Preserving and Protecting our Fundamental Rights - Freedom of Speech, Expression and the Right to Protest

Good evening, distinguished guests:

It is an honour to have been asked to deliver this year's Verghese Memorial Lecture.

B.G. Verghese – "George" to his friends, and "Saint George" to his admirers—was one of the most respected names in post-Independent Indian journalism.

He was also a classic specimen of the classic newspaperman anywhere in the world familiar with free press ---a man of impeccable professional integrity, committed to society's well-being, and an editor unafraid of the powerful, in and out of government.

And, it is most befitting that the Media Foundation keeps alive the values Verghese Saheb cherished by way of an annual lecture series in his name.

This evening I would like to address a gradual erosion of one of our most precious fundamental rights – the inalienable right to

freedom of speech and expression, an erosion that is leading to the gradual destruction of our human right to dissent and protest. This lethal cocktail is adversely impacting the liberty of all those who dare to speak up. Article 21 of our Constitution, the right to life and personal liberty is under a silent threat and we all know the consequence of losing our liberty – simply put, we will cease to be a democratic republic. Of course, our fundamental rights cannot be absolute and so our Constitution has placed a few reasonable restrictions on the exercise of the right to free speech and these include restrictions placed in the interests of the sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation and incitement to an offence. Yet it is important to note that these restrictions can be imposed only by law enacted by Parliament and the restrictions have to be reasonable.

Our freedom of speech is being eroded and mauled through twisting and turning the law if not abusing it altogether. The law needs to be objectively interpreted but subjective satisfaction has

taken over and the consequences are unpalatable: dissent or expression of a different point of view has become an issue to the extent that *bona fide* speech sometimes becomes a security threat. Some cynics glibly suggest that if the speaker is not guilty, he or she will be acquitted of the charges framed, but the fact of the matter is that detention as an under-trial is a gut-wrenching experience for anyone and particularly for a person whose cries of innocence fall on deaf ears. Such a person looks to the judiciary for protecting his or her freedom of speech and liberty but gets overwhelmed by the painfully slow justice delivery system.

I propose to discuss our fundamental right of free speech and expression and the right to disagree in different compartments and I hope the picture will reveal why we might need to conduct an inquest in due course of time.

(i) Free speech and sedition

Ours is a country governed by the rule of law, so let us first appreciate what the law has to say on some aspects of freedom of

speech. In my opinion, one of the worst forms of curtailment of the freedom of speech is charging a person with sedition. Way back in 1962, a Constitution Bench of the Supreme Court in *Kedar Nath Singh v. State of Bihar* considered the constitutionality of sedition in section 124A of the Indian Penal Code as a penal offence. While doing so, it was held that the freedom of speech and expression:

> "… has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words, which **incite violence or have the tendency to create public disorder**. A citizen has a right to say or write **whatever** he likes about the Government, or its measures, by way of criticism or comment, **so long as he does not incite people to violence** against the Government established by law or with the **intention** of creating public disorder."

A little later in the decision, it was held:

> "The provisions of the sections [that is, Sections 124A and 505 of the Indian Penal Code] read as a whole, along with the explanations, make it reasonably clear that the sections aim at **rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence**. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, **however strongly worded**, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression."

The Supreme Court, therefore, drew a correlation between sedition and violence, sedition and inciting violence, and sedition and tendency to incite violence – not just simple violence but violence of such a degree as to bring it within the purview of public disorder. So, when you have rival gangs confronting each other and one of them shouts *maro*, a law and order situation of

rioting and attempt to murder arises, not of sedition. The police, lawyers and judges have dealt with all such cases purely as a law and order problem. However, depending on the occasion and context, when a speaker raises a slogan at a public gathering of supporters by shouting *goli maro* a charge could possibly be laid of tending to incite violence or incitement to violence and raising a public order issue rather than a law and order issue. The distinction is quite clear. And should be clear to any policeman and Magistrate.

On the other hand, when there is a call to protest for a cause without any incitement to violence, it would not be sedition under any circumstances. For example, when a call was made for large numbers to assemble on the lawns of India Gate to protest against the rape and murder of Nirbhaya, the organisers of the protest were not committing sedition. Similarly, when India Against Corruption peacefully protested on the Ram Lila grounds, the organisers could not be held liable for sedition. This is extremely important for distinguishing between free speech and sedition,

but unfortunately the distinction is being lost sight of by the establishment.

