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A JOCULAR LANDMINE: NAVIGATING THE POSITION OF POLITICAL SATIRE IN THE SPHERE OF FREE SPEECH AND EXPRESSION

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With the growing number of arrests and contempt cases against political satirists, the conversation regarding satire as a means of free speech and expression has become pertinent. While the Supreme Court has opined that satire amounts to expression that is protected under Article 19(1)(a) of the Constitution of India, determining when satire may be reasonably restricted under the Constitution has become highly controversial. The question of how constitutionally free political satire is as a means of expression must find its starting point in the fundamental building blocks of what amounts to satire. This paper first undertakes a foundational analysis of what satire truly is – appreciating its linguistic 'quantum' nature of simultaneously being serious and non-serious speech that has perlocutionary impacts. Then, a doctrinal study of the freedom of speech and expression under the Indian Constitution is undertaken to understand that the framework within which political satire must operate is one that is not intrinsically dangerous to public interests, adjudged from the perspective of a reasonable, strong-minded person, free from the fear of the mob. Finally, it is argued that understanding the true intention of satire to serve as a powerful catalyst for social change, while operating within its comedic play frame at all times, would show that satire would always fall within the limits of Article 19(1)(a) of the Constitution.

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A JOCULAR LANDMINE: NAVIGATING THE POSITION OF POLITICAL SATIRE IN THE SPHERE OF FREE SPEECH AND EXPRESSION

INTRODUCTION

Political satire is a hotly contested topic of discussion in today's world – often finding itself awkwardly positioned at the frontier dividing fair criticism and defamation, advocacy and incitement. Nonetheless, it remains one of the most potent tools to keep the wheels of social revolution turning. Political satire is not a new phenomenon. From Sajjad Husain's *Awadh Panch*, to R.K. Laxman's cartoons to All India Bakchod's (AIB) YouTube videos, the country is quite familiar with using satire to mimic and criticise structures of power. With the advent of technology and the internet boom, it has become a form of expression that the country's youth relate to the most. Tweets, memes, YouTube clips of stand-up comedians and Instagram reels, among others, have become the fastest way to put forth disagreement in a satirical manner while simultaneously making it accessible to a large audience. Despite this, satire is arguably one of the most regulated forms of speech and expression. Instances such as the arrest of comedian Munawar Faruqui[2] and the contempt cases against cartoonist Rachita Taneja[3] and comedian Kunal Kamra[4] are testament to the same, which reignites the long-running debate on how truly free satire is. Considering these issues, this paper analyses the unique position of political satire in the tricky minefield of free speech and expression, its power as an instrument to bring about social change, and its vulnerability to political suppression.

Firstly, the article undertakes an analysis of the fundamental nature of satire as a tool for social change while placing emphasis on satire's 'quantum' nature, simultaneously existing as serious and non-serious speech. *Secondly*, the article provides a doctrinal overview of the sphere of free speech and expression in the Constitution, within which the laws governing satire must operate. This is followed by an overview of the methods by which speech is formally and informally regulated.

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[2] *Munawar Faruqui: Bail for jailed India comic who did not crack a joke,* BBC NEWS (Feb. 5, 2021), https://www.bbc.com/news/world-asia-india-55945712.

[3] *Supreme Court initiates contempt action against Kunal Kamra, Rachita Taneja*, THE HINDU, (Dec. 18, 2020), https://www.thehindu.com/news/national/supreme-court-initiates-contempt-action-against-kunal-kamra-rachita-taneja/article33361881.ece.

[4] *Id.*

Upon undertaking such an analysis, in the second half of the paper, an objective, reasonable person standard is suggested to be adopted by courts. This would enable courts to adjudge whether a case of political satire would amount to outright incitement, upon which it may be reasonably restricted by the State. *Finally*, it is argued that, following the objective, reasonable person standard and keeping satire's quantum nature in mind, political satire would fall within the ambit of constitutionally protected free speech. While satire may critique a wide range of topics from religion and politics to social norms, this paper is restricted to the analysis of satire as a means of political dissent.

