

Pulp Non-Fiction

Publishers, pulping and religious insult in India: this paper considers the fraught balance between freedom of speech and sensitivity to religious defamation in India, based on a case study of the legal controversy surrounding the publication of Wendy Doniger's 2010 book 'The Hindus: An Alternative History.'

INTRODUCTION

India is a nation flush with religious diversity, an eclectic mix which has often posed a political problem for this young democracy. The desire to shield the sacrosanct and private right to practice one's faith is at constant war with a constitutional largesse that prohibits unreasonable interference with free speech.¹ In the same breath, the constitution carves out a specific exception for defamation. If navigating these lines between belief, speech and insult is a problem for those who govern, it is an equally frustrating dance for writers and publishers.

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This paper explores how publishers manage the risk of legal and reputational liability in this environment by tracking the scandal surrounding Wendy Doniger's book, *The Hindus: An Alternative History*, (*The Hindus*)² After a four-year legal battle, in February 2014 Penguin Books India consented to pulp all remaining copies of the controversial book to settle two criminal complaints and a civil suit filed by Dinanath Batra on behalf of activist group Shiksha Bachao Andolan (*SBA*).³

While Penguin refused to disclose reasons for the move, the measure appeared politically and commercially defensible. Withdrawal from the Indian market allowed Penguin to generate internet and foreign sales. Against the background of national elections where talks of culture wars were rife,⁴ the prospect of a public lawsuit was unsavoury. The publisher's reputation is, after all, as much on trial as that of the plaintiff; and this provocation was nothing if not

profitable. But as other Doniger books threatened to disappear from the shelves, Penguin may have deterred legal confrontation at the cost of setting dangerous precedent on the politics of cultural regulation.

FILTHY PAGANISM: THE TEXT AND THE SCANDAL

Wendy Doniger is a well-known Indologist at the University of Chicago. Known for her vivid and wickedly droll prose, she is no stranger to controversy. As a philologist, Doniger's work naturally encounters the pleasures and pitfalls of language and history. The politics of writing religion are often dealt with subtly in scholarship, but Doniger openly departs from this trend:

"...most non-Hindu scholars of Hinduism strike the familiar religious studies yoga posture of leaning over backward, in their attempt to avoid offense to the people they write about...the Sanskrit texts were written at a time of glorious sexual openness and insight, and I have often focused on precisely those parts of the texts."⁵

But her studies of Hinduism's alterity have rarely drawn this level of notoriety. In 2010, her alternative history of Hinduism in *The Hindus* finally proved too 'sexy' for SBA's Dinanath Batra when the Indian edition was released by Penguin Books India.

Her self-confessed intention to move away from attempts 'to avoid offense to the people [non-Hindu scholars] write about', is exactly as her accusers describe. On 3 March 2010, SBA served a prolix legal notice⁶ on Doniger and Penguin alleging the entire publication was coloured by perversity, attracting contraventions of sections 153, 153A, 295A, 298 and 505(2) of the Indian Penal Code (*IPC*). These provisions are concerned with the criminalisation of various forms of religious and cultural hate-speech (discussed later under para [4]). The tome was perceived to be 'riddled with heresies and factual inaccuracies',⁷ blindly spreading 'pornography and hate

1 Constitution of India art 19.

2 Wendy Doniger, *The Hindus: An Alternative History* (Penguin, 2009) 26.

3 'Penguin India's Statement on 'The Hindus' by Wendy Doniger', *Penguin India* (online), February 2014 <<http://www.penguinbooksindia.com/en/content/penguin-india%E2%80%99s-statement-%E2%80%98hindus%E2%80%99-wendy-doniger>>.

4 See for example: Rohan Kalyan, 'Did India Just Elect Its Ronald Reagan?' *Economic and Political Weekly* (online) 31 May 2014 <<http://www.epw.in/web-exclusives/did-india-just-elect-its-ronald-reagan.html>>.