Frequent use of the law against sedition began sometime in 2012 during the India Against Corruption movement. Among the first few persons to be arrested for sedition was a political cartoonist who depicted the national emblem of three lions and the Parliament building in a manner unacceptable to the establishment[1].The cartoonist was charged with having violated the provisions of the State Emblem of India (Prohibition of Improper Use) Act, 2005. I have reservations whether an offence is made out under this law and I will not be surprised if the police also felt that way. But perhaps the idea was to keep that cartoonist in custody by hook or by crook and so the charge of sedition was added. The law was obviously twisted to sustain this charge since the cartoon did not incite or have a tendency to incite violence. But the objective was achieved and the cartoonist was sent to jail for a while. Interestingly, in due course, the charge of sedition

[1] Aseem Trivedi

was withdrawn against him, but I will not be surprised if the incident had a chilling effect on some political cartoonists.

The companion law adverted to by the Supreme Court, that is, Section 505 of the IPC was made use of against two young girls for a Facebook post in 2012. One of them questioned the need for declaring a holiday on the death of a political leader and the other 'liked' that post[2]. At best this was only an expression of an opinion that one may agree or disagree with. Unfortunately, both the young girls were arrested for creating or promoting enmity, hatred or ill-will between classes. So, the expression of a possibly unpalatable opinion became a criminal offence against the establishment. The Facebook post caused anguish amongst supporters of the political leader and they vandalised the hospital of the girl's uncle. An innocent tweet led to three consequences: silencing the young girls and perhaps many others who held the same or a similar opinion; sending a chilling message to others to be careful about voicing opinions, and finally imprisonment and

[2] Shaheen Dhada and Renu

damage to personal property. In other words - tweet at your own risk, a lesson that the Supreme Court sought to teach Prashant Bhushan quite recently.

(ii) Free speech and cooked up cases

In recent years new methods of silencing speech have been introduced: attribute something to a speaker that he or she never said. I find this simply amazing. Try and visualize a police complaint filed against you for something you never said and you are kept in jail for several months and eventually set free after litigating for your rights. Imagine the trauma that you and your family would have to go through and on the other hand, the police get away without even a censure. Well, this has actually happened.

A doctor delivered an address to students of the Aligarh Muslim University sometime in December 2019 criticizing the Citizenship Amendment Act and the National Register of Citizens[3]. More than one month later, he was arrested for making

[3] Dr. Kafeel Khan

an inflammatory and provocative speech. About 10 days later, he was granted bail but was not released for reasons that are not clear. However, immediately thereafter he was kept in preventive detention under the National Security Act by an order issued on 13th February, 2020. This is a draconian law and entails detention without trial and is based on the subjective satisfaction of the detaining authority who makes a prognosis of the future activity of the detenu. In other words, the detaining authority says that he or she is satisfied on the basis of past conduct that the detenu is likely, in future, to act in a manner prejudicial to the security of the State or to the maintenance of public order. Therefore, it is necessary to preventively detain that person so as to prevent him or her from committing an offence. The only remedy available to a detenu under such circumstances is to show to the Advisory Board that no case of a threat to national security is made out and after that to show to the Court the violation of procedural rights guaranteed by the Constitution.

The doctor challenged his preventive detention in the Allahabad High Court and by a judgement and order passed on 1st

September, 2020 the preventive detention order was quashed. The doctor had been in preventive detention, without trial, for more than six months before being set free. After reading the judgment of the Allahabad High Court quashing his detention order, I can safely say that any lawyer trained in the law of preventive detention will tell you that the order of preventive detention could not have been sustained under any circumstances. Almost every procedure known to law was violated. Additionally, on a limited judicial review of the grounds of detention the Allahabad High Court concluded that the detenu was alleged to have said things which he did not. For example, while he spoke of national integrity, he was accused of promoting hatred; while he deprecated violence, he was accused of promoting violence. The High Court said:

> "A complete reading of the speech prima facie **does not disclose any effort to promote hatred or violence. It also nowhere threatens peace and tranquillity of the city of Aligarh. The address gives a call for national integrity and unity among the citizens.** The speech also deprecates

> any kind of violence. It appears that the District Magistrate had selective reading and selective mention for few phrases from the speech ignoring its true intent."

This is a classic instance of cooking up a case against a person with the intention of putting him behind bars for several months.