UNDERSTANDING THE FUNDAMENTAL NATURE OF SATIRE

Before delving into the intricacies of the law, it is essential to undertake a scholarly analysis of political satire itself. For this purpose, James E. Caron puts forth an excellent working definition of satire. He defines satire as:

> "*an act of judgment based on an implicit or explicit (moral) value often made with an intent to reform or change the comic butt (target) of a ridiculing presentation.*"[5]

Over the years, courts from various jurisdictions have made attempts to define the main characteristics of what they deem to be 'satire'. One of the first jurisprudential discourses on satire was undertaken by the United States Supreme Court in *Hustler Magazine* v. *Falwell*,[6] ("**Hustler Magazine**") a case involving the publication of a satirical article by Hustler Magazine on a prominent conservative televangelist. The Court, while delving into the elements of a satirical piece of literature, noted that it is a form of literature "*often calculated to injure the feelings of the subject of the portrayal*".[7] It may not always be reasoned or even-handed and may be used as a "*weapon of attack, of scorn and ridicule*".[8] Through this analysis, the Court

[5] James E. Caron, *The Quantum Paradox of Truthiness: Satire, Activism, and the Postmodern Condition*, 2 STUD. AM. HUMOR 153, 156 (2016).
[6] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
[7] *Id.*
[8] *Id.*

seems to be lending a negative connotation to satire – seemingly analogizing it with a crime like libel.

While it is true that satire relies on injuring the subject of its ridicule, it is that very effect that enables it to trigger social change. It is because of this that the United States Supreme Court in *Hustler Magazine* simultaneously acknowledged that satirical literature has played a significant role in political debate.[9] Satire's "*transgressive, anti-authoritarian impulses*" enable it to criticise institutions of power.[10] Recognising this, the European Court of Human Rights recently noted in the case of *Vereinigung Bildender Künstler* v. *Austria*, that satire essentially involves "*inherent features of exaggeration and distortion of reality*", with an aim to "*to provoke and agitate*."[11] A holistic understanding of the jurisprudence surrounding satire suggests that it's a misconstruction to view satire solely as a weapon of attack, ignoring its ultimate aim.

Satirists often express their craft through mediums such as stand-up sets, cartoons, films, stories, etc. Satire does not belong to any particular genre of literature; instead, it pierces through various genres.[12] Political satire uses members of the government, the rich and powerful, the State, and the judiciary, among others, as its targets, with the intention to reform government actions, policy decisions, judicial pronouncements etc.[13]

The reformative nature of political satire need not be direct social change in the form of legal or social reform. In its true sense, political satire, just like all forms of satire and comedic art forms, is restricted to the play frame that it creates around itself. Rather, political satire serves as a trigger for socio-political transformation. It can provoke the audience and the satirical target to reconsider thoughts, perceptions and beliefs concerning a particular issue – to the extent of even making them repent their old beliefs

[9] *Id.*

[10] Jonathan Greenberg, *Part III*, *in* THE CAMBRIDGE INTRODUCTION TO SATIRE 157–276 (2018).

[11] Vereinigung Bildender Künstler v. Austria, [2007] ECHR 79.

[12] Historically, satire found its first incarnation in the form of poetry and prose. However, as noted by Jonathan Greenberg, today, satire cannot be limited to these forms. The permeation of satire into other modes over time, Greenberg argues, positions it as a genre that resists the very idea of a genre. *See generally* Greenberg, *supra* note 10, at 10.

[13] Jonathan Greenberg writes of "*transgressive, anti-authoritarian impulses of satire*" that enables it to criticise institutions of power. *See* Greenberg, *supra* note 10, at 23.

and actions. In its true essence, it is perlocutionary speech – wherein there is a temporal gap between the expression of speech and the consequences of said speech.[14]

This indirect, albeit strong reformative nature of satire has led to a new wave of activism by satirists – what scholars call 'satiractivism'.[15] Satiractivism is not activism; instead, it paves the way for activism on the audience's behalf through its perlocutionary effect. Satiractivism is a powerful parrhesia when used against those in seats of power. To capture the proactive nature of political satire, Rebecca Krefting uses the metaphor 'charged humour' to describe political satire aimed at provoking social change and crusading for political and civil rights.[16] The *raison d'etre* of such charged humour is social justice. Charged humour aims at challenging societal evils like social inequality, wherein the comic often relies on the crowd relating to or identifying with the toil of "*being a second-class citizen*".[17] It engages the crowd by being a humorous reminder that everything is not okay in the world.[18]

The most interesting aspect of satire is its 'quantum nature'.[19] Comparing it to the quantum nature of light – which has both particle and wave-like properties – Caron highlights the paradoxical nature of satire.[20] Satire has the ability to simultaneously convey serious and non-serious (comedic) speech at all times.[21] Political satire, therefore, has the rhetorical effect that serious speech could have; however, as previously mentioned, it operates within its play frame at all times. Satire's quantum nature often gives it the

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[14] Perlocutionary speech may be differentiated from illocutionary speech, wherein there is no delay between the expression of speech and its effect. *See* Lawrence Liang, *Free Speech and Expression, in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 815, 825 (Sujit Choudhry et al. eds. Oxford University Press 2016); JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 108, 115–117 (J. O. Urmson & Marina Sbisa eds. Clarendon Press 1962).

