India’s Dilemma: Political Sensitivity and Freedom of Expression

Subhajit Basu, University of Leeds
A Nair, Northumbria University
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Subhajit Basu
School of Law
University of Leeds

Abhilash Nair
School of Law
Northumbria University

The meaning as well as the scope of freedom of expression, which is protected under the Constitution of India,¹ has been tested in recent history,² due in large part to heightened political sensitivity and a culture of appeasement. In a significant number of recent cases, attempts were made to regulate and censor social media³ on the grounds of ‘offensiveness’ and ‘objectionable’⁴ through the application of Section 66A of the Amended Information Technology Act, 2000 of India.⁵ Whilst legislations with myopic provisions are nothing new in India, the aim of this paper is to critically analyse whether it is the application of the law, and not the law itself which is responsible for threatening freedom of expression.

The right to freedom of speech and expression is highly qualified, and is subject to what the State deems to be “reasonable” restrictions.⁶ However, prohibition of expression on the grounds of “offensiveness”⁷ has undesirable consequences for

¹ Art 19. Protection of certain rights regarding freedom of speech, etc.-
(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;

² India ranks 140th out of 179 countries in the Reporters without Borders Press Freedom Index

³ We will be concentrating on 5 cases registered under section 66A of the Amended Information Technology Act, 2000 of India where accused have either used Facebook or Twitter to post, share comments, cartoons.

⁴ We also saw knee-jerk reaction from the Government of India which allowed the prosecution of executives from companies like Google and Facebook for objectionable content posted online (This is unrelated to the cases we are referring to here). Delhi High Court in ‘Vinay Rai v. Facebook India & Ors’(2012) asked Facebook and Google India to “develop a mechanism to keep a check and remove offensive and objectionable material from their web pages” or “like China, we will block all such websites”. See http://www.techinasia.com/google-india-china/

⁵ 66A. Any person who sends, by means of a computer resource or a communication device,—
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

⁶ The state can silence its citizens for any number of reasons, including “public order,” “decency or morality” and “friendly relations with foreign states.” (First Amendment to the Constitution of India due to the Supreme Court’s verdict in ‘Crossroads vs. State of Madras’ (1950))

⁷ Cram, I., ‘The Danish Cartoons, Offensive Expression and Democratic Legitimacy’, in Hare, I., and Weinstein, (eds), Extreme Speech and Democracy; (Oxford University Press, Oxford, 2009) 322, 311-330
liberal democracies. We argue that the “freedom to criticise” should be protected to ensure that the diverse opinions are sincerely held within society, and this should apply equally to social media. Instead, the recent cases in this context highlight a culture of intolerance among the paranoid political elite towards criticism as they fail to distinguish between forms of criticisms that do and do not actually threaten public order, decency or morality.

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8 Cram, I., *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (Ashgate, Aldershot, 2006), 140

9 In 1989, the Supreme Court of India held that “the State cannot prevent open discussion and open expression, however hateful to its policies”, *Rangarajan vs P. Jagjivan Ram* (1989)