Another recent case on the same subject of attribution is that of a student activist, accused among things, of attempt to murder and making an inflammatory speech and inciting violence[4]. The offending speech was made by her on 25th February, 2020 and she was arrested three months later on 25th May, 2020. The Delhi High Court granted her bail after another three months by a judgement and order dated 1st September, 2020 and while granting bail, it was noted that the prosecution had "failed to produce any material that she in her speech instigated women of particular community or gave hatred speech due to which precious life of a young man has been sacrificed and property damaged. Admittedly, agitation was going on since long, **print**

[4] Devangana Kalita

and electronic media was present throughout in addition to cameras of police department, but there is no such evidence which establishes that the alleged offence has taken place on the act done by the petitioner, except statements recorded under section 164 Cr.P.C. much belatedly, though, those witnesses were allegedly remain present at the spot throughout."

These cases, and there are others, lead to a frightening inference that if a citizen exercises the freedom of speech and says something that is not even distasteful, yet, he or she can be arrested on the basis of a fairy tale and will have to go through a long-drawn process for being set free. If that person does not say anything at all but is otherwise a thorn in the flesh of the establishment, even then that person can still be arrested and detained on some cooked up or trumped up charges.

Please try and imagine the impact of this and if you are old enough, please compare it to the period between 1975 and 1977 when persons were jailed for allegedly threatening the internal security of the country, without any evidence in this regard. We are gradually witnessing a somewhat similar situation, the only

difference being that during the Emergency days the alleged threat was to the internal security of the country and today the alleged threat is to the sovereignty and integrity of the country.

(iii) Free speech and fake news

How does one define fake news and how does one distinguish it from misinformation or disinformation? Passing on fake news by a citizen, if it is narrowly interpreted, could lead to a charge of sedition in a given case. If that fake news is liberally interpreted, it could be described as misinformation and denied as untrue. Finally, a more liberal interpretation could describe that fake news as incorrect and it is not even worthy of denial. How does one look at propaganda disseminated by the establishment? Is it fake news, or misinformation or disinformation? Would it invite a charge of sedition against the purveyor of that propaganda? That question needs to be asked.

A few tweets, believed to be fake news relating to Kashmir have attracted a charge of sedition against a university student and investigations have been going on against her for the last one

year[5]. The student tweeted to the effect that the Army was "entering houses at night, picking up boys, ransacking houses and deliberately spilling rations on the floor." She also alleged that four men were called into an Army camp and interrogated (read tortured). A microphone was kept close by so that the screams of those being tortured could be heard in the area and the people terrorized. The allegations were denied as baseless by the Army and it appears that it had closed the matter and no complaint was filed against her for the tweets. However, some public-spirited person lodged a police complaint alleging that this was a case of fake news that excited disaffection towards the government established by law and is, therefore, sedition. On this basis the issue has been kept alive by the police for more than a year with no effective result as yet. The Army has closed the matter, but the police is still at it.

Three questions arise from this episode: Can the tweets be categorized as seditious in light of the judgment of the Supreme

[5] Shehla Rashid

Court? If the Army, against whose credibility the tweets were directed, has dismissed the allegations and not lodged any complaint and effectively closed the matter, should a complaint by a third party at all be entertained by the police? Finally, does it take more than a year to analyse a few tweets to determine if they are seditious or not, or are police investigations being used merely to silence her?

Similarly, a person in Punjab was charged with sedition for spreading fake news that ventilators were not available for covid-19 patients in a particular district[6]. Assuming this was not true, it could easily have been denied by the district administration, but a charge of sedition on him?

Contrast this case with another case of fake news where no action has been taken against an elected cabinet minister who made a bizarre claim that a particular brand of *papad* provides immunity from the corona virus[7]. So far, no one has dared to officially contradict the cabinet minister, except the corona virus which

[6] Simranjit Singh
[7] Arjun Singh Meghwal

attacked the cabinet minister and made him covid positive leading to his hospitalization. The pandemic has generated a tremendous amount of fake news in our country and worldwide and the latest going around is that corona were can be cured by snorting cocaine, drinking alcohol and bleach[8]. There is no doubt that fake news must be countered effectively and quickly, but surely, a charge of sedition is not the answer.

Apart from a vague definition of fake news and its subjective interpretation, these cases show that the establishment prefers to act against the weak and defenceless with what was recently described as an iron hand rather than against the privileged who can get away by saying anything. The fundamental right of freedom of speech cannot be applied arbitrarily.

