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ZAKIA JAFRI AND THE CONSTITUTIONAL CONSCIENCE

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‘The question that is foregrounded in the case is about the recovery of lost ground by constitutional courts’ | Photo Credit: Getty Images/iStockphoto

On June 24, 2022, the Supreme Court of India delivered a 452-page judgment in the case of Zakia Ahsan Jafri vs State of Gujarat, which has far-reaching implications for our understanding of constitutional morality and the rule of law in a constitutional democracy. The arrests of human rights defender and co-petitioner Teesta Setalvad, and former Gujarat police officer R.B. Sreekumar followed close on the heels of the judgment as if on cue to put all those who had (to quote from the judgment) ‘the audacity to question the integrity of every functionary involved in the process of exposing the devious stratagem adopted (to borrow the submission of the learned counsel for the Special Investigation Team [SIT]), to keep the pot boiling, obviously, for ulterior design… in the dock and proceeded with in accordance with law’ — Ms. Setalvad, Mr. Sreekumar and (another former IPS officer) Sanjiv Bhat (who has been in custody) are named several times with words such as ‘vengeance’, ‘tirade’, ‘persecution’ and ‘disgruntlement’ liberally used to describe them — the ‘aggrieved party’ in this account is the state.

The judgment reproduces at length the assertions of the SIT. Two senior advocates appointed as amicus curiae, advocate Prashant Bhushan and advocate Rohinton Fali Nariman (as he was then) withdrew in quick succession. The third, advocate Raju Ramachandran, submitted a separate report, parts of which are reproduced in the appendix. This report (although given no weight by the SIT with the Supreme Court following suit) nevertheless gives us a window into how constitutional sensibilities might be deployed in a case such as this against the odds. In all this, by deflecting judicial ire onto Ms. Setalvad, Mr. Sreekumar and Mr. Bhat, Zakia Jafri ends up being portrayed as a victim of diabolical activists rather than as a survivor of mass murder.

The complainant, Zakia Ahsan Jafri, is the wife of Ehsan Jafri, a politician, who was brutally murdered in the violence against Muslims that engulfed Gujarat in February-March 2002. As someone who suffered profound loss and yet tenaciously fought for redress over 20 years, staking an unswerving claim to justice under the Constitution of India, knowing each moment that the battle is unequal and weighted against her, and yet staying steadfast to her purpose, she is an exemplar for the women of India. And no court, no judge, no leader, no public can take that away. Her courage is indelibly imprinted in the history of the struggles of human rights defenders in this country, and indeed the world. The loss of a case does not negate her experience or her testimony. It remains a fact that Ehsan Jafri was killed by a murderous mob because he was Muslim.

Jafri was not alone. Gulberg Society, where he lived and died, witnessed one of the worst mass killings in February-March 2002. This is not denied by the Supreme Court in its judgment. Take the Court’s statement of facts of the case: ‘a violent mob attacked the inhabitants of Gulberg Society, Meghaninagar, killing 69 persons at the stated location including the husband of appellant — Zakia Ahsan Jafri, who had unsuccessfully attempted to dissuade the mob’ (pg.6).

Based on her experience, Ms. Jafri filed a complaint that named 63 people, including the then Chief Minister of Gujarat, of a conspiracy to commit mass murder of Muslims in the State. While bringing on record the fact that there were administrative lapses that resulted in uncontrolled

violence and deaths of Muslims in the State – 'there was widespread violence bordering on failure of the State machinery to prevent and control the same including to arrest all the perpetrators of the crime and undertake fair investigation' — the Supreme Court categorically rejected the argument that there was a larger conspiracy that fuelled this administrative inaction recommending 'the dock' for this 'audacity'.

What is material to our purposes as human rights defenders, however, is that the violence remains on record, as does the acknowledgment of Ms. Jafri's complaint that linked her personal tragedy to the political circumstances in which it was embedded. We are free to differ from the Court in the conclusions we draw from these events. And we can continue to hope audaciously to persuade the Court to remember the Constitution in the 'struggle of memory against forgetting', to quote Milan Kundera.

When people suffer state violence, in the form of encounters, custodial torture, custodial death, rape in custody, absence of due diligence in the prevention of targeted violence, incitement to violence, and when they are in the chokehold of state impunity, it is human rights defenders (lawyers, activists, journalists) whose support ensures constitutional redress and the assertion of rights under Article 21. Courts would have no occasion for a Justice H.R. Khanna to dissent (in the ADM Jabalpur case), if human rights defenders were not staking everything to provide legal representation, survivor support and witness protection.

A court that eulogises Justice Khanna (as this court did in 2017) can scarcely afford to criminalise human rights defenders. For its own sake. And the line between triggering arbitrary state action and asserting the rule of law within the remit of the Constitution must always remain exceedingly bright at all times at all costs, if the Constitution of India is to be saved. Counter questions of ulterior motives of human rights defenders can never adequately answer the questions they raise about arbitrary state practice. It is by now a well-worn custom for the state to habitually assault the credibility of defenders by taking easy recourse to labelling.

Coming as it did on the eve of the Emergency anniversary, from the very court that had less than five years ago resurrected the right of citizens to protest, to dissent, to be free from state surveillance and arbitrary arrests, this turn in the life of the Constitution in India is nothing short of tragic. This was the same court that declared that Justice Khanna's dissent (*ADM Jabalpur*) 'must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions' (*Justice K.S. Puttaswamy (Retd) vs Union of India*, 2017, paragraph 120).

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The words of the Court here are worthy of recall and guide this short reflection: 'A constitutional democracy can survive when citizens have an undiluted assurance that the rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights' (ibid). It is the judiciary then, in its role as the sentinel on the *qui vive*, that must provide constitutional succour to them. For, we have seen repetitive cycles in which states forever veer towards arbitrariness, illegal practices and authoritarianism; each new dispensation reinvents the means and bolsters the ends of injustice.

In the struggle against impunity then, it is to the Constitution and a judiciary with a robust 'constitutional conscience' that citizens will turn. The question that is foregrounded in Zakia Jafri's case is not about the state — that is already in the realm of established facts. It is about the recovery of lost ground by constitutional courts. For the Constitution belongs equally, if not more, to the people. It is a shared commons. And 'we the people' shall not be dispossessed of our constitution so easily.

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