[15] SOPHIA A. MCCLENNEN & REMY M. MAISEL, IS SATIRE SAVING OUR NATION? 196 (Pallgrave Macmillan 2014).

[16] REBECCA KREFTING, ALL JOKING ASIDE 25 (Johns Hopkins University Press 2014).

[17] *Id.* at 5.

[18] *Id.* at 6.

[19] Caron, *supra* note 5 at 156.

[20] Caron, *supra* note 5 at 156-157.

[21] Caron, *supra* note 5 at 156-157.

perception of being solely serious speech, thereby appearing to jump in and out of its play frame.[22] This is when satirists find themselves at odds with the law.

FREEDOM OF SPEECH AND EXPRESSION IN THE INDIAN CONTEXT

The foundation upon which political satire operates is the freedom of speech and expression. In India, the right to freedom of speech and expression is a fundamental right protected under Article 19(1)(a) of the Indian Constitution. It is a political right that imposes a negative obligation of restraint on the state by "*carving out an area in which the state shall not interfere*".[23] While doing so, it simultaneously imposes a positive mandate on the state, obligating it to ensure that vital conditions for this freedom to thrive are maintained.[24] However, free speech and expression in India is not unconditional – it is subject to reasonable restrictions under Article 19(2). The few grounds on which free speech and expression can be restricted include interests of the sovereignty and integrity of India, 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.[25] The drafters of the Constitution[26] intended to allow "*very narrow and stringent limits*"[27] on free speech and expression, acknowledging that its existence is essential for the functioning of a popular government.[28]

Textually, no specific medium of communication is specified. However, Indian constitutional jurisprudence and case laws through the years have, with the intention to expand the ambit of Article 19(1)(a), comprehended the press, films, broadcasting, advertisements, etc. within its scope.[29] While

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[22] *Id.*

[23] Indibility Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.

[24] *Id.*

[25] INDIA CONST. art. 19 cl. 2.

[26] GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 52 (Oxford University Press 2016).

[27] Romesh Thappar v. The State of Madras, 1950 SCC 436.

[28] *Id.*

[29] Subhradipta Sarkar, *Right to Free Speech in a Censored Democracy*, 7 U. DENV. SPORTS & ENT. L. J. 62, 74 (2009).

one can use this constitutional right to propagate ideas, thoughts, responses, and dissent, the manner in which this may happen also finds itself as a contentious topic. As recently as 2019, in a significant victory for advocates of free speech and expression, the Supreme Court in *Indibility Creative Pvt. Ltd. and Ors.* v. *Govt. of West Bengal and Ors.* ("**Indibility**") upheld satire as a form of expression protected under Article 19(1)(a).[30] The case involved the unofficial ban of a Bengali film 'Bhobishyoter Bhoot' (English translation: 'Future Ghosts'), that portrayed a political satire "*about ghosts who wish to make themselves relevant in the future by rescuing the marginalized and the obsolete.*"[31] Despite receiving official certification for screening, the film was removed from theatres after its release due to the instruction of "*higher authorities*", as the screening may lead to "*political law and order issues*".[32] Stressing on the previously mentioned positive mandate of the State, the Court held that unless this positive obligation is upheld and realised, art and literature, including satire, would fall victim to intolerance.[33]

While the Supreme Court in the *Indibility* case expressly brings satire within the ambit of constitutionally protected speech, there is significant jurisprudence on the various oscillating stances taken by the Supreme Court on what amounts to reasonable restriction against speech. Acknowledging this judicial discourse is essential to understand the manner in which free speech, including political satire, may be regulated.

DIRECT AND INDIRECT REGULATION OF POLITICAL SATIRE

Political satire in India is far from immune to regulation. Due to the way law functions in India, political satire may be formally regulated on multiple fronts. This includes regulations stemming from the Constitution, the Penal Code, as well as special laws. Although these formal modes of regulation are in place to deter legitimate offences, we see that they are increasingly weaponised to curb free speech, including political satire.

