

HATE SPEECH

Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination is a book recently published by Article 19, the human rights organisation dedicated to the promotion of freedom of expression and the Human Rights Centre at the University of Essex; it deals with the dilemmas that arise at the point of intersection of two rights - the right to free expression and the right to be free from insult and harassment on racial, religious and other grounds.

In a note introducing this book in Index on Censorship, Helen Darbishire writes:

Hate speech causes psychological and moral harm to the individuals or groups against whom it is directed and it also threatens to damage the political and moral fabric of society as a whole. These injuries have led many policy makers to justify laws which curb expression of national, racial or religious hatred.

Might not endorsement of policies which firmly penalise hate speech and publication contribute to that first goal of the human rights movement, namely that all people should be treated as entitled to equal respect and dignity regardless of their religion or national or ethnic origin? Would legal constraints on the expression or display of bigotry and prejudice towards those who are the victims of discrimination make a difference? Is censorship justified if it muzzles hatred?

Having investigated the situation in many countries, Article 19 has come to this conclusion:

It is our assessment that hate speech laws in themselves cannot resolve the problem of religious, racial or national hatred. Hate speech may fan the flames of already existing hatreds, but the 'cure' of hate speech laws poses a greater threat to freedom of expression and the rights of oppressed groups than does the disease itself.

Article 19 believes that truly tolerant multicultural societies can only be achieved by exposing problems through freedom of expression. Words are powerful: they do cause mental injury; they are a potent weapon for bringing about change in society; they may for a time make fascism and racism acceptable. But equally, words and other forms of expression such as boycotts, demonstrations and public debate, form the best defence, at least over time, against intolerance, bigotry and ignorance.

There is no question that much speech may be offensive, but unless there is a very clear probability that speech will lead directly to violence or other unlawful action which is unavoidable by other means, the dangers of suppressing the speech outweigh the dangers of insult and hurt. A balance must be struck between equality, dignity and freedom of expression.

We reproduce below the article on Sri Lanka.

INCITEMENT TO INTER-ETHNIC HATRED IN SRI LANKA

Sunila Abeysekera and Kenneth L Cain

Introduction

The theoretical parameters of the debate over freedom of expression generally, and 'hate speech' specifically, are familiar, and indeed have formed an important chapter in the jurisprudence of liberalism. Analysis is traditionally bounded on the one hand by the notion that liberty is best guaranteed when society is exposed to a body politic of the debate that is, ultimately, its life's

blood. On the other hand, society is obligated to ensure its own survival, and free expression must, at the margins, be curtailed to ensure social order; in its classic formulation, liberty must concede to restraints in order to protect the very freedom guaranteed.

The challenge, of course is to draw the line - to define the threshold at which the fundamental freedom must be compromised, on the one hand, by society's interest in order and stability and on the other, by the rights of



individuals, especially those who belong to a disfavoured minority, to be physically secure and free from intimidation and harassment. Specifically, when do words exit the category of expression and enter the restricted category of, for example, incitement?

There is no dearth of learned attempts to articulate just such a threshold. Justice Holmes' formulation is one of the most frequently quoted:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.¹

THE CONTEXT OF THE DEBATE IN SRI LANKA

Limitations on Expression in the Interest of Public Order

In a society such as Sri Lanka the context of this dilemma, often quite literally a question of life and death, is of a substantially different character than the context of stability and security which produced the classic Anglo-American formulations. Indeed, as Lord Sumner himself understood:

The words, as well as the acts, which tend to endanger society differ from time to time [and, we would add, from place to place] in proportion as society is stable or insecure in fact, or is believed by its members to be open to assault.

In the unstable, violent and repressive context of Sri Lankan society, the question is profound and its appropriate resolution crucial to Sri Lanka's future. Freedom of expression is meaningless unless it includes the freedom to challenge and indeed to provoke. The right merely to agree and to conform is an empty freedom. However, it is just such challenges and provocations that in a divided society, not unreasonably, can and will be perceived as a direct threat to a tenuous public order. Inherent in the notion of public order in the Sri Lankan scenario of virtual ethnic civil war (between the majority Sinhalese government forces and militant minority Tamils, generally limited to the north and east of the country) is the suppression of militant minority aspirations is necessary for the preservation of "public order". The security forces of the Sinhala-dominated state engage in a military campaign against the Tamil militant group, the Liberation Tigers of Tamil Eelam (LTTE); the state must justify the war effort while purporting to seek a

political and democratic solution to the conflict. Opposition political groups and parties are vociferously critical of the state, alleging that it is granting concessions to the Tamil people; the birth of several Sinhala rights organizations in the past months is but one manifestation of this trend. The minority communities, Tamil and Muslim, direct their energies to the creation of groups and organizations that will protect and preserve their identity, which they see as being under attack by both the state and non-state entities.

