, the majority decision to prohibit a candidate from conveying to voters "that the injustices faced by them on the basis of traits having an origin in religion, race, caste, community or language would be remedied," he said, "is to reduce democracy to an abstraction".

Another compelling reason cited by Chandrachud for disagreeing with the gag order proposed by the majority opinion is that it would violate the constitutional protection of free speech enjoyed by candidates and political parties. Given that this fundamental right is subject only to "reasonable restrictions" enacted

[1]Abhiram Singh v. C.D. Commachen, Civil Apppeal No. 37 of 1992, Order dated January 2, 2017.

by Parliament, Chandrachud said, "There is no warrant for making an assumption that Parliament while enacting Section 123(3) intended to sanitize the electoral process from the real histories of our people grounded in injustice, discrimination and suffering." Thus, even if Section 123(3) is assumed to have been drafted to bar candidates from discussing any identity-based issues faced by sections of voters, such a restriction would have failed the test of reasonableness and would therefore have been vulnerable to being declared unconstitutional.

As a corollary, the minority judgment raised the bar for what constitutes a corrupt practice under Section 123(3). "Discussion of matters relating to religion, caste, race, community or language which are of concern to the voters is not an appeal on those grounds," it said, adding, "What is proscribed by Section 123(3) is a candidate soliciting votes for himself or making a request for votes not to be cast for a rival candidate on the basis of his own (or of the rival candidate's) religion etc." Pointing out that the Constitution contains provisions for the amelioration of disabilities and discrimination practiced on the basis of various identities, Chandrachud said, "Discussion about these matters - within and outside the electoral context – is a constitutionally protected value and is an intrinsic part of the freedom of speech and expression."

But what if a candidate, without directly soliciting votes for himself, derives electoral mileage by inciting hatred between different groups of voters? There is a different provision for it, Section 123(3A), which deals with the promotion of enmity between different classes of citizens on the basis of any of the five identities by the candidate or anyone authorized by him. And, as the minority judgment put it, "Section 123(3A) cannot be telescoped into Section 123(3). The legislature has carefully drafted Section 123(3) to reach out to a particular corrupt practice, which is even more evident when the ambit of Section 123(3A) is contrasted with Section 123(3). One cannot be read into the other nor can the text of Section 123(3) be widened on the basis of a purposive interpretation."

Clearly, the literal interpretation of Section 123(3) made by the minority judgment is more thought through, while the purposive interpretation by the majority judgments offers a remedy worse than the disease. As the majority judgments with all their flaws are the law of the land, the Indian democracy has been rendered more illiberal by its Supreme Court.

Consider the anomalies that may arise in the upcoming election in Uttar Pradesh, if the majority judgments are seriously implemented. However much they are of concern to the people of the state, no candidate can discuss identity-based issues such as Muzaffarnagar, Kairana, Dadri, Ayodhya, beef, love jihad, reservations and caste atrocities without falling foul of the widened definition of corrupt practice. The situation may be even more farcical in the other election-bound state, Punjab, where the very name of the ruling party, Shiromani Akali Dal, may be construed as an appeal that is forbidden.

Though it had raised expectations of undoing the damage done by its 1995 Hindutva judgment[2], the Supreme Court ended up aggravating the problem, despite all its rhetoric about the purity of the electoral process. If anything, with its sweeping attack on identity- based concerns, the Supreme Court has made a deeply political statement by privileging issues like development and nationalism over human rights and social justice.

Central to the Supreme Court's flawed conclusion is its disregard for the irreconcilable contradiction between its purposive interpretation of Section 123(3) and the fundamental right to free speech and expression.

[2]Ramesh Yeshwant Prabhoo V. Prabhakar Kashinath Kunte, 1996 AIR 1113; The Supreme Court in this case held that since "Hinduism" and "Hindutva" amounted to a "way of life", not every election speech that invoked these words amounted to a corrupt electoral practice.

Consider the cursory manner in which Lokur's lead judgment dealt with this crucial aspect. It began by admitting that the challenge to the constitutionality of bringing voters under the ambit of the pronoun "his" was one of the "four principal submissions" made by the counsel for the appellants. Yet, when it came to addressing this submission, the judgment gave it short shrift saying: "Although it was submitted that a broad interpretation given to sub-section (3) of Section 123 of the Act might make it unconstitutional, no serious submission was made in this regard." Lokur also took refuge in a 1954 Supreme Court judgment[3] in which a "similar submission" was dealt with "rather dismissively" although the sweep of the corrupt practice at the time was "rather broad". After quoting a paragraph from that 1954 verdict, Lokur simply said: "We need say nothing more on the subject."

One of the two provisions examined by the 1954 judgment was indeed the original version of Section 123(3), which had then been codified as Section 124(5). The problem, however, is that the 1954 verdict was based on the pretense that the restrictions imposed by Section 124(5) on political discourse during elections had no bearing on the candidate's right to free speech. It simply passed off those restrictions on the candidate's speech as "conditions which must be observed if he wants to enter the Parliament". Whether those conditions could include drastic curbs on his right to free speech was a question that the 1954 judgment did not address at all. Much less did it pronounce on whether the restrictions laid down on campaign speeches were reasonable enough to hold that they did not violate the candidate's constitutionally protected right to free speech.

Thus, citing a 62-year old judgment on a long repealed provision, the Supreme Court glossed over the sanctity of the free speech protection while enlarging the restrictions imposed by a substantially different Section 123(3). Equally disingenuous is its reference to the legislative history of Section 123(3) for its purposive interpretation of the provision. Just before the term "his" was inserted in Section 123(3) in 1961, the Parliament had amended a hate speech provision in the Indian Penal Code, Section 153A, strengthening the safeguard against communal and separatist tendencies. The change made in Section 153A IPC was followed in the same year by an amendment to the corresponding hate speech provision in the electoral law, Section 123(3A). As indicated by the dissenting judgment of Chandrachud, the majority opinion conflated Section 123(3) with Section 123(3A) to justify its assault on free speech in the name of protecting secularism. Never has secularism been so gratuitously invoked to undermine free speech.

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[3] Jamuna Prasad Mukhariya v Lachhi Ram, 1954 AIR 686.

DIGITAL RIGHTS AND DIGITAL DIVIDE

Lack of Internet Access Undermines Freedom of Speech and Expression

***Osama Manzar and Shivani Lal**

When one comes across the words 'digital rights', one cannot help but associate them with words like hierarchy, privilege, entitlements, diversity, human rights and division. Digital rights are rights of the people to access and use digital tools and technologies. They mean universal and equitable opportunities for all to be able to make meaningful use of the digital tools available to them. So, the context of talking about equal access and digital rights arises from the fact that there still exists a reality where there is lack of universal and equitable access to digital technologies or the Internet for all.

This article aims to establish an understanding of how digital rights are human rights; and specifically, how lack of access to the Internet creates an unequal society in our times. It concludes by demonstrating that lack of access to the Internet affects all our other rights such as right to access and disseminate information, freedom of expression, association and assembly and rights to entitlements that are enabled by technology and the Internet.

Why do Digital Rights Matter?

Let's take an example of a book which is a medium to receive and disseminate information and knowledge. Having access to books is our basic right. We do not think of access to books as a problem or an issue because it is not being denied to us, books are widely and equally available to all. They are a medium of information sharing, have always been and will always be. Similarly, Internet is a medium and has increasingly become one that we use not only to access or share information but also to express opinions, conduct business, entertain ourselves, form and find relationships and stay connected to our loved ones.

The lines between our online and offline lives are beginning to blur. We are constantly not only creating and consuming content and data, we are also becoming the data. When almost every part of our life depends and functions heavily on digital tools and the Internet, it is imperative to talk about our human rights as individuals online as well as our human rights that are affected by rights online.

Access to the Internet empowers us to exercise various human rights i.e. civil and political rights as well as economic, social and cultural rights. The resolution adopted in June 2016 during the 32nd session of the United Nations Human Rights Council (UNHRC) declares that human rights are unequivocally applied in the online sphere[1]. It reinforces that access to the Internet is the basic necessity, which would enable the exercise of a whole host of other rights in online spaces. This particularly includes our right to access and disseminate information.

Governments across the globe are adopting digital technologies for information and service delivery of welfare and entitlement schemes. These services were earlier provided without the Internet, manually. Super-fast reach, no geographic limitations, affordability and lower requirement of manpower have been the major reasons for the governments to shift entirely from offline management of services to online.

[1] https://www.article19.org/data/files/Internet_Statement_Adopted.pdf (A/HRC/32/L.20)

Therefore, equitable access to the Internet and digital tools is critical to access entitlements such as ration, Right to Information (RTI)[2] and livelihood schemes like Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA)[3], among others, that are now exclusively digitally enabled services.

Digital Divide: Haves and Have-nots

Digital divide can be defined as an unequal environment created by division of people falling in two extreme categories based on the ones that have access to digital technologies and the ones that don't. This further expands to divisions based on those having the adequate skills or literacy to make meaningful use of access and the ones that do not[4]. Today 65.2% Indians do not have access to the Internet[5]. Only 17% Indians have smart phones, and most users are accessing the Internet on their phones for the first time[6].

Urban mobile Internet users constitute about 262 out of 306 million mobile Internet users in India while rural India constitutes 109 million mobile Internet users in 2016[7]. There are about 250,000 panchayats (village councils) in India encompassing some 650,000 villages and almost all of them are living offline lives[8]. Evidently, the opportunities available to urban population puts them at a privileged position than the ones in rural areas, setting a clear divide in access to the Internet and related technologies.

The Government of India (GoI) launched the Digital India initiative in 2015 with the vision of empowering the country digitally. During the launch event, GoI recognised digital access as a human right[9]. Additionally, the National Fibre Optic Network (NOFN) plan was initiated in 2012, to provide high-speed broadband connectivity to 250,000 village councils by December 2016, by laying 700,000 km of optical fibre cable by that time. The National Telecom Policy (NTP), 2012, also notes that telecom and broadband connectivity are basic necessities like education and health, and encourages working towards 'Right to Broadband'[10]. Despite these developments, the implementation of these initiatives is substandard — the cables are yet to be laid in the pipes and servers are not available at the access points[11].

