

AT LIBERTY

Freedom to Express and Offend

Ravi Shanker Kapoor



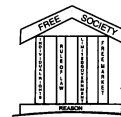
“I disapprove of what you say,
but I will defend to the death
your right to say it.”

- attributed to Voltaire

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"Where the mind is without fear..."

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SECTION I

For absolute freedom of expression

About Ravi Shanker Kapoor

Ravi Shanker Kapoor did Mathematic (Honors) from Hansraj College, University of Delhi. A journalist by vocation, he has worked with a variety of publications including *The Financial Express*, *The Political and Business Daily*, *The Asian Age*, and *Destination India*. Championing individual freedom, market economy, limited government, and freedom of expression, he has also contributed extensively to the websites of the Liberty Institute.

Kapoor has written three books, published by Vision Books - *More Equal Than Others: A Study of the Indian Left* (2000), *Failing the Promise: Irrelevance of the Vajpayee Government* (2003), and *How India's Intellectuals Spread Lies* (2007).

Is it possible to have freedom of expression which is not absolute? The answer is a big 'no.' Freedom of expression ought to be absolute—or it is no freedom at all.

The immediate objection to this assertion, especially in the Indian context, is that there is no point in offending people. Novels, short stories, and poetry can be written, and movies made, without hurting the sentiments of groups and communities. After all, a huge amount of literature *is* created and a large number of films produced without any objections from anybody. So, why should writers and filmmakers come up with works which can offend somebody? Why can't they promote harmony, instead of breaching it? Why can't creativity be harmless?

We are told that even John Stuart Mill, arguably the greatest champion of "the fullest liberty of professing and discussing," talked about what came to known as the Harm Principle: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

American philosopher Joel Feinberg went a step further and in 1985 recommended an Offence Principle to act as a guide to public censure. According to him, Mill's Harm Principle is not sufficient to check wrongful behaviors: "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end." He favored

legal prohibition on some forms of expression if they are very offensive, though he recommended lower penalties for offence than for harm. Feinberg suggests that a number of factors need to be taken into account when applying the offense principle, including: the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offense, and the general interest of the community at large.

Feinberg intends to legitimately prohibit some forms of expression because they are very offensive. He, however, agrees that offending someone is less serious than harming someone.

The Harm Principle

The impression that we sometimes get is that Mill favored some governmental control over freedom of expression. It arises from confusing 'action' with 'expression of views.' The full passage is:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the *liberty of action* of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. (emphasis added). [Introductory, *On Liberty*, John Stuart Mill].

It is unfortunate that even those who champion the cause of liberty sometimes refuse to distinguish between the two. Consider Bibek Debroy's article, titled 'Politics of bans and rights,' in *The Indian Express* on November 28, 2007. He wrote: "...is an individual right ever absolute? It can't be, for it is conceivable that the exercise of my individual right might constrain yours, and there is a difference between exercising an individual right in my private domain and doing it in public. For instance, it might be fine for me to walk around nude in my apartment, but should I be allowed to do it in public? If I am a

serial killer, exercise of my individual right might require me to murder people. Should that be allowed? Even in relatively free countries, including the US, freedom of expression is a relative, not absolute right—defamation, obscenity, perjury, copyright violations, actions that incite hate, sedition and blasphemy, are all instances where freedom of expression has been curbed in developed countries."

Notice how he mixes various things—freedom of expression with freedom of action, defamation with perjury and copyright violations. But freedom of expression has little to do with perjury and copyright violations, for these are crimes by their very definition and have little to do with freedom of expression: perjury is lying under oath, whereas copyright violations steal somebody's intellectual property. Defamation, on the other hand, is related to freedom of expression.

More misleading is the blurring of distinction between opinion and action. Loitering nude on streets and killing people are actions; airing of views—howsoever controversial, unconventional, seditious, or blasphemous—is just a way of telling others what one thinks and/feels about something. Mill is clear about the distinction. He wrote:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.

Opinions ought to be freer than actions, because words break no bones. Mill would not accept any curbs on the freedom of

speech except in rare circumstances—to “an excited mob” against corn-dealers “before the house of a corn-dealer.” That is, when the harm to life, limb, and property of the targeted person is almost imminent. But then in such a situation, haranguing an angry mob is incitement to violence rather than an expression of opinion; and there is nothing improper in penalizing incitement to violence. At any rate, such penalizing would be against felonious intent and action rather than freedom of expression. When a mafia don orders his henchmen to eliminate a rival, he is not exercising his right to freedom of expression; he is triggering off a crime. There is a difference between freedom of expression and crime.

A socialist is not only entitled to his view that private property is theft but also free to express it. It is when he convinces, coaxes, or instigates his followers to indulge in violence that he crosses the line.

Fear of Freedom

It can be argued that incitement may not always be imminent or immediate; it is possible to fill the hearts and minds of a group with hatred against some person(s), institution, religion, or country on a long-term basis. Should indoctrination be allowed? As it is, Islamic terror and Maoist menace, to name the two biggest threats India faces, are a headache for the people and the government. If freedom of expression is made absolute, it would be possible for the most venomous jihadis and hardcore Maoists to teach their violent doctrines. Would not that be a recipe for disaster?

