

# 721

## SPEAKING THROUGH JUDGEMENTS

a symposium on

the courts as thinking

working institutions

symposium participants

- 10 THE PROBLEM**  
Posed by **Shiv Visvanathan**, Adjunct Professor, Raman Research Institute, Bengaluru; **Latika Vashist**, Assistant Professor, Indian Law Institute, Delhi; **Amit Bindal**, Assistant Professor at Jindal Global Law of O.P. Jindal Global University, Sonipat; and **Avantika Tiwari**, Assistant Research Officer, IHED, Jindal Global University, Sonipat
- 14 OBSERVING CONSTITUTIONAL MORALITY**  
**Mahendra Pal Singh**, Professor Emeritus, University of Delhi; Currently, Visiting Professor, National Law University, Delhi
- 22 THE SUPREME COURT AS A CONSTITUTIONAL WATCHDOG**  
**Tarunabh Khaitan**, Professor of Public Law and Legal Theory at University of Oxford, and Future Fellow at University of Melbourne
- 29 THE STRUGGLE IS ITS OWN REWARD**  
**Kalpana Kannabiran**, Professor and Director, Council for Social Development, Hyderabad
- 39 REVERSING CRIMINALIZATION OF THE MARGINALIZED**  
**B.B. Pande**, Distinguished Professor, NLU; former Professor of Law, University of Delhi
- 46 LAW'S NATURE**  
**Abhayraj Naik**, Researcher and Consultant, Bengaluru
- 53 THE PRIVACY JUDGEMENT(S): EXPLORATIONS AND EXPOSITIONS**  
**P. Puneeth**, Associate Professor, Centre for the Study of Law and Governance, Jawaharlal Nehru University, Delhi
- 60 THINKING PRIVACY IN FAMILY LAW**  
**Malavika Rajkotia**, lawyer, Delhi
- 67 THE LACK OF HONEST TOIL**  
**Ashley Tellis**, Independent Researcher, Hyderabad
- 73 SABARIMALA AND THE FLATTENING OF RELIGIOUS COMMUNITY**  
**Amit Bindal**, Assistant Professor at Jindal Global Law of O.P. Jindal Global University, Sonipat, and Member, Compost Heap
- 78 AGE OF CONSENT AND THE IMPOSSIBILITY OF CHILD SEXUALITY**  
**Latika Vashist**, Assistant Professor, Indian Law Institute, Delhi, and Member, Compost Heap
- 89 REVISITING TULASAMMA**  
**Prabha Sridevan**, Former Judge, Madras High Court; and Former Chairman, Intellectual Property Appellate Board, Chennai
- 95 BOOKS**  
Reviewed by **Rabindra Kr. Pathak**, **Pooja Satyogi** and **Avantika Tiwari**
- COVER**  
Designed by [www.designosis.in](http://www.designosis.in)

# The struggle is its own reward

KALPANA KANNABIRAN

*'This unfinished Sisyphean struggle has not made me tire of it but I have been spared of the futile struggle with which Sisyphus was condemned; mine has been the struggle for a better world and the struggle is its own reward.'*

– K.G. Kannabiran,  
undated note, 2007/8

THE spate of attacks by the state over the past couple of years on human rights defenders is cause for concern. These are also times of extreme political turbulence, with the space for deliberative democracy and dissent virtually disappearing. Draconian law like the Unlawful Activities (Prevention) Act, 1967 (UAPA) truncates the reach of the Constitution in the play of courtroom politics and 'justice-speak'. On another track, paradoxically, the Supreme Court has resurrected what it called the 'Three Great Dissents' and unequivocally affirmed (on hindsight) the rights of citizens to live lives free

\* This essay is the first fragment of writing (incomplete, unfinished and rough) emerging from work I have been engaged in over the past few years. I have attempted to thread together narratives and writing that connect the present to an older history of performing the politics of dissent in Andhra Pradesh. I am grateful to V. Ramakrishna, Nikhileshwar and N. Venugopal Rao for sharing valuable books, materials and thoughts with me; my thanks also to Nikhileshwar for consenting to an interview at short notice. The poems by Sivasagar and Nikhileshwar were translated for this project and appear in print for the first time. I am indebted to Vasanth Kannabiran and Ramya Kannabiran Tella, poets both, for

of surveillance and state interference, upholding the indivisibility and non-negotiability of fundamental rights, the right to autonomy and dignity – through the nine-bench judgement in *Puttaswamy & Ors v. Union of India*<sup>1</sup> and the five-judge bench decision in *Navtej Singh Johar v. Union of India*.<sup>2</sup>

This then, is the context in which we will look at the cluster of cases around *Romila Thapar v. Union of India*<sup>3</sup> that was decided by a three-judge bench of the Supreme Court and snatch glimpses of the throwback to Emergency era cases that dealt with these same questions, somewhat differently – in court, government and society. This is more in the nature of a politico-legal memoir that illuminates the assemblages of the social and of resistance through literary mirrors in times of repression. What I aim to

---

readily agreeing to translate for me 'on demand.' The poem by Cherabanda Raju is part of *Dakshinayana: Selections from Telugu Literature* (forthcoming) edited by Volga and Kalpana Kannabiran. Volga's support (as always) in discussing the materials and helping me make contact with writers has been vital. Raj Mohan Tella is always my first reader and critic – but his accounts of the 'other side' of this story in the distant past have been a source of much mutual amusement and learning.

