

Dissent, our draconian laws, bail and a step in the right direction



Photo: PTI. Updated: 20 Jun 2021. [Jhuma Sen](#)

Three Delhi high court rulings offer hope against an over-carceral state but the struggle against harsh laws is far from over

A two-judge bench of the Delhi high court, comprising Justice Siddharth Mridul and Justice Anup Bhambhani, on Tuesday granted bail to student activists Asif Iqbal Tanha, Natasha Narwal and Devangana Kalita. The three, along with many others, had been accused of a conspiracy to turn the anti- Citizenship Amendment Act (CAA) protest violent, leading to “Delhi Riots” last February, and were charged under provisions of the Unlawful Activities (Prevention) Act (UAPA). The judgements are a refreshing read, not only because they tackle the mythical legal beast called UAPA by pushing it inside a constitutional law framework, but also because they chart out a clear road-map for securing bail under a draconian legislation like UAPA, which not only contains visibly broad and vague provisions blurring the line between anti-terror laws and ordinary penal law, but also Section 43(D)(5) which makes bail extremely difficult to get.

It must also be remembered that under the UAPA, a person can be detained for up to 90 days without bail and the detention can be extended for upto 180 days at the request of the prosecution. The pandemic in a carceral state has also meant a discernible lockdown of rights, with re-congestion of prisons taking priority over decongestion, and bail pleas are not always being prioritized as urgent by courts. All three student activists spent over a year in jail, following the general trend of UAPA, where the process is the punishment. Against this background, the judgements bring much hope, since they manage to move the slow and heavy wheel of justice in the right direction, especially at a time when the routinized use of exceptional laws have become the order of the day.

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The high court ruling reminds us that UAPA is not the same as ordinary penal laws, and the use of the former is for a very limited purpose. It also repeats a foundational principle of criminal law, that it should be interpreted narrowly and strictly in order “to ensure that a person who was not within the legislative intendment does not get roped into a penal provision.” It reminds us that the “more stringent a penal provision, the more strictly it must be construed”. It then goes on to scrutinize the overtly broad definition of “terrorism” to support an interpretation that is consistent with both our constitutional law framework and statutory interpretation of criminal law.

Equally importantly, the court breathes fresh life into jurisprudence on the right to protest, which has been muddled by some ill-reasoned judicial precedents of late, but the Delhi High Court makes the right to protest as a civic duty the heart of this interpretive exercise. The court assures that unless the ingredients of the UAPA can be distinctly made out in the conduct of the accused, protests and other acts of dissent cannot be branded as ‘terrorism’. The court notes that allegations relating to inflammatory speeches, organizing chakka jams, instigating women to protest and to stock-pile various articles do not terrorism make.

Further, the court majestically assures us that “the foundations of our nation stand on surer footing than to be likely to be shaken by a protest, however vicious, organised by a tribe of college students or other persons, operating as a coordination committee from the confines of a university situated in the heart of Delhi”.

To restate our democratic constitutional values at a time when the pandemic has visibly served as a portal for transforming the Indian state into a carceral authoritarian version, is laudable. The sheer number of arrests made in this period under UAPA and the sedition law, in what look like efforts to muzzle dissent against unfair laws and harsh policies of the state, from citizenship laws to farm laws, suggests a high likelihood that while 2020 and 2021 will be known as a time when coronavirus devastated the world, in India they will also be remembered as years when the state went on an overdrive against personal liberties through the routinized use of laws that were meant for exceptional circumstances, from UAPA to the Epidemic Disease Act.

Hence, at a time when dissent is under pressure from the state, through an assortment of laws—the ‘holy trinity’ of UAPA, sedition and the National Investigation Agency—and institutional mechanisms either appear co-opted or are coercive, the precedent set by the Delhi high court deserves much appreciation for the hope it engenders, especially for hundreds of other accused. This hope is of course limited by the fact that bail will still remain largely discretionary and depend on a particular judge’s ability and inclination to analyse the case diary, charge-sheet and disagree with the prosecution about the prima facie truth of the case. The Bhima Koregaon case has already shown how trial courts tend to nod in agreement with the prosecution’s version, often resulting in prolonged incarceration of the accused without trial, thus serving what is apparently an ulterior purpose of laws of this nature.

The Delhi Police, too, it seems have understood the potential of these judgements in pushing back a carceral project, and have rushed to the Supreme Court to minimize their democratic impact with a prayer that the Delhi High Court judgements not be treated as a precedent by any court to obtain similar reliefs. On Friday, India's apex court, in an ill-conceived order, gave credence to that argument and held that the impugned judgement shall not be treated as a precedent until the matter is finally decided. While this has the effect of making a spectre out of a precedent, it has also meant that the struggle against repressive laws is far from over. As the student activists reaffirmed after being released on bail, "We will continue our struggle." This struggle will take place not just inside courts, but also, importantly, outside them as well.

Jhuma Sen teaches law at Jindal Global Law School