It may appear that unrestrained freedom of expression would give a fillip to, among other things, jihadist and Red terror, but a proper analysis would show otherwise.

To begin with, it must be made clear that these two problems have not been caused because of the limited freedom of expression that is allowed in the country; nor would these be exacerbated if this freedom is made unlimited. These have been caused, and

exacerbated, by politicians’ machinations, by their bad policies, and by their reluctance to uphold the rule of law. The rule of law, it may be mentioned, is the necessary condition for freedom of expression in an open society.

Maoism came into being in the late 1960s; it has seen several peaks and troughs. A variety of factors were responsible for its birth and current virulence: socialist economic policies, bad governance, and the lack of political will to combat Leftwing violence. Even today, the Maoist sympathizers openly propagate the justness of the Maoist cause. So, absolute freedom of expression will not aggravate the problem.

As for jihadist violence, it needs to be emphasized that curtailment of freedom of expression has actually boosted the morale of Islamic fundamentalists, emboldening them to directly and indirectly help terrorists. A watershed in the history of freedom of expression in India was the ban of Salman Rushdie’s *Satanic Verses* in 1988; it proved that the Indian political class could be subdued by a mix of rhetoric, threat, and downright violence. Published on September 26, 1988, in the UK, it was reviewed by prominent journalist and author Khushwant Singh in *Illustrated Weekly of India*. He recommended a ban on the book, arguing that it could lead to trouble. Another journalist-author who called for proscription was M.J. Akbar. Parliamentarian and editor of the monthly magazine *Muslim India* Syed Shahabuddin petitioned the Rajiv Gandhi government the same. The government immediately responded and banned the book on October 5. Years later, Bangladeshi author Taslima Nasreen was also haunted and persecuted by Muslim fanatics; and she also received minimal support from the government.

An intended consequence of proscription and persecution has been the demise of all meaningful debate on Islam; everybody knows that any critical observation about theology and practice of Islam would attract opprobrium and possibly prosecution. All writers and journalists know that criticism would make them vulnerable to the accusation of being bigoted and fascistic. For a critical Muslim, the predicament could be worse: even his

physical existence would be in danger. There have been cases where fundamentalist Muslim politicians have tried to incite violence against those who are critical of Islam. So, we have a perverse inversion of the freedom of expression: while writers and artists are restrained from freely expressing themselves, those who are opposed to this freedom are rarely restrained. The perversity is comprehensive: the *views* which are frowned upon by the tetchy are proscribed or suppressed, but the *violence* of the most retrograde elements is tolerated.

The unintended consequence is that the malaise has spread among other sections of Indian society. The success of retrograde elements in Muslim society has encouraged similar elements in other communities to thrust their narrow viewpoint. So, the Hindus have violently protested against some of the paintings of M.F. Husain on the grounds that these hurt their sentiments. Another painter, Jatin Das, also had to face the ire of Hindu zealots.

Roots of the Fear

Where does this fear of absolute freedom of expression emanate from?

The fear has its roots in the belief that there is a reality (or Reality) which can be misrepresented or distorted if the freedom of expression is absolute. This presupposes a universally accepted definition of the reality. But the fact is that no such definition exists; there are as many definitions of reality as there are philosophers and philosophies. There are Christian theologians interpreting the faith in numerous ways; there are six orthodox Hindu schools of philosophy (with several sub-schools); there are Marxists, again following countless lines; there are Western conservatives (Burkeans in harmony with tradition, others ardently anti-state); there are libertarians (followers of Ayn Rand and others); there are postmodern thinkers (who actually do not believe in any reality); and long goes the list. So, what is the reality or ultimate reality? What is the truth (or the Truth)?

I do not claim that the reality does not exist or, as Kant said, that it is unknowable (noumenon); this question is beyond the scope of my thesis. My assertion is that since there is no *universally accepted* understanding of (ultimate) reality, the question of its misrepresentation or distortion does not arise.

Let's climb down from the metaphysical plane and concentrate on the mundane aspects of life. Let's discuss topics like state, market, society, individual rights, and property. Again, we face the same plurality of views. What is state? Marxists tell us something which libertarians and conservatives can never agree with. What should be the role of state? While Left-leaning thinkers would argue for its greater role in the economy, libertarians and conservatives would like it to keep away from the market. Should market take care of itself, or should it be kept under the watchful eyes of government functionaries and regulators? Again, there is a wide divergence of views. Even among Leftists and Rightists there is considerable difference of opinion. For instance, Rand is against regulators, whereas in India even those who are considered pro-market favor regulators.

What is society? Is it organic and more than the sum-total of individuals, as Burke and many conservatives believe? Is society, as Burke put it, "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born"? Rand would hit the roof hearing such a definition of society; in her scheme of things, everything is subservient to the individual and his rights. Interestingly, both Burke and Rand are placed on the Right of the ideological spectrum.