(iv) Free speech and the Press

In last few years the establishment has displayed a new determination and great ingenuity in securing conformity and obedience from the Press. The cumulative effect is chilling. We

[8]https://www.edexlive.com/news/2020/mar/18/can-cow-urine-cure-coronavirus-four-of-the-most-ridiculous-myths-about-covid-19-busted-10747.html[9] Dhaval Patel

all recall Mr. L.K. Advani's observation that during the Emergency journalists were merely asked to bend but they chose to crawl. Today, there is no Emergency and nobody has asked the media to bend, yet the perception (maybe wrong) is that they are crawling. It is quite a mystery.

There are two possible reasons: The first is a June 2020 report by the Rights and Risks Analysis Group which recorded that "A total of at least 55 journalists faced arrest, registration of FIRs, summons or show causes notices, physical assaults, alleged destruction of properties and threats for reportage on COVID-19 or exercising freedom of opinion and expression during the national lockdown from 25 March to 31 May 2020." These measures were taken in 20 States and Union Territories and included charges of sedition, promoting enmity among different groups, causing breach of peace and so on.

The second possible reason is that an unseen "iron hand" has been used to silence dissent and criticism.

In May, an egregious case concerning the freedom of speech related to the arrest of the editor of a news portal[9]. His alleged crime of sedition was spreading fake news by speculating that the Chief Minister of the State is likely to be replaced for his inept handling of the pandemic and thereby exciting disaffection against the government. In this particular case, while rejecting the application for bail, the Magistrate is reported to have said that the journalist was trying to **destabilize the government** and what he said was a contempt against the government. Fortunately, a higher court granted him bail but after he had spent about 15 days in custody.

In June, a senior and respected journalist had a sedition charge levelled against him for a YouTube show and had to petition the Supreme Court for staying his arrest[10]. The allegations may have been reckless or bizarre (as they have been described) but the question is whether they can be classified as seditious given the

[9] Dhaval Patel
[10] Vinod Dua

law laid down by the Supreme Court over 50 years ago? The chilling message to the Press is to crawl or else ….

Just a few days ago, the horrible gang rape and murder of a young girl in Hathras resulted in another and rather ingenious method of restricting the freedom of the Press. With a view to prohibit the media from reporting anything about the events, the establishment completely cordoned off the entire area with a few hundred policeman and issued a prohibitory order under Section 144 of the Cr.P.C. so that nobody could enter that area. Some intrepid journalists attempted, individually, to meet the family of the victim without violating the prohibitory order but were stopped from doing so on the basis of some undisclosed order said to have been passed by some higher-ups. This is nothing but an egregious violation of the freedom of the Press through a bizarre abuse of the law.

Everyone is hearing and seeing what is going on, but is anybody listening? The other question to be asked in this context is can any serious journalist function fearlessly if an opinion expressed, however absurd or bizarre, leads to arrest and a charge of sedition

followed by a long-drawn battle in the courts? Can such serious charges be levelled so casually – and remember a free Press is the fourth pillar of democracy.

(v) Weaponising the sedition law

The National Crime Records Bureau started keeping a record of sedition cases in 2014 and every year has seen a spike in sedition cases. The number reached a high of 70 cases in 2018. Figures for 2019 recently released by the National Crime Records Bureau reveal that 93 cases were registered – a 30% increase. Almost every State seems to have weaponised sedition as a means of silencing critics and the numbers are increasing. Any statement is good enough for a sedition case, and this is not in just a few States; it is in almost every State and Union Territory.

On 31st October, 1984 the day Mrs. Indira Gandhi was assassinated, two public servants shouted "Khalistan Zindabad". The atmosphere in the country was charged and yet the Supreme Court held that this did not amount to sedition. The Supreme Court held:

> It does not appear to us that the police should have attached much significance to the casual slogans raised by two appellants, a couple of times and read too much into them. The prosecution has admitted that no disturbance, whatsoever, was caused by the raising of the slogans by the appellants and that in spite of the fact that the appellants raised the slogans a couple of times, the people, in general, were un-affected and carried on with their normal activities. The casual raising of the slogans, once or twice by two individuals alone cannot be said to be aimed at exciting or attempt to excite hatred or disaffection towards the Government as established by law in India."