5 Doniger, above n 2, 21.

6 Full text reproduced on *Outlook Magazine* (online) 11 February 2014 <<http://www.outlookindia.com/article/your-approach-is-that-of-a-woman-hungry-of-sex/289468>>.

7 Shougat Dasgupta, 'Penguin India settles a civil suit with Dinanath Batra over Wendy Doniger's controversial book on Hinduism', *Live Mint & the Wall Street Journal* (online), 12 February 2014 <<http://www.livemint.com/Specials/ZL8MkEyTobNWPEQm05jYDL/Dinanath-Batra-Here-comes-the-book-police.html>>.

literature'. Civil and criminal complaints were filed. After simmering in the courts for over three years, in February 2014 Penguin settled on terms that it would withdraw the book from the market in exchange for SBA dropping all pending complaints and lawsuits. A ream of alleged settlement documents were quickly leaked online.⁸

With a provocative private act of management, did Penguin barter moral triumph for discretion and temporary commercial gain?

MORAL PANIC: THE PUBLIC TEMPER

Public responses to the settlement were swift and critical. Numerous articles lamented the pulping of 'liberal India'⁹ and expressed dissatisfaction with the impact of private bargains on the conditions of treasured public freedoms.¹⁰ Widespread acts of protest on social media¹¹ suggested that Penguin ought to change its logo to a chicken.¹² Downloadable copies of *The Hindus* were quickly circulated online – technology and human effort combined to defeat the letter of a private undertaking. On Amazon.com as of 11 February 2014, there were only two copies of the book left in stock.¹³ Three days later it slotted in at number 26 on the Amazon top-seller list.¹⁴

Politics featured prominently in the discourse around the book, against a background of culture wars and a historic election that eventually landed a significant victory for the 'right-wing' Bharatiya Janata Party (BJP). Journalist Sunny Hundal argued that the withdrawal of Doniger's book was not unrelated to the BJP's recent successes. He noted that in the same week, the USA ended its boycott of the then BJP prime ministerial candidate, Narendra Modi. Modi's visa had previously been cancelled for alleged violations of religious freedom.¹⁵ SBA itself appears committed to endorsing a particular understanding of Hinduism in India. This brand of nationalism is termed, not without passionate objection, 'Hindutva'.

From a regulatory standpoint, a string of events and decisions have contributed to a perceived turn against freedom of speech in India. According to one study, India is the second largest issuer of take-down notices to Google, mostly for material that may cause religious offence (55% of requests).¹⁶ Recent defamation cases had also set an unfavourable tone.¹⁷ Moreover, Modi was Chief Minister of the state of Gujarat when it banned a biography of Mohandas Gandhi which suggested that the iconic man "was bisexual".¹⁸

It is no surprise then that *The Hindus* could well constitute grounds for state censorship. For example in one particular passage, Doniger writes Gandhi had a "habit of sleeping beside girls young enough to be called jailbait in the United States, to test...his celibate control".¹⁹ In 2006, the eminent artist M.F Husain resigned himself to exile after receiving death threats from nationalist groups for 'obscene' works, namely paintings of deities in the nude.²⁰ On this example Doniger's book jacket, stamped with frolicking deities, invites trouble.

Despite the moral panic organised around pulping, nary a book nor leaf of paper was reportedly harmed in the end. By May 2014, all extant copies of the book had sold out.²¹ Yet the discourse remains haunted by a sense of loss. As James Raven explains, there

According to one study, India is the second largest issuer of take-down notices to Google, mostly for material that may cause religious offence (55% of requests)

8 'Penguin India Withdrawn Copies of Wendy Doniger's Controversial Book *The Hindus*' *The Economic Times* (online) 12 February 2014 <http://articles.economictimes.indiatimes.com/2014-02-12/news/47269928_1_publishers-controversial-book-penguin-india>.

9 Sunny Hundal, 'The pulping of liberal India' *The Independent* (online), 27 February 2014 <<http://ezproxy.library.usyd.edu.au/login?url=http://search.proquest.com/docview/1502086503?accountid=14757>>.

