

The worth of liberty in the eyes of the law

(GS Paper 2, Polity and Governance)

Context:

- Serious conversations around criminal procedure in India usually happen in the event of scandalous exercise of authority by the powers that be.
- Currently, one such wave of interest is witnessed in the subject, prompted by the **arrest and custodial detention of Alt News co-founder** Mohammad Zubair, purportedly for having **published a tweet almost four years ago** which has only now caused hurt to the religious sentiments of unidentified persons.



Opinions:

- Those **standing with the accused decry his persecution** and that of independent journalism, while others argue that the **police ought to be allowed to probe the case** and let the truth be established through an investigation.
- The suggestion of illegal targeting by agencies might be true in some cases in India, but perhaps it is not so in the ongoing prosecution of Mr. Zubair.

Was the arrest necessary?

- Was it improper to arrest a person in one case, especially after summoning him in respect of another? It certainly was.
- The offences alleged to have been committed in the objectionable tweet case were cognisable, giving the police the power to arrest if there was a reasonable suspicion that the accused had committed the alleged crime as required by **Section 41 in the Code of Criminal Procedure**.
- These conditions were arguably satisfied here as authorship of the tweet was not in dispute.

But while arrest might have been legally permitted, was it strictly necessary?

- Often, the conversation about an illegal arrest is, in law, actually a conversation about an unjustified one, and Mr. Zubair's case is a reminder of just how problematic this distinction is.
- If an arrest is illegal, the scope for having two views on the point is minute. But when we shift from the realm of clear rules to hazy standards, there is great scope for argument.

- The court cannot completely substitute its views for the opinion of the police officer. It has to give the police officer's opinion some value. This means that except in the most egregious of cases, it is difficult to conclude that the arrest was, indeed, unnecessary.
- All too often one finds that there are judgments rendered months after the trauma of arrest was inflicted, imploring police officers not to rush to make an arrest in cases where the power might exist.
- It is far more infrequent to see police officers being hauled up, within a reasonable time frame, for having made wrongful or unnecessary arrests.

Search and seizure:

- Besides wide powers of arrest, there are **wide powers of warrantless search and seizure** conferred upon the police.
- This means that there is no necessary legal requirement that the police must obtain prior permission before effecting a search. Not only this, but the only threshold that the law requires the police to meet for seizing property is whether such property is "found under circumstances which create suspicion of the commission of any offence".
- Whether one's current phone and laptop were involved in the publication of a tweet through a mobile phone years ago is, therefore, not what the law requires the police to answer. The threshold is far lower than that, and easily met by expanding the contours of an investigation.
- The end product of this 'search and seizure' regime is that the **police can go take what they want**, whether they use it or not is up to them. **No distinct statutory rules govern searches and seizures of digital devices**, nor have courts emphasised on the distinction between the physical and digital realms.

The question of bail:

- For all non-bailable offences, such as the ones involved here, there is **no right of bail for an accused**.
- It is **up to the discretion of the judge**, which is not fettered by any statutory norms or rules.
- There is not even a presumption that ordinarily judges would try to ensure that personal liberty is protected; rather, there is hope and expectation that judges will exercise their discretion judiciously. Granting or denying bail is not merely about ensuring that the accused will show up in court.

Factors for judicial discretion:

- Rather, the exercise of **judicial discretion requires many factors to be considered**, including the seriousness of the allegations and the interests of the pending investigation. What this means, in practice, is that differences of opinion are bound to come up on whether or not the accused should be granted bail.
- A bail order may be worthy of criticism and a superior court may well disagree with the opinion of the magistrate in Mr. Zubair's case and grant bail.
- But as long as the judge considered the relevant factors and then came to an opinion, a bail order is not illegal, no matter how much we may disagree with the outcome.
- A dominant purpose for having legal procedures govern investigations and prosecutions is to ensure that the **liberty of an individual is not completely forsaken** before the might of the state.
- There must be a justification on part of the state to peel through layers of citizenship, consisting of facets such as the freedoms of movement, privacy, association.

Concerns:

- Mr. Zubair's case is a reminder that this does not hold true for the Indian criminal process, which is built upon conferring near-unfettered discretion upon its various constituent parts and hoping that the outcome achieves justice.
- At the mere registration of a First Information Report, the police are vested with vast powers of arrest, detention, search and seizure.
- Rather than the police, the process asks more questions of the accused seeking to restore their liberty, often placing enormous burdens of establishing innocence at the threshold itself.