

## A NEW JUDICIAL DEVICE FOR 'COMPLETE JUSTICE'

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

'In certain rare situations, the judiciary could still act as a determined umpire who checks the executive's excesses' | Photo Credit: PTI

Mohammed Zubair, the co-founder of Alt News, continues to be in prison despite the Supreme Court of India, last Friday, granting him interim bail, because of remand in another case by the Delhi police. The Court was aware of the futility of the bail order. Yet, the Court did not direct his release by granting him bail in the other case too.

The order relates to a case challenging the Allahabad High Court's judgment refusing to quash the First Information Report (FIR) against Mr. Zubair. The charge was under Section 295A of the Indian Penal Code (IPC) — outraging religious feelings ... by insulting religion or religious beliefs. Later, a charge under Section 153-A IPC, of promoting religious enmity, was added.

It was explained to the Court that there was not even a *prima facie* case against Mr. Zubair. Also, it was shown that the case itself was a device to crush dissent. The political malice behind the charge was very obvious. The Court also seemingly accepted the contentions, as evident from the grant of bail. Yet, the Court said the order was with respect to only the case registered in Uttar Pradesh. This has meant the continued detention of Mr. Zubair.

The Supreme Court of India is regarded as the world's most powerful top court, on account of its wide power of judicial review. It has the jurisdiction to issue writs under Article 32 of the Constitution. It also has the original jurisdiction under Article 131 of the Constitution. There is also wide appellate power under Articles 132, 133, 134 and 136 of the Constitution. More significantly, the Supreme Court has the power to "make such order as is necessary for doing complete justice in any cause or matter pending before it", as per Article 142 of the Constitution. Yet, the top court has shown itself to be helpless when issues of individual liberty have been placed before it on very many occasions. Many political prisoners languish in prison after their bail pleas have been repeatedly rejected by different courts. The executive is able to register multiple FIRs in different States of India so as to ensure that the dissident is not released from prison even if bail is granted in some of the cases. Thus, the jail jurisprudence of the executive effectively surpasses the Court's bail jurisdiction. Reports say that after the Supreme Court's order, another warrant was issued against Mr. Zubair by a local court in Lakhimpur Kheri in Uttar Pradesh. This scenario, which reflects the new normal in the country's criminal jurisprudence, poses crucial challenges to the judiciary.

The Supreme Court cannot afford to be conventional if it really wants to tackle this situation where an aggrandising executive hunts its opponents in a systematic and incremental way. Conventional legal wisdom proclaims that every criminal case is a case which requires to be dealt with as such and taken to its logical conclusion. Even in Mr. Zubair's case, the contention of the Solicitor General of India was that "any order passed by (the Supreme) Court (in this case) will interdict four judicial orders passed by two courts which have not been challenged". It is the Court's inability to overcome this line of argument by invoking the spirit of Article 142 that led to the ironic predicament of Mr. Zubair being in jail, despite the grant of the 'interim bail'.

The practice of registering multiple FIRs is extremely problematic. In the context of free speech, American legal scholar Professor Vincent Blasi identifies "historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to

stifle dissent systematically". The situation in India is illustrative.

The criminal justice system in such tough times degenerates into rule by law, that replaces rule of law. The law becomes an effective device in the hands of the Government for the purposes of a witch-hunt and this operates against the opponents of a regime, as a class. In this scenario, if the Court erroneously presumes that the nation's legal system is governed by the principle of rule of law, fallacies and unjust consequences are bound to occur. In such a legal ambience, it will be equally fallacious to treat each case as isolated, as in reality, it is not so. Climatic changes in a nation's constitutionalism are a hard reality which no court can ignore.

Even in challenging times, a constitutional court should be able to evolve a mechanism of its own to preserve the democratic foundation of the country by intervening in the incremental process of nation's "deconstitutionalisation". Professor of law Rosalind Dixon in a recent study says that "at least under certain conditions — of sufficient independence, political support and remedial power — courts can too play an important role in buttressing democratic processes and commitments", and this, according to her, "is the essence of responsive judicial review". The constitutional courts in Colombia and Brazil have developed the new doctrine of "unconstitutional state of affairs". This enables the court to address structural deficits with a sense of realism and to pass effective orders even by deviating from procedural rigour, with a view to protect fundamental rights. This is, in certain ways, akin to the practice of Public Interest Litigation (PIL) in India and structural injunctions in the United States.

The courts, no doubt, may sometimes subserve the interest of the executive. This may even pose a serious threat to personal liberty, as it happened recently in its observations against activist Teesta Setalvad and former police officer R.B. Sreekumar. But in certain rare situations, it could still act as a determined umpire who checks the executive's excesses. The Supreme Court's intervention in the Centre's COVID-19 vaccine policy and the Pegasus episode illustrates this point. The need is to expand the latter approach and to create and perpetuate a democratic judicial atmosphere that supports the cause of freedom.

At least in principle, the Indian Supreme Court is constitutionally equipped with the power to invoke its jurisdiction for the larger cause of liberty, even by deviating from the conventional technical route. The "complete justice" under Article 142 is meant to be used when the legalistic arguments such as those raised by the state in Mr. Zubair's case have the effect of sabotaging the goal of constitutional justice. The Court needs a new version of judicial activism, which the Court itself evolved, in the 1980s.

The genesis of Article 142 shows that the makers of the Constitution have consciously incorporated this provision by drastically modifying the earlier corresponding provision in the Government of India Act, 1935. The Government of India Act, by way of Section 210(2), only said about the enforceability of the orders of the Federal Court. It did not, naturally, contain an idea of complete justice in the constitutional sense. Article 142, on the other hand, arms the Supreme Court with this supplemental power.

The interpretation of the scope of this provision has been varied, and sometimes even conflicting. Some judgments pleaded for its restrictive use while some others did for its liberal and contextual application. In *Delhi Development Authority vs Skipper Construction Company* (1996), the top court said that the power under Article 142 should remain "undefined and uncatalogued, so that it remains elastic enough to be moulded to suit the given situation".

It is essential for the Supreme Court of India to treat political prisoners and dissenters facing multiple FIRs and undergoing unjustifiably long incarceration as a class. It needs jurisprudence at the normative level to tackle the technical arguments that create a false notion of rule of law

when the very cause of arrest and detention is the lack of it. When a glaring instance of curtailing a person's freedom is placed before the top court, it should be capable of calling for the records pertaining to the multiple FIRs and to *suo motu* add all the stakeholders as parties (if needed); the Court should immediately ensure that vindictive incarceration does not continue even for a day. This might be difficult, yet not impossible. Mr. Zubair's case is one (like many other cases in the past) that demonstrates the juridical deficits of today's Supreme Court. It is, therefore, an imperative to evolve an effective jurisprudence of "complete justice" by focusing on personal liberty. It is the praxis of this new judicial device that can, perhaps, preserve the country's democratic legacy.

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