10 See for example: Krista Mahr, 'Penguin India to Recall and Destroy Renowned American Scholar's Book on Hinduism' *Time.com* (online), 18 February 2014 <<http://web.a.ebscohost.com.ezproxy1.library.usyd.edu.au/bsi/detail?sid=9fbde422-a62d-4805-8542-18c1907e1aaa%40sessionmgr4001&vid=1&hid=4204&bd>>.

11 See: Ananya Vajpeyi, 'Reconsider and Revise Sections 153(A) and 295(A) of the Indian Penal Code to Protect Freedom of Expression in India!' (online) <<https://www.change.org/en-IN/petitions/members-of-both-houses-of-the-indian-parliament-and-the-honorable-law-minister-government-of-india-reconsider-and-revise-sections-153-a-and-295-a-of-the-indian-penal-code-to-protect-freedom-of-expression-in-india>>; Alison Flood, 'Penguin India Faces Growing Protests Over Withdrawal of Hinduism History,' (online) 19 February 2014 <<http://www.theguardian.com/books/2014/feb/19/penguin-india-protest-hindus-wendy-doniger>>.

12 'The Penguin is Mutating into a Chicken' *Outlook* (online), 14 February 2014 <<http://www.outlookindia.com/article.aspx?289534>>.

13 Kian Ganz, 'Penguin Settles Religious Conservatives' Civil and Criminal Cases by Pulping Book of Hindu History,' *Legally India* (online), 11 February 2014 <<http://www.legallyindia.com/201402114335/Bar-Bench-Litigation/penguin-pulps-hindu-book>>.

14 Jonah Tabb, 'Penguin India Bans University Professor's Book,' *The Chicago Maroon* (online), 14 February 2014 <<http://chicagomaroon.com/2014/02/14/penguin-india-bans-university-professors-book/>>

15 Hundal, above n 9.

16 Jane Bambauer and Derek Bambauer, 'Vanished' (2013) 18 *Virginia Journal of Law and Technology* 137, 137, 142, 150.

17 Ellen Barry, 'Indian Publisher Withdraws Book, Stoking Fears of Nationalist Pressure' *New York Times* (online), 13 February 2013 <<http://www.nytimes.com/2014/02/15/world/asia/indian-publisher-withdraws-book-stoking-fears-of-nationalist-pressure.html>>.

18 Shashank Bengali, 'India's Tough Defamation Laws Put Book Publishers in a Bind' *South Florida Sun-Sentinel* (online), 27 February 2014 <<http://ezproxy.library.usyd.edu.au/login?url=http://search.proquest.com/docview/1507675874?accountid=14757>>.

19 Doniger, above n 2, 402.

20 He remained as such until his death, despite court orders quashing orders of his arrest: *Maqbool Fida Hussain v Raj Kumar Pandey* (2008) Crim L J (Delhi HC) 4107.

21 Wendy Doniger, 'India: Censorship by the Batra Brigade' *New York Review of Books* (online) 8 May 2014 <<http://www.nybooks.com/articles/archives/2014/may/08/india-censorship-batra-brigade/>>.

> is a strong cultural preoccupation with the 'vanishment' of literary forms.²² The spectre of loss, real or imagined, is deeply affective in a nation whose history has been marked by colonial experiences of cultural destruction and censorship.

the concept of 'group defamation' has found expression in the IPC as a means of identifying, criminalising and punishing forms of conduct and speech thought to be "inimical" to the public interest

COULD PENGUIN HAVE 'WON'?