Annual cost of Internet Usage in Dhani Poonia:

Due to lack of availability of internet access points/centers in villages at convenient distances, people do not only spend money on Internet services but also during the commute to these centers. According to a study[12], a small village like Dhani Poonia (under Jhaadsar Chhota panchayat in Churu district of Rajasthan)

[2] http://righttoinformation.gov.in/rti-act.pdf

[3] http://www.nrega.nic.in/netnrega/forum/2-MGNREGA.pdf

[4] http://ww.gunkelweb.com/articles/digital_divide.pdf

[5] http://www.internetlivestats.com/internet-users/india/

[6] http://www.livemint.com/Consumer/yT14OgtSC7dyywWSynWOKN/Only-17-Indians-own-smartphones-survey.html

[7] http://articles.economictimes.indiatimes.com/2016-02-03/news/70314156_1_mobile-internet-rural-india-user-base

[8] http://swarajyamag.com/politics/national-optical-fibre-network-modis-pet-project-gains-momentum-but-still-has-a-long-way-to-go

[9] Digital India Programme, Government of India, http://www.digitalindia.gov.in/content/about-programme

[10] National Telecom Policy 2012, Telecom Regulatory Authority of India, available at:http://www.dot.gov.in/sites/default/files/NTP-06.06.2012-final.pdf

[11] "For 800 million citizens, Modi's Digital India highway is a bridge to nowhere", Scroll.in, May 26, 2016, available at: http://scroll.in/article/808622/for-800-million-citizens-modis-digital-india-highway-is-a-bridge-to-nowhere

[12] Tiwari, A. (2016). Internet Exclusion Study. Unpublished raw data.

spends upto Rs.1,76,598 annually to access the Internet (165 households). The study shows that on an average each household spends 5.4 hours on the Internet annually, which is 890 hours for 165 households; and at least 10 households spend nine hours annually on the Internet. Therefore, nine hours could mean loss of nine hours of wage work for these villagers, with some of them earning as less as Rs 200 a day. These people are living below poverty line and are losing money and resources on accessing the internet even though it is supposed to be provided for free or at nominal charges through the NOFN.

Poor and rural populations rely heavily on welfare and entitlement schemes offered by the Government. These services are now being run digitally, creating an interesting paradox by making lives easier and relatively difficult at the same time for the have-nots, for various reasons that will be discussed in later sections. To say the least, the people who have access and necessary skills to make use of this access can take maximum benefits of these digital services (haves) while the ones that cannot do so (have-nots) find themselves confused and at a disadvantage. This in turn leaves them vulnerable at the hands of middlemen who exploit them, creating further confusion and division.

Factors that Lead to Digital Divide

Internet brings equality, but is still percolated through a hierarchy of power, gender, economics, affordability and control. Socio-economic or structural inequalities that exist in offline spaces also reflect on human rights online. Factors such as levels of digital literacy, wage gap, age gap, geography and physical abilities play a role in determining if a section of the society is digitally excluded.

For example, only 9% of those with lower education levels are online, as compared with 38% who have higher education levels[13]. Digital literacy can be defined as the fluency or efficiency of an individual to be able to comprehensively access the digital tools and use the information available effectively. Access alone is not useful if the individual is unable to use the technology for their desired purpose. For example, most of the content available on the Internet is in English, while only 30% of Indians can speak or read English. On the other hand, only 74.04% population is literate in India, according to the 2011 Population Census. Therefore, even if access is provided, lack of digital fluency is a challenge that leaves most at a disadvantage.

Chanderi Weavers on the Internet

DEF has been making efforts in Chanderi (Madhya Pradesh) since 2010 through digital literacy, skill building and e-commerce trainings online for the weavers' community. The objective is to enable them to maximise their business and visibility through the Internet. Along with providing necessary trainings and orientation towards using the Internet, DEF has also connected every household in the village to the Internet through broadband. In six years, almost 3,500 weaver families have discarded designing on paper to adopt CAD/CAM software, learnt to use e-commerce platforms for sales, and have adopted social media tools for marketing and promotion of their handloom products.

The ambitious NOFN plan with a budget of Rs.700 billion to connect every panchayat through a 100-mbps line was designed to provide pipeline for affordable Internet connections in rural India where they don't have an option of choosing an Internet service provider (ISP) and Bharat Sanchar Nigam Limited (BSNL) is the only choice available. However, Bharat Broadband Network Ltd (BBNL) has only been able to lay incremental network cables across 139,582km (as of May 2016). While the government claims to have reached 61,000 gram panchayats (out of a total of 250,000), only 7,000 of them have a working network[14].

[13] http://www.livemint.com/Consumer/yT14OgtSC7dyywWSynWOKN/Only-17-Indians-own-smartphones-survey.html
[14] http://swarajyamag.com/politics/national-optical-fibre-network-modis-pet-project-gains-momentum-but-still-has-a-long-way-to-go

As many as 72% women in India do not have access to the Internet or any kind of digital technologies. Gender discrimination remains one of the major barriers in access and usage of technology in India[15]. Women face more familial and societal censure than men for using mobile phones or the Internet[16]. However, the provision of infrastructure and devices alone will not increase women's access. Multiple barriers need to be simultaneously addressed to address this divide. These include women's exclusion from technology education, lack of digital skills, social norms that favour men and financial and institutional constraints, among other reasons[17].

In some villages of Uttar Pradesh[18], Rajasthan[19] and Gujarat,[20] khap panchayats[21] have banned young and unmarried women from using mobile phones. These actions further restrict women's access not just to digital technologies but also to information, speech and expression.

Conclusion

Access to digital technologies and the Internet is fundamental to our lives today, it is fundamental for us to practice and protect citizenship, which is gradually also being looked at as digital citizenship. We've established that the lines between our online and offline lives are blurring, allowing the structural inequalities that exist offline to also reflect online. These structural inequalities manifest themselves online in terms of access to digital rights and how these rights are perceived and practiced. Denial of access to the medium that facilitates right to exercise freedom of expression, seek or disseminate information, conduct business, seek livelihood, communicate and participate in democracy results in denial of human rights, which is not limited to online sphere.

The right to have a voice of the dissent, independent opinion, exchange of information, ideas and access to communication to analyse those ideas, in order to make informed decisions constitutes freedom of expression, which lies at the core of principles of democracy. To exercise this freedom of expression, we need a communication medium. This communication medium that was earlier provided by analogue platforms like radio and TV has now been replaced by digital platforms such as the Internet, and unequal or disproportionate access to Internet results in unequal participation in democracy by haves and the have-nots.

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****Digital Empowerment Foundation (DEF)*** *works with underdeveloped and marginalised communities and people living in socio-economically backward conditions by empowering them through technology. It advocates for the protection and promotion of human rights on the Internet.*

[15] http://www.iamai.in/media/details/4491
[16] "A Gross Misuse of the IT Act by Mumbai Police", The Wire, July 14, 2015, available at: http://thewire.in/6390/mumbai-polices-gross-misuse-of-the-it-act/
[17] Add UNESCO footnote
[18] "Panchayat bans mobile phones among girls" The Time of India, Feb. 19, 2016 (http://timesofindia.indiatimes.com/city/agra/Panchayat-bans-mobile-phones-among-girls/articleshow/51060339.cms)
[19] "Khap panchayat strikes again: Mobile phones use banned for girls in Barmer" Zee News, July 2, 2015 (http://zeenews.india.com/news/rajasthan/khap-panchayat-strikes-again-mobile-phones-use-banned-for-girls-in-barmer_1623430.html)
[20] "Gujarat village bans mobile phones for unmarried women" Hindustan Times, Feb. 18, 2016 (http://www.hindustantimes.com/india/gujarat-village-bans-mobile-phones-for-unmarried-women/story-iziKwjYckgmOOP8ZRBNn3K.html)
[21] Khap Panchayat; https://en.wikipedia.org/wiki/Khap

THREAT TO FREE SPEECH: IGNORANCE IS BLISS

The Right To Be Forgotten Requires Deliberate Rulemaking

***Apar Gupta**

On July 5, 1993 an illustration made by Peter Steiner was published in The New Yorker picturing a pair of dogs talking to each other. One of them with a paw on a keyboard, in front of a computer. It carried the now iconic caption, *"On the internet, nobody knows you're a dog*". The graphic and the accompanying text conveyed an utter lack of trust in the early use of the Internet. But it also captured another minor sentiment--the presence of user choice. In the early days of the Internet a person could be anyone. They could build their online personality, or simply refuse to participate in the growing information economy.

"On the Internet, nobody knows you're a dog."
The New Yorker, July 5, 1993

With the network maturing, information being aggregated and the erasure of boundaries between the physical and the virtual, the ability of users to shape their online identities has become tougher. Irrespective of merit, digital mediums of communication have become a preferred mode for publication by users, institutions and governments. Much of this ends up being publicly accessible information. While such data improves hope of transparency and rich empirical models, it has also led to a loss of control for individuals. Search engines today provide a deep insight into a person's identity by collecting information published over years, if not decades. A simple online search, not taking more than a few minutes, may reveal intimate, embarrassing details. Such information may be timeworn, selective or irrelevant but may lead to social judgment and emotional distress for the subjects of such a search result. Clearly there exists a problem. One of the solutions being proposed to it is the right to be forgotten.

The right to be forgotten has been an area of debate for some years, but was relatively dormant until a recent judgment by the European Court of Justice (ECJ). The ECJ in Google Spain judgment[1] rendered an opinion in favor of a right to be forgotten stating that, "…if it is found..., following a request by the data subject…that the inclusion in the list of results displayed following a search made on the basis of his name… [are] *inadequate, irrelevant or no longer relevant, or excessive... the information and links concerned in the list of results must be erased.*"

This judgment has come under substantial criticism on several grounds. Much of this concern arises from its impact on free expression. There is good reason for such worry. The role of the Internet in decreasing barriers for access to knowledge and communication is well documented. The United Nations Human

[1]Google Spain SL & Anr. v Agencia EspanÞola de Protecccioìn de Datos (AEPD) & Anr. , 014 E.C.R. I-317

Rights Council has recently recognized access to the Internet to be a basic human right. Given the growing adoption of the Internet, risks to individual reputation do arise, but there also exists large-scale social benefits. It may be also important to emphasize that a binary analysis between the right to privacy and the right to free speech, while useful, may also be restrictive. It may provide a false sense of certainty in analysis when the area of regulation in India is more complex within such categories.

This essay has the modest hope of setting out the complexity of the debate on the right to be forgotten as may be specially suited to India. It makes the argument that the right to be forgotten is a determination that requires a deliberative process. Many elements have been flagged which are best suited to be examined by the office of a Privacy Authority or a Privacy Commissioner. Such a proposal may look tedious or even politically unviable at present — but terming whim into regulation is a perilous path. Without wide consultation by an expert institution, we may not be able to assess how much the right to be forgotten guards individual reputations, and how much it bites into public interest.

The Origins of the Right To Be Forgotten in India

It is first necessary to understand the premise of the right to be forgotten. What are its proper contours and from where does it arise in law? The first part of the inquiry is linked to explaining the articulation of right to be forgotten by the ECJ and then examining its links to the existing body of law in India.