1. AIR 2017 SC 4161.

2. AIR 2018 SC 4321. For a related analysis of this case, see Kalpana Kannabiran, "'What Use is Poetry?'" Excavating Tongues of Justice around Navtej Singh Johar vs. Union of India', *National Law School of India Review* 31(1), 2019.

present here are vignettes of experiences from Andhra Pradesh in the 1970s, immediately relevant to or connected with *Romila Thapar* – in courts, in movements, and in prisons – the three spaces at the centre of the theatre of the present. In doing this, I will look at reported and unreported judgements and writings – poetry, reminiscences and prison memoirs – by the accused in this cluster of cases to unmask the representation of politics and literary sensibilities in the courtroom.<sup>4</sup>

*'Dissent is the safety valve of democracy. If dissent is not allowed then the pressure cooker may burst.'*

– Justice D. Y. Chandrachud,  
29 August 2018, while hearing  
*Romila Thapar*

Five well known scholars petitioned the Supreme Court on 29 August 2018 in the public interest, seeking immediate action from the court 'against the arrests of five human rights activists from Delhi, Faridabad, Mumbai, Thane and Hyderabad on completely fabricated charges under various provisions of the Unlawful Activities Prevention Act (UAPA) and the Indian Penal Code, after their houses and offices were raided on 28 August 2018.'<sup>5</sup>

3. AIR 2018 SC 4683.

4. The imprisonment of writers was only a small fraction of actions by the repressive state in the 1970s. This was a period of encounters, illegal custody, torture, disappearances and executions – can we forget the execution of Kishta Goud and Bhoomaiah in December 1975? There is also a wealth of writing by men and women as well as important Dalit Bahujan critiques of revolutionary politics in the four decades since the Emergency. This essay, however, using *Romila Thapar* and the Supreme Court in 2018 as its point of departure, is limited to an examination of the imprisonment of revolutionary writers and their court appearances and memoirs, while being mindful of the larger realities of authoritarian rule and of cultural politics.

5. *Romila Thapar & Ors. v. Union of India & Ors.* Writ Petition in public interest seeking the immediate release of activists raided

The five persons whose arrests under the UAPA were challenged in this petition are: Gautam Navlakha, Sudha Bharadwaj, Varavara Rao (VV), Arun Ferreira, and Vernon Gonsalves. In seeking immediate directions from the court, the petitioners pointed out to the court that all those targeted by this action are human rights defenders, activists, writers and journalists committed to democratic struggle and justice, the objective being to muzzle dissent and criticism of the government. The FIR, registered in the name of Tushar Damgule accuses artists from Kabir Kala Manch of causing disturbance through their speeches and performance. Specifically seen as incitement was the following 'malice and disputable statement' (sic): '*Jab julm ho to bagawat honi chahiye shahar mein, jab julm ho to bagawat honi chahiye shahar mein, Aur agar bagawat na ho to behatar he ke ye raat dhalane se pehle ye shahar jalkar rakh ho jaye.*' ('When injustice is done there should be revolt in the city/And if there is no revolt, it were better that the city should perish in fire before night falls.')

*'Bhima Koregaon ne Diladhada, Navi Peshwa Navi Peshawar Mainat-gada, Udavathikrya Rai Rai re, Gadun Taka Peshwai Re Garjana Sidnakache, Aalee Nvyane Peshwai re Garaj Tila Thokyachee, Re Saimka Garaj Tila Thokyachee...'* (Para 2). (Bhima Koregaon has taught us that we must destroy the new peshwai. Crush it to bits like mustard seeds and

and arrested in complete violation of their fundamental rights guaranteed under Article 14 and 21 of the Constitution of India. Accessed on 29 August 2018 from [www.livelaw.in](http://www.livelaw.in). While the writ petition speaks of five persons arrested in connection with what have come to be known as the Bhima Koregaon case – the arrests in fact spread out from January to November 2018 and involve 22 accused persons (20 arrested and two living under the shadow of arrest). For details, N. Venugopal, 'Bhima Koregaon', *Veekshanam* 12(VV), 2019, p. 4.

bury it. With the roar of the lion, let us unite to overthrow the new peshwai.)

While we will return to the performance of resistance and its relationship to incitement shortly, a constitutive aspect of these struggles, performances, movements and repression is the fact of it being a criminalization of Dalit resistance against caste, against Hindutva politics in all its avatars, and Dalit assertions of the right to political dissent. While all those under arrest may not be Dalit, the sounding of the bugle of anti-caste protest on a scale unprecedented in recent times marks this moment apart.

On the specific facts of the case, interestingly, none of the five persons on behalf of whom this writ petition has been filed are named in this FIR. The commemoration was led by anti-caste cultural activists as part of an annual event. The FIR then proceeds to translate the performance into incitement (although even in this segment of the FIR, the arrested persons in this petition do not figure by name): 'Therefore, I state that, banned Maoist Organization (CPI) have organized role is to boast and implicate the strong Maoist thoughts in depressed class and misdirect or misguide them and turn them towards unconstitutional violence activities, carrying the same thoughts, Kabir Kala Manch's Sudhir Dhawale and his other activist had presented different areas in Maharashtra, *malice speeches, had spread false History, disputable statements and incite objectionable slogans, sung songs and road-dramas.* They distributed some objectionable and provocable pamphlets, books too. *So remarkably it reflected at Bheema Koregaon and nearer places by stone throwing, castes clashes and arson incidents.*'<sup>6</sup>

The investigating officer draws the link between the 'frontal organiza-

tion' of CPI (Maoist) – Kabir Kala Manch – and the arrested persons who are all allegedly Maoists, involved in an 'ongoing sinister design of having committed and in the process of committing criminal offences having the potential of destabilizing the society', and that they planned 'to carry out violence including planned ambush/rebellion against the enemy (which is our country and security forces)'<sup>7</sup> – according to the investigating officer, they were 'not merely political dissenters.'<sup>8</sup>

In pondering over these questions, the two judges who authored the majority judgement ask, not if a prima facie case has been made out based on the evidence on record and the arguments placed before the court by the petitioners, the accused and the respondents, but 'Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law-abiding person?'<sup>9</sup>

The case was decided 2:1 rejecting the plea of the petitioners. A careful reading of the dissenting judgement by Justice D.Y. Chandrachud – especially its presentation of the facts – makes it clear that the court did not need to rely on the perception of the next friend of the accused but could draw their inference from the outcomes of past trials three of the accused went through: Arun Ferreira acquitted in all 11 cases, Vernon Gonsalves acquitted in 17 of 19 cases and VV acquitted in all 20 cases he was prosecuted in<sup>10</sup> (para 2). The other two had not stood trial before this case – and therefore there

was no 'criminal/terrorist/Maoist history' in their records.

