

ARREST OF ACTIVISTS: A CRITICAL ANALYSIS OF UNDERLYING ISSUES

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It is imperative for us to look back at the events that took place on January 1, 1818, to understand how and why such an incident escalated into the arrest of the activists, which attracted extensive attention and condemnation. This year marked the 200th, anniversary of the Battle of Bhima Koregaon, which signifies the victory of Dalit Mahar soldiers against the Maratha army. On January 1, 1818 around 800 troops of the British East India Company predominantly composed of Mahars or Dalit leather workers, defeated a numerically superior Maratha army of Peshwa Bajji Rao 2.¹ A memorial was established by the British in the village of Koregaon in honour of the sacrifices made by the soldiers. Ever since Dr. Bhim Rao Ambedkar visited the memorial in 1927 and led a commemoration ceremony, January 1 became a day of remembrance for many. Dalits view and celebrate the battle as a victory of oppressed Dalits against the injustice and discrimination meted out to them by the Brahmanical Marathas.

Before bringing up the debate of patriotism against imperialism, we need to appreciate that, the present reality of 'India' as a sovereign State was absent in the early 19th century. Individuals did not identify themselves as 'Indian', since no such nationality existed. Although Chhatrapati Shivaji had instituted members from the Mahar community as an essential part of his army, after his death oppression against the community by Brahmanical Marathas surged. The Peshwa rulers reinvented caste conceptions of purity and cast out the Dalits to the very fringes of society. A Maratha martial law mandated all Mahars to tie a broom to their neck to erase their own foot prints.² When the British fought against the Maratha Peshwa to consolidate

¹ Debjani Chaterjee, 'Maharashtra Violence And The Battle Of Bhima Koregaon: A Backgrounder' *NDTV* (January 03, 2018) <https://www.ndtv.com/india-news/maharashtra-violence-and-the-battle-of-bhima-koregaon-a-backgrounder-1795233> accessed on October 15, 2018.

² Asang Wankhede, 'The Pot, Broom And Battle of Koregaon:Its Significance And The Rattling Rhetoric' (2018) <https://countercurrents.org/2017/12/30/pot-broom-battle-koregaonits-significance-rattling-rhetoric/>

their power in India, it was only acceptable for the Mahars to ally with the British against their oppressors.

This year being the 200th anniversary of the battle, before the commemoration a large crowd under the banner of “Elgar Parishad” gathered at Shaniwar *Wada* in Pune, the former seat of the Peshwas. A stand was made against the modern-day manifestation of caste-based discrimination in the form of the right-wing Hindutva movement, which was termed as “New-Peshwai” and pledged allegiance to the Indian Constitution. The commemoration day was mired by violence due to clashes between the Dalits and right-wing groups opposing the celebrations, resulting in the death of one person. Nine months later on August 28, Maharashtra police conducted raids across India to arrest five activists on charges of insinuating the violence at Bhima Koregaon along with other far more sinister accusations not limited to having ties to banned Maoist organisation and conspiring to assassinate the Prime Minister.

In Delhi, a police team arrested Gautam Navlakha a civil rights lawyer who has worked for three decades with a rights organisation named ‘People’s Union of Democratic Rights’. Sudha Bharadwaj also a civil rights lawyer, currently practicing in the High Court of Chhattisgarh was arrested from Faridabad. Varavara Rao a noted Telegu poet and co-founder of the Revolutionary Writer’s Association, “Virasam” was detained in Hyderabad. Arun Ferreira a lawyer and political activist was detained in Mumbai along with Vernon Gonsalves a social worker and former professor at Mumbai University. Vernon Gonsalves had been involved in the defense of lawyer Surendra Gadling who had been arrested earlier in connection to the January 1 violence.³ Arun Ferreira is no stranger to the contraptions of the police force, as he spent nearly six years in prison since 2007 on multiple charges before being acquitted by the judiciary.⁴

The arrests raise three important questions for our considerations. Were the arrests lawful and legally justifiable? Were they necessary to maintain the functioning of State institutions and

³ Mridula Chari, Among those raided in Bhima Koregaon case: A poet, a management professor, a business journalist *Scroll.in* (August 29, 2018) <https://scroll.in/article/892284/among-those-raided-in-bhima-koregaon-case-a-poet-a-management-professor-a-business-journalist> as accessed on October 15, 2018.