The right to be forgotten has been identified by several commentators as arising from European statutes on criminal and civil law. Many link it to the right of rehabilitation for convicts, reasoning that erasure of their criminal histories is necessary for social integration. Such statutes exist in the United Kingdom and France that incorporate a "right to oblivion" or, *le droit à l'oubli*. But an immediate origin of the *Google Spain judgment* is the European Union's Data Protection Directive made in 1995. The ECJ premised its holding on the right of "rectification, erasure or blocking of data" under Articles 12(b) and 14(a) of the Data Protection Directive. As per the official court summary, it reasons, "the effect of the interference with the person's rights is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such lists of results ubiquitous." The practical effect of the judgment is that persons within the European Union may make a request directly with a search engine to de-list. After, such an application is then judged by the search engine, which may delist the webpage.

Ostensibly the right to be forgotten is on a similar trajectory for recognition in India. At present, a case titled as, *Laksh Vir Singh Yadav v. Union of India & Others*[2] is pending adjudication in the High Court of Delhi. However, there exist concerns as to the creation of such a right given its tenous link with the right to privacy. There exists little statutory support of any privacy legislation in India that may provide an underlying legislative basis (such as Data Protection Directive) for holding that a right to be forgotten exists in India. Further, though unfortunate it is also relevant to highlight a cloud that has been brought on the fundamental right to privacy. This is due to the reference by the Supreme Court on the question as to its origin in the aadhaar batch of cases titled as *Justice K.S. Puttaswamy & Anr. v. Union of India & Others*[3].

Due to this reference inconsistency has crept into the application of the fundamental right to privacy. While some High Courts (specifically the High Court of Bombay and the High Court of Patna) have applied the right to privacy in their determinations, the High Court of Delhi has restrained itself in the case of *Karmanya Singh Sareen & Anr. v. Union of India & Ors*[4].

[2]W.P. (C) No. 1021 of 2016
[3]W.P. (C) 492/2012
[4][W.P. (C) 7663/2016

There also exist substantive objections to extending the right to privacy to include the right to be forgotten. The right to be forgotten though concerns the interest of an individual to control information/data as similarly found in the right to privacy, there is an important distinction between both.

Whereas the right to be forgotten concerns information which is publicly available, the right to privacy concerns information which is private and intimate. Such distinction is made clear from the obiter of the Supreme Court in *R. Rajagopal v. State of Tamil Nadu*[5], where it held that, "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters…None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical…[however] any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others.*"

Further, if such a right were to be created purely as per the right to privacy under Article 21 of the Constitution of India, it is questionable if it can be extended to wholly private companies who operate search engines. This is given that fundamental rights generally apply to state instrumentalities.

At this instance, it is important to recognize that the right to be forgotten is also distinct from an assertion that the publication itself is defamatory. If that would be the case, the removal of the link from the search engine would operate as a regular injunction (in the nature of a consequential relief to a finding of defamation), rather than an independent distinct right. Hence, the right to be forgotten as is at present being proposed is not only independent of the right to privacy but also the wrong of defamation.

When wading through such legal doctrine it would be inequitable to deny that there exist instances where public information that is indexed by a search engine may be damaging to an individual. Much of the information indexed by search engines on a person does not originate from such persons data but through independent, third party websites that are not under their control. Hence, there is little recourse a person has when the first result for a search query on their name reveals damaging information. Such lament may be one of the reasons that about two years ago the New Yorker revisited it's illustration of the two talking dogs. This time the caption read, "remember when, on the Internet, nobody knew who you were?". However, there exist good reasons to restrain sympathy for the right to be forgotten.

Threats to Free Expression

While the right to be forgotten may offer uncertain benefits, the risks to free expression and speech are immediate. The right to freedom of speech and expression is expressly guaranteed under Article 19(1)(a) of the Constitution of India. It includes, (i) the freedom of the press; and (ii) the right to receive information. Both the right of the press and the right to receive information have been recognized by the judgments of the Supreme Court of India as forming the core of the right to freedom of speech and expression. While freedom is not absolute and is restricted by the express grounds for legislation under Article 19(2), it has to be built on the basis of well-recognized limitations such as privacy or defamation. As the analysis above demonstrates, the right to be forgotten does not fall within the silos of either. At the very least there is some balancing that is required when, and if, the right to be forgotten is recognized in India.

[5] 1994 SCC (6) 632

Limited Liability of Intermediaries in India

Another aspect that merits consideration is the operation of such a right. In its present formulation the right to be forgotten would be determined by a system of a private complaint to an online intermediary (such as Google). Even if a criterion were developed for the application of the right to be forgotten, the determination in individual instances would still be as per the discretion of the online intermediary.

The Supreme Court in the case of *Shreya Singhal v. Union of India*[6] signaled a discomfort with a quasi-judicial power being vested in a private party by stating that, "*Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not.*"

Quite simply, the court reasons that the takedown mechanism for illegal content can only be enforced as per the order of a court or a state authority. There are several benefits to such an approach, including the observance of natural justice. As per the approach indicated under the *Shreya Singhal case* illegality is first determined as per existing laws and reasons are provided within the order. In reaching such a determination a public authority would be legally obligated to provide the opportunity of a hearing.

This would be extended both to the complainant and the party whose web page will be removed or de-indexed from the search engine. In case either of them remains dissatisfied further processes for appeal would exist. All these safeguards will be circumvented in a private system of enforcement, when the complaint can directly be made to the search engine that would act like a judge. These are only some of obvious considerations that need to be weighed and balanced to determine the legal regulation for the right to be forgotten in India.

Some Solutions and Wider Prescriptions

The Internet policy space is witnessing frenzied activity as we come to realize that slogans for Digital India are not matched by the regulations of a digital India. However we must not mistake movement for progress. Risk exists that the pressures to act in haste may negatively impact public interest. A positive way to proceed in future may be provided by the lessons of the past.

Here India's principal statute to regulate online conduct, the Information Technology Act, 2000 (IT Act) provides some guidance. Commentators frequently point to inadequacies within the IT Act. While criticisms on its several provisions and deficiencies have merit, to its credit the Information Technology Act, 2000 was the product of deliberative rule making. The origin of the law was premised on the desire for uniformity in national legislations that would govern the Internet. Hence, large parts of the legislation are based on the Model Law on Electronic Commerce proposed by the United Nationals Commission on International Trade. Even when amendments were made to the legislation after eight years of its existence, there were multiple rounds of consultations to examine the recommendations made by an expert committee. However, at present such an approach seems to be episodically employed. There is a general absence of any sustained policy dialogue fostered by a government institution that advances rule making.

[6] W.P. (Crl.) 167/2012

For instance the Information Technology Act, 2000 in Section 88 provides for the constitution of an advisory committee that should be composed of persons having special knowledge in the area. Even though stray government notifications exist indicating the constitution of the committee, its effectiveness remains in doubt. Till date the composition of this advisory committee has included only civil servants who are government officers or representatives of industry associations.

There have not been any members who are academics, engineers, civil society representatives or technologists. Even the meetings of this advisory committee are not public and it is not clear if the committee has been conducting regular business. Given the pace at which the Internet is being adopted in India and the tremendous impact it has on society, what is needed today are government institutions that promote research and dialogue.

The government when looking to develop its institutional capacity must balance various stakeholder interests. This understandably will require diverse voices to be continuously engaged rather than be granted an audience every few years. The absence of such a forum will only throw up more legislative and regulatory gridlocks, or even subject them to reactive measures adverse to public interest. Even after several years there is no clear roadmap indicated by the government for privacy legislation in India. Drafts of a Draft Privacy Law have been kept private without any public consultation.

In such a situation it is reasonable to deduce that litigations are only symptoms of a legislative vacuum. Another example of this is the case concerning the right to be forgotten, which subjects a complex Internet policy determination to adversarial litigation. While we may pride ourselves with mental faculties that are superior to animals, there are lessons to learn from them. About six years ago, Jessica Pierce and Bekoff Marc wrote a book by the name of 'Wild Justice'.

As the title hints, it concerns an examination of the behaviors of animals contrasted against humans. One of the startling findings they posit is that dogs have a unique sense of right and wrong. They further suggest that when in packs, they enforce moral boundaries for their members. There is some modesty in such an approach that is built on dialogue and negotiation. It promises the advancement of social interest with individual rights. It helps us to collectively assess risk, factor complexity and reach for an ideal.

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Disclosure: Apar is a trustee in the Internet Freedom Foundation (IFF) that has filed an intervention application in the case of Laksh Vir Singh Yadav v. Union of India [W.P. (C) No. 1021 of 2016].All comments made in this post are personal views of the author.

CRUSHING DISSENT, THE INDIAN WAY

Difference of Opinion is the Lifeline of Democracy

***Swapna Jha**

The hurriedly passed 2008 amendment to the Information Technology Act brought in draconian provisions with vague and arbitrary terms resulting in utter misuse of the law by the state agency. They were indiscriminately deployed to quell perceived expressions of dissent by citizens, against those in power. Amongst the more famous of such notorious incidents were the arrest of Ms Shaheen Dadha for daring to question the shutdown of the city of Mumbai, after Shiv Sena Chief Bal Thackeray's death, in an innocuous post on Facebook, Ms. Renu, who 'liked' and shared the said post, Mr. Ravi Srinivasan, a businessman for his tweets about Union Finance Minister Sri P. Chidambaram's son and Mr. Ambikesh Mahapatra, for posting on social networking sites critical cartoons of the Chief Minister of West Bengal. These, and many such incidents compelled Common Cause to challenge these laws by way of a Public Interest Litigation.

The Common Cause Intervention

In the year 2013, Common Cause approached the Apex Court with prayers for issuance of appropriate writ declaring Sections 66A, 69A and 80 of the amended Information Technology Act, 2000 as violative of Articles 14, 19 & 21 of the Constitution of India and hence unconstitutional. The Apex Court admitted the petition and after hearing the parties at length declared Section 66A as unconstitutional, upheld Section 69A and made no mention of Section 80 in the judgment.

Apart from the vague phraseology, Section 66A was challenged as being violative of the fundamental right under Article 19(1)(a), which guarantees that all citizens shall have the right to freedom of speech and expression, subject to reasonable restrictions provided under Article 19(2). The petition contended that no pervasive and blanket ban/restrictions could be imposed on the right to freedom of expression and the right to life and personal liberty as was happening under Section 66A. It contended that the said Section was capable of wanton abuse resulting in deprivation of the personal liberty of people, which per se was a flagrant violation of the principles of fairness and justness of procedure implicit in Article 21 of the Constitution.

It was pleaded before the Court that as per the established law of the land, the constitutional protection of free speech was calculated to insulate the freedom from such a “chilling effect”. The impugned Section 66A of the amended Information Technology Act, 2000 allowed the institution of criminal proceedings on frivolous grounds against law abiding citizens exercising a freedom guaranteed to them under the Constitution. Under the provisions of this Section, offence was alleged to have been committed if the information provided was either annoying or inconvenient etc. The Section thus made no clear distinction between mere discussion or advocacy and incitement. It denied citizens the right to know, share or receive any information provided on the internet and directly hit upon their freedom of speech and expression.