Added to this case is the case of Anand Teltumbde where the Supreme Court refused to quash the FIR, directing Teltumbde instead to seek reliefs before the appropriate court. The earlier round of arrests – of Surendra Gadling, Rona Wilson, Shoma Sen and others, likewise, may be questioned on the same basis. In the case of G.N. Saibaba, the necessity of holding a person with multiple and severe disabilities in solitary confinement and the refusal of any court to consider the grave harms inflicted by such incarceration raise serious concerns for human rights defenders.

Why are these people in custody at all? Senior advocate Rebecca Mammen John's questions are pertinent: 'What has happened to first principles of criminal jurisprudence? Why are courts taking an extreme, almost perverse view while assessing evidence? Why are courts insisting that accused persons face trial in cases where it can clearly be seen that the evidence is shaky, perhaps fabricated and false? Why must they insist that the accused prove his innocence after facing a long, arduous, expensive and debilitating trial, when the evidence can be thrown out so easily at the preliminary stage?'<sup>11</sup>

From this state of suspended justice, I move to explore this field in two parts. The first part looks at the literatures of incarceration that are intimately connected to the case under discussion in the hope that the reading citizenry – judges, lawyers, politicians and the lay public – can see and comprehend the different shades of grey in a complex and intertwined tale of dissent and of constitutional morality embedded in this tale of many parts.

11. Personal telephone interview, 20 January 2019.

The second part looks briefly at judicial reasoning and the place of political dissent in the constitutional imaginary – for political dissent this is, notwithstanding the police averments to the contrary – spinning back in time to a selection of cases where precisely the performativity of literature and its (un)proximate connections to revolution were debated in the courts.<sup>12</sup>

My regret is, of course, that except for the teller of this tale, all the actors in the courtroom with one exception are men. The exception(s) tell a parallel story buried deep that waits to be excavated. This is indicative of the deeply gendered spaces that institutions of justice, state and political movements are – spaces that utterly invisibilize the figure of women as architects of the right to dissent, although we know from a wealth of feminist historiography that they are.

In the most recent cases, Sudhir Dhawale, a leader of the Kabir Kala Manch is now in prison facing prosecution under the UAPA and various sections of the Indian Penal Code for incitement to violence and waging war against the state. In the FIR placed before the court in *Romila Thapar*, performance of the lines from Bertolt Brecht's 1942 play *The Good Person of Szechwan*, was understood by the complainant and the investigating officer as a malicious incitement to violence.

'When injustice is done there should be revolt in the city  
And if there is no revolt,  
it were better that the city should perish in fire before night falls.'<sup>13</sup>

12. All the cases from Andhra Pradesh discussed in this essay were ones in which my father, Civil Liberties Advocate K.G. Kannabiran (1929-2010) defended the accused.

6. Id., para 2, emphasis added.

7. Id., para 10.

8. Id., para 11.

9. Id., para 20.

10. Id., para 2.

What is the relationship between the performance of resistance and incitement to violence? The Parvatipuram Conspiracy Case was the first time communists were tried *en masse* for ‘waging war against the state’ in independent India. While it is out of the scope of this paper to deliberate at any length on the case, I reproduce below the poem by Sivasagar recited in the court in lieu of his statement – challenging the legal definition of the crime of conspiracy itself, recasting it to speak to the conspiracies of those in power.<sup>14</sup>

*Statement of a ‘Conspirator’*

‘Your Lordships!

The sunrise is no conspiracy

The Sun no conspirator

Would you call the labour

of a pregnant woman conspiracy?

And the path of the chariot of history?

Your Lordships!

Demon landlords

rolling up our land like mats

tucking them under their arms conspire

The brokers hawking my country

to foreign countries are conspirators

Soliciting alliance at Kosygin’s leprous

feet conspiracy

Nixon’s food borne hither by ships

conspiracy

13. Bertolt Brecht, *The Good Person of Szechwan*, 1942, p. 44. <http://www.socialist-stories.com/liberate/The%20Good%20Person%20of%20Szechuan.pdf>. Accessed on 23 February 2019.

14. K.G. Satyamurthy (1931-2012), born in Krishna district, also known by his pen-name Sivasagar was a leader of the Communist Party of India (Marxist-Leninist), and an unparalleled revolutionary poet. Co-founder (with Kondapalli Seetaramayya) of the CPI-ML (Peoples’ War Group), and long-time leader who spent years underground, he parted ways with the party, inaugurating a serious debate on Ambedkarite philosophy and caste in the naxalite movement, drawing on his personal and political experience with revolutionary politics. A prolific writer and philosopher, Sivasagar is an icon of the Dalit movement and a leading figure in contemporary Telugu literature.

Devouring Bharat’s freedom is conspiracy

The ballot box is a conspiracy

“Garibi Hatao” is a conspiracy

Indiramma’s smile a conspiracy

Conspiring to hang the sun

through arrogant half-closed eyes

of injustice is conspiracy

The sunrise of Srikakulam is no conspiracy

The guerilla sun no conspirator!

Sunrise piercing through darkness

spreads warmth and light

Among the people

Your Lordships!

You are indeed good people!