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[30] Indibily Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.
[31] *Id.*
[32] *Id.*
[33] *Id.*

Constitutionally, political satire may be restricted under all seven heads under Article 19(2). Disruption of public order is one of the most common heads invoked to curtail free speech. The Supreme Court has seen a multitude of cases oscillating from an expansive understanding of what a reasonable restriction can be, to a speech-protective understanding of reasonable restrictions. Four important cases may be used to illustrate the judicial discourse surrounding the scope of reasonable restrictions to free speech under Article 19(2) of the Constitution.

After Article 19(2) was amended to its current form,[34] the first case to deal with its scope was *Ramji Lal Modi v. State of Uttar Pradesh* ("**Ramji Lal Modi**").[35] The Supreme Court, posed with the question of whether §295A of the Indian Penal Code fell within the ambit of Article 19(2) of the Constitution, looked at the wording of Article 19(2), which allowed reasonable restrictions "*in the interest of*" public order. Noting that the phrase in question has a wide ambit, the Court noted that when the matter comes to activities likely to cause public disorder,

> "*a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order.*"[36]

Three years later, the Supreme Court, in *Superintendent, Central Prison* v. *Dr. Ram Manohar Lohia* ("**Ram Manohar Lohia**")[37] came up with an understanding that is more speech-protective than that of the bench in *Ramji Lal Modi*. The Court, while assessing the scope of Article 19(2), noted that it is essential that while assessing a reasonable restriction, the ground of "*public order*" be "*demarcated from the others*".[38] The Court further added that while assessing whether a measure can reasonably restrict free speech, it is imperative that the court assess whether there is a reasonable connection between the measure and the public order it intends to

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[34] INDIA CONST. art. 19. cl. 2, *amended by* The Constitution (First Amendment) Act, 1951.
[35] Ramji Lal Modi v. State of Uttar Pradesh, 1957 AIR 620.
[36] *Id.*
[37] The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia, AIR 1960 SC 633 (India).
[38] *Id.*

achieve.[39] By doing so, the Court brought in a proximity element for any reasonable restriction to sustain.

In *Kedar Nath Singh* v. *State of Bihar* ("**Kedar Nath**"),[40] the question of the constitutionality of §124A of the Indian Penal Code was placed before the Supreme Court. In what seemed to be an attempt to save the provision from unconstitutionality, the Court created greater uncertainty in the assessment of what amounts to a reasonable restriction. Firstly, the Court acknowledged that,

> "*...comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.*"[41]

The Court then proceeded to say that words "*which have the pernicious tendency or intention of creating public disorder or disturbance of law and order*" can be reasonably restricted by the State.[42] In doing so, the Court in *Kedar Nath* cited *Ramji Lal Modi*, and created a "*pernicious tendency*" test to adjudge the nature of free speech. Further, the Court made no mention of the proximity test noted in *Ram Manohar Lohia*, which narrows the power of the State to regulate speech, and assures a real connection to its intention to maintain public order.[43]

The aforementioned oscillations eventually led to the landmark case of *S. Rangarajan* v. *P. Jagjivan Ram* ("**Rangarajan**").[44] The Supreme Court, dealing with a matter pertaining to the revocation of a film's certificate issued by the Censor Board, noted that the Constitution's commitment to free speech may only be suppressed in a situation where "*community interest is endangered*".[45] Noting that this danger should be proximate, the Court opined that the nature of speech must be "*intrinsically dangerous to the public interest*". More importantly, there must be an inseparable connection

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[39] *Id.*
[40] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.
[41] *Id.*
[42] *Id.*
[43] Liang, *supra* note 14, at 827.
[44] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 (India).
[45] *Id.*

between the words and the action contemplated, "*like the equivalent of a 'spark in a powder keg*".[46]

The "*spark in a powder keg*" test laid down in *Rangarajan* serves as useful guidance for determining the constitutionality of satirical literature. It gives due importance to the requirement of lack of temporal disjuncture between the utterance of speech and its effect when it comes to speech that may be reasonably restricted.[47] However, to this day, the judiciary is still grappling with questions like, to what extent courts should view individuals as morally responsible and autonomous, capable of deciding what kind of speech or expression they want to be exposed to. Additionally, to what extent should courts be willing to restrict content due to the potential harm individuals may cause if such content is not filtered?[48]

The Indian Penal Code is another legislation with various provisions that could be deployed against the legitimate exercise of free speech. Be it the ever-controversial law on sedition,[49] laws on hate speech,[50] disruption of public tranquillity,[51] or even criminal defamation,[52] these laws are worded in such a manner with a far-reaching, all-encompassing scope. This makes them extremely easy to abuse. Furthermore, the way politics operates in India, satirists portraying political burlesque often find their actions tied to hurting (often the majority's) religious sentiment, for which they can be booked as well.[53] While such laws intend to prevent inter-community discord, and though people seldom get judicially convicted under most of these laws, it does not stop people from approaching the police to book others for exercising their legitimate right to free speech. We often find the State pursuing such complaints as well.[54] Political satirists, who often use