Individual rights are also understood in vastly different ways by thinkers of different persuasions. Those on the Right would want nothing but freedom from the clutches of government, freedom to be left alone—*laissez faire*. The Leftists, on the other hand, find such freedom vacuous; they talk about the right to food, work, etc., all of which requires big state.

Similarly, on property there are diametrically opposite views across the ideological spectrum. While the Left views it as the result of exploitation (if not downright theft), the Right regards it as the cornerstone of liberty.

Therefore, there is no unanimity on any kind of reality, metaphysical or mundane. I will reiterate that this is not a thesis promoting epistemological nihilism; on the contrary, mine is an attempt to undermine such nihilism. This nihilism is actually promoted by the postmodern dogma in association with various anti-Enlightenment tendencies like political correctness (PC), multiculturalism, and Islamism.

The only way we can know any truth is by letting the free-play of ideas in the arena of public discourse, a veritable *laissez faire*. A genuine quest for knowledge and a yearning for wisdom (or philosophy, which is, etymologically, 'love for wisdom') is an onward march to gain more and more facts; we shall realize as many truths as possible. The quest may or may not lead us to the 'Ultimate Reality' (if it exists), but we can hope to go near that. But this march is impossible without unrestrained freedom of expression.

Controversy is inevitable

A large number of truths came to be acknowledged as such without much fuss, but there are many which were preceded with long and often acrimonious debates and sometimes also with violence. And acrimony takes place because somebody or some group feels offended by a truth. It is often argued that we must avoid the truths which violate the Offence Principle, for the consequences could be apocalyptic.

The Galileo affair needs special mention in the context of Offence Principle. Galileo published his *Sidereus Nuncius* (Starry Messenger) in 1610. This was based on the observations that he had made with his the telescope. Some of these discoveries—lunar mountains, small moons around Jupiter, the phases of Venus, and sunspots—indirectly undermined the geocentric

Christian cosmology. They harmed nobody but surely offended the sensibilities of people in an age in which religious faith was a great, if not the ultimate, concern. Had Galileo decided not to offend the Christians—and this would have been a rewarding option—he would have deprived the world of important truths and science would have been poorer. He was not granted freedom of expression; he had to grab it. And he *did offend* many—and suffered because of the 'offence.' Without the freedom to offend, Salman Rushdie said, freedom of expression ceases to exist.

There are many other instances where science offers explanations which conflict with religious beliefs. But the science-religion conflict is beyond the scope of our thesis. What is pertinent here is that even religions that have evolved over the centuries could not have without challenging the established orthodoxies and offending many—often most of—people. Jesus Christ propagated beliefs which offended many people, leading to his crucifixion. Shankaracharya (788-821) famously disputed with great theologians. Martin Luther enraged the Pope's clergy. In fact, it is in religion rather than in science that new expositions are generally frowned upon.

End of Time?

To say that freedom of expression should be curtailed lest it offend or hurt the sentiments of people, or some people, implicitly accepts a ludicrous postulate: that all facts and truths that mankind ought to know have been known, and any new expositions would merely distort truths. One need not be a philosopher to say that the postulate is not only ludicrous but also smacks of hubris and complacency.

At any rate, the Offence Principle would end up banishing philosophy and any serious contemplation. As Bertrand Russell wrote in *The Problems of Philosophy*, "Philosophy is to be studied, not for the sake of any definite answers to its questions since no definite answers can, as a rule, be known to be true, but rather for the sake of the questions themselves; because these questions enlarge our conception of what is possible, enrich our intellectual

imagination and diminish the dogmatic assurance which closes the mind against speculation; but above all because, through the greatness of the universe which philosophy contemplates, the mind also is rendered great, and becomes capable of that union with the universe which constitutes its highest good.”

SECTION II

Freedom of expression in Independent India

When India became Independent on August 15, 1947, many thought that this would automatically, if gradually, result into, among other blessings, greater individual freedom. After all, the British imperialists had quit; soon the vestiges of repression would also go. The land of Tagore's dream seemed within sight: “Where the mind is without fear and the head is held high/... Where the clear stream of reason has not lost its way/Into the dreary desert sand of dead habit...”

But, alas, that was not to be! Imperialism was gone, but an equally, if not more, constraining nationalism replaced it. Let us see what nationalism is and how did it struck root in India.

While patriotism is simply love one's country, nationalism—being love of one's nation—is quite complex. First, the term ‘nation’ is never without ambiguity. What defines a nation—race, ethnicity, creed, language, culture (but then what is culture?), or a permutation or combination of all these? There is no clarity or consensus among scholars. Patriotism, on the other hand, is much simpler, being firmly rooted in land—even literally, as it is derived from the Latin ‘*patris*’ or father. Hence the term ‘fatherland.’

Patriotism is; nationalism argues

Patriotism is spontaneous, often inarticulate; nationalism is well-thought out and passionately reasoned. Patriotism is; nationalism argues.