There are competing viewpoints around the vexed question of legal victory for Penguin under the IPC. Some legal experts suggest the law is doctrinally indeterminate,²³ while others believe academic dissent would not have come within the punishable ambit of the law.²⁴ Indeed, veteran lawyer and author A G Noorani persuasively argued that the relevant provisions of the IPC would not have applied at all.²⁵

Two key criminal complaints were aired against the publisher and author, though its precise contents remain mysterious. Little known is that the criminal contraventions recited in the legal notice to Penguin apparently did not register as First Information

Reports (FIR) (which ordinarily initiate investigations under the IPC).²⁶ In theory however, state criminal procedure codes empower governments to order the forfeiture of im-

pugned publications, judged on the standards of 'reasonable, strong-minded, firm and courageous'²⁷ persons. At least three Supreme Court cases have dealt with forfeiture proceedings triggered by s 295A.²⁸ In the *Rupawate*²⁹ decision for example, which dealt with a forfeiture order against James Laine and Oxford University Press, the publishers quickly apologised and withdrew the impugned book from publication despite the official ban being set aside. After incidents of public disorder occurred, a FIR was quickly issued in 2004. By the time the government's forfeiture order was appealed to the Supreme Court, it was already 2010.

These events can be contextualised from a perspective sensitive to India's legal history and culture. When India's Constitution was drafted in the aftermath of the Partition, the objective was to "establish a sense of security upon those who look upon each other with distrust and suspicion".³⁰ Freedom of the press³¹ and faith were thus accommodated through articles 19 and 25 of the Constitution respectively, but reasonably abridged in the interests of security, morality, health and peace. Flowing from this constitutional architecture, the concept of 'group defamation' has found expression in the IPC as a means of identifying, criminalising and punishing forms of conduct and speech thought to be "inimical" to the public interest.³²

Broadly, s 153A has been interpreted as a 'defamation of religion' provision.³³ It criminalises the promotion or attempt to promote hatred or ill-will between religious groups which is prejudicial to the maintenance of harmony and likely to disturb public tranquillity. Cases have interpreted the section to require that there be an intention to wilfully promote or attempt to promote hatred, inferred through the words used and extrinsic evidence.³⁴ Importantly though,

22 James Raven, 'Introduction: The Resonance of Loss' in James Raven (ed), *Lost Libraries: The Destruction of Great Book collections Since Antiquity* (Palgrave Macmillan, 2004) 1, 19.

23 Apar Gupta, 'Five Questions on Penguin Books Withdrawing, 'The Hindu's: An Alternative History' *Bar and Bench* (online). 13 February 2014 <<http://barandbench.com/content/212/five-questions-penguin-books-withdrawing-%E2%80%9C-hindu%E2%80%99s-alternative-history%E2%80%9D#.U3RFToGSzy9>>.

24 Personal Communication with Lawrence Liang, 12 May 2014.

25 A G Noorani, 'Penguin & the Parivar' *Frontline* (online) 4 April 2014 <<http://www.frontline.in/social-issues/penguin-the-parivar/article5787832.ece>>.

26 Personal Communication with Lawrence Liang, 12 May 2014.

27 *State of Maharashtra v Sangharaj Damodar Rupawate* (2010) 2 OJR 194.

28 *Harnam Das v State of UP* (1961) AIR 1662; *State of UP v Lalai Singh Yadav* (1997) AIR 202; *State of Maharashtra v Sangharaj Damodar Rupawate* (2010) 2 OJR 194.

29 *State of Maharashtra v Sangharaj Damodar Rupawate* (2010) 2 OJR 194.

30 Bharat Bhushan Gupta, *The Seven Freedoms* (Ashish Publishing, 1977) 3.

31 This extends to publishers: *W N Srinivasa Bhat v The State of Madras* (1951) IMLJ 115.

32 Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (Kluwer Law International, 1998) 88; *Beauharnais v Illinois* 343 US 250 (1951) 255-257 (Frankfurter J).

33 Abhinav Chandrachud, 'Speech, Structure and Behaviour on the Supreme Court of India' (2012) 25 *Columbia Journal of Asian Law* 222, 235.

34 *P K Chakravorty v Emperor* 1926 AIR (Cal) 113; *Satya Ranjan Bakshi v Emperor* 1929 AIR (Cal) 309; *Lajpat Raj v Emperor* 1928 AIR (Lah) 245; *Kali Charan Sharma* 1927 AIR (All) 654.