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46 *Id.*

47 Liang, *supra* note 14, at 828.

48 BHATIA, *supra* note 26, at xxxv.

49 PEN. CODE, §124A.

50 PEN. CODE, §153A; PEN. CODE, § 505(2); PEN. CODE, §505(1)(c).

51 PEN. CODE, §505(1)(b).

52 PEN. CODE, §499; PEN. CODE, §500.

53 PEN. CODE, §295A; PEN. CODE, §298.

54 HUMAN RIGHTS WATCH, STIFLING DISSENT: THE CRIMINALIZATION OF PEACEFUL EXPRESSION IN INDIA 48 (2016), https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india.

popular authorities as their comic butt, are particularly vulnerable to complaints and arrests for criminal defamation or so-called hate speech.[55]

Special laws dealing with particular areas of the law also have provisions that can blatantly silence political satire. Be it the State's power not to certify[56] or prevent exhibition of films in certain areas,[57] or its power to prohibit cable operators from transmitting anything in public interest[58] or which "*promotes anti-national attitudes*",[59] or its competence to censure any news agency publishing anything against "*public taste*",[60] we see that textually, special laws have an extensive scope.

One of the most damaging laws to the modern-day expression of political satire is §69A of the Information Technology Act, 2000. This empowers the State to block any content *that it believes* violates grounds similar to those laid out in Article 19(2) of the Indian Constitution.[61] In an era where

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[55] An example of the usage of the law which has led to the incarceration and curtailment of free speech and personal liberty of individuals is the arrest of comedian Munawar Iqbal Faruqui. The comedian was arrested in Indore, Madhya Pradesh under § 295A of the Indian Penal Code, for a deliberate act intended to outrage religious sentiments. The arrest solely relied on the word of an intruder who interrupted one of Faruqui's shows to accuse him of hurting Hindu sentiments. What followed were months of hearings at lower courts, where he was continuously denied bail. Simultaneously, a warrant arising from a complaint lodged a year prior to the arrest was issued by the Uttar Pradesh police, which could have led to Faruqui's re-arrest, in case he is to be granted bail. The matter was eventually appealed to the Supreme Court, which finally granted him bail after he spent 37 days in prison. While passing the order granting bail and staying the warrant issued by the Uttar Pradesh police, the apex court noted that the allegations against Faruqui were "vague", with several procedural lapses on part of the police during the arrest and custody process. *See* Sonia Faleiro, *How An Indian Stand Up Comic Found Himself Arrested for a Joke He Didn't Tell*, TIME (FEB. 10, 2021), https://time.com/5938047/munawar-iqbal-faruqui-comedian-india/.

[56] The Cinematograph Act, 1952, §5B(1), No. 43, Acts of Parliament, 1952 (India).

[57] The Cinematograph Act, 1952, §13., No. 43, Acts of Parliament, 1952 (India).

[58] The Cable Television Networks (Regulation) Act, 1995, §19, No. 7, Acts of Parliament, 1995 (India).

[59] The Cable Television Networks Rules, 1994, G.S.R. 729 (E), Rule 6(e).

[60] The Press Council of India Act, 1978, §14, No. 37, Acts of Parliament, 1978 (India).

[61] The Information Technology Act, 2000, §69A, No. 21, Acts of Parliament, 2000 (India). A contemporary example of the usage of §69A of the Information Technology Act, 2000, is the recent directions by the Central Government directing Twitter India to take down multiple tweets pertaining to and containing links to the controversial documentary by the British Broadcasting Company (BBC) – "India – The Modi Question". The Ministry of

political satire flourishes through stand-up comedy/YouTube videos, OTT content, memes, tweets, etc., this provision enables almost immediate blocking of content. Often, authorities cite no reasons for the blocking of content.[62]

As political satire can target all organs of the State as its comedic butt, they often tend to criticise the decisions of courts as well.[63] However, political satirists disagreeing with and criticising a court's decisions may find themselves caught up with a charge of contempt of court. Although the law only criminalises speech that scandalises or lowers the authority of any court,[64] and expressly excludes fair criticism on merits from the scope of contempt,[65] there is unfortunately no clear distinction between what amounts to fair and what amounts to unfair criticism.[66]