Consider an illustration. If there is a calamity—earthquake, flood, etc—the patriotic response would be: ‘Do whatever to save lives.’ That would include help from other countries. The nationalist response, however, would be cautious and convoluted; there would diffidence, even reluctance, to seek help from other countries. How would this reflect on us; can’t a great nation like ours solve our own problems—this is how the nationalist mind works. National glory is more important than human life. This happened in the wake of the Gujarat earthquake of 2002: the Indian Government got but did not *seek* foreign help from others—at least, that was the official position.

Nationalism did not lose its virulence after Independence. Human autonomy, which was the defining feature of the Enlightenment, fell victim to the First Amendment of the Constitution, which took place after just 15 months of the Constitution coming into effect on January 26, 1950. The website of the Ministry of Law & Justice lists the Statement of Objects and Reasons appended to the Constitution (First Amendment) Bill, 1951 which was enacted as the Constitution (First Amendment) Act, 1951:

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen’s right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. The citizen’s right to practise any profession or to carry on any occupation, trade or business conferred by article 19(1)(g) is subject to reasonable restrictions which the laws of the State may impose “in the interests of general public.” While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to article 19(6). Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject-matter of dilatory litigation, as

a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

The main objects of this Bill are, accordingly to, amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. The opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may arise.

This was the beginning of the curtailment of freedom of speech and expression and property rights. The concept of “reasonable restrictions” was brought in to curb the freedom of expression. The First Amendment proved to be the Original Sin, for the concept of reasonable restrictions is deeply flawed.

Partially free

We were rendered, at best, partially free, for the “reasonable restrictions” appended to the Right to Freedom of Speech and Expression in Article 19 (a) empowered the State to curb this Fundamental Right whenever it wished to. Restrictions can be imposed for the maintenance of “the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.” Since the concepts of the security of the state, friendly relations with foreign States, and maintenance of public order or decency are comprehensive enough to restrict the freedom of expression in every conceivable manner, the sphere of freedom has shrunk considerably. For instance, the government cannot be accused of betraying the Constitution if it comes down heavily against an author who exposes the role of any country, including Pakistan, in fomenting violence in India. Technically, a ban on his writings would not be *mala fide*, if the government says that it wants to improve ties with Pakistan and his writings may jeopardize the improving Indo-Pak relations. Similarly, decency and morality are vague and, therefore, can be applied arbitrarily.

It needs to be mentioned that the curtailment of Article 19 was not the result of some tyrant scheming to intellectually subdue

the people. The ruler at that time, Jawaharlal Nehru, Independent India's first Prime Minister, was the embodiment of toleration, liberalism, and gentleness. It was the desire of the nation, rather than the mischief of Nehru or his coterie, that the freedom of expression be restricted. Never at ease with the main Enlightenment ideal of individual liberty, the Indian nation manufactured chains to shackle the citizen. This was the reason that there was hardly any resistance to the curbing of the freedom of expression. This was, and is, a danger greater than the wickedness of a dictator. The people, as citizens and as constituents of the nation, had fallen in love with the chains that bound them.

SECTION III

Art versus law and order?

In India, as also in other countries, often demands are made for ban on movies, paintings, books, songs, or other creative works. The demands are accompanied with overt and covert threats—ban it, or else... Apparently sound arguments are made in favor of capitulation. After all, it is just a movie, song, or book; why hurt the sentiments of somebody or some group; why risk peace and amity in society; why should the law and order situation be allowed to worsen just because some Johnny thinks that his creation is a great piece of art; at any rate, human lives are more important than art. Governments face the question: should the demand be accepted?

The easy answer is yes. The tetchy (and raucous) group is appeased; the specter of large-scale violence fades away; and the authorities breathe easy.

The tough, and correct, answer is no.

A ban is wrong not only in principle but also as an expedient measure. It is wrong in theory because it violates or curbs the right to freedom of expression; and without the individual enjoying freedom of expression, democracy is reduced to a farce. Democracy is not just about casting vote and electing representatives for state assemblies and Parliament; it is a way of life: if you can't say what you want to say, it is democratic form without substance. The principle worth imbibing is: give me freedom or give me death.

Why offend somebody

It is often argued that freedom of expression does not mean licence to offend others. Why should Salman Rushdie write a book that offends the Muslims? After all, he was a writer of repute even before he published *Satanic Verses*; his other books received critical acclaim and were sold in good numbers. So, the argument goes, why should he write a blasphemous novel in the first place? Similarly, why should M.F. Husain paint goddess Saraswati in the nude? Why should Taslima Nasreen author novels which offend the Muslims? Why should the Danish cartoonist sketch the Prophet Mohammad?

But the point is that, as George Orwell said, if liberty means anything at all, it means the right to tell people what they do *not* want to hear. If you tell me that I am a great author, and I let you say that, it is neither liberty nor tolerance. You enjoy liberty only if you tell me that my writing is not worth the paper it is printed on; and I am tolerant when, even if I have the power to squash you, I let you (or am forced to let you, because the law will protect you, however powerful I may be) express your opinion.

Former U.S. President Ronald Reagan famously cracked a joke at one of his press conferences which goes on like this: An American and a Russian had an argument about freedom of speech in their respective countries. The American said that he could go to White House, enter the Oval Office, and tell the President, "Mr. Reagan, you are a fool!"