35 *Bilal Ahmed Kaloo v State of Andhra Pradesh* (1997) CrI A No 81/97.

to trigger the provision's operation there must be at least two groups involved.³⁵

Section 295A serves a similar purpose by criminalising deliberate and malicious acts intended to outrage the religious feelings of any class by insulting their religion or religious beliefs. In the seminal ruling in *Ramji Lal Modi v The State of UP*³⁶ the Supreme Court confirmed its constitutional validity in terms of article 19 which guarantees freedom of speech subject to eight exceptions. Public order is one among them. However, the Chief Justice was at pains to point out that s 295A only penalises conduct that has been 'perpetrated with the deliberate and malicious intention of outraging...religious feelings'.³⁷ Proof of *mens rea* is required³⁸ and there is a high burden of proof.

On this analysis, it would have been difficult to argue Doniger's book contravened s 153A. There were no reports that the book had inspired ill-will between classes or religions. In spite of Doniger making it clear that 'I wanted to put into my book precisely those parts of history that they don't like',³⁹ the degree of malice demanded by s 295A is difficult to satisfy. One factor weighing against the publishers was an online petition that had amassed 11,000 signatures claiming there were 24 factual errors in the book.⁴⁰ However, procedural requirements also placed Penguin in a strong legal position. Nevertheless, it would have been difficult for Penguin to successfully argue its case without significant political ramifications. Sections 153A and 295A could not have been validly entertained by any court without the 'previous sanction'⁴¹ of the government. Had the SBA sought consent, the matter would have escalated and entered directly into an electoral process primed for controversy.

On one view, branding the jurisprudence around these two provisions as doctrinally indeterminate is defensible when the law is viewed through a commercial eye which privileges certainty. The label is also possibly the result of a lack of substantial judicial consideration of these provisions: criminal prosecutions are rare.⁴² Even with the possibility of legal victory, it appears the judicial disposition was set against Doniger. Batra alleged a judge hearing the case had said to him, 'I started to read it, but I stopped halfway because it was so vulgar and dirty'.⁴³ Pursuing legal vindication before this ostensible judicial mindset would have been fraught with risk.

A NO-COST SETTLEMENT?

'It's a shame that Penguin lost the lawsuit,' Doniger was later quoted as saying.⁴⁴ Even if the settlement was coloured as a moral loss for the author and publisher, it represented a partial commercial triumph. Penguin lawyers apparently knew "winning the case was impossible"⁴⁵ and informed Doniger that settlement would be delayed as long as possible to keep the book in print (and naturally produce sales).

Based on classic litigation strategy⁴⁶ and the meagre facts known to the public, settlement appeared viable. Litigation in India is unsurprisingly costly and as *Rupawate* showed, comically sluggish. Given the difficulty of distilling certain jurisprudence on the IPC provisions, the high likelihood of having to appeal to the Supreme Court would further extend the litigation cycle. Empirical research also shows that "speech cases are not a high priority" for the highest court in the land.⁴⁷ In a largely sensitive political context, this judicial canter generates uncertainty.

Aside from the content, the way Doniger framed her agenda in the book would have also presented a risk for the proceedings. Generating testimony and precedent on the question of intention would be unfavourable, particularly when coupled with the possibility of an official ban. If her detractors correctly cited factual errors in the book, the publishers would certainly be ill-disposed towards judicial findings of fact on the matter.

A private settlement avoided an official ban and arguably, best leveraged the division of rights between the parties. Doniger retained copyright in the publication with Penguin operating as publishers and distributors of the work in India. If Penguin withdrew in the absence of a government ban, Doniger would technically be able to publish through other

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36 (1957) AIR 620.

37 (1957) AIR 620.

38 *Sujato Bhadra v State of West Bengal* (2005) 3 CALLT 436.

39 Tabb, above n 14.

40 Ibid.

41 *Code of Criminal Procedure 1973* s 196(1).