⁴ Kuwar Singh, Who are the five left-wing activists arrested by the Indian police? *Quartz India* (August 29, 2018) <https://qz.com/india/1372887/bhima-koregaon-arrests-who-are-bhardwaj-rao-navlakha/> as accessed on 15th October, 2018

social accord? Was there any underlying impetus behind the arrests? During the arrests, charges pertained to the cultural event organized under the banner of “Elgar Parishad” on December 31, 2018 and were filed in accordance with FIR No.4/2018. The initial charges essentially common to all five accused were under Section 153A (prompting enmity between different groups on grounds of race and religion), Section 505 (statements creating enmity between classes), Section 117 (abetting commission of offence by the public) and Section 120 (concealing design to commit offences punishable with imprisonment) of the Indian Penal Code, 1860. Charges under the draconian Unlawful Activities (Prevention) Act 1967 (UAPA) particularly under Section 13, 16, 17, 18, 18 (b), 20, 38, 39 and 40 were added to the FIR subsequently. The charged Sections of the UAPA pertain to causing death of persons through terrorist acts, raising funds and supporting terrorist organisation, and conspiring to commit acts of terrorism.⁵ As evidence the police in a press conference exhibited an electronic letter seized from one of the activists allegedly showing links with a banned Maoist organisation, CPI and a conspiracy to wage war against the nation.⁶

Maharashtra police had previously maintained that the attack on the congregation at Bhima Koregaon by right wing groups had been planned and executed by two radical Maratha Hindu leaders, Manohar Bhide and Milind Ekbote who have several cases pending against them. While Milind Ekbote was arrested due to public pressure, the police are yet to act against Bhide, even though the Supreme Court had rejected his anticipatory bail.⁷

Habeas Corpus writ petitions were filed in Chandigarh High Court on behalf of Sudha Bharadwaj and in Delhi High Court on behalf of Gautam Navlakha. The Punjab and Haryana High Court barred the police from transferring Bharadwaj to Pune ordering her to be kept in house arrest till August 30. The Delhi High Court opined that the transit remand granted by the Chief Metropolitan Magistrate (CMM) was unsustainable as he had failed to comply with the mandatory requirement of Article 22 (1), Article 22 (2) of the Constitution. The Court observed that Navlakha had not been informed about grounds of his arrests, and the CMM had failed to

⁵ *Romila Thapar and Ors. V Union of India and Ors.*, WP(CRL) 260 (SC:2018).

⁶ Sukanya Shantha, *Judicial Commission Begins Hearing in Mumbai on Bhima Koregaon Violence* *The Wire* (September 6, 2018) <https://thewire.in/rights/judicial-commission-begins-hearing-in-mumbai-on-bhima-koregaon-violence> as accessed on October 15, 2018.

⁷ Varsha Torgalkar, *From Naxal Links to Modi Assassination Plot, Pune Police's Theories Branch Out* *The Wire* (June 8, 2018) <https://thewire.in/caste/naxal-links-modi-assassination-plot-pune-police-dalit-activists-bhima-koregain> as accessed on October 15, 2018.

apply his mind in taking into account the material available with the police to necessitate Navlakha's arrest. On October 1, 2018 the Delhi High Court ordered an end to the house arrest of Gautam Navlakha.⁸

Historian Romila Thapar and four other eminent persons had filed a Public Interest Litigation in the Supreme Court challenging the arrest of the five activists in connection with the Bhima Koregaon violence and requesting a probe by Special Investigation Team (SIT). The Petition was heard by a three-judge bench of Justice A.M. Khanwilkar, Chief Justice Dipak Misra and Justice D.Y. Chandrachud. In an interim hearing the bench had extended temporary relief to the arrested activists by ordering that they be kept under house arrest till September, 6 and not transferred to Pune. Justice D.Y. Chandrachud noted that, "*dissent is the safety valve of democracy. If not allowed, the safety valve will burst.*"⁹ On September 28, 2018 the much-anticipated judgement of the Supreme Court turned left a debilitating trail as the Supreme Court in a 2:1 majority rejected the request for a SIT.