In this evil hour of injustice

Yama Dharmaraja incarnate!’<sup>15</sup>

In 1971, three poets – Nihilshwar, Jwalamukhi and Cherabanda Raju<sup>16</sup> – who called themselves the Digambara poets were arrested under the Andhra

15. Sivasagar (alias K.G. Satyamurthy), ‘Kutradaru Vangmulam’, read out in court in June 1973. Reproduced in Cherukuri Satyanarayana, *Suryodayam Kutrakaadu* (Sunrise is no Conspiracy), Tarimella Nagireddy Memorial Committee, Guntur, 2016, p. 3-4. Translated from Telugu by Vasanth Kannabiran.

16. Cherabanda Raju (1944-1982), born as Baddam Bhaskara Reddy in Ankusapuram in Hyderabad, was a Telugu teacher in a government school in Hyderabad. He earned wide acclaim for his revolutionary songs. He was imprisoned under Preventive Detention in 1971, again in 1973 under the Maintenance of Internal Security Act, and finally implicated in the Secunderabad Conspiracy Case – all for inciting armed rebellion against the state through his songs. Suspended from his job, he died young and is remembered for singing the revolution as few could. Jwalamukhi (1938-2008), was an active member of the Organisation for People’s Democratic Rights. A prolific poet and human rights defender, he was arrested in 1971 under Preventive Detention. Nihilshwar (b. 1938), renowned poet for over six decades, was imprisoned in 1971 under Preventive Detention. All three were Digambara poets and co-founders of Viplava Rachayitula Sangham (VIRASAM) also called Revolutionary Writers’ Association (RWA).

Pradesh Preventive Detention Act, 1970. J. Vengal Rao, then State Home Minister declared in the Assembly that ‘these poets are dangerous because they are “verbal Naxalites”.’<sup>17</sup> Nihilshwar also speaks of a member of RWA being held in police custody for four days ‘for the crime of writing a poem and publishing it in a local weekly... two years ago. Later he was fined Rs 50 by the magistrate for “literary crime”.’<sup>18</sup>

The Digambara poets were held in custody for 50 days. Arguing in their defence, civil liberties lawyer, K.G. Kannabiran persuaded the court to witness the performance of revolutionary poetry: ‘The hearing was totally uninhibited and free. The courtroom was packed and our request to permit the poets to read out the poems impugned by the detention orders was acceded to... [T]he best was Cherabandaraju’s reading. It was a fine satire on Indira Gandhi’s socialism set to rhythm and tune. This device demonstrated the untenability of the detention orders against these three poets.’<sup>19</sup>

Nihilshwar recalls the mood in the court – it was the first time poets were asked to perform in a court of law. The poem he read out was *Bhayam* (Fear).

*Fear*

wears a deathly countenance

turning blood

to water, it

drenches

the veins

17. Nihilshwar, Interview, 16 January 2019, in Hyderabad. ‘We have travelled now all the way from verbal Naxalites to urban Naxalites’, he commented sardonically during the interview.

18. Nihilshwar, ‘Dissent and Hypocrisy’, *Frontier Weekly*, 23 March 1974, p. 7.

19. K.G. Kannabiran, *Wages of Impunity: Power, Justice and Human Rights*. Orient Longman, Hyderabad, 2003, p. 300.

Yet death  
is the idea  
that we are but mortal, so  
to live the life of an animal  
tending the pleasures of  
the body alone  
only ever gives way to fear

Countless die  
each passing day  
some innocent  
some nameless  
others violently  
still others tortured  
brutalised by lead  
each round a mark  
of the enemy's cowardice  
the inhumanity  
of their violence  
thriving evidence  
of the derangement  
of authority

So why live in fear?  
Rather than  
crawl and prey unseen  
like a bedbug or common louse  
and creep about  
like the agents that surveil  
Set yourself free  
and live, why don't you!

Your death,  
whether distant  
nameless  
or cruel  
will ensure  
you overthrow  
the forces  
that terrorise and decimate  
those who are free  
And in your resolve  
to change  
this wretched system  
may you immerse yourself  
in the warmth of struggle  
knowing always  
that in the anatomy of fear  
lies the seed  
of its inevitable defeat.<sup>20</sup>

Inguva Mallikarjuna Sharma, speaking of his years in prison between 1973 and 1978 as A-1 in the Secunderabad Conspiracy Case, narrates this habit of performing revolution in the courts: 'Those days coming and going to court was a sort of cynosure to both us under-trial accused as also to our visitors. We would sing revolutionary songs, Cherabanda Raju would also begin singing many times, and even give slogans inside the courts despite protests from the judges. Normally no action would be taken for this 'contempt' and 'defiance' but in emergency things changed. They began to foist cases under criminal law amendment for giving out slogans and that decreased the number of slogan raising comrades. However, I continued till last – even giving slogans in the court trying such cases!'<sup>21</sup>

Cherabanda Raju read *Vande Mataram* in court:

Oh my beloved motherland  
You are mother, father and god  
Yours the virtue of heaving in the beds  
of rogues/villains  
Yours the beauty of one who has  
pawed each limb in the global  
market.  
Yours the youth of one who slumbers  
forgetfully in the arms of the  
wealthy

20. Nikhileshwar, *Nikhileshwar Kavityam*. Emesco Books, Hyderabad, 2018, p. 108-109. Translated from Telugu by Ramya Kannabiran Tella.

21. I. Mallikarjuna Sharma, 'Tale of a Roving Rebel', *Frontier* 50(30), 28 January-3 Feb 2017. Vice President Venkaiah Naidu was an ABVP detenu at the time that Sharma was a CPI (ML) detenu – and Sharma recalls sharing a van and escort with him to court, 'bitter ideological rivals' who 'had some friendly or non-rancorous chat' on the ride to court. The possibility of this 'chat' however fleeting is foreclosed in the present political environment, a foreclosure that signals the hegemonic disruptions of debate and multi-sited politics attendant on the rise of right wing majoritarian nationalism to state power.