The petition contended that the offence created by the Section 66A had no proximate relation with any of the eight exceptions contained in Article 19(2). However, the Union of India claimed that the restriction could be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

[1]WP(Cr) No. 167 of 2012, order dated March 24, 2015.

The Striking Down of Section 66A: *Shreya Singhal v Union of India*

The Court, hearing a clutch of petitions, including Common Cause's, delivered a landmark judgment in March 2015 in *Shreya Singhal v. Union of India*[1], holding that the exception of 'public order' did not hold good in the present case, as it seemed to punish any person using the Internet to disseminate any information falling within the sub-clauses of Section 66A rather than causing disturbance to the community. It was observed that the Section failed to make a distinction between mass dissemination and dissemination to one person, or require that such message should have a clear tendency to disrupt public order. The absence of a nexus between the message and action that may be taken based on the message did not result in an immediate threat to public safety or tranquility and hence had no proximate relationship to public order. It held that the need for suppression of free speech arose only when free speech posed a clear and present danger to public tranquility, a condition conspicuously absent in the case in point.

The Court ruled that the Section was neither aimed at defamatory statements nor had proximate connection with incitement to commit an offence. It did not grant the refuse sought by the government, under the exception of "decency" or "morality" either. When the Section did not pass muster the test of reasonableness of restrictions, the counsel for the government requested the Court to read into the Section all the exceptions contained in Article 19 (2). The Court turned down this proposal as that would amount to a wholesale substitution of the provision. The constitutionality of Section 66A was challenged on grounds of vagueness too. Citing international as well as domestic precedents, the Court agreed that the expressions used in 66A were completely open-ended and undefined. The Court opined that every expression used in the Section was nebulous in meaning, which neither conveyed a demarcating line nor provided manageable standards for establishing offence, thereby rendering it unconstitutionally vague.

Another contention in the petition was that Section 66A had a chilling effect on the freedom of speech and expression. The Court declared the Section as unconstitutional on this ground too, as in its present form, the Section took within its sweep protected speech or innocent speech so as to have a chilling effect on people's freedom of expression. The desperation of the government can be gauged from the fact that when the Section did not stand the test of Article 19(2), its counsel requested for the application of the doctrine of severability, so that the invalid part of the Section could be severed and the rest could be saved. An enactment, capable of being applied to cases where none of the restrictions prescribed under 19(2) were met, or used for purposes not sanctioned under the Constitution was not held to be valid to any extent by the Court, which declared that no part of Section 66A was severable and the provision as a whole was unconstitutional. The challenge to the constitutional validity of Section 69A was disregarded by the Court on grounds of the said Section having adequate procedural safeguards.

Free Speech After *Shreya Singhal*

The striking down of Section 66A was much hailed by the citizens, who presumed that the right to free speech had been restored by this judgment. However, this may not be so, as is evident from reports of the National Crime Records Bureau (NCRB). According to the data compiled by the NCRB, 4,154 new cases were filed under Section 66A in 2015 as compared to 3525 cases in 2014. As per the report, 3,514 cases were disposed by the police, 1,510 cases were sent for trial, trial completed in 328 cases, 143 convicted, 2,522 cases pending trial at the end of 2015. The report states that 3,137 people were arrested under this section in 2015 and 575 were languishing in custody at the end of 2015. It has also been clarified that data

[1] Section 69A allows the Central Government to block content where it believes that this content threatens the security of the State; the sovereignty, integrity or defence of India; friendly relations with foreign States; public order; or to prevent incitement for the commission of a cognisable offence relating to any of the above

under 66A is inclusive of cases under Section 66 too. Though the report does not provide a monthly breakdown, the probability that all reported cases were filed prior to the law being scrapped by the Court in March 2015, seems unlikely. It is rather strange that law enforcement agencies and the lower courts are unaware of the scrapping of 66A and are booking, trying cases and convicting for conduct which has ceased to be an offence.

Some reports also expressed reservations on the Apex Court's belief that there were sufficient checks and balances built into Section 69A of the IT Act. The contention in the petition was not on power of blocking content but rather the manner in which the blocking was being done. While it is true that reasons have to be recorded in writing in such blocking orders so that they may be assailed by way of a writ, unfortunately, the orders themselves are a secret and do not outline reasons for the blocking. There are no reports available in public domain on the procedure followed under the rules, and the state has routinely, in complete secrecy, blocked content on the internet preventing any judicial scrutiny. The lack of transparency in decision-making will deplete accountability and result in curtailing of freedom of the citizens. This is a matter of concern and we all need to be vigilant on this aspect of the law. It gets even more bizzare. The Department Related Parliamentary Standing Committee on Home Affairs in its 189th Report has stressed the need for a law replacing Section 66A, with adequate modifications. The Committee feels that owing to rapid development of technology and the sophisticated modus operandi adopted by the criminals, the laws dealing with cybercrime need to be reviewed on a regular basis. It noted that subsequent to 66A being declared unconstitutional, several aspects needed consideration for bringing them under the ambit of law.

Presently, there is no section of law to cover spoofing which according to the Committee, should be an offence under the law. It recommended more elaborate and specific law, which could pass the test of judicial scrutiny. It asserted that any such content, which when transmitted online was likely to promote hatred and enmity amongst communities, race, religions etc. must be covered under the IT Act by means of a separate section. It also recommended that any transmission of information claimed as being innocently forwarded should not be excluded from the purview of the offence and any such person sending or transmitting the information should also be liable for the offence. In short, the proposal is to combine sections 153A and 153B of the Indian Penal Code and make it an offence under the IT Act as well.

Conclusion

Duplication of laws would further add to the burden of overburdened courts and lead to what the Apex Court tried to prevent by scrapping 66A. The Committee recommended stricter penalties under IT Act, as information can be disseminated faster and wider online, resulting in more severe and damaging impact. However, this observation reveals a tendency to view the Internet as an inherently dangerous medium, one that deserves greater regulation with decreased safeguards to protect the rights of the citizens. This is a cause for worry.

Unless the new law is in consonance with the safeguards detailed in the Court's ruling and clearly establishes a very close link between the impugned expression and an imminent risk of discrimination, hostility or violence attributable to such expression, it will only serve as an instrument of oppression of expression. India is aspiring to be an equitable society, and the constitutional guarantee of liberty of expression should be used to fortify our strengths, rather than suppressing dissent. The expression of differing opinions may be inconvenient or annoying, but it is the life-line of our democracy. Restrictions on free speech should operate not as a cloak to protect powerful political figures, but as a means to counter grave and serious dangers to democracy.

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NO COUNTRY FOR DISSENT

A Vague Sedition Law is Antithetical to Free Speech

***Pallavi Sharma**

Section 124A of the Indian Penal Code criminalizing 'sedition' is broad and can virtually engulf any expression of opposing opinion—a poem, a movie, a speech or any anti-establishment idea—as long as it qualifies as inciting hatred and disaffection towards the government. As vague as the law may sound, sedition is no petty crime in India. It carries the highest punishment as imprisonment for life, the same that is awarded for heinous crimes like rape and slave trade, to name a few.

In September 2016, the Supreme Court dismissed a petition filed by Common Cause that sought to curb the rampant misuse of this law. The petition prayed for integration of procedural safeguards before booking someone for sedition. The Court, in the brusque dismissal order, reminded the authorities of its 1962 dictum in *Kedar Nath v State of Bihar* but stopped short of curing the mischief that exists in indiscriminate misapplication of the law in spite of decades having gone by since that verdict.

Preventing Misuse: The Common Cause Case

The Common Cause petition had urged that Section 124A was being misused as a means to harass and persecute legitimate dissent. It aimed to prevent misapplication of the Section and bring about strict compliance of the Constitutional Bench dictum in the much-talked-about *Kedar Nath* case that narrowed down the scope of the law. In *Kedar Nath*, the Supreme Court had held that mere criticism of the government was not seditious unless it incited violence or had the tendency to disturb public order.

The Common Cause petition had sought to limit the misuse of this law by calling for exercise of due diligence and reason by law enforcement authorities before arresting anyone for sedition. To this effect, directions were sought that before an FIR was lodged or an arrest was made under Section 124A, a prior reasoned order by the Director General of Police or the Commissioner or the Magistrate, as applicable, may be obtained certifying that the alleged seditious act either incited violence or had the tendency to disturb public order.

The intention was to ensure that the Director General of Police, the Commissioner or the Magistrate was not only apprised of the incident but also certain of its potential to create violence and disturb public order before characterizing such conduct as seditious.

The dismissal of this case by a mere reference to *Kedar Nath* is problematic. Sheer number and range of cases in which sedition has been invoked since *Kedar Nath* makes it hard to logically delineate a threshold for invoking this law. In addition, neither Section 124A nor the jurisprudence clarify if the government in the damning provision is central or state. This may lead to ambiguity in application of this law if the allegedly seditious act favors either the union or the state government at the cost of condemning the other.

The Apex Court decision of hinging sedition on incitement of violence in *Kedar Nath* also needs to be taken with a pinch of salt as any impassioned speech may incite violence, especially from the disagreeing segments of the audience.

Sedition charges are more often than not slapped to silence dissent or gain publicity, only to be dropped eventually. The National Crime Records Bureau (NCRB) Report for 2015 indicates that 73 arrests were

made under 30 cases alleging sedition in 2015. But out of 11 trials completed, not a single person was actually convicted.

Of the most ridiculous recent cases, a sedition case was filed against the actor Aamir Khan and wife Kiran Rao for their comments on the rising intolerance in the country. Sedition charges were also slapped to browbeat two police constables from Karnataka who attempted to organize a mass leave in protest against long-pending welfare measures.

Last year, Tamil folk singer Kovan was unceremoniously picked up at midnight by the police under charges of sedition for his songs that poked holes into Chief Minister J Jayalalithaa's liquor policy. Was there an urgency justifying a dramatic midnight arrest? A question that was not and probably will not be raised in the current parochial scheme of things where sedition has become synonymous with criticism.

Conclusion

Sedition is the creation and legacy of colonialism. It was crafted to throttle dissent and rebellion of the subjects against the Crown. Now, it merely stands in guard of majoritarianism, a weapon in the hands of zealots peddling their political agenda. It should not find space in a "mature" democracy. While one can wait for the Legislature or a higher bench to deliberate on the purpose of this colonial vestige, the least that could have been done was to curb the misapplication of the law by instituting procedural safeguards before arrests, an opportunity that the Apex Court lost by merely leaning on *Kedar Nath*, without reflecting on the prevalent reality of its abuse.

It is rather ironic that the United Kingdom repealed its sedition law in 2009, for being obsolete in a democratic state, but we, a former colony and the world's largest democracy, continue to brandish it in the face of our own constitutional freedom of expression. But the Courts have spoken and the Legislature has chosen to silently preserve this tool of oppression by a paranoid state, chilling the freedom of expression, including dissenting opinions of its citizens.

