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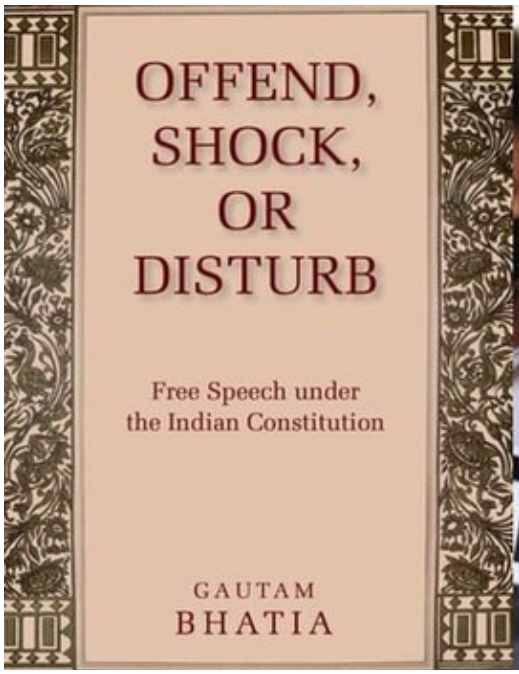
BOOK REVIEW

Why you must read Gautam Bhatia's 'Offend, Shock, and Disturb' to debate Free Speech in India

What justifies restricting speech in the first place? On what basis should we argue for a right to free speech, and how should we determine its contours? These questions form the backbone of the book.

by *Arudra Burra*
Published Dec 27, 2015 · 07:30 pm



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The title of this fine book does its contents a disservice, for it is about much more than speech which offends, shocks, or disturbs. Its aims are two-fold: first, to provide a doctrinal analysis of Indian free speech jurisprudence; and second, to critically examine it from a philosophical point of view.

Bhatia notes ruefully that the pathologies of the Indian legal system may limit the impact of these

theoretical explorations in practice. Nevertheless, it is worthwhile to ask whether Indian free speech jurisprudence is internally coherent and compatible with democratic ideals.

A comprehensive doctrinal analysis

The doctrinal analysis covers almost the entire breadth of Indian free speech jurisprudence, ranging from sedition and public order at one end to defamation and contempt of court at the other; there are also brief discussions of issues such as surveillance, net neutrality, and source protection for journalists. This alone makes it a worthwhile read, though non-lawyers may find parts of it heavy going. It is helpfully placed within a comparative frame, drawing from case-law in an impressive range of jurisdictions.

One part of the doctrinal analysis aims to tease out from Supreme Court decisions an underlying vision with respect to free speech. He argues that Indian case-law reveals at least two strands of free speech jurisprudence which are in deep tension with each other. One strand is "moral-paternalistic," and is drawn towards the need for restricting speech because it sees human beings as basically corruptible and prone to violence: this strand is visible in its jurisprudence on obscenity and contempt of court. The second, "liberal-autonomous" strand is more wary of speech-restriction, confining it to areas involving imminent violence, or a danger to other constitutional values such as dignity.

This duality in the Court's jurisprudence – sometimes reflected within the same case – opens a space for normative doctrinal argument to take the jurisprudence forward. Bhatia follows Catharine Mackinnon in making a strong case for thinking of free speech issues in some domains (pornography and "hate speech") through the lens of equality.

He suggests that this view can find doctrinal support within the Indian constitution by taking the "morality" exception in Article 19(2) to be "constitutional morality." This he takes to consist in the "set of basic political principles that underly and justify Part III of the Constitution," which can in turn be identified on the basis of the Court's "basic structure doctrine."

If equality is part of constitutional morality so construed, then restrictions on free speech can be constitutionally justified on grounds of equality; equally, if "morality" is not identified with, say, some set of beliefs about moral proprieties and improprieties, then it is harder to justify at least some restrictions of expression on the grounds that they are obscene or offensive.

Free speech meets philosophy of law

Bhatia's interests are philosophical as well as legal, and has done a great deal to bring together

the worlds of Indian constitutional law and philosophy in a widely-read blog. What can the tradition of liberal legal and political theory (represented by philosophers such as John Rawls, Ronald Dworkin, and TM Scanlon, as well as legal scholars such as Owen Fiss, Jack Balkin, and Robert Post) say to free speech issues in the Indian context?

One kind of contribution is conceptual. For instance, Bhatia points out that an analysis of the notion of freedom can help sort through the Court's understanding of the relation between economic regulation and free speech – e.g., when it inquires whether a mandatory minimum wage for journalists impinges upon the free speech rights of newspapers.

But Bhatia is more centrally concerned with normative questions. What justifies restricting speech in the first place? On what basis should we argue for a right to free speech, and how should we determine its contours? These questions form the backbone of the book, and their application to the Indian context is novel and welcome.