Swooning unmoved whether people  
spit at you or cast mud at you  
You are the Bharati who stands  
patiently  
while rats and bandicoots dig at the  
roots of crops ripe for harvest.  
You are the evergreen land that does  
not reach people's mouths.  
Vandemataram. Vandemataram  
Stitching flags from the clothes on  
your body  
Boldly you parade naked  
Yours the wretchedness of a cat with  
burnt paws  
Roaming on terraces built on borrowed  
money  
Yours the grief of being unable to  
comfort  
children who spring at your shrivelled  
breasts  
yours the elegance of woman starving  
blazing with hunger  
taking to the streets in borrowed  
finery.  
Amma Bharathi. Whither are you  
going  
Vande Mataram! Vande Mataram!<sup>22</sup>

In his obituary of Cherabanda Raju, K. Balagopal recalls that long after he wrote this poem, when he recited it in jail during Emergency, 'he was assaulted by a RSS leader for the blasphemy.'<sup>23</sup> In this as well, the historical repetition of cycles of reactions that hold up a lesson for court-craft and public discourse. They underscore the importance of not losing sight of the history of liberty jurisprudence in independent India, not just in the crest but in the peripheries and margins, which is where the important and enduring lessons lie forgotten.

22. Source: 'Patalu, Cherabanda Raju Kavitalu' in Varavara Rao (ed.), *Peoples' Books*, Vijayawada, 1982, p. 5 (Written in 1968). Translated from Telugu by Vasanth Kannabiran.

23. K. Balagopal, 'Cherabanda Raju', *Economic and Political Weekly*, 24 July 1982, pp. 1188-1189.

For 46 years, from 1973 to 2019 (the continuing present), VV has lived in anticipation of incarceration or in jail, as Hemalatha, his wife, recounts. In December 1985, during N.T. Rama Rao's term as Chief Minister, when there were open threats to his life from the police, VV asked for cancellation of bail in order to protect his rights to free speech and life. Towards the end of 1988, his family, in their efforts to secure bail, met Justice V.M. Tarkunde and Arun Shourie (then editor of *The Indian Express*). Arun Shourie asked them to persuade VV to write a weekly column in the Express that would generate public support for his release: 'Not politics, but about what life is like in prison. The pigeons, birds, trees, flowers, skies, fellow prisoners, their troubles, the books he reads, his thoughts. VV is a sensitive person. His writing on these aspects will reach people across the country through the Indian Express.'

And he offered to convince the jail authorities to permit this writing. So from 25 December 1988 to 16 April 1989, VV wrote a weekly column that appeared in Telugu and English—later published as a book in Telugu with a foreword by Kaloji Narayan Rao and in English with a foreword by Ngugi wa Thiong'o.<sup>24</sup> Originally published in 1989, the Telugu collection, *Sahacharulu*, was republished in February 2019 in the context of VV's incarceration in the ongoing Bhima Koregaon case.<sup>25</sup>

The throwback to the 1970s, through the singular figure of VV, now 79 years old and in Yeravada jail,

24. Ngugi wa Thiong'o, 'That Which the Imagination Makes Possible', in Varavara Rao, *Captive Imagination: Letters from Prison*. Penguin/Viking, New Delhi, 2010, pp. 7-12.

25. Hemalatha, 'Marokasari Nirbandha Jnyapakalu (Once More, Prison Reminiscences)' in Varavara Rao, *Sahacharulu*. Navodaya Publications, Hyderabad, 2019, p. 5-6. Translation mine.

ceases to be a throwback – the past, present and future indistinct from each other, especially in the machinations of penal justice. For as was observed in *Romila Thapar*, in the 20 prosecutions he has faced in the past 46 years, he has not had a single conviction. And yet, as he says poignantly, it has been a lifetime of waiting:

'Singing in solitary glory in that remote corner of the dark sky  
More beloved than the others  
What are you called, my pretty star?  
Whatever your name  
There is on earth a signal  
Far more precious  
That lights my path.

Waiting for the hearings in court...'<sup>26</sup>

It has also been a lifetime of waiting and trips to courts and jails and police stations for P. Hemalatha. Not only seeking the release of VV, her husband, but defending her own actions in defence of free speech. A cursory look at her life shows her stunning resilience and grit in the face of continued onslaught by the state under different political regimes. While most recently in the news for releasing an open letter to the Chief Justice of India seeking VV's release on bail on merits, for which she mobilized over 600 signatures worldwide,<sup>27</sup> I point to an older, quite spectacular account that lies buried and forgotten,<sup>28</sup> an account which in fact anticipates her life to the present.

26. Varavara Rao, *Captive Imagination: Letters from Prison*. Penguin/Viking, New Delhi, 2010, p. 8. Several poems and letters in this collection were translated by Vasanth Kannabiran in 1988-89 for publication in *The Indian Express*.

27. P. Hemalatha, Open Letter to the Chief Justice of India, 26 March 2019. See <http://www.newindianexpress.com/cities/hyderabad/2019/mar/27/600-sign-open-letter-to-cji-seeking-bail-for-varavara-rao-1956444.html>. Accessed on 30 April 2019.

'Mrs. P. Hemalatha, 27, lay waiting for the arrival of her third child at the Government Maternity Hospital, Warangal, on April 26, 1974... Just before coming to hospital she had worked hard with her associates to bring out the May issue of *Srjana*, a Telugu literary monthly. Two thousand copies of *Srjana* devoted to the railway strike were out on the street that day.'

VV, then a college lecturer was arrested days after her return from hospital, in the Secunderabad Conspiracy Case. Three years later, after Emergency was lifted in 1977, Hemalatha was sentenced to two years in prison for a poem published in that issue (with Madhu Dandavate who led the railway strike during Emergency now installed as Railway Minister). The Sessions Judge, Warangal, delivering the judgement observed: 'The fact that the accused is the mother of three children warrants a lenient view, *but as she is not repenting on what she did*, we have to be firm to meet the ends of justice...'