Information and Broadcasting sent the legal notice pursuant to §69A of the Information Technology Act, 2000, read with Rule 16(3) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Members of the Central Government had publicly tweeted that the documentary was blocked on video hosting websites like YouTube, using 'emergency powers' under the 2021 Rules. While the matter is, as of March 2023, in the process of being heard in the Supreme Court, the apex court has dismissed petitions seeking the ban of BBC's India operations, labelling them as 'highly misconceived'. *See* Krishnadas Rajagopal, *Supreme Court will hear a plea on February 3 to restrain government from 'censoring' BBC documentary*, THE HINDU (Jan. 30, 2023), https://www.thehindu.com/news/national/sc-agrees-to-hear-pil-challenging-centres-decision-to-block-bbc-documentary/article66449344.ece; Krishnadas Rajagopal, *Supreme Court dismisses Hindu Sena petition seeking to ban the BBC in India*, THE HINDU (Feb. 10, 2023), https://www.thehindu.com/news/national/supreme-court-dismisses-plea-seeking-complete-ban-on-bbc-from-operating-in-india/article66493078.ece.

62 HUMAN RIGHTS WATCH, *supra* note 54, at 95.

63 Such a form of political satire is extremely common in the United States, with late night TV shows airing live, daily episodes critiquing the legislature, executive, and judiciary. A contemporary example is the viral video clip from *The Daily Show*, wherein the host, Trevor Noah, undertakes a satirical deep-dive of the consequences of the United States Supreme Court overturning the landmark case – Roe v. Wade, 410 U.S. 113 (1973), wherein the United States Supreme Court had ruled that the country's constitution protects a woman's right to choose to seek an abortion. *See* The Daily Show, *Abortion Rights Under Siege as Roe v. Wade Overturned | The Daily Show*, YouTube (Jun. 28, 2022), https://www.youtube.com/watch?v=BptGmN1LQJs.

64 The Contempt of Courts Act, 1971, §2(c)(i), No. 70, Acts of Parliament, 1971 (India).

65 The Contempt of Courts Act, 1971, §5, No. 70, Acts of Parliament, 1971 (India).

66 HUMAN RIGHTS WATCH, *supra* note 54, at 90.

A common characteristic of all such laws is overbreadth[67] – they contain provisions with the capability to muffle constitutionally protected free speech. Although many such provisions have been challenged, the Supreme Court often reads the law extremely narrowly to save the impugned provisions. Nevertheless, as argued, they are extremely easy to misuse. As Gautam Bhatia argues, apart from being constitutionally skewed, overbreadth causes what is known worldwide as the "*chilling effect*" – when citizens are forced to self-censor to avoid being penalised, stifling free speech to the point of harming political discourse.[68]

Formal regulations are not the only way political satire, and by extent dissent, is muffled. India is notorious for informal and often extrajudicial regulation of free speech.[69] Mob violence, criminal intimidation by goons, vandalism and trespass to property are just some of the methods in the arsenal of the rich and the powerful to suppress their critics and turn them

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[67] Gautam Bhatia argues that speech-regulating laws suffer from 'overbreadth'. Overbreadth is the phenomenon by which the language employed in phrasing a law is so broad as to allow the State to regulate speech that it is constitutionally not permitted to regulate. Laws mentioned in this section, like The Cinematograph Act, 1952, and the Cable Television Networks Rules, 1994, Bhatia argues, suffer from such overbreadth by employing a concerning amount of vagueness in its structuring. See BHATIA, *supra* note 26, at 29-30, 182.

[68] An example of the chilling effect was elaborated by the Delhi High Court in the case Petronet v. Indian Petro Group (158 (2009) DLT 759), wherein the Court ruled that any injunction restraining the publication of news articles by the Respondent on negotiations by the Plaintiff company using a large amount of public money, and the removal of published articles, would have a chilling effect on the exercise of the fundamental right to speech and expression. The law pertaining to protective injunctions cannot operate in a manner that leads to self-censoring by news agencies. For a more elaborate discussion, *see* BHATIA, *supra* note 26, at 32.