42 Jones, above n 32, 215.

43 Barry, above n 17.

44 Tabb, above n 14.

45 Ibid.

46 Jacob Horowitz, 'Why Going to Trial is a Bad Bet (But if you Must, How to Improve the Odds)' *Litigation Strategy Series* (Law Society of NSW, 2011); Larry Tepley, *Legal Negotiation in a Nutshell* (Thomson West, 2nd ed 1992).

47 Chandrachud, above n 33, 222, 257.

- > entities or at a more favourable time. Reports emerged quickly at the time, that the New York arm of Penguin, unaffected by the terms of the settlement, was “considering sending 3,000 copies of the book to sell in India”.⁴⁸ At least two other publishers allegedly offered to re-publish the now notorious tome.

This transaction raises deeply uncomfortable questions about cultural regulation by non-state actors

PROFITABLE PROVOCATION

“You’ll be happy to hear about an interesting transaction I witnessed today,” a scholar wrote to Doniger. “My friend walked into one of the larger bookstores and asked for a copy of your book. Within a minute the paperback edition of *The Hindus...* discreetly packed away in a paper bag, was produced from some back area of the store and handed over to her. So the book is

still being sold right here. This is India.”⁴⁹

This story was relayed to Doniger less than a month after the pulping announcement.

The resonance of the forbidden and the pleasure of possessing illicit cultural artefacts lingered in the aftermath. William Mazzarella’s classic words on the art of ‘profitable provocation’⁵⁰ best captures these shifting lines between law, censorship, reputation and publicity:

As a gamble on publicity, cultural regulation is, for all its apparently routinised banality, an uncertain and open-ended venture.⁵¹

Lawsuits and complaints unlikely to succeed are strategically filed to stir public interest and pressure publishers – in turn, the notoriety delivers commercial windfalls. These provocateurs play cannily with the recursive relationship between the media and reputation⁵² where private acts of cultural regulation become both centrally destructive and creative. Seemingly emboldened by the vic-

tory, the Aleph Book Company received demands from SBA seeking the withdrawal of Doniger’s *On Hinduism*, published in 2013. In a public statement Aleph resolved not to reprint the book ‘until an acceptable resolution’ was found.⁵³ Its Chairman wryly noted that their stock had sold out “probably due to various statements made in public as well as the media coverage of your objections to the book published by Penguin”.⁵⁴

Aided by secrecy, a private settlement placed control over the media trial in the hands of Doniger and Penguin to manage its reputation where it mattered most: in public. Had the civil suit proceeded to final judgment, the scrutiny would have been greater, and more costly. This transaction raises deeply uncomfortable questions about cultural regulation by non-state actors. Where unaccountable private dealings determine the breadth and scope of state freedoms, publishers risk drawing the ire of the governed, and the governors. Provocation, then, becomes more political than profitable – a risk that settlement rarely handles, but which Penguin dangerously managed to gamble.

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48 Tabb, above n 14.

49 Ibid.

50 William Mazzarella and Raminder Kaur, ‘Between Sedition and Seduction: Thinking Censorship in South Asia’ in William Mazzarella and Raminder Kaur (eds), *Censorship in South Asia: Cultural Regulation from Sedition to Seduction* (Indiana University Press, 2009) 1, 21.

51 Ibid.

52 See: Fraser P Seitel and John Doorley, *Rethinking Reputation: How PR Triumphs Marketing and Advertising in the New Media World* (Palgrave Macmillan, 2012); David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008).

53 ‘Doniger’s Book On Hinduism Put on Hold’ *The Indian Express* (online), 11 March 2014 <<http://indianexpress.com/article/india/india-others/donigers-book-on-hinduism-put-on-hold/>>.

54 Aleph Book Company, *Official statement from Aleph/Rupa Regarding On Hinduism by Wendy Doniger* (online), 10 March 2014 <<http://alephbookcompany.com/sites/default/files/press/Official%20Statement.pdf>>.