The poem, which she as editor was unrepentant about publishing was by Satyam, titled 'Can the Jails run the Trains?'

'We work on the railways  
Turning our bones into coal  
Turning our blood into steam  
Our lives sapped  
By hunger and soaring prices  
...  
Is it demanding the moon  
...  
To ask for wages on par  
with other public sector employees  
...  
But look, the ruling class  
Is already panic stricken  
They see armed struggle  
and revolution behind our strike  
...'

28. Narendra Panjwani, 'Prison for a Poem', *Times of India*, 21 August 1977. The excerpts that follow on this case are from this report.

the struggle won't end comrades  
until we achieve a workers' state.'

This account foregrounds the deep contradictions posed by the presence of women in revolutionary/progressive movements. The constant slippage between receding into the invisibility of reproductive labour and conjugal duties in a patriarchal revolutionary imaginary on the one hand, and the refusal by women to 'repent' or be contained/confined within that space (being punished by a criminal court for that refusal) on the other, is one that must be disentangled.<sup>29</sup>

Imagining these light and shadow plays, and bringing the conflicted space of 'womanhood' in times of incarceration into stark relief, is a poem by feminist poet, Vasanth Kannabiran, written as a response to VV's poem from jail titled 'Waiting'. Published originally in Telugu as 'Nireekshana':

'...and you speak of waiting  
for petty inconsequential things  
of waiting  
for bells and meals and papers  
but what of my long life  
this womantime of waiting?  
now without a centre?  
what is there for my life to revolve  
around?  
...  
no—it is no great act of faith to wait.  
but not to wait  
that would demand a faith  
...'

29. For a detailed discussion on these questions see Vasanth Kannabiran, Volga and Kalpana Kannabiran, 'Women's Rights and Naxalite Groups', *Economic and Political Weekly* 39(45), 6-12 November 2004, pp. 4874-4877; Kalpana Kannabiran, Volga and Vasanth Kannabiran, 'Reflections on the Peace Process in Andhra Pradesh', *Economic and Political Weekly* 40(7), 12-18 February 2005, pp. 610-613; Kalpana Kannabiran, Volga, Vasanth Kannabiran, 'Peace and Irresponsibility', *Economic and Political Weekly* 40(13), 26 March-1 April 2005, pp. 1310-12.

You say that you are confined to a  
limited space  
like a woman's world  
what do I do  
with an existence in which  
my public world is  
confined to a limited space  
to the semblance of a woman's  
world?'<sup>30</sup>

The prison holds multiple layers of disobedience and speaks to several expressions of the loss of liberty simultaneously—in fact and metaphorically. Co-accused with VV in the Bhima Koregaon case is Arun Ferreira, whose prison memoir is a searing account of the criminal justice system as it operates today. But, like every one of those placed in custody as political prisoners has reminisced, if the court was a space for politics and expressions of solidarity, so was the prison: 'In October 2010, due to overcrowding in the Chandrapur prison, around sixty Naxal accused undertrial prisoners from there were transferred to Nagpur. All of them were tribals from the interiors of Gadchiroli. With their arrival, I became rather busy... Suddenly there were always unlettered adivasis from Gadchiroli who required help in sending applications to court, studying their charge sheets or making points for their defence... Among such indigent tribals was a young lady, seven months pregnant, who... gave birth to a healthy boy in the prison hospital... Though he had committed no crime, Azad became a prisoner too, and would remain one until his mother was freed.'<sup>31</sup>

What is a jail like? The  
Musheerabad jail – 'the high wall sur-

30. Vasanth Kannabiran, 'Waiting'. English Unpublished. On file with author. Published in Telugu, Vasanth Kannabiran, 'Nireekshana', in Volga and Vasanth Kannabiran (eds.), *Neeli Meghalu* Asmita Resource Centre for Women, Secunderabad, 1990, pp. 63-70.

rounding it, the huge gate within which there was a small gate – like the mouth of a python;'<sup>32</sup> 'That door yawned open like the small mouth in the mountain-like body of the elephant. That was the small gate. It opened out from the big gate.'<sup>33</sup> Ferreira describes the *anda* barracks as 'a cluster of windowless cells' in the maximum security zone of Nagpur jail. The prisoner cannot see anything outside, and although it resembles an enormous egg, the difference is that '[t]he *anda* is impossible to break out of. Rather, it's designed to make inmates crack.'<sup>34</sup> It is in this cell, in which Ferreira served time, that another prisoner convicted on similar charges in March 2017 is held – G.N. Saibaba, who has written his prison memoirs in verse:

'No, the older order  
Isn't changing to yield a new one  
No signs of the  
apocalypse in sight  
No revelations are unfolded

Yet –  
A terrible void is born  
A terrible future awaits us.'<sup>35</sup>

The struggle then, as now, has been to keep furiously writing and resisting state action – 'house searches, midnight raids, preventive detention laws, MISA, arrests under terrorist laws, false cases, false witnesses, confes-

31. Arun Ferreira, *Colours of the Cage: A Prison Memoir*. Aleph, New Delhi, 2014, p. 114.

32. Varavara Rao, *Captive Imagination: Letters from Prison*. Penguin/Viking, New Delhi, 2010, p. 17.

33. Nihilshwar, *Godala Venuka* (Behind Walls). Arunasahiti, Hyderabad, 1972, p. 1.

34. Varavara Rao, op. cit., 2010, p. 2.

35. G.N. Saibaba, 'A Terrible Void' (excerpt), in *Nenu Chaavunu Niraakaristunnaanu: Saibaba Anda Cell Kavitvam* (I am rejecting death: Saibaba's *anda cell* poetry) VIRASAM, Hyderabad, 2019, p. 17. For a travesty of justice that G.N. Saibaba's incarceration is, see Kalpana Kannabiran, 'The



sions (approvers) extracted through force and bribery’, as K.V. Ramana Reddy observed in 1975 in his *Prison Diary*.<sup>36</sup> In the experiences of the accused in the Bhima Koregaon case, we return in troubling fashion to this moment, the past fusing with the present in state action and in the resistance to it.