Two criticisms

Despite its riches, the book could do with a clearer and more careful discussion of its central claims, and more than once I found myself wishing that Bhatia had paused to consider the difficulties, both philosophical and doctrinal, with the views he advances.

Spark in a powder keg

Consider his discussion of public order. Bhatia points out that one persistent problem for public order rationales for restricting speech is that they are subject to the so-called "heckler's veto": a credible threat of creating public disorder is enough to force the State to restrict another's speech, and this is a convenient way to shut people up. The public order rationale thus needs to be restricted.

Bhatia suggests that the restriction take the form of a tight connection of causal proximity between the act of speech and the presumed disturbance of public order: following Rangarajan v. Jagjivan Ram as to be the equivalent of a "spark in a powder keg."

Bhatia seems to argue for the Rangarajan standard by invoking a principle drawn from an early paper of TM Scanlon's: when B causes harm as a result of listening to something A has said, then as long as B has acted as a rational, autonomous individual (and not in the throes of excitement or passion), A should not be held responsible for the harm caused – respect for B's autonomy should lead us to attribute responsibility to B alone. The only exceptions to this principle are cases in which B's autonomy is diminished, for instance because she is part of an excitable mob

poised to riot; these are the spark-in-a-powder-keg cases.

There are several problems with this line of argument. First, Scanlon's original intuition was limited to cases in which A's speech involved giving B good reasons for causing harm, and B's causing harm as a result of being persuaded by these reasons. But this is not the situation with the hecklers veto.

Second, the principle itself is problematic: it would seem to absolve A of responsibility for facilitating harm caused by B by any means, and not only by persuasive speech ("All I did was buy the poison for her; the choice to administer it was hers alone").

Third, one need not assume that "spark-in-a-powder-keg" cases always involve diminished responsibility: I may be perfectly rational and primed for violence, awaiting just the right theoretical justification for causing it.

Finally, the Rangarajan standard may simply be too strong – there may be cases of justifiable speech restriction on public order grounds even when the causal connection between speech and action is not immediate, for instance if "counter-speech" is likely to be ineffective.

The heckler's veto is a genuine problem, and does raise a question about the transmission of moral responsibility: there are many cases in which we *do* feel that A should not be blamed for harm caused by B in response to A's speech, and it is not straightforward to explain why this is so. But the solution does not lie in a test of causal proximity, certainly not through Scanlon's autonomy-based theory of free speech (a theory which Scanlon himself came to repudiate in later work).

Equality and free speech

Similar concerns arise on the doctrinal front. Bhatia's attempt to read an equality-based rationale into the Art. 19(2) "morality" exception is ingenious and elegant. But there are considerable costs to adopting it.

First, it seems very unlikely that the framers of the Constitution meant by "morality" anything other than the kind of consideration which might be used to justify restrictions of obscene or offensive material. The move to criminalise insults to religious sentiment in S295A of the Indian Penal Code was not, after all, a "colonial imposition" such as sedition: Neeti Nair has pointed out that it had broad-based nationalist support in the 1920s, and it seems quite likely that this support would have continued in a Congress-dominated Constituent Assembly which was very conscious of the role of religion-based hatred in fomenting the violence of Partition.

Second, it is not clear why "constitutional morality" must be found in the basic structure doctrine, rather than, say, the Directive Principles.

Third, it is not obvious that traditional "morals legislation" governing offence and sexual obscenity have no place in a constitutional scheme which gives priority to individual liberty.

Finally, it is not clear that the Indian constitution *does* give this kind of priority to individual liberty rather than, say, social reform.

To be sure, these problems are not insuperable – they give life to debates about positivism and originalism (among others) which are the bread and butter of legal philosophy. It would have been a valuable and interesting exercise to tackle these problems in the Indian context with the tools of legal philosophy; the failure to acknowledge them represents to me a missed opportunity.

Raising the bar

It is tempting to imagine that the job of a philosopher-lawyer of progressive bent writing about free speech today is to make the most persuasive legal and philosophical case for extensive speech protections. But if the goal is that of holding the judiciary, and our legal culture more generally to a higher standard of argument, then criticising speech-restrictive arguments is only one part of the job.

The overall standards will not rise unless one subjects one's own views to the same standard of criticism. This is a hallmark of philosophers such as Rawls and Scanlon, who are forthright about acknowledging gaps and weaknesses in their own positions, and do not hesitate to revise those positions in the light of criticism.

It is this sensibility, I think, which marks the greatest distance between the roles of the philosopher and the advocate, and I think some of the difficulties with the book arise from the inherent tension of occupying both these roles at once. Despite these difficulties, it is clearly an interesting and illuminating book, and does an excellent job of presenting a synoptic view of the state of Indian free speech jurisprudence.

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