The Russian responded, saying that he could also go to the Kremlin, enter Gorbachev's office, and scream, "Mr. Gorbachev, Mr. Reagan is a fool!"

Secondly, it is practically impossible for a creative person to envisage what would offend somebody. Yes, sometimes people say and do things for instant publicity, but again that is neither criminal nor immoral so long as it does not hurt others. How could

the makers of *Billoo Barber* have imagined that a neutral word 'barber', which is not pejorative by any stretch of imagination, would get them into trouble?

Vagaries of political correctness

And, finally, if a creative person has to always keep the sensibilities of tetchy rascals and the vagaries of political correctness into account, how could he create anything of any consequence? He would be busy studying, analyzing, and examining the nuances of every word, every name, epithet, etc.

As for the fears about the worsening of law and order situation if 'offensive' books, movies, etc. are not banned, we can only say that the fears are grossly exaggerated. This is not to say that there are no fears. Hindu groups have attacked painting exhibitions by M.F. Husain and Jatin Das. Salman Rushdie did receive a death fatwa from Iran's Ayatollah Khomeini for his novel *Satanic Verses*. While Rushdie was not hurt, many others were.

According to www.wikipedia.org:

Hitoshi Igarashi, its [*Satanic Verses*] Japanese translator, was stabbed to death on 11 July 1991; Ettore Capriolo, the Italian translator, was seriously injured in a stabbing the same month; William Nygaard, the publisher in Norway, barely survived an attempted assassination in Oslo in October 1993, and Aziz Nesin, the Turkish translator, was the intended target in the events that led to the Sivas massacre on 2 July 1993 in Sivas, Turkey, which resulted in the deaths of 37 people. Individual purchasers of the book have not been harmed. However, the only nation with a predominantly Muslim population where the novel remains legal is Turkey.

It is important to note here that since that unfortunate incident, no *Verses*-related violence has happened in Turkey. The reason: Turkey refuses to forget the Sivas Massacre and forgive the perpetrators.

An angry mob of Islamic fundamentalist had attacked the Madimak Hotel in Sivas after traditional Friday prayers. The intellectuals had gathered at the Madimak to celebrate 16th century poet Pir

Sultan Abdal. The attackers were incensed by the presence of Aziz Nesin, a writer who had translated and published extracts from *Satanic Verses*. While Nesin managed to escape because the mob did not recognize him, dozens perished in the arson attack.

The State Security Court sentenced 33 people to death in November 1997 for the massacre. In a 2001 appeal, all but two of these sentences were upheld. The sentences were, however, commuted to life in prison as Turkey abolished the capital punishment in 2002.

Turkey and us

Civil society organizations and prominent intellectuals commemorated every year the anniversary of the Sivas Massacre. In 2010, the Turkish government joined for the first time ceremonies commemorating the outrage which had claimed the lives of many intellectuals, writers, and artists.

“The pain of Madımak is a pain for the entire country,” State Minister Faruk Çelik said at the commemoration ceremony held in front of the Madımak Hotel and attended by other government officials.

Çelik went on to call July 2, 1993, as one of the most painful dates in Turkish history. “That day, they wanted to test the brotherhood we have built for centuries, with blood and tears,” Çelik said. “The fire that encompassed the hotel affected all our bodies.”

What this shows is that the Islamist fundamentalists, despite their bluff and bluster, are mostly a cowardly lot; they become dangerous when they get the impression that they get away with murder.

It also shows that in Turkey intellectuals actually died and suffered for the cause of the freedom of expression—unlike their counterparts in India who invariably succumb to the pressures of Islamic fundamentalists and whose fight for freedom of expression is restricted to a tirade against fanatic Hindus.

This is not to say that Hindu groups pose no threat to the freedom of expression. Their campaign against *Shivaji: The Hindu King in Muslim India*, a book written by American scholar James Laine, is a case in point. The book not only occasioned ban and court cases but also violence.

Shivaji Bhosle (1630-1680), the Maratha Emperor with the royal title Chhatrapati Shivaji Maharaj, fought for the freedom of the Maratha nation from Sultanate of Bijapur. Owing to his fight against the Muslim rulers, including the mighty Mughals, Shivaji is a hero of Hindu nationalists. His many adventures have bestowed a halo to his legend. In Maharashtra, he is especially cherished as a cult figure. The local parties like the Shiv Sena which peddle Maratha pride almost worship him and even the slightest hint of criticism, let alone disparagement, is projected as blasphemy. Characteristically, the Mumbai (formerly Bombay) airport was renamed as Chhatrapati Shivaji International Airport.

Shivaji controversy

In June 2003, *Shivaji* was published in India by Oxford University Press India. In November, scholars affiliated with the Bhandarkar Oriental Research Institute (BORI) of Pune, city MP Pradeep Rawat, and others demanded withdrawal of the book. The OUP was prompt in coming out with an apology; it also withdrew the book from the Indian market. This, however, did not appease Shiv Sena activists who, on December 22, assaulted scholars attached to BORI for their assistance to Laine for his book. Sanskrit scholar Shrikant Bahulkar was beaten up and his face blackened.