Thus in the context of Sri Lanka's ethnic and social divisions, the right to dissent, the most fundamental democratic right, is as precious as it is under attack.

The Need to Safeguard the Rights of Vulnerable Minorities

A second even more complex and volatile tension exists between the need to guarantee freedom of expression and the need to safeguard the interests of minority ethnic and religious communities. It is of crucial importance to understand the manner in which this tension has been "resolved" in Sri Lanka: on the one hand, the state enjoys unfettered discretion to restrict expression which it determines is likely to inflame inter-ethnic tensions or violence; on the other hand, the government selectively invokes free expression values in order to justify its tolerance of provocative and unambiguously racist speech by militantly chauvinistic elements among the Sinhalese majority.

In the past fifteen years, we have witnessed the polarization of the Sri Lankan community on ethnic and religious lines. Given the militarization of the ethnic conflict into a virtual civil war in the past seven years, the question of freedom of expression, and the safety of vulnerable minorities, has become a crucial variable in the complex, contemporary, political constellation. The growing hostility between different ethnic and religious groups living on the island has led to justifiable fears that unrestricted freedom of expression of the majority is enabling chauvinists and those who would incite armed conflict to disseminate propaganda that negates the principles of pluralism and directly threatens several minority communities.

Incitement of Hatred Against Minorities

The above themes are illustrated by the hostile tone of press reports in the leading dailies that surfaced in February 1992, primarily in response to proposals for a resolution of the conflict put forward by Mr S Thondaman,



a senior Cabinet Minister in the present government and a trade union leader among the Tamil workers in the plantation sector. Responses to the proposals were couched in language that was hostile not only to Mr Thondaman as an individual (and as a Tamil) but also to the Tamil community in general. Statements of a Sinhala-Buddhist exclusivist nature triggered fears that an escalation of anti-Tamil sentiments could destroy not only all prospects for peace or devolution of power but, as has happened in the past, could threaten the very physical safety of Tamils throughout the country. Press reports of the various responses to the Thondaman proposals tended to portray the ethnic conflict as a military struggle between the state and the LTTE which could only be resolved militarily, rather than as a manifestation of justifiable demands of the Tamil minority for equal rights. Those who hold such views are engaged in an ongoing campaign of vilification of groups and organisations, both local and foreign, that are supportive of a peace process which includes a cease-fire, negotiations and devolution of power to the minority communities.

For example, a headline in the Sinhala daily newspaper, *Divayina*, which is probably the largest circulation daily in the country, said on 25 February of this year, "The only solution to the question of Tamil extremism is war." The next day the *Divayina* published an article which included this analysis: "What we have in the north and east today is a Tamil racist uprising. It uses terrorist tactics. Their demands are racist and anti-Sinhala." In a frontal assault on pluralism, the *Divayina* of 20 February headlined a report on a public meeting thus: "It is a grave error to identify this country which has a Buddhist heritage as multi-religious or multi-ethnic."

These examples of the Sinhala press advocating war as the only possible means of resolving the ethnic conflict and promoting the idea of Sinhala-Buddhist exclusivity illustrate the complexities of developing an appropriate threshold of restraint on hate speech. These widely disseminated views must be understood in the context of war in the north and east and the profound vulnerability of minorities in the rest of the country.

Government Selectivity in Enforcing Anti-Incitement Laws.