[69] An example of the usage of the mob to informally regulate speech was seen in 2012, when a 21-year-old was arrested under §295A of the Indian Penal Code and §69A of the Information Technology Act, 2000, for questioning why the city was completely shut down for Bal Thackeray's funeral through a Facebook post. Even though the person apologized and retracted her comment, her uncle's orthopaedic clinic was trespassed and ransacked by a mob of over forty Shiv Sena party workers. *See*, *Two girls arrested for Facebook post questioning 'Bal Thackeray shutdown' of Mumbai, get bail*, THE INDIAN EXPRESS (Nov. 20, 2012), http://archive.indianexpress.com/news/two-girls-arrested-for-facebook-post-questioning-bal-thackeray-shutdown-of-mumbai-get-bail/1033177/.

into orderlies.[70] These formal and extrajudicial mechanisms epitomise what renowned jurist Harry Kalven refers to as *"the heckler's veto"*.[71] The Supreme Court, in *Indibility*, noted that it is the State's responsibility to "*ensure that speech is not silenced by the fear of the mob*", recognising that such informal regulation cannot exist in the constitutional framework of free speech.[72]

As mentioned previously, while convictions and sentencing may be rare – people, police and authorities nonetheless file cases against political satirists. This drags them through a lengthy process of arrest, judicial or police custody, courtroom battles and media trials. In effect, while there might not be any judicially pronounced punishment, in many ways, the process itself is a form of punishment.[73]

LOCATING POLITICAL SATIRE'S UNIQUE POSITION

All things considered, the quantum nature of political satire puts it in a peculiar position while examining the right to free speech. Political satire's paradoxical disposition makes it vulnerable to incorrect analysis. As it serves as serious and non-serious speech simultaneously, people often try to characterise it as one or the other. When one splits political satire into its components – serious, didactic speech and humour - and ignores the former, they fatally impair its true essence.[74] This is because political satire without the intention to trigger some form of reform appears as mere amusement with a holier-than-thou attitude. On the other hand, when one ignores the latter, they forget that satire operates within its specified comedic play frame. This leads to the target political satire's charged humour attempting to suppress comics.

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[70] For a detailed overview of the usage of mob violence and vigilantism in India as a substitute for law, *see* Ishan Gupta, *Mob Violence and Vigilantism in India*, 23(4) WORLD AFFAIRS: THE JOURNAL OF INT'L ISSUES 152 (2019). Gupta notes the usage of mob lynching to commit heinous crimes against minority communities for a variety of matters – from cow vigilantism to regulation of speech.

[71] DAVID HAMLIN, THE NAZI/SKOKIE CONFLICT 57 (1980).

[72] Indibility Creative Pvt. Ltd. and Ors. v. Govt. of West Bengal and Ors., 2020 12 SCC 436.

[73] HUMAN RIGHTS WATCH, *supra* note 54, at 8-10; RAJEEV DHAVAN, PUBLISH AND BE DAMNED: CENSORSHIP AND INTOLERANCE IN INDIA 175, 197-201 (Tulika Books 2008).

[74] Caron, *supra* note 5, at 165.

Perhaps one of the best ways to understand the elements of free speech under Article 19(1)(a) is through the Supreme Court's opinion in *Shreya Singhal* v. *Union of India*, the case which lead to the striking down of the extremely vague and expansive §66A of the Information Technology Act, 2001.[75] The Court, a two-judge bench led by Nariman, J. identified three fundamental concepts of free speech: discussion, advocacy and incitement.[76] The bench correctly pointed out that only when free speech leads to incitement would even the possibility of reasonable restrictions under Article 19(2) kick in. It recognised the importance of differentiating between advocacy and discussion that "*may be annoying or inconvenient or grossly offensive to some*",[77] and outright incitement. This analysis helps navigate political satire's position within the gamut of free speech and expression.

The mechanics of political satire, its efficacy, and its signature trait rely on it being "*annoying or inconvenient or grossly offensive to some*". Consumption of political satire requires that the audience accept its paradoxical nature. The moment people (and by extension, the law that they use) equate this feeling of discomfort, inconvenience or annoyance purely because they disagree with it as outright incitement, the rudimentary requirement of restriction of free speech being reasonable is thrown out of the window. If the person consuming the political satire keeps its quantum nature in mind, irrespective of whether they agree or disagree with it, political satire will fall short of incitement – it is mere discussion and advocacy.

However, one could argue that incitement and hurting one's personal sentiments are effectively the same. To this effect, the Supreme Court in *Ramesh* v. *Union of India* ("**Ramesh**") has held that the effect of words should be analysed,

> "*from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view*".[78]

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[75] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

[76] *Id.*

[77] *Id.*

[78] Ramesh v. Union of India, (1988) 1 SCC 668. Another example of courts recognising such a reasonable person standard can be seen to have been set by the Madras High Court.