A few days later, James Laine faxed a statement, saying:

It was never my intention to defame the great Maharashtrian hero. I had no desire to upset those for whom he is an emblem of regional and national pride, and I apologize for inadvertently doing so. I foolishly misread the situation in India and figured the book would

receive scholarly criticism, not censorship and condemnation. Again I apologize.

The campaign against the book continued nonetheless. On January 5, 2004, over 150 members of the Sambhaji Brigade ransacked BORI, vandalizing the building, books, and artworks.

The state government, however, did little to stem the assaults. State home minister R.R. Patil said (*The Indian Express*), "We condemn the attack and also distorting of the history of Chhatrapati Shivaji. The government is seeking legal opinion to ascertain if any action can be taken against the author and also whether the book can be banned." Notice the bracketing of scholarship with criminality. Unsurprisingly, the criminals were emboldened. On January 9, Sambhaji Brigade spokesman Shrimant Kokate is reported (*The Times of India*) to said, "In fact, scholars should be happy that BORI is still intact." The brigade was "most unhappy" that scholars who had helped Laine were "still alive," he lamented.

In another report (*The Indian Express*), he was quoted as saying, "Those who fed him [Laine] with the offensive information should be hanged by the government. If the government is unable to do so they should be handed over to us."

As for the newsmen disapproving of vandalism, Kokate said, "We will deal with the media later."

On January 14, the Maharashtra government proposed to ban the book, citing Sections 153 and 153A of the Indian Penal Code. Two days later, prime minister Atal Bihari Vajpayee opposed the proscription, infuriating the ally Shiv Sena. He said (*The Indian Express*), "If you do not like anything in a particular book, then sit and discuss it. Banning a book is not a solution. We have to tackle it ideologically... If differences of opinion remain after an issue is discussed, the best way would be to come out with another good book on the subject."

Because ban involves us all

It needs to be noted that it was not just the pro-Hindu outfits like the Shiv Sena which were whipping up a frenzy against the book; leaders of other parties also joined in the capitalize on despicable popular sentiments. Senior Congress leader and former Maharashtra chief minister A.R. Antulay castigated Laine and urging the government to take all necessary legal steps to punish him. Chief minister Sushilkumar Shinde said (*The Hindu*) that it was "not fair" to write such "bad things" about Shivaji.

Fortunately, the Bombay High Court decided against the ban; and the Supreme Court on July 9, 2010, upheld the high court's decision. The apex court maintained that the Maharashtra government did not follow the mandatory procedure while invoking the ban on the book.

In *Shivaji*, politicians saw a golden opportunity to gain popularity by transmogrifying the people into rabble. In what he thought was an excellent exercise in competitive populism, Maharashtra BJP president Gopinath Munde also demanded a ban on Jawaharlal Nehru's book, *Discovery of India*, claiming that a 1986 edition contained derogatory remarks about Shivaji. But he had not read the book; and the hearsay he relied on proved to misleading. When it was pointed out that no such remarks were found in that edition, he sheepishly said, "I am a politician and not a scholar."

The controversy over *Shivaji: The Hindu King in Muslim India* was just one of the many that Hindu groups kicked off. In 1998, they unleashed hell against Deepa Mehta's film *Fire* on the grounds that it portrayed a distorted version of Indian society. The movie was about lesbian relationship between two family members. On December 2, activists of the Shiv Sena Mahila Aghadi attacked the matinee show of the film at Cinemax theatre in suburban Goregaon in Mumbai. Glass panes were smashed, posters burnt, and slogans raised against the movie.

A day later, the women storm troopers vandalized Regal cinema in the heart of the national Capital, accompanied with TV camera

crews. The cops, however, were conspicuous by their absence. *Fire* producer Bobby Bedi was quoted in *India Today*, "The Delhi Sena chief's letter informing the press about the demonstration said that they would do *tod-phod* and violence was expected... almost as if tea will be served." Pune was next, then Surat.

According to *India Today*:

On the eve of their attack on Cinemax, the Mahila Aghadi women called on state Culture Minister Pramod Navalkar to protest against the depiction of the "lesbian relationship" between Shabana Azmi and Nandita Das in the film. They even demand Azmi's resignation from the Rajya Sabha.

While Navalkar obviously gave the green signal, Chief Minister Manohar Joshi egged them on, even patting them on their backs. "I congratulate them for what they have done. The film's theme is alien to our culture," said Joshi on the day the Sainiks attacked cinema halls and succeeded in stopping a film cleared by the Censor Board. Of course, Joshi backed down later saying he was only supporting their protest and not the vandalism.

The charge of the Sena brigade was, however, successful: Union Minister of State for Information and Broadcasting M.A. Naqvi sent *Fire* back to the Censor Board. Once approved, a film is rarely referred back to the censors, with exceptions like R.V. Pandit's *Maachis* [directed by Gulzar] because of its supposed soft treatment of terrorists. You need a "public outrage" for that, and the Sena obliged.