The court statement of K.V. Ramana Reddy, ‘But am I a citizen in the true sense of the word? A citizen, by definition, is one who both rules and is ruled. I am only here to be ruled, and as such, a very essential part of citizenship is denied to me, and to that extent, I am only a subject, as all other detainees are. A state which calls itself a democracy cannot, and ought not to, admit of subject-hood to even the tiniest fraction of its population, and at the same time hope to continue to be a democracy.

... What on earth is this Parliamentary Supremacy for? To beat down the judiciary?’<sup>37</sup>

The charge sheet against Nikhileshwar read as follows: ‘You are one of those who launched the Digambara (naked) poets. Along with your friends Jwalamukhi and Cherabanda Raju you

prodded Sri Sri into leaving the Progressive Writers’ Association and joining the Revolutionary Writers’ Association. You are the principal functionary of the Revolutionary Writers’ Association. Through your poem ‘Fear’ you tried to incite people to class struggle. You preached that they should face death fearlessly in struggle. In your poem ‘Counter-violence’ you criticised the Indian government’s role in crushing the revolt in Ceylon by satirising it. You travelled extensively in the state participating and speaking at student, youth, revolutionary writers and civil rights defenders meetings. You attended the Punjabi writers conference in Jullunder and endorsed its resolutions.’<sup>38</sup>

Nikhileshwar responded with a point-by-point rebuttal of the statements in the charge sheet: ‘Whatever I might be by profession, as a poet and a writer... defying the evils of caste, creed and race, I wrote along with the other Digambara friends for universalism... The present society is the result of several contradictions. To go to the roots of these contradictions is my responsibility... My writings were within the limits of the freedom of speech and expression provided by the Constitution... The contemporary writer finds concrete shape for his ideal in the humanistic philosophy of Marxism. I can say unhesitatingly that I follow this great philosophy and write to the call of the times.

It is our duty to assail the inequalities in this society and rouse the people. We wrote poetry as part of our responsibility. To say that they are sadistic or obscene is the result of your perverse interpretation. The Police Department lacks the competence to decide what is sadism or obscenity in literature. The poems *Fear* and *Counter-*

38. Nikhileshwar, *Walls*. Unpublished, 1975. On file with the author.

*Violence* reflect my views. We did not defraud Sri Sri. It would be insulting him to say that we prodded him into joining the Revolutionary Writers’ Association. He was one of the founders of the Association. I do not think writing, travel or participation in meetings could constitute a threat to public safety or law and order.’<sup>39</sup>

Justice O. Chinnappa Reddy and Justice A.D.V. Reddy, hearing the case in the Andhra Pradesh High Court found the grounds of the order of detention invalid. In a sharp comment Justice Chinnappa Reddy observed: ‘The first three grounds in the three orders of detention are identical... We are unable to see any relevance between these three grounds and the object of the detention namely, maintenance of public order... We are also unable to see how their beliefs in Marxism, Leninism and Maoism or their “vulgar and sadistic” references to certain classes of people in their writings have any rational connection with the object of detention. Beliefs are not subject to controls and no one can be jailed for his beliefs.’<sup>40</sup>

He quoted Chief Justice Patanjali Sastri who two decades earlier had ‘lamented’: ‘Notwithstanding repeated admonition by this court that due care and attention must be bestowed upon matters involving the liberty of the individual, it is distressing to find that such matters are dealt with in a careless and casual manner’ after twenty years we find from the grounds furnished in these cases that the position continues to be the same and we

39. Ibid.

40. K. Yadava Reddy, B. Bhaskar Reddy, A.V. Raghavachari v. Commissioner of Police, AP & State of AP, WP Nos. 3115, 3116 & 3117 of 1971. High Court of Judicature at Hyderabad, 20 September 1971. O. Chinnappa Reddy, J. & ADV Reddy, J. Para 21. Emphasis added.

can only join the lament of Patanjali Sastri, C.J.’<sup>41</sup>

Forty-five years later, it is not unreasonable to join the lament of Justice Chinnappa Reddy and of Patanjali Sastri, C.J. before him. The responsibility of the state in matters to do with the negation of personal liberty continues to be the most distressing aspect of our political life.

On poetic expression and incitement, Justice Chinnappa Reddy said: ‘Poetry is the “spontaneous overflow of powerful feelings”; it is the record of the poet’s struggle “from darkness to light and passion and extravagance go hand in hand with it”. It is difficult to see how the mere outpourings of a poet’s thoughts and emotions in the form of a poem can have any rational connection with public disorder.’

In *Jwalamukhi v. State of Andhra Pradesh* the following year again, the dissenting judge, Justice Madhava Reddi observed: ‘These poems only educate the literate Telugu people in these ideas and theories, but as observed by Justice Holmes, ‘every idea is an incitement’ and the propagation of every such idea cannot, in my opinion, be termed seditious.’<sup>42</sup>

This dissenting opinion was upheld by Justice Krishna Iyer in the Supreme Court three years later during the Emergency in *The State of Uttar Pradesh v. Lalai Singh Yadav*,<sup>43</sup> which concerned the publication of a Hindi translation of Periyar’s work *Ramayana: A True Reading*. The circulation and interweaving between proscription by the state of political dissent by the left and the majoritarian proscription of anti-caste critiques of Hindu religion then and now is an aspect that merits a more detailed exploration.

