

Opinion Suhas Palshikar writes on Pahalgam and free speech: How liberal is this democracy?

That is the question when someone is arrested for what he says, or when we demand that someone be arrested for what he said

Free speech is a key element of the liberal norm. But the problem with the liberal norm is that on the one hand, states and societies invent multiple ways to compromise on the liberal norm and on the other hand, anti-liberals find it easy to misappropriate the norm for their own legitimacy. This predicament makes liberalism a weak justification of freedom of expression (FoE).

Recently, two citizens exercised their right to free speech — both referred to India's decision to have Colonel Sofiya Qureshi as a member of the team at the press briefings during India's post-Pahalgam military action. One citizen argued that there was a contradiction involved in this choice while the other used the same instance to target her as being the "sister" of terrorists. In the former case, the citizen was promptly arrested and received interim bail along with some bashing by the Court, and now faces the hanging sword of a Special Investigation Team; in the latter case, too, the idea of an SIT was invoked but the citizen got away without arrest.

These two instances bring into sharp focus the complications in the path of freedom of expression and the confusion about how to approach it. While India always prided itself on its democratic credentials, its journey on the liberal path is dotted with such complications. They stem not only from a resistance to the idea of FoE but an unwillingness to let society and the polity be governed by the liberal norm. How do these complications reflect on India's democracy?

Three myths govern India's difficult journey toward the liberal norm generally and the idea of FoE more specifically. But they have deeper lessons for India's democratic claims too. The first is a theoretical construct: It is argued that the state can be depended upon as a guarantor of FoE and also as an arbiter of questions about the extent and scope of FoE. It is argued that as a democratic institution drawing authority from the Constitution, the state is a reliable institution that respects FoE and operates within this liberal framework when it comes to limiting FoE. If a student of constitutional law were to write a dissertation on this, she would find that over the past almost eight decades, endless legal instruments have been designed to restrict FoE rather than to protect it. We have found too many excuses to legitimise restrictions on FoE.

Beginning with the First Amendment, India's legislative, judicial and political history has had many alibis for muzzling free speech. Today, all these excuses converge with a vengeance to delegitimise the idea of the right to free speech. If at all, FoE is converted into an occasional concession to citizens. Broadly, one can identify three main alibis. National interest (including relations with a friendly country etc, but more importantly, anti-terrorism measures), defamation (popular in its use currently) and causing enmity between communities — these effectively authorise the state to curtail citizens' freedom of expression. Of course, a more omnibus argument about hurt sentiments becomes a popular justification for FIRs and arrests. This is not to say that all these are always wrong bases for limiting FoE; rather, the argument here is that once the genuine reasons for limiting FoE are designated, we start reading those mal-intents in every act of free speech that someone from the ruling establishment does not like.

The second myth pertains to safeguards against attacks on FoE. Legislation on this is so weak that, in effect, the state has become the sole arbiter of what fits in FoE and what does not. Using legislative majorities, executives have consistently sought to empower themselves and the police bureaucracy to restrict citizens' FoE, intimidate them and punish them for the exercise of free speech. All parties when in Opposition appear to be upholding FoE, and when in government, find justifications for restricting FoE. Jurisprudence on these matters is so complicated and inconsistent

that no lawyer or judge could easily guide us as to what can be said and what cannot.

What we mostly get are eloquent eulogies to FoE through obiter dicta, oftentimes a pontification about the responsibility of citizens not to cross the limits, alluded to as Lakshman Rekha, and most commonly a confusion about the consequences of exercising FoE. The confusion is partly because it is not clear if transgressing the limits of FoE will invite judicial trial or prejudicial arrest wherein bail becomes a big concession.

The third myth arises from a smart distortion of the idea of FoE — this myth is born out of a misappropriation of the liberal norm. It argues that if FoE is valuable, then it should be available to those who want to use it in order to distort the reality and target certain communities. While there is a group of expressions that are classified as hate speech, the practitioners of such speech and their supporters challenge the idea behind the liberal norm by asking why certain expressions are called hate speech. This argument ostensibly adopts the idea of FoE while in practice seeking to delegitimise the defence of free speech. The myth that all speech must be treated on the same footing allows the public to believe that any vulgar allusion to a given community has moral and legal validity as “criticism” that is protected under FoE.

But even as these nuances of jurisprudence and shades of hate speech will continue, the present crisis India faces is much beyond the FoE legalese. The core question which is not frontally asked and only obliquely answered is this: Is FoE necessary for democracy? Is it part of what we understand by democracy, or is FoE a fancy of the few?

Both within India and globally, the past few decades have witnessed a slant in understanding the idea of democracy mainly through the prism of electoral regularity and formation of governments on the basis of the electoral majorities. Such understanding tends to downplay other factors such as inter-institution balance, supremacy of the Constitution, and above all, public reason that shapes electoral outcomes. All these, but public reason above all, are predicated on citizens’ engagement with ideas, debates and disagreements.

Once the idea of the liberal is decoupled from the idea of the democratic, we pave the way for distortion of democracy. When someone is arrested for what he says or when we demand that someone be arrested for what he said, we probably choose to ignore this umbilical relationship between the liberal norm and democracy. The debate about FoE therefore needs to be waged not in technical legal terms but the easily legible language of democracy. That alone will save the liberal norm and serve the democratic purpose.

The writer, based in Pune, taught political science