

STATES OF MATTER

Taking liberties

A series of recent orders has dented public perception of the judiciary as custodian of rights



SUKUMAR MURALIDHARAN



To free or not to free The Supreme Court recently dismissed a habeas corpus petition filed by the wife of Saifuddin Soz (in the photo), based on the Centre's affirmation that the Kashmiri politician was a free man PTI

MT Hany Babu, an English teacher at Delhi University, was arrested late-July on charges of complicity in violent clashes at Bhima Koregaon near Pune on New Year's day 2018. He joined another 11 people already in custody in the matter, nine of them for two years.

On the same day, the Bombay High Court adjourned for the sixth time without deciding an interim medical bail application by the lawyer and civil rights activist Sudha Bharadwaj, also detained in the same case. The National Investigation Agency (NIA), a body that has no clear constitutional sanction, opposed Bharadwaj's plea ostensibly because of her involvement in "terrorism and anti-national activities". She was, moreover, being given "the best treatment inside jail" for her ailments of diabetes and ischaemic heart disease, claimed the NIA.

To complete a dubious trifecta for the day, the Nagpur bench of the Bombay High Court rejected the interim bail plea of GN Saibaba, a Delhi University teacher jailed for over six years, and sentenced in March 2017 to life imprisonment for alleged Maoist links. Stricken by polio at the age of five and confined to a wheelchair since then, Saibaba has been diagnosed with a multitude of ailments. With all that, he remained a fearless spokesman for civil liberties, calling out the Indian constitutional order for its failure to deliver the promised social revolution of equality and opportunity. That made him, despite his fragility, a mortal threat in the eyes of the Indian State.

Varavara Rao, an octogenarian Telugu poet held for two years in the Bhima Koregaon case, had just tested positive for the lethal novel coronavirus, and been taken away in a state of delirium to emergency medical care. Brutally overcrowded and managed with conspicuous indifference, the Indian prison system has

been regarded with particular concern as the site of a potential viral outbreak. Yet, efforts to minimise risks have been absent and the judiciary, conspicuously indifferent.

On July 30, the Supreme Court (SC) disposed of a habeas corpus petition filed by the wife of veteran Kashmir politician Saifuddin Soz, who has been at various times a minister at the state and central levels. As respondent, the Union government simply had to affirm that Soz was not under any form of detention for the SC to let the matter go.

The next day, Soz scaled the high compound wall of his home in Srinagar, to shout out to passers-by that the government had lied to the SC. He was hustled away by security personnel, who have kept him in confinement for a year, with warnings that he would pay a heavy price.

The message that Soz sent out, though perhaps muffled by a media conspiracy of silence, was unmistakable: The SC had swallowed a brazen lie rather than challenge the continuing violation of basic rights by the government.

In 1976, in what is still regarded as its lowest moral ebb, the SC ruled in the matter of ADM Jabalpur that the habeas corpus right stood extinguished in a situation of national emergency. Justice MH Beg, one of the judges to sign off on the majority opinion of four against the solitary dissent of Justice HR Khanna, couched the infamous ruling in famously honeyed words: "The care and concern bestowed upon the welfare of detenus who are well-housed, well-fed and well-treated, is almost maternal".

India's republican history is a story in several chapters of institutional tensions and the contest between rights and privileges. In the early phase of political activism in pursuit of

distributive justice, the judiciary often balked, reading the erosion of property privileges as an attack on fundamental rights. In later years, when the sheer diversity of India began to threaten the relentlessly centralising political executive, harsh repression became increasingly common. But in the defence of the rights to life and liberty, the judiciary proved supremely supine.

As various legal scholars have observed, rather than assert its writ jurisdiction in the defence of rights, the SC has proved eager to carve out its own domain of autonomy and privilege. This has involved a bargain of mutual convenience with the political executive, often involving judicial intrusion into legislative areas, with little lasting public benefit. In return, the political executive has secured a measure of immunity to judicial scrutiny as it tramples over basic rights.

From being a custodian of rights, the judiciary has mutated into a zealous and self-interested defender of privilege. While indefinitely deferring matters of urgent constitutional importance, the SC found time recently to serve a notice of contempt on the eminent lawyer Prashant Bhushan, for two social media posts deploring its failure to address the crisis of migrant workers triggered by the coronavirus outbreak.

Bhushan's reply, submitted on August 3, is a catalogue of judicial 'failures', suffused with accounts of how the SC has wilfully participated in its own deception. Whatever trajectory the matter takes now, its impact on the public perception of judicial integrity is likely to be enduring.

Bhushan's reply, submitted on August 3, is a catalogue of judicial 'failures'