The rights of all Sri Lankans, but most acutely of minorities, are constantly under attack on the grounds of "security" and "national interest", often motivated by logic exemplified by the above quoted passages of *Divayina*. Clearly, a convincing case could be made for the theoretical justification of restricting speech that incites racial animosity, such as that which appears almost daily in the mainstream Sinhala press. In practice however, the state

uses its restrictive powers selectively, and majority prejudices are widely disseminated, while minority expression is dramatically restricted particularly under the guise "national security" emergency legislation. Therefore, any theoretical justification for restraint of racist speech immediately loses its force in the face of the practical realities of utter and profound lack of good faith on the part of the government in enforcing the anti-censorship laws. The Sri Lankan government's unwillingness to undertake to protect all of its citizens, the tragedy of our society, on the one hand undermines legitimate principles of restrictions on hate-speech, and on the other hand permits majority-inspired incitement to be widely disseminated.

The Law and its Application

Article 14 (1) (a) of the Fundamental Rights chapter of the Sri Lankan Constitution provides: "Every citizen is entitled to the freedom of speech including publication." Article 15 (2) of the same chapter, however, broadly empowers the government to apply limits on the exercise of this freedom:

The exercise and operation of the Fundamental Right declared and recognized by Article 14 (1) (a) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony or in relation to...incitement to an offence.

The restrictions set forth in Article 15 (2) are broader than those permitted by the ICCPR which states that fundamental rights may be restricted only if necessary to promote specific interests which are enumerated very clearly in the Covenant. Indeed, as the Sri Lankan Supreme Court stated in 1982;

the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question.²

A number of Emergency Regulations have been issued under the broad authority conferred by Article 15 (2). For example, Article 14 (1) of the Emergency Regulations prohibits publication of any material which, in the view of a 'competent authority',

would or might be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or of matters inciting or encouraging persons to mutiny,



riot or civil commotion or to commit breach of any law.

Section 120 of the Sri Lankan Penal Code provides as follows:

Whoever by words, either spoken or intended to be read...excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice...or attempts to raise discontent or disaffection amongst the people of Sri Lanka, or to promote feelings of ill will and hostility between different classes of such people, shall be punished with simple imprisonment which may extend to two years.

Emergency Regulation 26 expands the already restrictive language of Section 120 and broadens the scope of criminalised speech to the point that, in effect, dissent is outlawed. These comprehensive and draconian regulations are supplemented by a catch-all provision, 26(g), the overbreadth of which speaks for itself:

Any expression is an offence if the competent authorities determine that it excites or attempts to excite or incite the inhabitants of Sri Lanka or any section, class or group of them to do or omit to do any act or thing which constitutes a breach of any Emergency Regulation.

Furthermore, Regulation 26 intensifies the penalty for an offence to "rigorous imprisonment which shall not extend to more than 20 years."

Emergency Regulations have been in effect virtually continuous for 20 years, during which time the edifice of Sri Lankan civil liberties has crumbled before the ubiquitous powers of the 'competent authorities.' The Supreme Court has conspired in this tragic degeneration.

In the case of *Visvalingam v. Liyanage*, the competent authority, acting under the powers of the Emergency Regulations, ordered the closure of a Tamil newspaper, the *Saturday Review*, which had carried stories highlighting alleged brutality by the Sri Lankan police and army. The competent authority argued that the closure was reasonable because:

The *Saturday Review* is blatantly communalistic and constantly high-lighted grievances and injustices committed against the Tamil community which were capable of arousing communal feelings among this community and encouraged conduct prejudicial to the maintenance of public order and security.

The government's rationale for closing the newspaper illustrates the extent to which dissent has been restricted in Sri Lanka. If highlighting grievances and injustices is a cause for closing a newspaper, it is difficult to imagine what meaningful form of dissenting speech would fall outside the reach of the competent authority. In upholding the constitutionality of the *Saturday Review's* closure, Judge Soza wrote:

[A]t times when ethnic hatreds are mounting, curbs are necessary. At times of grave national emergency headline exposure of Army and Police atrocities will not help the cause of peace and public security. *It can cause deep resentment, fan passion, provoke defiance, It can set off a chain reaction of violence, and violence begets violence. It happened before our very eyes* (Emphasis added.)

These very words, though justifying restriction of free speech, in fact well state the process by which tension is heightened when a basic speech right, such as publishing an opposition newspaper, is restricted. Anger and frustration are surely better expressed on the pages of a newsweekly than on the streets or in the jungle.