The pattern

There is a pattern. The bodies protesting against a work of art are front organizations of Sangh Parivar or the Shiv Sena. The pro-Hindu political parties are under the (false) impression that sanctimonious thump over 'the great and glorious Indian culture' will bring a rich harvest of votes. As Manohar Joshi's flirtation with the activists indicated, the vandals enjoy political and administrative support. So, the real threat to the law and order does not emanate from the artists' flights of fancy but from politicians' shielding of hooligans.

It is not just the Bharatiya Janata Party and the Shiv Sena but also the Congress and other 'secular', 'liberal' parties which have great faith in and tolerance for storm-troopers. The grand old party, in a bid to outsmart the regionalism and sectarianism of mainstream Akalis, set up Bhinderanwale—resulting into the assassination of Prime Minister Indira Gandhi and killing of thousands of people of all faiths. Similarly, to counter the Maratha chauvinism of the Shiv Sena, it propped up Maharashtra Navnirman Sena chief Raj Thackeray and refused to take action against the violence he brought about. Not much dissimilar is Trinamool Congress chief Mamata Banerjee's effort to out-Left the Marxists in West Bengal; she has partnered with the ruthless Maoists.

In short, it is the shortsightedness of mainstream politicians that creates law and order problems, not the works of art, howsoever outrageous they might be. If the vandals are brought to justice and the rule of law is upheld, there would be no lawlessness and disruptions.

SECTION IV

Censorship and the Law of Inexorability

In India, no other form of human expression has faced more restrictions than cinema. Unfortunately, it is not only the Central Board of Film Certification (CBFC) which does the job of censorship but, as we shall see, a variety of forces tend to curtail the filmmakers' creative freedom.

The CBFC, a statutory body under the Ministry of Information & Broadcasting, is mandated to regulate the public exhibition of films under the provisions of the Cinematograph Act, 1952. Films can be publicly exhibited in India only after they have been certified by the CBFC or the censor board in common parlance.

The Board, headquartered in Mumbai, comprises a chairperson and non-official members, all of whom are appointed by the Central government. It has nine regional offices, one each in Mumbai, Kolkata, Chennai, Bangalore, Thiruvananthapuram, Hyderabad, New Delhi, Cuttack, and Guwahati.

Films are certified under four categories: 'U' certificate or Unrestricted Public Exhibition; 'UA' certificate or Unrestricted Public Exhibition, but with a word of caution that parental discretion required for children below 12 years; 'A' certificate or restricted to adults; and 'S' certificate or restricted to any special class of persons. The vision behind the setting up of the CBFC was "to ensure the good and healthy entertainment" in accordance with the established provisions.

Supreme Court's justification

Why should cinema be subjected to censorship when other forms of expression like the press, novels, and short stories are not? The Supreme Court of India justified film censorship, arguing:

Film censorship becomes necessary because a film motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers and can affect emotions. Therefore, it has as much potential for evil as it has for good and has an equal potential to instill or cultivate violent or good behavior. It cannot be equated with other modes of communication. Censorship by prior restraint is, therefore, not only desirable but also necessary.

Our argument is that even if the apparently harmless vision of the CBFC (good and healthy entertainment) and the apex court's justification (potential for evil) are accepted on their face value, it is not possible to resolve the issue. For there have been instances where films have been banned despite clearance from the censor board. While categorizing films as per various certificates is essential, the very idea of CBFC acting as a censor board is not good. What makes the matters worse is that the CBFC's certification is not considered final either by the political class or society.

Mrinal Sen-directed *Neel Akasher Neechey* (1959) was banned for two years, apparently by the government and not the censor board. That it was banned by the government run by Jawaharlal Nehru, the quintessential liberal, makes the assault on creative freedom even more deplorable. His government also went on to proscribe the 1962 film *Nine Hours to Rama*, which showed Nathuram Godse's political and psychological motivation for killing Gandhi. The movie was based on a book by celebrated historian Stanley Wolpert; incidentally, he also wrote an authoritative biography of Nehru.

If gold rusts, what will happen to iron? With men of high ideals with touching faith in liberalism falling prey to political expedience,

the lesser and later politicians showed much less tolerance to the subjects and viewpoints that they found unpalatable.

Directed by Gulzar, *Aandhi* (1975) was said to be based on triangle of Indira Gandhi-Nehru-Feroze Gandhi relationships. Its release faced problems, even though it showed Indira Gandhi in a favorable light. Then there was Amrit Nahata-directed *Kissa Kursi Ka* (1977). Though not depicting any prominent leader in particular, it showed a corrupt and vile politician wooing personified public, played by Shabana Azmi. The movie was banned by the government.

Nationalistic peevishness

Nationalistic peevishness is another factor. In 1984, *Indiana Jones and the Temple of Doom* was proscribed for "racist portrayal of Indians and overt imperialistic tendencies." The West Bengal government banned *City of Joy* in 1992 for the alleged denigration of Calcutta.