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COMMON CAUSE UPDATES

Supreme Court:

New Intervention:

Even though the Central Government was fully aware that the Director CBI, Mr. Anil Sinha, was demitting office on December 2, 2016, it failed to convene a meeting of the selection committee for selecting the new director of the CBI. In order to safeguard the independence of the CBI against executive interventions, a detailed procedure has been laid down in Section 4A of the Delhi Special Police Establishment Act, 1946, as amended by the Lokpal and Lokayuktas Act, 2013. Through a series of omissions and commissions, Central Government chose to ignore the mechanism put in place to insulate the functioning of the CBI Director from undue executive influence.

Common Cause filed a PIL in the SC praying for issuance of appropriate writ directing the Union of India to appoint a regular Director of CBI as per procedure established by law and for quashing the appointment of Interim/Acting Director of the CBI. Notice was issued on December 12, 2016 and on December 16, 2016 the AG submitted that the procedure laid down under Section 4C of the Delhi Special Police Establishment Act, 1946 had been followed in the case of transfer of Mr. Dutta, (the 2nd senior most officer in the CBI). It further submitted that the process of appointment of regular Director to the CBI had been commenced and that the first meeting of the Committee was to take place in the last week of December, 2016. The SC directed the matter to be listed on January 17, 2017. Meanwhile, a meeting of the Selection Panel was held on January 16, 2017, as reported in the news. In the light of the AG's submission that post deliberations of the Selection Committee, the minutes of the meeting was still being drawn up, the hearing was deferred to January 20, 2017.

Previous Interventions:

Contempt Petition Against Lawyers Strike: The contempt petition filed by Common Cause against the strike of lawyers in Delhi HC and all district courts of Delhi on the issue of conflict over pecuniary jurisdiction, in WP (C) 821/1990 *(Harish Uppal vs Union of India)* was again taken up on January 13, 2017. After hearing the counsels, the Court ordered that reply, if any, be filed within six weeks and matter be listed thereafter.

Challenging the Vires of the Appointments Made to the CVC: The IA filed by Common Cause in November 2016, praying for directions for constitution of a Special Investigation Team to thoroughly investigate the evidence gathered in the raids on the Aditya Birla and the Sahara groups, came up for hearing twice in December 2016, with the Court on both occasions insisting for better material/further evidence on the record of the case. It said that one should not be cavalier in making allegations of corruption against top constitutional functionaries without sufficient evidence.

The request of our counsel for more time made on December 16, 2016, for submission and analysis of additional evidence was granted by the Court and the matter was listed for January 11, 2017. After hearing the counsels, the Court was of the opinion that the applications filed by Common Cause lacked evidentiary value, were irrelevant and legally inadmissible. Keeping in view principles laid down in the cases of of *CBI v. VC Shukla* (1998 (3) SCC 410) and *State of Haryana and Ors v. Bhajan Lal and Ors,* 1992 Supp (1) SCC 335*,* the Court held that it would not be legally justified, safe, just and proper to direct investigation and dismissed the applications. There are no further orders of listing.

Red Sandal Wood Case: Pleadings in the matter were completed on August 22, 2016. Despite an undertaking before the Apex Court, the Union of India (Ministry of Environment and Forests) did not file its vakalatnama and counter affidavit. Respondent No.2, Department of Commerce, too failed to do so despite directions from the Court in May and August 2016. Declining to grant them further opportunities, the Court directed the Registry to process the matter for listing as per rules. On November 23, 2016 the matter was taken up by the Court and posted for December 15, 2016 as it did not receive the files and hence could not hear the matter. The Court website has not uploaded any further orders.

Challenge to the Lokpal Search Committee Rules*:* Even though the Government filed an affidavit stating that the impugned Rules 10 (1) & (4)(i) (as prayed by Common Cause in the original writ petition) had been amended in terms of the prayers made in the petition, it did not initiate the process of appointing the Lokpal. As the inaction of the Government regarding the appointment of Lokpal was arbitrary and unreasonable and hence, violative of Article 14 of the Constitution, in March 2016 Common Cause filed an IA requesting the Court to allow an additional prayer in the already filed writ petition. The IA requested the Court to direct the Government to make the appointment of Lokpal as per the amended rules framed under the Lokpal and Lokayukt Act, 2013. The amended petition was taken on record and the respondents directed to file their counter-affidavit to the amended petition. This matter was taken up on November 22, 2016, and adjourned to November 23, 2016, at the request of the counsel for the Union of India. On November 23, the SC admonished the centre on delay caused in the selection process on the pretext of absence of leader of opposition in the Parliament. On December 7, 2016 the Court granted time to the ASG to file some additional documents, including the report of the Parliamentary Standing Committee proposing certain amendments to the Lokpal and Lokayuktas Act, 2013. This matter has been tagged with another PIL filed by Ashwini Kumar Upadhyay seeking directions to the centre and the states to appoint Lokpal and Lokayukta's respectively. There are no further orders of listing.

Crime and Violence on TV: The petition sought to curb the excess of crime, violence and sex on TV. The Secretary, Ministry of Information & Broadcasting, has been forced to submit a personal affidavit on the compliance of various directions given by the Court in the matter, which stands tagged with a bunch of petitions relating to the right to freedom of speech and expression including our PIL on unreasonable restriction on private radios against relay of news. During the hearing on December 1, 2016 the Court observed that while the pleadings in the petition no. 387/2000 was complete, respondents in the connected matters were yet to file their counter affidavits. Granting time to file the counter and corresponding rejoinder, if any, the Court directed the matter to be listed for after the winter vacation. It was reported in the newspapers on January 13, 2017 that that SC had sought response from the government on allowing private radios to broadcast news.

Last week, the SC website uploaded an order by which a bunch of petitions, including two petitions filed by Common Cause were disposed of by the bench of the CJI, J Khehar and J Chandrachud by an order dated January 12, 2017. Stating that the factual and legal position depicted in the original writ petition (387/2000, filed by CC) and in other connected writ petitions stood incorporated and upgraded in writ petition (1024/2013, filed by Media Watch), the Court disposed both our petitions on Crime and Violence on TV and FM Radio writ summarily.

It held that the primary issue for consideration in the petitions was with reference to the introduction of a complaint redressal mechanism in respect of complaints made against television and radio programmes.

It was contended by the respondents that such a mechanism was in place and keeping in mind media rights contemplated under Article 19 of the Constitution, the existing rules need to be interpreted in a manner as would be sustainable, within the framework of Article 19 of the Constitution.

After considering the submissions of the Government, the Court concluded that though the mechanism existed, it needed adequate publication. It, therefore, directed the Union of India, to publish the mechanism, so as to enable complainants, to air their grievances, before the appropriate forum and to obtain a determination thereof, at the hands of the concerned competent authority, in the Ministry of Information and Broadcasting. The Government was advised to finalise a similar statutory framework for radio programmes as well.

Inquiry Against Ex-Chairman, NHRC*:* During the hearing on March 14, 2016, the Attorney General submitted that the individuals (relatives of Mr. Balakrishnan) in whose names the properties stood were income tax assesses. He informed the Court that he had all the assessment orders of the said assesses. In view of this submission, the AG was directed to file a chart indicating the said facets and also keep the assessment orders and the orders passed by the appellate authorities, if any, for perusal of the Court. The matter was taken up October 18, 2016, when the AG submitted the chart to the Court. A copy of the said chart was provided to our counsel by the Court. The Court directed that other documents previously referred to by the AG, be made available for the perusal of the Court and the matter be listed after eight weeks. It is likely to be listed on January 31, 2017.

RTI Rules of the Allahabad High Court: The petition challenges the vires of the Allahabad High Court (RTI) Rules, 2006, which were found to be the most obstructive of all the High court rules examined by Common Cause. In November 2012, the High Court sought and was granted two months to amend the deviant rules. A gazette notification was issued on April 4, 2013 for the amendment of Rule 4 relating to application fees. Common Cause filed an additional affidavit on July 15, 2013, highlighting a deliberate ambiguity in the wording of the amended rule.

In January 2014, our PIL was clubbed with Lok Prahari's PIL on the same issue, initially filed in the Allahabad High Court. After a long gap of over two years, the cunctation in listing of this matter finally ended with the Court taking it up on November 10, 2016. As the Court had already ordered returnable notice in September 2014, it directed that the matter be processed for listing.

Combating the Criminalization of Politics: The Supreme Court had on March 10, 2014, passed an interim order directing that trials in criminal cases against MPs and MLAs must be concluded within a year of the charges being framed. The Court also directed that if the trial court is unable to complete the trial within a year, it would have to submit an explanation to, and seek an extension from, the Chief Justice of the High Court concerned. While seeking compliance of the Supreme Court order, we sought specific time-bound directions for closer monitoring of all such cases. Common Cause has filed an IA before the Apex Court seeking urgent directions to implement its order dated March 10, 2014. The matter is yet to be listed for hearing.

Delhi High Court:

Petition on Electrocution by Live Wire:

Our petition on the subject was disposed by the Delhi High Court on December 5, 2016 with the following directions:

(i) The Electricity Regulatory Commission being a regulatory body must oversee strict implementation and compliance of the safety measures by the DISCOMs (Distribution Companies) for all the residents against electrocution deaths and other electricity related injuries.

(ii) The Regulatory Commission has to ensure that officers of DISCOMs shall comply with the directions issued by the Commission from time to time. Any violation of these instructions or directions would attract penal action against the erring department/officer under the Electricity Act, 2003.

(iii) The Electricity Regulatory Commission and DISCOMs to take appropriate measures to prevent these accidents through the use of insulation, guarding, grounding, electrical protective devices and safe work practices.

(iv) DISCOMs to take urgent cognizance of cases of electrocutions and pay compensation in accordance with law to the dependents of the deceased in case lapses are established in maintaining the prescribed safety measures.

(v) The other land owning agencies shall give the respondents proper assistance in order to prevent any untoward incidents due to electrocutions in future.

BSP Symbol Case:

Common Cause had filed a petition challenging the order of the Election Commission (EC) rejecting our request for freezing the reserved symbol of BSP on account of its misuse by its government in UP. On July 7, 2016, the Delhi High Court disposed our petition with two requests to the EC. The first was to issue within three months of the date of order, guidelines preventing political parties from using public places and funds for propagating their election symbols to ensure free, fair and peaceful election and to safeguard the interest of the general public and the electorate in future. In response to this, the EC vide its letter dated October 7, 2016 directed the political parties to refrain from using or allowing the use of any public funds or public place or government machinery for carrying out any activity that would amount to advertisement for the party or propagating the election symbol allotted to the party. The EC clarified that any violation of the above directions would be treated as violation of a lawful direction of the EC within the meaning of paragraph 16A of the Election Symbols (Reservation & Allotment) Order, 1968.

