

A PLAINTIVE LAMENT ON LIBERTY THAT RINGS HOLLOW

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

In early November 2020, after the overnight listing of a defective petition, the Supreme Court of India granted bail to the television anchor, Arnab Goswami. In a section of the judgment, delivered later on November 27 and titled “Human Liberty and the role of courts”, the top court noted that “human liberty is a precious constitutional value”; that “the writ of liberty runs through the fabric of the Constitution”; that it was important for courts across the spectrum to ensure that “criminal law does not become a weapon for the selective harassment of citizens”; that the courts remained “the first line of defence against the deprivation of the liberty of citizens”; that “the remedy of bail is the solemn expression of the humaneness of the justice system”, and, most poignantly, that “deprivation of liberty even for a single day is one day too many” (<https://bit.ly/3quEFiX>).

Observers of the Indian judiciary would no doubt have been bemused by this eloquent encomium to human liberty. At the time of the Supreme Court’s judgment, social activists incarcerated in the Bhima Koregaon case had been in jail for more than two years, with the trial yet to start, and with multiple bail applications having been rejected by the courts (they still remain in jail). In the aftermath of the Delhi riots in February 2020, students had been jailed for months (again without trial), with bail having been refused on specious grounds such as a court telling an accused who was not even present at the scene of a riot that “if you play with embers you cannot complain when there is a fire” (most of them still remain in jail).

After the effective abrogation of Article 370 on August 5, 2019, thousands of Kashmiris had been locked up for months, with their *habeas corpus* petitions going unheard, or dismissed with absurd invocations to the mythical Greek King Menelaus (whose accomplishments included a 10-year war of destruction to retrieve a wife).

The same Supreme Court that on November 27 sung paeans to personal liberty had, a year before, in 2019, told the daughter of a detained politician, in a *habeas corpus* petition, “why do you want to go to Srinagar when it is so cold there?”

Indeed, the same Supreme Court had, earlier in the year, in 2020, suspended the Karnataka High Court’s decision releasing certain Citizenship (Amendment) Act protesters on bail, and had kept that decision suspended for six months — leading to six months in jail, when, apparently, “a day” was “a day too many”.

In this background, the Supreme Court’s solicitude about human liberty appeared no more than a cruel joke. But perhaps, one could bring oneself to believe these words were implicit acknowledgement of past mistakes, and a promise to do better. Perhaps, one could bring oneself to believe that a judiciary that had visibly held human liberty in contempt over the previous few months would now turn over a new leaf. Perhaps *habeas corpus* would start to mean something again, as would bail.

But in the two months that have elapsed since the judgment in Arnab Goswami’s case, it has become evident that the judicial hymn to personal liberty was not worth the paper it was written on.

After the horrific gangrape in Hathras (September), came the news of Kerala journalist Siddique Kappan along with three others being arrested and incarcerated by the Uttar Pradesh police, in October, while en route to Hathras. When Mr. Kappan's lawyers approached the Supreme Court in a *habeas corpus* petition, it turned out that "deprivation of liberty even for a single day" was no big deal.

The Supreme Court adjourned the case on multiple occasions, harangued Mr. Kappan's lawyers for not going to the High Court (when, it turns out that under the Constitution, moving a *habeas corpus* petition before the Supreme Court is a matter of right, while an appeal from a High Court decision, as in Mr. Goswami's case, is only meant to be admitted in "special" circumstances). On one of the dates when the case was supposed to be heard, the Supreme Court did not take it up because it was hearing *Tata Sons vs Cyrus Mistry* for the third consecutive day. At the time of writing this piece, Mr. Kappan remains in jail.

At the turn of the year, a comedian named Munawar Faruqui, along with other individuals, was arrested and jailed while he was performing at a comedy show in Indore. The arrest took place on the apparent basis that Mr. Faruqui had "insulted Hindu gods" during his show. Leaving aside the larger point of what jailing comedians for cracking jokes about gods says about the present state of Indian democracy, it soon came out that Mr. Faruqui had not, as it turned out, made any jokes at all.

When this was pointed out to the Police, the Police responded by saying that that did not matter, as "he was going to make those jokes", bringing Indian policing firmly into the terrain of the film, "Minority Report". Despite this, the local court rejected Mr. Faruqui's bail application and, subsequently, the bail applications of his colleagues on the spurious basis that releasing him would be detrimental to law and order (who, one wonders, would have been responsible for disrupting law and order if these men had been released?).

The rejection of Mr. Faruqui's bail application was on January 5, 2021. His lawyers immediately moved the High Court. On January 15, the High Court "adjourned" the case because the Police had failed to bring their Police Diary along with them. However, as it has been noted, the police station was two minutes away from the courtroom, and that it would not take much time to bring the diary to the court. It turned out, however, that indeed, "a single day", or rather many days deprived of personal liberty were wholly irrelevant, and the case was "adjourned." At the time of writing, Mr. Faruqui remains in jail.

These two cases present simply the most glaring examples of how every level of the Indian judiciary, from the trial court to the Supreme Court, has treated the issue of human liberty, after the judgment in Arnab Goswami's case. Examples could be multiplied —after all, the social activists in the Bhima Koregaon case and the students in the Delhi riots case still remain in jail despite evidently specious prosecution cases against them, but these suffice.

The rule of law in a society breaks down when the courts appear to be telling the citizenry, "show me the man and I'll show you the law". The rule of law in a society breaks down if the Supreme Court says, one day, that "a single day deprived of liberty is a day too many", while every other court including the Supreme Court itself rejects bail applications of people jailed for years and months without trial, and in Mr. Faruqui's case for something a man did not even do. And the rule of law breaks down when the Court declaims that "liberty is not for the few", but by its conduct, extends liberty only to a few, while the unfortunate many count the weeks and months in jail cells. The judiciary's undeniably callous attitude towards human liberty is deeply destructive of the rule of law; and in that context, its plaintive lament in Arnab Goswami's case, that deprivation of liberty for even one day is a day too many, is reminiscent of Macbeth plunging his hands into the basin and asking the world: "Will all great Neptune's ocean wash this

blood/Clean from my hand?"

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