The Dilemma

In theory, the notion of providing substantial restrictions on the recognised right of free speech is not necessarily pernicious. In a volatile society, in which vulnerable minorities can and have been brutalised by zealous opponents, a policy of vigilant regulation of hate speech is not, *prima facie*, meritless. In more stable democracies, laws and practices which allow unrestricted freedom of expression involve far lesser risks of creating an environment in which violence is likely to erupt suddenly. In this sense, a stable democracy can afford a highly expansive interpretation of the freedom, such as that propounded in this volume by the ACLU,³ because the threat that violence will ignite is in fact quite low. In contrast, it is clear that in Sri Lanka hate speech does indeed pose a substantial risk of instigating very real and very bloody upheaval.

However, while broad powers to restrict freedoms, such as those provided by Article 15 (2), may be theoretically justifiable, in practice, in the case of Sri Lanka, these powers ultimately defeat the stated purpose of protecting public order. Overly broad censorship of dissenting, provocative, challenging and even hate-filled expression in fact merely inflames the very passions and hatreds which sought a non-violent outlet in the censored speech.

In other words, granting unfettered discretion to the authorities to promote "harmony" is ultimately more



destabilizing than the hate speech itself. Inevitably, the very freedom to dissent will be prohibited and, in an unstable and violent society, censorship of dissent will only beget more instability and violence. It is axiomatic in our jurisprudence that freedom of speech does not extend to the right to yell "fire" in a crowded theatre and thereby instigate a panic. But what if the authorities distort that unassailably legitimate limitation to prevent, for example, a whole class of suspected "potential instigators" from entering the theatre at all? In the name of promoting calm inside the theatre, have not the authorities guaranteed upheaval on the street outside?

Our Position

Our position is not an abstract, civil libertarian view; indeed we recognise the theoretical justification for restraints on hate speech in a tense and violent society where members of a minority group are in constant danger of physical attack and deprivation of other rights. However, we have found that regulation of speech, in the unfettered hands of the "competent authority", particularly when empowered by sweeping Emergency Regulations and motivated by a majority bias, ultimately defeats the stated regulatory purpose of protecting public order. In these circumstances, therefore, we believe that only hate speech which clearly incites to imminent illegal action can justifiably be restricted. Dissent and indeed hate will eventually be expressed; sadly, in Sri Lanka, we have witnessed far too much evidence that censoring hate from public discourse only banishes it to more deadly fora.

We therefore would define these two categories of speech as "incitement" and thus as forms of discourse to be prohibited: (1) advocacy of group hatred calculated or likely to result in violence against a minority group or calculated or likely to result in an escalation of the threat of violence; and (2) advocacy of a solution to the ethnic problem which includes the destruction or elimination in any form or manner of the distinct identity of a minority group.

It is incumbent upon the legislature to ensure that the above forms of expression, and only the above or similarly

described forms of expression, are prohibited. Prohibition of such speech is necessary to ensure that basic protections are extended to all citizens.

Conclusion

Sri Lanka has a long history of violence directed at minorities. In an unhappy, recurring cycle, minority demands for the realization of aspirations such as language parity, federalism, constitutional recognition and a secular state have been received with rage and violence from belligerent elements within the majority. The majority characterizes these outbursts, which punctuate post-independence Sri Lankan history, as natural and understandable, if lamentable responses to "provocative" minority aspirations. The minorities' demands for protection and recognition as distinct entities are denounced, in the rhetoric of the rejectionist element within the majority, as an offence to the majority and indeed an affront calculated to inflame communal passions. This rhetoric not only rationalizes and excuses mob violence but, even more insidiously, it attributes the blame to the victims.

Thus, members of the minority perceive the state's failure to restrict speech which incites hatred against them as a *denial* by the state of the minority's legitimate group rights. That is, legislative inaction, in these circumstances, symbolizes the state's unwillingness to protect the minority's most basic rights to physical safety and, *a fortiori* the utter denial of more abstract collective identity rights. *Legislative inaction in restricting speech which incites the mob, or indeed which merely implies that the mob is at liberty to form and to take action, tragically, can be and has been a death sentence for vulnerable minorities.*

Achieving the balance, the tension of which has been manifest throughout this discussion, between protecting the victims of hate speech and permitting a legitimate forum for dissent and the expression of grievances is the profoundly difficult challenge which confronts all human rights activists committed both to equality rights and to the right to freedom of expression.

People who can be made to believe in absurdities can be made to commit atrocities.

Voltaire