Prudery has also been the bane of filmmakers. *Kama Sutra: A Tale of Love Banned* (1996) faced trouble with the censors; a truncated version was later released. The same year, *Fire* faced the ire of Hindu groups who objected to lesbianism and the names of protagonists, Sita and Radha. Using these names for lesbians was mischievous, the activists said. This was a slur on Hinduism. Religious sensibilities are easily offended in India. Politicians in some states with a substantial Christian population banned *The Da Vinci Code*, even though the Christian West did not do that.

Sometimes it is publicity hunger that propels people to attacks films. The 2009 *Billu Barber* met with fierce resistance from salon and beauty parlor associations; they said that the word 'Barber' was derogatory. The head of the film's production company, Shahrukh Khan, was forced to rename the title as Billu. He also found it politic to invite members of the Hairdressers' Association of Mumbai members to the premier of the movie.

Politics has always played a big role in attracting proscription. In 1971, Satyajit Ray-directed *Sikkim* faced a ban, which lasted

till September 2010. In 2006, the film *Fanaa* was banned in Gujarat for a strange reason—that the lead star, Aamir Khan, was against the Sardar Sarovar Dam over the River Narmada and had demanded adequate rehabilitation for the ousted villagers! Shatrughn Sinha, popular film star and member of the Bharatiya Janata Party (which ruled in the state), even hinted his party would launch violent protests if the Khan did not retract his support to the anti-dam activists.

Then there was the curious case of *Jo Bole So Nihal*. In May 2005, the Shiromani Akali Dal (SAD) sought ban on film in which the hero, Sunny Deol, played the role of Sikh cop. “The producer of the film has misused the holy Sikh community slogan (*Bole So Nihal*),” SAD chief Parkash Singh Badal told a press conference. “It is pertinent to mention here that a sub-committee of the Akal Takht had given ‘clean chit’ to the Hindi film starring Sunny Deol,” said a PTI report on May 18.

The ruckus was the product of intra-Akali bickering; some factions used the movie as a pretext to score brownie points. The most recent controversy, regarding the ban on Prakash Jha’s *Aarakshan*, is a typical case of political correctness not just going berserk but also it mingling with the shenanigans of politicians.

National Commission for Scheduled Castes & Scheduled Tribes chairman P.L. Punia objected to some dialogues in the film, calling them anti-Dalit. This was despite the fact that the film was cleared by a panel comprising nine people, including a Dalit activist and a former high court judge. Usually, such panels include four or five people.

The result of Punia’s petulance was the movie was banned in Uttar Pradesh, Andhra Pradesh, and Punjab.

Politics, pure and simple

It was politics, pure and simple. Punia, a Congress leader who was earlier a confidante of Uttar Pradesh chief minister Mayawati, wanted to present himself as a ‘true’ leader of the Dalits. The Congress and Mayawati’s Bahujan Samaj Party, seen as the big rivals in the country’s largest state, were both vying for the bigger

chunk of Dalit vote. It was Jha’s misfortune that he was caught in the crossfire.

More dangerous than the machinations of politicians is the tacit and often explicit support they get from intellectuals in the assaults on freedom of expression. For instance, Dalit scholar Kancha Ilaiah and prominent editor Ajay Bose practically supported ban on *Aarakshan*. Bose saw nothing wrong in Mayawati’s ban on *Aarakshan* on the grounds that she was entitled to take whatever action she deemed fit for her political survival. The ideals and rights enshrined in the Constitution mattered little to him.

It is this intellectual milieu that emboldens the political class to trample over the fundamental rights of citizens. Eminent academics, media Brahmins, and other opinion makers—most of them steeped in dirigiste mindset—have convinced themselves that meaningful change in human existence can be brought only by the state. A natural corollary is that any political cunning is justified. Hence the easy condoning of the actions of Punia and Mayawati by intellectuals.

In short, the so-called reasonable restrictions on the freedom of expression may have occasioned the censor board to regulate cinema but the matter did not end there. As any other government regulation, it has also acquired a life of its own, often making the existence of the CBFC redundant. Any political party, social outfit, cultural group, or publicity seeker can don the mantle of a censor and torment a filmmaker. Punia cited reasonable restrictions to justify his attack on *Aarakshan*; it is another matter that the restrictions he wanted to impose were unreasonable. The concept from which the censor board derives its legitimacy is also the one from which super-censors do.

Creative freedom will remain constrained and restrained till the individual is deprived of the right to express himself without restrictions, reasonable or otherwise. Until that is done, grumpy politicians, tetchy outfits, blackmailers, mischief mongers, and trouble makers will inexorably continue to thrive at the expense of freedom of expression.

“To hold a pen is to be at war”

- Voltaire

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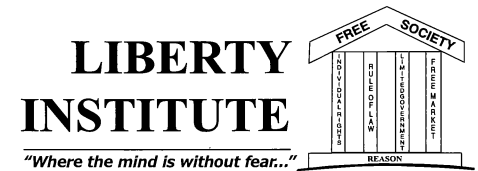
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To say that freedom of expression should be curtailed lest it offend or hurt the sentiments of people, or some people, implicitly accepts a ludicrous postulate: that all facts and truths that mankind ought to know have been known, and any new expositions would merely distort truths.

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