This is where the previously mentioned questions put forth by Gautam Bhatia become extremely important. If the State and Courts uphold the restriction of free speech based on personal sentiments being hurt under the façade of incitement or disruption of public order, they abysmally fail as bastions of civil rights. It is vital that the Courts set an objective perspective to judge speech and expression – one, it is argued, should be in line with what was observed by the Supreme Court in *Ramesh*. Conforming with such a standard, without oscillating to a subjective perspective is essential for the sustenance of political satire as a mode of dissent.

While such an understanding can aid in eventually weeding out illegitimate claims by people to restrict free speech or legalise their violent behaviour, the deeper issue is the State's weaponisation of the law to stifle dissent, a problem deeply embedded into the socio-political fabric of India. As Lawrence Liang rightly pointed out, the extent to which a government can tolerate dissent and criticism indicates the self-confidence and security of democracy.[79] Political satire augments the opinion of the noted British columnist Polly Toynbee, that "*the best way to destroy an undesirable idea is not to brush it under the carpet but to air it in public*."[80] It asks uncomfortable questions and makes people think while they laugh. By making people in power the comic butt (as opposed to the sanctimonious status such people assign to themselves), political satire attacks their egos in such a manner that backs them into a corner with no option other than misusing the law. It is not the possibility of public incitement that causes the State and people in power to make or misuse ambiguous laws. Rather, such acts amplify the

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The Court, while adjudicating a case of criminal defamation lodged by members of the state's ruling party against a cartoonist and editor of a daily newspaper for the publication of an allegedly defaming cartoon, noted that "*No doubt, law has to come to the rescue of a person who feels defamed. But then, law envisages a reasonable person and not a touchy and hyper-sensitive individual like the respondent*." *See* Karna v. M. Jothisorupan, MANU/TN/1745/2018 (India).

[79] Liang, *supra* note 14, at 826.

[80] DARREN J. O'BYRNE, HUMAN RIGHTS – AN INTRODUCTION 126 (Pearson Education Limited, 2003).

government's insecurity. It augments their fear of criticism and casts the spotlight on their paranoia of losing their clutch on the electorate.[81]

CONCLUSION

In a democratic government, while elected representatives are required to work towards societal betterment, they cannot claim a monopoly over values, opinions and characteristics that define India's society.[82] A plurality of opinion is intrinsic to the Constitution's liberal promise, and providing avenues for dissent is essential to foster and protect social, economic and political growth.[83] Social revolution is what catalyses such growth, and political satire stands firmly planted in this exercise. However, with the way the State and people in power treat the law as an armament, it is challenging to sustain a Panglossian outlook towards social revolution.

This paper sought to analyse, justify and secure the position of political satire in the sphere of free speech. It finds that the acknowledgement of satire's fundamental quantum nature in any judicial analysis is necessary to understand if it may be reasonably restricted. Existing jurisprudence and judicial discourse on this topic lay down an important, objective, reasonable-person standard through which free speech must be judged. Consistency in conformity with such a standard laid down by the Supreme Court, whilst recognising that satire, at all times, operates within its comic play-frame, would enable the cultivation of a political system in which

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[81] An incident, which arguably displays such an attitude on the government's part, is the response to comedian Vir Das' viral clip "*I Come From Two Indias*". The clip contains Das' monologue from his performance in Washington D.C., USA, wherein he recites a poem of sorts, describing the contrasting values found in Indian society. While the clip, as expected, received polarising reactions from the audience, what was most noticeable was the reaction by the Home Minister of Madhya Pradesh, Narottam Mishra. Mishra publicly stated that 'jesters' like Das would not be allowed to perform in Madhya Pradesh. The Minister said that 'they' (the government) would think about allowing the comedian to perform in the state only after he issues a formal apology for his monologue. *See* PTI, *Vir Das can't perform in M.P.: Minister*, THE HINDU (Nov. 18, 2021), https://www.thehindu.com/news/national/other-states/vir-das-cant-perform-in-mp-minister/article37568054.ece.

[82] *Labelling Dissent Anti-National Strikes at Heart of Democracy: Justice Chandrachud*, THE WIRE (Feb. 15, 2020), https://thewire.in/rights/justice-chandrachud-dissent-anti-national-democracy-caa.

[83] *Id.*

robust dissent may sustain. Without such a system, through any appraisal of the Indian Constitution, it is hard to see the tumbler of social revolution as anything but half-empty, rather than half-full. Until then, satire remains a mighty bludgeon in the arsenal of the vulnerable – indicating that there is the potential to foster a safe environment for discourse, debate, and of course – humour.