The second request was that within further three months from the date of issuance of direction, the EC should consider whether the actions already done by the BSP were in violation of its directions and to initiate proceedings under Clause 16A of the Symbols Order for withdrawal of recognition after according it sufficient opportunity to undo the same. On January 5, 2017, the EC issued subsequent order wherein held that though BSP was a beneficiary from the activity which propagated its party symbol, using public fund, action cannot be taken against it retrospectively. In any case, it is hoped that this order of the EC will go a long way in ensuring free and fair elections.

NOTICE FOR ANNUAL GENERAL MEETING

To,

All members of COMMON CAUSE,
The Annual General Meeting of COMMON CAUSE Society will be held at 3rd Floor, Common Cause House, 5, Institutional Area, Nelson Mandela Road, Vasant Kunj, New Delhi – 110070, on Saturday, March 4, 2017 at 11.00 AM.
The agenda will be as follows:

1. Consideration of Annual Report and adoption of the Annual Accounts along with the Auditor's Report for the year 2015-2016
2. Appointment of Auditors for the year 2016-2017
3. Activities and Programmes
4. Elections
5. Any other item with permission of the chair

It may kindly be noted that in accordance with Rule 15 of the Rules & Regulations of the Society, if within 15 minutes of the beginning of the meeting, the quorum is not present, the meeting would stand adjourned and be held after half an hour of the original scheduled time, and the members present in the adjourned meeting shall form the quorum of that meeting. Copies of the Balance Sheet and Income & Expenditure statement will be provided during the AGM.

Vipul Mudgal
Director,
COMMON CAUSE

VKGN & ASSOCIATES

Chartered Accountants

312,Ansal Bhawan,16, Kasturba Gandhi Marg, New Delhi 110001

Independent Auditors' Report
To the Members of Common Cause

Report on the Financial Statements

We have audited the accompanying financial statements of Common Cause ("the Society"), which comprise the Balance Sheet as at March 31, 2016, and the Income and Expenditure Account for the year then ended and a summary of significant accounting policies and other explanatory information.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation of these financial statements that give a true and fair view of the financial position, and financial performance of the Society in accordance with the accounting principles generally accepted in India.

This responsibility includes the design, implementation and maintenance of internal control relevant to the preparation and presentation of the financial statements that give a true and fair view and are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with the Standards on Auditing issued by the Institute of Chartered Accountants of India. Those Standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatements. An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the Society's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of the accounting estimates made by management, as well as valuating the overall presentation of the financial statements. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

(a) In our opinion and to the best of our information and according to the explanations given to us, the aforesaid financial statements give a true and fair view in conformity with the accounting principles generally accepted in India:
(i) In the case of the Balance Sheet, of the state of affairs of the Society as at March 31, 2016; and (ii) In the case of the Income and Expenditure account, of the Surplus (excess of income over expenditure) for the year ended on that date.

(b) We have obtained all the information and explanations which to the best of our knowledge and belief were necessary for the purpose of our audit.

(c) In our opinion, proper books of account as required by law have been kept by the Society so far as appears from our examination of those books.

For VKGN & Associates

Chartered Accountants

Firms Registration No. 012897N
Vijay Gupta
Proprietor
Membership No. 081986
Place: New Delhi, Date: September 30, 2016

ANNUAL REPORT FOR THE YEAR 2015-16

The last one year has been notable in many ways. The Society's initiatives in advocacy and PILs yielded a fair measure of success in making focused interventions. It engaged and teamed up with many institutions and like-minded organizations/activists during the course of the year.

Common Cause is now on a crowd-funding platform which enables us to cast our net wider. The platform is run by Azadi.in, an IIM Bangalore-based group of young entrepreneurs who showcase specific projects for individual donations. The funds are meant for legal research and for empowering School Management Committees (SMCs) formed under the Right to Education Act. Common Cause journal, the Society's link with its members, is known for its clarity and forthrightness. This year the journal has undergone a gradual change in its outlook and approach. Beginning October 2015, the new issues are dedicated to a single policy-oriented theme. The idea is to develop the journal over time in such a way that each issue becomes a collectors' item on social policies.

As a part of its effort to connect with the younger generation, the team engaged with tech-savvy citizens through AMA (Ask Me Anything) platform of the social media site, Reddit. It is felt that attempts like these will add to the strength of Common Cause and more and more young people will know about and engage with our activities. The Common Cause team is also in touch with IIT Delhi to host programmes of common interest in future.

Following are the other activities of the organisation over the past year:

Advocacy Initiatives

a. Police Reforms

The proposed State of Policing project has made significant progress. We have completed the first round of data crunching for categorising Indian states on the basis of the performance of their police. A joint team of researchers from Common Cause and the Lokniti Programme of the CSDS is working on the project. It was felt that a state-wise survey of the rule of law would provide a valuable tool for the antiquated police administrative system by generating time series data on the satisfaction levels of the citizens. The survey is designed to monitor the impact of the police force on the ground in collaboration with academic and civil society partners.

Meant to be an all-India performance cum perception survey, it will lead to the creation of an index where states can be compared on common parameters. A comparative framework is likely to incentivize parties and politicians to improve the performance of the police under their rule. The survey is being supplemented by an analysis of the existing databases on the rule of law. An integral part of the survey is the self-perception of the police personnel about their job, recruitment, promotion, core police functions, working conditions, and the level of political interference in their work.

b. Judicial Reforms

Common Cause has been holding wide-ranging consultations with like-minded organisations such as ADR, Daksh, CJAR, Vidhi and NASSCOM on the smart and effective use of ICT for expediting the delivery of justice. Several rounds of interaction have been held with Dr Justice

(Retd.) GC Bharuka and NASSCOM President R Chandrashekhar with a view to revamping the e-Courts Project, which was expected to enhance the productivity of judges and improve the delivery of justice. A channel of communication which was opened with the top functionaries of the Department of Justice last year is also being taken forward. In this regard, the President and the Director had an informal exchange of ideas with Justice Madan B Lokur, who is heading the Supreme Court's E-Committee, on the sidelines of an event in New Delhi.

Common Cause team has also done a dipstick survey to test the efficacy of Internet-based systems at district courts to be shared with the stakeholders. We also dedicated a special issue of our quarterly journal (January-March 2016 http://bit.ly/2dAwv6V) on the role of ICT in the effective judiciary. Our focus is on better use of technology for increasing the productivity of judges and to instil a sense of transparency and accountability in the system.

The Department of Justice requested us for 100 extra copies of the journal to be shared with their officials working on the E-Courts programme. The President, subsequently, wrote letters to the Chief Justice of India, members of the E-Committee and all the Supreme Court judges, bringing their attention to the significance of ICT in timely delivery of justice. The President also wrote to the Secretary and senior officials of the Department of Justice, among others.

c. Making the Right to Education Act a Reality

Common Cause team is working on the empowerment of School Management Committees (SMCs) to improve community participation in the running of schools, particularly in slums and urban villages. The team took part in the SMC Convention organised by the RTE Forum. Over 400 SMC members had participated in the Convention. Subsequently, the team held one on one meetings with school principals and local MLAs. The team has prepared a draft of a simple but imaginative booklet for distribution among SMC members to acquaint them with their rights and duties.

Common Cause team submitted its comments on the Draft National Education Policy, 2016, pursuant to the public notice issued by the Ministry of Human Resource Development. The comments/ suggestions were mainly about primary and secondary education. It also made a representation to Delhi's Education Minister Manish Sisodia to amend the Delhi RTE Rules in order to incorporate a framework to prevent school drop-outs. Later, the President wrote to the secretary, Ministry of HRD, Dept. of Higher Education, requesting that the full report of the T.S.R Subramanian Committee (on New Education Policy) be published on the Ministry's website.

d. Initiatives on Health Reforms

Common Cause has submitted its comments on the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016, pursuant to the public notice issued by the Department of Health and Family Welfare. As a litigant in *Common Cause Vs UOI* (WP (C) 215 of 2005), Common Cause has been involved in researching medical and ethical aspects of the issue.

Representations were made before Shri J P Nadda, Union Minister of Health & Family Welfare and Secretary, Dept. of Health & Family Welfare for improving accessibility and availability of generic drugs in India. It is believed that the generic drugs are the lifeline of affordable medicines

for the common citizens. Our pharmaceutical industry is a major source of generic medicines worldwide. However, due to the lack of effective policies, most people are forced to buy the expensive branded medicines, a compulsion that accounts for a high proportion of the out of pocket expenditure on healthcare.

e. Miscellaneous Representations

Apart from the letters and submissions made under the above-mentioned categories, Common Cause also submitted its views on the uploading of RTI replies on the Ministries/Departments' websites to strengthen protected disclosures. In the matter of the CAG Audit of NOIDA, GNIDA and Yamuna Expressway Authority, a representation was made to the Governor of Uttar Pradesh, Shri Ram Naik with reference to his proactive engagement over the audit of the Ghaziabad Development Authority by the Comptroller & Auditor General (CAG) of India, which was widely reported in the media. We apprised him of our petition in this matter and appreciated the principled position he had taken on the need for an independent and transparent audit of the land development authority that receives money from the Consolidated Fund of the State. We also sought his support in our fight for building institutional integrity in the functioning of all development authorities that deal with sale and transfer of land, our most valuable national resource.

f. Applications filed under the RTI Act

i. Issue of Generic Drugs/ Pricing of Medical Devices

Common Cause has filed RTI applications before (a) the Medical Council of India (MCI) seeking particulars of the steps taken and policies made by the MCI to promote and encourage the sale of generic drugs in the past five years, details of funds committed to encourage, popularize and promote the use of generic drugs and details of a time-bound action plan, among other things; (b) before the Secretary, Ministry of Health & Family Welfare, requesting to provide particulars/terms of Reference of the committee set up to examine the Intellectual Property Rights (IPR) Regulations, in the pharmaceutical sector; and (c) before the National Pharmaceutical Pricing Authority of India (NPPA) seeking particulars of the report submitted by the Maharashtra Food and Drug Administration (FDA) to the NPPA on its study on the arbitrary overpricing of medical devices.

ii. C & AG Audit of NOIDA, G. Noida and Yamuna Expressway Authority

These RTI applications have been filed as a follow up to our writ petition filed in the Allahabad High Court on September 1, 2015, seeking the extension of the audit jurisdiction of the C& A G of India to NOIDA, G. Noida Authority and Yamuna Expressway Authority (established under the U.P. Industrial Area Development Act, 1976)

The RTIs were filed before the concerned authorities asking if any audit of NOIDA, G. NOIDA and Yamuna Expressway Authority had been done by Examiner, Local Funds Account in the last three years under Section 22 of the U.P. Industrial Development Area Act, 1976. We also asked whether the audit reports were tabled before the legislature in the past three years along with the comments/observations received.

iii. Furnace Oil

Furnace Oil (F.O) is a lower quality fuel obtained by blending residue found in refining. Average Sulphur contents in it normally range from 4-6% against the globally permissible limit of 1%, if at all used. Several RTI Applications were filed before the concerned authorities seeking information regarding the extent of the F.O. use and to examine if any alternatives were available before making a legal intervention.(As a rule, it is a lot more polluting than other fuels available but is commonly used as industrial fuel, specifically in boilers, diesel generators and marine engines. The continued usage of F.O, despite the availability of cleaner fuels and piped natural gas, is a blatant violation of the NGT and Supreme Court Orders on the issue of environmental hazards and pollution.

