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NOT SO STELLAR IN PROTECTING PERSONAL LIBERTY

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

A pair of recent rulings gave us a glimmer of hope that the judiciary might yet serve as a tribune of people's rights. The first was the acquittal of the journalist, Priya Ramani, on charges of criminal defamation. A Delhi court, in discharging her of the accusations, recognised that a woman's right to dignity superseded any claims over reputation. The court also held that a survivor of sexual harassment had the freedom to place her grievance at any point of time after the occurrence of the event and on any platform of her choice.

The second was the grant of bail to Disha Ravi, a 22-year-old woman who was arrested in Bengaluru and taken to New Delhi on charges of sedition. Her alleged crime: helping edit, and sharing, a "toolkit" that was meant to lend support to protests against the Union government's new farm laws. In the order granting bail, the court of the additional sessions judge noted that the prosecution had failed to produce even an iota of evidence linking Ms. Ravi to an act of violence. It found the toolkit to be innocuous and the actions of the Delhi police, in restraining her liberty, to be based on "propitious anticipations". The judge was also constrained to state the obvious: that, in a democracy, the right to dissent is fundamental.

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In a free republic, verdicts such as these will be seen as unexceptionable. If anything, they are attempts at undoing, at least in part, injustices wrought by the processes of the criminal justice system. Ms. Ramani spent months on end participating in a trial, not for being a perpetrator of any crime but for speaking out about sexual harassment at the workplace. Ms. Ravi spent 10 days in custody on the basis of evidence that the court found, at best, "scanty and sketchy". But these rulings are now far from routine. Indeed, on February 25, the Allahabad High Court, in *Aparna Purohit v. State of U.P.*, gave us a scantling of the disdain with which the higher judiciary views issues of personal liberty.

In denying anticipatory bail to Ms. Purohit, who is the head of Amazon Prime Video's India Originals, which ran the web series *Tandav*, the High Court was effectively telling the applicant that she deserved to be interrogated in custody for running a show that was "bound to hurt the sentiments of the majority community". Not that *Tandav* necessarily does this, but it mattered little to the court that deriding a person's belief is not an offence, not even under India's draconian blasphemy laws.

Free speech, we all recognise, is a condition of legitimate government. We also recognise that there are limits to this right. The Constitution permits reasonable restrictions on speech on a variety of stated grounds. Determining what is reasonable and what falls within the bounds of those permitted limitations can sometimes be an exercise fraught with difficulty. But India's Parliament has never grappled, with genuine seriousness, over these questions. It has either chosen to allow colonial-era laws to do the government's bidding or it has legislated new rules that do not merely err on the side of restraint as much as they treat the restriction as their chief goal and purpose. The cases concerning Ms. Ramani, Ms. Ravi and Ms. Purohit each emanate out a law that is categorically unconstitutional, but that has nonetheless been upheld by the Supreme Court.

Draconian laws foisted on people: former Supreme Court judges

Consider first criminal defamation. It ought to be self-evident that the punishment, even the very idea of prosecution, for libellous speech is disproportionate to the offence. Criminal law does not exist to make prosecutable acts that are essentially private in nature. By making ostensibly slanderous talk a punishable offence, the state imposes a chilling effect on all manners of legitimate speech. It is for this reason that almost every democratic nation of the world has revoked laws criminalising defamation. But in India. it remains a tool for the powerful and is routinely invoked not just by individuals and governments in positions of authority but also by corporations looking to protect their commercial interests.

In the case of sedition, its colonial remnants are, again, plainly apparent. Although it was not a part of Macaulay's original draft, it was incorporated by the British government into the Indian Penal Code with the explicit aim of repressing all forms of dissent against the regime.

Editorial | A colonial relic: On need to scrap sedition law

The offence — which carries with it the prospect of life imprisonment — is defined as any act which "brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India". The clause also contains an ominous explanation: the word "disaffection" includes disloyalty and all feelings of enmity.

In saving the provision from the Constitution's demands, the Supreme Court, in 1962, read down the offence and held that it was only seditious action that had the "tendency to disrupt public order" that was prosecutable. Since then, in other cases, the Court has held that speech can be criminalised only when it bears a proximate connection to disorder. But despite the imposition of these confines, the offence of sedition continues to be weaponised to restrict even the most inoffensive forms of dissent.

India's blasphemy laws, Section 153A, which deals with speech that seeks to promote enmity between different communities, and Section 295A, which criminalises speech that outrages religious feelings, are also vestiges of colonialism. Rather than aiding in dealing with genuine cases of hate speech, the laws permit governments to target acts that so much as offend a person's belief, dislodging, in the process, the very foundation of free expression.

That the Supreme Court has allowed these provisions to remain on India's books ought to tell us that its record in protecting personal liberty is acclaimed without reason. Every now and then, the Court does bewail the state of affairs. In *Arnab Manoranjan Goswami vs State of Maharashtra*, decided in November 2020, the Court warned against the use of the criminal law as "a ruse for targeted harassment". The judgment noted: "Our courts must ensure that they continue to remain the first line of defence against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many." But any hope that the verdict would augur well for the many thousands who continue to languish in jail without trial was quickly quelled.

When those involved with the making of *Tandav* first approached the Supreme Court, weeks after the verdict in *Arnab Manoranjan Goswami*, the Court not only refused to quash the criminal charges against them but also offered them no interim protection against arrest.

A plaintive lament on liberty that rings hollow

What is more, when one of the show's actors pleaded that he had simply been contracted to play a part, he was told, "You cannot play the role of a character which hurts the religious

sentiments of others.”

To be sure, as the lawyer Abhinav Sekhri has repeatedly highlighted, India’s bail jurisprudence suffers from a systemic malaise, where the manner in which offences are classified and the manner in which judicial discretion is vested invariably leads to arbitrary outcomes. But when this uncertainty is coupled with the prevailing distrust — which flows from the Supreme Court — in the values of personal liberty, of free thought and expression, what we get is a complete erasure of the rule of law.

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