

Remedy for some but not for all: Looking at the inequalities in India's judicial system

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Supreme Court's division bench on 28 July 2023 granted bail to [Bhima Koregaon](#) accused and activists Vernon Gonsalves and Arun Ferreira.

The court, in its judgment, held that mere possession of literature, even if it inspires or propagates violence by itself, would neither amount to a 'terrorist act' within the meaning of Section 15 of the Unlawful Activities (Prevention) Act (UAPA), 2002 nor any other offense under Chapter IV or VI of the Act.

Both Gonsalves and Ferreira were arrested in connection with the 2018 caste based violence that broke out in Bhima Koregaon in Pune for having alleged links with the banned 'front' organization, the Communist Party of India (Marxist). The bail granted to Gonsalves and Ferreira marks the release of all 16 accused arrested by the National Investigation Agency (NIA) under the UAPA.

The Bhima Koregaon episode and the subsequent court proceedings brought to the fore certain features of the Indian legal system and the sanctity of the institutional integrity of the judiciary. Note that the [accused of the Bhima Koregaon](#), arrested under India's umbrella anti-terrorism law, were undertrial prisoners facing years of incarceration.

In July 2021, the tragic death of Father Stan Swamy, an 84 year old Jesuit priest and tribal rights activist, while in judicial custody marked the lowest point in the judicial process of the Bhima Koregaon Case. A terminally ill Stan Swamy was denied bail on medical grounds multiple times and succumbed to his illness. The death of Swamy highlighted numerous challenges not merely limited to the law but also the system of trial in place.

[Section 43D \(5\)](#) of the UAPA Amendment Act, 2008 made it difficult to secure bail since it required the court to assess guilt only by looking at the charge sheet prepared by the investigative agency. Additionally, the accused is prohibited from providing evidence outside the charge sheet in their defense.

This stands antithetical to the institution of bail that seeks to synthesize the right to liberty of one who has not yet been proven guilty and the requirement to ensure the appearance of an accused person on trial.

On a more generic note, a review of the bail orders of the accused shares two similar features: inconclusive evidence and exploitation of the membership clause. Thus, although most of the undertrial accused were released by the court, indicating the insubstantiality of the evidence to meet the membership clause, no questions were raised by the court at any point, to review the membership clause on its merits. Instead, the Supreme Court has further insisted on several stringent bail conditions, in addition to those that a special NIA court will formulate, as reported by [LiveLaw](#).

A significant [setback](#) to prisoners' right to bail when arrested under stringent laws like UAPA came into force in March this year when the Supreme Court, in a landmark verdict, reversed the judgment of [Anup Bhuyan v. State of Assam](#) (2011), which held that mere membership of a banned association is not sufficient to constitute an offense under UAPA 1967 or Terrorism and Disruptive Activities (Prevention) Act (TADA), 1987 unless it is accompanied with some overt violence.

Another set of problems arises with the way in which these cases were handled.

Although all the Bhima Koregaon accused were granted bail under similar conditions, there was no uniformity of application of the law. The reason for this non-uniformity could be located fundamentally in the preventive detention regime. Although constitutionally mandated, preventive detention is an exceptional clause, applicable majorly during the state of emergency.

Nevertheless, the court and administration's attitude towards these stringent laws has indicated a state of permanence over the years. This leads to several years of incarceration and a never-ending wait for trial. One of the glaring problems of the Indian judiciary, the massive backlog of pending cases, is the direct result of a lack of non-uniform application of the law.

Recently, in response to the questions raised by various Members of Parliament in Lok Sabha, the Union Law Ministry has responded that there are over 4,43,92,136 pending cases in various district and subordinate courts as of 24 July 2023. Among the pending cases, one lakh cases are over 30 years old.

The problem of the non-uniform application of the law has been exploited from time to time by the state, investigative agencies, and the country's affluent section, leaving the poor and the marginalized under the whims and fancies of the administration.

While the judgment of the apex court in [Teesta Atul Setalvad v. State of Gujrat](#) (2023) granting regular bail to activists Teesta Setalvad in connection with the FIR for allegedly fabricating evidence in 2002 Gujrat Riot cases is commendable, the immediacy with which the court handled the case seeks attention.

While bail pleas in high-profile cases of political significance are attended actively, unfortunately, the fate of thousands of 'common' prisoners is perishing behind bars with no hope for liberty. The lack of uniformity in applying the law not only adds a burden to the judiciary's ever-increasing list of cases but also leaves sufficient scope for discretionary practices by the state and its institutions.

Under such circumstances, a Janus-faced judiciary only protects the guarantees of liberty of specific individuals precluding a vast section of the population with no recourse to legal remedy. As a result, the judiciary fails to deliver its constitutional duty to maintain equality before the law and protect citizens' fundamental rights.

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