Public Interest Litigation

New interventions and significant developments in the writ petitions and applications filed by the Society are summarized below.

Supreme Court Cases

1. **Crime and Violence on TV:** ***WP(C) 387/2000 tagged with WP (C)880/2013 (PIL on FM Radio)-*** The petition had sought to curb the excess of crime, violence and sex on TV. There has been no development in this case since last reported. There are no further orders of listing. This petition has been tagged with our PIL on news broadcast by private radio stations.

2. **Slaughter House Pollution:** ***WP(C) 330/2001-*** This petition praying for remedial measures against the rampant malpractices in slaughter houses was taken up on July 18, 2016, and the Court took note of the cost deposited by the states which had failed to file the compliance report. This matter was previously taken up May 2, 2016, when cost was imposed on six states for not filing the compliance report. The ASG was directed to finalise the BIS standards and the last opportunity granted to her.

The order dated January 30, 2014, wherein a request had been made to the Chief Justices of all the High Courts to appoint a retired District Judge as a Convener of the State Committee for Slaughter House, was brought to the notice of the Court. The request was renewed with the mention that a copy of this order may be sent to the Registrar General of each High Court for being placed before the Chief Justices of the High Courts for information.

At the last hearing held on September 26, the Court directed that an index of the various standards, rules and statutes governing the slaughtering of animals and management of slaughter houses be prepared for circulation to all concerned so that the management of the slaughtering of animals and slaughter houses is done more efficiently. The matter is listed for October 28, 2016.

3. **Contempt Petition in Large-Scale Advertisements:** ***Cont. Pet.(C) 692/2015 in W.P. WP (C) 13/ 2003 -*** Common Cause filed a contempt petition against the State Governments of Uttar Pradesh, Delhi and Tamil Nadu for publishing publicly-funded advertisements in violation of the letter and spirit of the Apex Court's guidelines regarding large-scale advertisements, which had carved out exceptions for the Prime Minister, the President and the Chief Justice of India. The matter was last taken up on March 9, 2016. The Centre and seven States, including the poll-bound West Bengal and Tamil Nadu, sought revision of the verdict, pleading that it infringed on the fundamental rights and the federal structure. The Bench headed by Justice Ranjan Gogoi reserved its verdict on the review pleas of the

Centre and the seven states which demanded that besides the PM, pictures of Central ministers, CMs and other State ministers be allowed to be carried in public advertisements.

On March 19, 2016 the Court ruled, modifying its earlier order, that photos of governors, chief ministers and Cabinet ministers can also feature in the advertisements by central and state governments published in print media and shown on electronic media to announce various schemes and greet the public on various occasions. The petition was disposed of on April 28, 2016.

4. **Living Will:** ***WP (C) 215/2005***- The petition sought the enactment of a law on the lines of the Patient Autonomy and Self-determination Act of the USA, which sanctions the practice of executing a 'living will' in the nature of an advance directive for refusal of life-prolonging medical procedures in the event of the testator's incapacitation. The matter came up on January 15 and February 15, 2016. The ASG submitted that the government was considering a legislation on the subject. Hence, the matter was adjourned for July 20, 2016. There are no further orders of listing. The Government meanwhile had sought comments from stakeholders on the Treatment of Terminally Ill Patients [Protection of Patients and Medical Practitioners] Bill, following which Common Cause submitted its detailed comments (mentioned in the section under Health Initiatives of Common Cause).

5. **Safety Concerns in Nuclear Energy Programme:** ***WP(C) 464/2011-*** We had challenged the constitutional validity of the Civil Liability for Nuclear Damage Act (CLNDA), 2010, and sought a safety reassessment, and a comprehensive analysis of the long-term cost-benefits, of Indian nuclear plants. The petition also prays for the establishment of an independent atomic energy regulatory authority in the interest of people's rights to life and clean environment. After protracted deliberations, the Court partly admitted the petition to the extent of the challenge to the *vires* of the CLNDA. There has been no development since last reported.

6. **Combating the Criminalization of politics:** ***WP (C) 536/2011***- The Supreme Court had on March 10, 2014, passed an interim order directing that trials in criminal cases against MPs and MLAs must be concluded within a year of the charges being framed. The Court also directed that if the trial court is unable to complete the trial within a year, it would have to submit an explanation to, and seek an extension from, the Chief Justice of the High Court concerned. While seeking compliance of the Supreme Court order we sought specific time-bound directions for closer monitoring of all such cases. The matter was referred to the constitution bench on March 8, 2016. The Court directed the Registry to place the papers before the CJI on the administrative side for referring the matters to a larger Bench in view of Article 145(3) of the Constitution. There are no further orders for listing. Meanwhile, Lok Prahari had filed a writ in the Allahabad High Court for ensuring implementation of the Apex Court order dated March 10, 2014, in our PIL for disposal of criminal cases against legislators within a year of framing of charges. The same was dismissed in *limine* against which SLP has been filed by them. We are now in the process of filing an IA before the Apex Court seeking urgent directions to implement its order dated March 10, 2014.

7. **Illegal Allocation of Captive Coal Blocks:** ***WP (C) 463/2012-*** On July 12, 2016, the Apex Court after hearing the counsels, reserved its judgment on further steps to be taken on the report submitted by Mr. M L Sharma, Former Special Director CBI. The CBI and the CVC had submitted notes on the steps taken by them to implement the orders of the Court regarding investigations in the coal case. The Court considered and opined on the administrative note given by the CBI as well as on observations of the CVC.

The matter was adjourned on August 2, 2016.

The case was widely reported in the media on the basis of the court proceedings. It was understood that the position of Common Cause — that former CBI Director Ranjit Sinha's decisions may have been influenced by his meetings with coal scam accused — has been vindicated after the visitor diaries at his official residence have been found to be genuine. Mr Sinha has been indicted by a Supreme Court-appointed panel, headed by former CBI Special Director Mr M L Sharma, which has held that prima facie there was an attempt to influence the investigation into the coal block allocation scam. The Apex Court, which is monitoring the coal scam probe, was told by Attorney General Mukul Rohatgi on July 12, 2016, that the M L Sharma panel has held that Sinha's meetings with some of the high- profile accused in the scam prima facie indicated that there was an attempt to influence the investigation. Rohtagi, who only had received an initial report of the panel for the perusal on condition of maintaining its confidentiality, said that he had gone through the report which has found that the visitors' diary at Sinha's residence was genuine. However, he said that the correctness of entries in the visitors' diary can only be ascertained in the court of law through evidence.

Taking note of the submissions, a bench comprising Justices Madan B Lokur, Kurian Joseph and A K Sikri reserved its order for passing directions. According to media reports the court also pulled up the CBI for sluggish probe and directed it to complete the investigation expeditiously.

8. **Inquiry against ex-Chairman, NHRC:** ***WP (C) 678/2013-***The matter was taken up on March 14, 2016. The Attorney General submitted that the individuals (relatives of Mr. Balakrishnan) in whose names the properties stood were income tax assesses. He informed the Court that he had all the assessment orders of the said assesses. In view of this submission, the AG was directed to file a chart indicating the said facets and also keep the assessment orders and the orders passed by the appellate authorities, if any, for perusal of the Court. The matter has been listed for October 18, 2016.

9. **Preventing the Export of Logs of Red Sandalwood:** ***WP(C) 976/2014***- The intervention of the Supreme Court was sought to foil a determined bid by the Government of Andhra Pradesh to export a huge quantity of confiscated red sandalwood, an endangered species. This move flies in the face of international conventions, express provisions of the Import-Export Policy and repeated admonitions of the Ministry of Environment & Forests. This matter was taken up on May 6, 2016, when the Court granted a last opportunity to the Union of India (Ministry of E & F and Department of Commerce) to file their counter affidavits. At the last hearing held on August 22, 2016, the Court observed that two of the respondents had not filed counter affidavits, despite the last opportunity having been granted. There are no further orders of listing.

10. **Challenge to the Lokpal Search Committee Rules:** ***WP (C) 245/2014-*** This matter was taken up on May 9, 2016. Even though the Government filed an affidavit stating that the impugned Rules 10 (1) & (4)(i) (as prayed by Common Cause in the original writ petition) had been amended in terms of the prayers made in the petition, it did not initiate the process of appointing the Lokpal. As the inaction of the Government regarding the appointment of Lokpal was arbitrary and unreasonable and hence, violative of Article 14 of the Constitution, in March 2016 Common Cause filed an IA requesting the Court to allow an additional prayer in the already filed writ petition. The IA requested the Court to direct the Government to make the appointment of Lokpal as per the amended rules framed under the Lokpal and Lokayukt Act, 2013. The amended petition was taken on record and the respondents directed to file their counter-affidavit to the amended petition. This matter was listed for Aug 30, 2016. (No order for the said date appears on SC website.) There are no further orders of listing.

11. **Illegal Mining in the State of Odisha:** ***WP (C) 114/2014-*** Our petition to curb illegal mining in Odisha, as highlighted by the Central Empowered Committee and the Justice M. B. Shah Commission was taken up on April 21, 2014. The Court issued notices to the respondents and directed the CEC to submit a report on illegal mining. On May 16, 2014, the Court granted an interim stay on the operation of 26 mines and directed the State Govt. to dispose of all renewal applications as per the law. These matters were later taken up several times and the Court directed the amicus curiae, Mr. A D N Rao, to file his response. The Court also requested the Attorney General to assist it on the interpretation of Section 8A for disposing the IAs filed, especially the one filed by the Steel Authority of India. The bench of Justices Khehar and Nagappan citing provisions of the amended Mines and Minerals (Development and Regulations) Act, 1957, disposed the petition on April 4, 2016, concluding that applications of miners filed before January 2015 or at least 12 months prior to expiry of the lease would have to be considered by the State. Stating that the Parliament amended MMDR Act to address miners' hardships and remedy their grievances regarding pending applications for renewals, the Court said that a mining lease would not lapse automatically unless the state government has heard the companies and issued orders to that effect. According to the Court, in the absence of state government orders on pending applications, the leases would be extended by two years.

12. **Mismanagement of Defense Lands:** ***WP(C) 204 /2014-*** The CAG had submitted several reports highlighting the rank mismanagement of defense lands. Common Cause and CPIL filed a PIL on February 20, 2014, to seek the intervention of the Court to remedy this situation and protect the national patrimony constituted by the vast tracts of lands under the management of the Defense Ministry from further erosion. This matter is likely to be listed on October 21, 2016.