41. Id., para 27.

42. ILR (1973) AP 114.

43. AIR 1977 SC 202.

Four poems published in the journal *Srujana* led to the proscription of the issue by the state. In *P. Hemalatha v. State of Andhra Pradesh*, a three-judge bench of the Andhra Pradesh High Court deliberated on the contents of the issue.<sup>44</sup> While the bench comprising Justices Lakshmaiah, Alladi Kuppuswamy and A. Sambasiva Rao unanimously upheld the proscription, Justice Kuppuswamy upheld it on the basis of two poems (the third and fourth), while the other two held that all four poems incited violence against the government – and this is an important distinction:<sup>45</sup>

‘In the first verse the author says that while there is plenty of grains in the granaries of the landlords there is hunger in the bellies of the people. He suggests breaking of godowns and distributing the grains and cutting to pieces “the bastards who obstruct them”. *I do not find anything in this verse which even remotely brings into hatred or contempt or excites or attempts to excite disaffection towards the Government*’ (para 14, emphasis added).

The next one is called ‘Rickshaw Song’ by Gaddar:<sup>46</sup>

‘... The police bastard,  
Is an Yama for me,  
He stop some at every place,  
He squeezes money out of me.

...  
‘Some hero,  
Get into my rickshaw,  
He opened my eyes,  
enquired about my earnings and sufferings,  
He pitied me,  
...  
He explained,  
How the haves earned lakhs,  
He explained,

44. *P. Hemalatha v. State of Andhra Pradesh*, AIR 1976 AP 375.

45. Id., para 14, emphasis added.

46. Id., para 86.

How the others became poor,  
He showed me away out of poverty,  
He has given me the address in the forest

...  
Before I go to the forest,  
I will meet the Sait,  
I will cut his throat,  
With all my vengeance,  
And for all my jor...’

This, says Justice Kuppuswamy, ‘is not directed against the police generally... But this appears to me to be an accusation only of a particular type of policeman who is corrupt and tries to squeeze from the poor rickshawala. *I do not think there is anything in this poem which contains matters publication of which is punishable under S. 124-A, I.P.C.*’<sup>47</sup> (para 15, emphasis added).

This is one small part of the performance of dissent in the courtroom in the 1970s. The ways in which the echoes of that time reverberate through the present, holds lessons for a defence of human rights today and should form the basis of our understanding of liberty jurisprudence. The critical difference to keep sight of is the character of the state that has shifted from an authoritarian state of the Emergency era to right wing authoritarianism in the present, and the arbitrariness of courts that validate repression in times of ‘freedom’ as we saw in the case of *P. Hemalatha*’s conviction in 1977.

According to Justice D. Y. Chandrachud: ‘Individuals who assert causes which may be unpopular to the echelons of power are yet entitled to the freedoms which are guaranteed by the Constitution. Dissent is a symbol of a vibrant democracy. Voices in opposition cannot be muzzled by persecuting those who take up unpopular

47. Id., para 15, emphasis added.

causes. Where, however, the expression of dissent enters upon the prohibited field of an incitement to violence or the subversion of a democratically elected government by recourse to unlawful means, the dissent ceases to be a mere expression of opinion.’<sup>48</sup>

The most significant and indeed critical aspect of the decision of the Supreme Court in *Puttaswamy* was the resurrection of dissents. Of the three great dissents that were affirmed as correct by the nine-judge bench was the judgement of Justice H.R. Khanna in *ADM Jabalpur v. Shivakant Shukla*.<sup>49</sup>

During the Emergency of 1975, when the entire Supreme Court capitulated, and civil liberties movements were at their strongest outside courts resisting repressive rule, Justice Khanna was a lone voice that said, ‘Even in the absence of Article 21 in the Constitution (i.e. the right to life and personal liberty), the state has got no power to deprive a person of his life or liberty without the authority of law.’ I have attempted in this essay to briefly trace the genealogy of Justice Khanna’s opinion in one state. The ‘strength... and the courage of conviction’ of Justice Khanna build on the indomitable dissenting spirit of defenders of civil liberties in locales far from the pinnacle of justice.

We have full and partial judicial dissents in these cases. Within the 1970s courts, the turn from dissent to incitement is far from resolved in the judicial mind, as we saw in the cases of *Srujana* as also in Justice Chandrachud’s observation above. On the other side, despite internal contradictions and differences within movements on the course, strategies and

modalities of struggle (a discussion of which is out of the scope of this paper), the spaces of the courtroom and the prison acquired a memorably pedagogic quality – where courts, law, the state and oppressive regimes were critiqued through poetry and song, and judges were drawn across the line to dissent.

This stands in contrast to the present time where judges take recourse to poetry to speak to questions of dignity, autonomy and liberty as we saw in *Navtej Singh Johar*.<sup>50</sup> As performative moves, they speak to the radical politics of court-craft and to revolutionary stirrings in constitutional interpretation. As memory of cultural politics they evoke possibilities of a different trajectory for negotiating the present – and across it all, it is a memory of a moment charged with emotion, just as the present is too: ‘After the high-pitched and at times emotional arguments concluded, each side presenting his case with equal vehemence, we as Judges have had to sit back and ponder over as to who is right or whether there is a third side to the case.’<sup>51</sup>

The repression and arrests started immediately after the election victory of Indira Gandhi after the 1971 war leading to a consolidation of the authoritarian regime. Today, in a comparable political climate, Justice D.Y. Chandrachud’s dissenting opinion in *Romila Thapar* joins the extremely slim, fragile, yet valuable tradition of dissent in independent India – where political dissent is inextricably interwoven with judicial dissent, together creating illimitable possibilities of hope for a better future, even while we struggle for justice and liberty in the here and now.

48. Dissenting judgement, *Romila Thapar case*, para 29.

49. AIR 1976 SC 1207

50. AIR 2018 SC 4321.

51. *Romila Thapar case*, para 19, majority judgement.