The Petitioner argued that the original FIR filed on the basis of statement given by Tushar Ramesh Damgule had no mention of the names of the five accused. A faulty correlation was drawn between statements against caste oppression and Maoist conspiracy. The Maharashtra police was attempting to leak false information against the accused to spread fictitious propaganda about a Maoist connection with the accused. The Petitioners pleaded that the five arrested activists were not present on the day of the "Elgar Parishad" event and were being falsely implicated on charges under Unlawful Activity (Prevention) Act 1967. No new FIR was filed by the police taking into account the newly found evidence. The arrest memos served to the accused were in Maratha and no translation was provided, thus denying them the avenue to know the grounds of their arrests, a fundamental right. The arbitrary arrests were a politically motivated attempt to subdue any dissent against the ideology propagated by the reigning Government.¹⁰

A counter affidavit filed by Dr. Shivaji Panditrao Pawar, Assistant Commissioner of Police, Pune City, argued that there was no *locus standi* for maintaining the writ petition which had

⁸ Gautam Navlakha V State (NCT Of Delhi) & Ors., WP(CRL) 2559 (Del. :2018)

⁹ Shaswati Das, Dissent is the safety valve of democracy, says SC Livemint (August 29, 2018) <https://www.livemint.com/Politics/SiXRDqBThdK92lfR0CRyEP/Dissent-is-the-safety-valve-of-democracy-says-SC.html> as accessed on October 15, 2018.

¹⁰ Romila Thapar and Ors. V Union of India and Ors. WP(CRL) 260 (SC:2018).

been filed by a third party who was not privy to the offence under investigation. The raids and consequent seizure of incriminating documents from the residence of those named in the original FIR led the police to unravel information that implicated the arrested activists as active members of banned Maoist organisation CPI. The Respondents also alleged that the police had uncovered a plot to commit offences that would destabilize the fabric of Indian society. The incriminating evidence implicating the accused was in police custody and would be produced before the court in accordance with due process of law.

In a single concurring judgement Justice Khanwilkar and Chief Justice Dipak Misra opined that a superior Court can only change the investigating agency if it is convinced of *mala fide* exercise of power by the present investigating officer, and the individuals under investigation have no right to choose or alter the investigating agency as it would amount to interference with the investigation process. In the present case, barring discrepancies about the process and cause of arrest no concrete evidence proving mala fide exercise of power on the part of the investigating officer could be produced. The two judges found the argument provided by the Respondent side that, incriminating evidence against the accused had been found tying them to Maoist organizations convincing, and thus ordered the present investigation agency to continue rejecting the prayer for a SIT probe.¹¹

The dissenting opinion of Justice D.Y Chandrachud provides a far intricate analysis of the problems plaguing our justice system and provides pragmatic solutions and reliefs. The value of individual dignity is essential to the foundation of a democratic way of life, and it is the Constitutional duty of the Courts to oversee the effective administration of Justice. The Honorable Justice commented that, “The state is not taking the conspiracy theory seriously as is evident from the fact that no fresh FIR has been registered and the investigation continues to remain with the Pune police.”¹² The object of the petition is not to hinder the investigation process but to ensure a fair, credible and independent investigation by transferring the case to a SIT. Although the sanctity of the Criminal Procedural Code and its technicalities must be maintained, in doing so the protection of fundamental liberties entrusted to the Court under Article 32 of the Constitution cannot be overridden. Thus, the Court has a Constitutional

¹¹ id

¹² id at para 10

obligation to transfer the investigation to an independent agency by exercising power under Article 142¹³ of the Constitution, to ensure effective mitigation of justice.

The Petition had provided Indian judiciary an opportunity to revolutionize itself and reassert its duty not just as a mechanical interpreter of statutes and laws but as a Constitutional protector of the very essence of democracy. Unlike subordinate Courts, Supreme Court has the power to make law and re-define the very essence of past laws through precedents. Article 32 of the Constitution¹⁴ imposes a duty on the courts to act where it is apparent that the fundamental rights of individuals are being violated. One of the most appalling acts of the whole episode was the attempts of police to hold extra-judicial press conferences to further the causes of State Propaganda.

Another ugly reality bared by the arrests was that the police and the State enjoy the absolute power to arbitrarily charge any individual under stringent acts, forcing a limitation on their freedom and silencing their voice of dissent. Although the process of filing of the FIR are questionable as well as the charges attached, it would be inconclusive to debate on their truth. Various outfits, individuals, and the media have made comments to fit their own narrative, shading all colours of neutrality. As questionable as the state of the lower judiciary might appear, it is necessary to respect the Rule of Law and trust its processes, although an independent investigation was imperative to ensure that justice is delivered.

¹³ Constitution of India 1950

¹⁴ Constitution of India 1950