13. **Lawyers strike:** ***Cont. Pet (C) 550/2015 in W P(C) 821/1990-*** The contempt petition filed by Common Cause against the strike of lawyers in Delhi High Court and all district courts of Delhi on the issue of conflict over pecuniary jurisdiction, in WP (C) 821/1990 *(Harish Uppal vs Union of India)* was taken up on November 27, 2015. At the hearing, Mr. Ram Jethmalani requested for time to convene a meeting of the important sections of the Bar to find a lasting solution to the problem. Granting the request, the Court directed the respondents to file their responses and listed the matter for February 1, 2016, when it was again taken up. At the hearing, Mr. Ram Jethmalani sought more time to convene a meeting of the Bar Association. The request was granted and matter taken up on April 5, and subsequently on April 12, 2016. Mr. Jethmalani again requested for time which was granted. The matter is likely to be listed on November 7, 2016.

14. **Challenging the Vires of the Appointments Made to the CVC:** ***WP (C) No. 505/2015 tagged with W P (C) No. 683/2014***-The Petition challenges the arbitrary and non-transparent appointments of the new CVC and VC as violative of the principles of 'impeccable integrity' and 'institutional integrity' laid down in Vineet Narain case (1998) and Centre for Public Interest Litigation (CPIL) case (2011). The matter was last heard on May 3, 2016, when notice was issued to the respondents. There are no further orders of listing.

15. **PIL to Address the Misuse and Misapplication of Section 124 A, IPC on Sedition:** ***WP(C) 683/ 2016-*** A petition was filed in the Supreme Court to address the misuse and misapplication of Section 124A (sedition law) by the Centre and various state governments leading to routine persecution of students, journalists and intellectuals engaged in social activism. It was submitted that these charges are framed with a view to instilling fear and to scuttle dissent and are in complete violation of the scope of sedition as laid down by Constitution Bench judgment of SC in *Kedar Nath v State of Bihar* [1962 Supp.(2) S.C.R. 769], which is the locus classicus on the interpretation of sedition.

We had prayed for the issuance of an appropriate direction making it compulsory for the concerned authority to produce a reasoned order from the Director General of Police (DGP) or the Commissioner of Police, as the case maybe, certifying that the "seditious act" either lead to the incitement of violence or had the tendency or the intention to create public disorder, before any FIR is filed or any arrest is made on the charges of sedition against any individual. Similarly, there was a prayer for a review of all pending sedition cases and for criminal complaints for sedition made before a Judicial Magistrate with a view to curb the misuse and misapplication of the sedition law.

Our PIL was heard on September 5, 2016. The Apex Court passed an order stating that in their considered opinion the authorities while dealing with the offences under Section 124A of the IPC shall be guided by the principles laid down by the Constitution Bench in *Kedar Nath*. As per the constitution bench judgment in *Kedar Nath*, only those acts which involve incitement to violence or violence constitute a seditious act. In the various cases that have been filed in the recent years, the charges of sedition against the accused have failed to stand up to judicial scrutiny. The petitioners had therefore sought a strict compliance of this judgment in which the scope of sedition as a penal offence was laid down and it was held that the gist of the offence of sedition is "incitement to violence" or the "tendency or the intention to create public disorder". Thus, those actions which do not involve violence or tendency to create public disorder, such as the organization of debates/discussions, drawing of cartoons, criticism of the government etc do not constitute the offence of sedition.

Delhi High Court

1. **Misuse of BSP Reserved Symbol:** ***WP(C) 8363/2010-*** The petition challenging the order of the Central Election Commission rejecting our request for freezing the reserved symbol of BSP on account of its misuse by its government in UP could not be taken up during 2015 due to adjournments sought by the respondent, lawyers' strike and non-availability of the bench. On July 7, 2016, the Delhi High Court disposed our petition with a direction/request to ECI to issue guidelines to prevent political parties from using public places and public funds for propagating their election symbols and suggested their de-recognition if they failed to abide by these norms.

The court asked the ECI to consider issuing within three months "appropriate direction or guideline within the meaning of clause 16A(b) of the Symbols Order preventing recognised political party in power from using public places and public funds for propagating its reserve(d) symbol and /or its leaders". The court said that it was necessary for "conducting free, fair and peaceful election" and "to safeguard the interest of the general public and the electorate in future".

It is hoped that the EC will take the follow-up action to restrict the violations of ECI laws and rampant wastage of public money.

2. **Post-Retirement Activities of Former Supreme Court Judges:** ***WP 866/2010-*** Common Cause had filed a writ petition in the Delhi High Court on February 10, 2010, highlighting how Article 124(7) of the Constitution was being violated in letter and spirit because of certain post-retirement activities of the former SC judges. This provision forbids former SC Judges from pleading or acting in any court or before any authority. During the pendency of this petition the Society secured some significant outcomes. The HC had instructed its registry to reject writ petitions annexed with opinions of retired judges. This was in line with our prayer for the prohibition of this practice. The Union Government has also introduced the Tribunals, Appellate Tribunals and other Authorities (Conditions of Service) Bill, 2014, in this regard and this is before the Standing Committee.

The petition was disposed on December 11, 2015, with a direction to the UOI to give special attention to the issue and to ensure that appropriate legislation was made at the earliest.

3. **Evidence of Corruption by Shri Virbhadra Singh:** ***WP (C) 7240/2013*** **–** The High Court on December 10, 2015 disposed of the petition filed by Common cause against Mr. Singh, ruling that issue was already under CBI and income tax investigation. During the course of hearing, the Court was informed by the counsels that with respect to the tax matters, the proceedings had been taken up for assessment and re-assessment. The counsel for CBI stated that a regular case had been registered and the investigation would be taken to its logical conclusion in accordance with law. In light of this, the petition was disposed of with the observation that it was no longer necessary to go into the issue of maintainability of the writ petition.

4. **Petition on Electrocution by Live Wires:** ***WP(C) 7241/2015 tagged with W.P.(C) No.5765/2014-*** The Petition highlights the issue of recurring fatalities due to live wire electrocution, especially during the monsoon. Notice has been issued and the matter was listed on March 17, 2016. The Action Taken Report filed by respondent no 9 was also taken on record.

After an adjournment on September 21, 2016, the matter is now listed on November 21, 2016.

Allahabad High Court

1. **Extension of Audit Jurisdiction of the C & AG of India to NOIDA, G.Noida and Yamuna Expressway Authorities:** ***WP (C) 48416/205-*** In the hearing of January 27, 2016, the Advocate General sought an extension of time to file the counter affidavit as directed in the previous order. Subsequently, the CAG office sought an adjournment to file a supplementary affidavit. The Court granted two weeks to the parties to file their response to the supplementary affidavit filed by the office of CAG of India. The case was taken up on August 1, 2016 and is likely to be listed in December 2016.

g. Finance and Accounts

The Audit Report on the Annual Accounts of Common Cause Society and Common Cause Trust for the year ending March 31, 2016 has been received. The Governing Council has accorded its approval to the documents on September 30, 2016. Briefly, the expenditure duringthe year was Rs. 74.15 lakh against Rs. 79.62 lakh recorded in the previous year. The income during the year was Rs. 148.15 lakh compared to Rs. 108.30 lakh during 2014-15. Thus, there was a surplus of Rs. 74.00 lakh during the year as against a surplus of Rs. 28.68 lakh in the previous year. Overall, the financial results have been satisfactory.

APPLICATION FORM FOR MEMBERSHIP OF COMMON CAUSE.

1. Name: _____
2. Father's Name: _____
3. Mother's Name _____
4. Date of Birth: _____
5. Educational Qualification: _____
6. Occupation: _____
7. Permanent Address: _____

   _____

8. Mailing Address: _____

   _____

   (a) Email ID : _____

   (b) Phone :_____Mobile: _____

9. Next of Kin (Name & Address): _____
10. Membership Sought. (Tick any one block):

Categories	**Ordinary**	**Life**
Individual (with voting rights)	Rs. 500.00 P.A. ☐	Rs. 5000.00 ☐
Associate (without voting rights)	Rs. 100.00 P.A. ☐	Rs. 500.00 ☐

11. Why do you wish to join COMMON CAUSE (up to 80 words)

    _____
    _____
    _____
    _____
    _____
    _____

12. Your expectations from COMMON CAUSE (up to 40 words)

    _____
    _____
    _____
    _____

Place & Date: Signature

Your feedback is crucial for us!

Common Cause journal has changed many times since its inception in 1982. In 2015, we started special issues dedicated to a single public cause. Our last four issues have been on the right to education, domestic workers, access to justice and parliamentary reforms. Edited excerpts of your feedback are given below:

…Your issue on Parliamentary Reforms (July- Sep 2016) is very timely and well brought out. *What makes Indian Parliament Irrelevant?* By Jagdeep S. Chokkar and other articles are like eye openers...I wish the journal could be published in every regional language.

…*Striving for Quality Elementary Education in India* by Anumeha (Oct-Dec, 2015) is informative and well documented. An incorruptible educational system is the need of the day…. to eradicate corruption, the education systems must be streamlined first and made accessible to every child.

J. V. Francis, Ranchi

…Anumeha's article (Oct-Dec 2014) … is well-written, has all the basic facts, and is comprehensive. It would be a pity if it would be restricted to our quarterly only. I feel it needs exposure in mainline papers and magazines to reach a much larger public.

Vikram Lal, New Delhi

…Compliments for keeping the spirit of Common Cause and its founders alive! I have been a founder life member and an admirer of the work the organisation is doing. I wish to congratulate you for your July-Sept 2016 issue on our Parliament.

Atmaram Saraogi, Kolkata

I wrote to Sri.H.D.Shouri during mid-eighties regarding some gross anomaly in the matter of unit pricing by Unit Trust of India. He took up the matter and finally UTI was compelled to reverse their decision for the benefit of millions. I am delighted to know that the legacy of Shri Shourie is being carried forward.

Subhasish Sengupta, via email

I appreciate the work being done here. I will participate as and when I can.

Ujjwal Chatterjee, via email

I congratulate you for taking the common people's common cause ahead step by step in a democratic way.

Alhad Sabadra, via email

Congratulations for the Oct-Dec 2015 issue devoted to RTE. It is encouraging that Common Cause has sought to address some pertinent questions. It would be even more effective if you would lead a delegation to the Prime Minister himself to acquaint him with ground realities...

Gopal M. Paranjpe, via email

After attending the AGM for the first time in 10 years, I went through the Jul-Sep and Oct-Dec issues, rightly named "Voice of Common Cause." Please accept my heartiest congratulations.

Capt S S Puri (Retd), New Delhi

The greatest people are those who work for the 'common cause'. Their needs are simple, their greed limited. And that is why they are able to live and work for others.

Jigme N Kazi, via email

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