How things have changed since then. In an absolutely peaceful atmosphere, a teenager in Bengaluru raised a particular slogan three times and this resulted in her arrest on charges of sedition[11]. Could this ever amount to an attempt to destabilize the government? But this teenager spent four months in jail before

[11] Amulya Leona

she was granted bail. Again in Karnataka, as many as 85 school children were interrogated by the police concerning a play in which a child recites what the authorities found to be an objectionable dialogue[12]. The mother of the child and the teacher who oversaw the play were charged with sedition and arrested. Please try and imagine the trauma that the school children would have gone through with policemen and policewomen questioning kids over five days in school.

And while we are discussing destabilising the government, does horse trading of MLAs (let me be clear, this is not my expression, but one used by the Supreme Court), does horse trading of a few MLAs with a view to topple a duly elected government amount to sedition? Perhaps. In July the Special Operations Group in Rajasthan filed FIRs against six MLAs for sedition because they had indulged in horse trading with a view to topple the government. However, just before the High Court was to take up

[12] Shaheen school in Bidar

the challenge to the sedition charge, the allegations were withdrawn[13]. A pity, because it would have been a fun case.

(vi) Free Speech and the Internet

District or state-wide internet shutdowns are becoming a tool to stifle freedom of expression through prior restraint. Shutdowns are effected through blanket orders under the guise of preventing breach of peace. In most cases, they are deployed when the authorities apprehend that people may exercise their fundamental right to freedom of expression to organise a peaceful protest that is critical of the State. An internet shutdown is a highly disproportionate response, since it affects everyone who uses the internet for professional reasons, for communicating with family or friends, for access to education, medical facilities and so on.

In December 2019 there was an internet shutdown across all districts of Assam and mobile internet was suspended for almost a week. While striking down the shutdown, the Gauhati High Court noted that "… mobile internet services now play a major

[13]https://www.hindustantimes.com/india-news/rajasthan-s-sog-drops-sedition-charge-transfers-horse-trading-cases-to-anti-corruption-bureau/story-MwnTqx0wdSoIXP5m13cccO.html

role in the daily walks of life, so much so, shut-down of the mobile internet service virtually amounts to bringing life to a grinding halt." In light of the fact that the prevailing situation was normal and there was no justification for the continuation of the shutdown, the Court directed the State to restore mobile internet services with effect from the evening of the same date[14].

In Allahabad, the High Court took *suo moto* cognizance of the internet shutdown imposed in the city and while issuing notice observed that stoppage of internet services has paralyzed the entire judicial system[15]. I may mention that access to justice is a valuable human right.

In Anuradha Bhasin's case, the Supreme Court in January 2020 while deciding the legitimacy of internet shutdowns as well as physical lockdowns in Jammu and Kashmir stopped short of declaring access to internet as a fundamental right, but declared that "the right to freedom of speech and expression under Article 19(1)(a) and the right to carry on any trade or business under

[14] Banashree Gogoi v. State of Assam, decided on 19th December, 2019
[15] Suo Moto Writ Petition PIL No. 2485/2019: Reference to the Discontinuation of Internet services by the State Authorities, Order dated 20th December 2019

19(1)(g), using the medium of internet is constitutionally protected[16].”

In September last year, the Kerala High Court recognised that access to the internet is essential for not only exercise of freedom of speech but also the right to education[17]. It was noted that the UN Human Rights Council had declared that right to access the internet is a fundamental freedom.

We have the unenviable record of stifling freedom of speech and expression through the maximum number of internet shutdowns for prolonged periods in any vibrant democracy.

In Conclusion

There is no doubt that the fundamental right to free speech is extremely important for any civilised democracy to survive. Similarly, the right to protest peaceably and without arms is also an equally important fundamental right guaranteed to all of us under the Constitution. While it is important for each one of us to exercise our fundamental rights within reasonable limits **laid**

[16] Anuradha Bhasin
[17] Faheema Shirin R.K. v. State of Kerala, (2019) 4 KLJ 634

down by law, there is a greater obligation on the establishment to ensure that the laws are not twisted, misused or abused in such a manner that citizens are deprived of fundamental rights that impact the liberty of an individual. We have seen several instances of deprivation of liberty with persons having to spend days and sometimes months in jail for remarks that would perhaps not attract any attention except for the fact that the establishment used draconian laws to silence those dissenting voices and thereby give them traction. It is time for the establishment to realise that the people of this country mean well and as in any democracy, there are bound to be different points of view. These must be respected --- otherwise the fabric of our society might disintegrate, and fraternity, one of the key words in the preamble to our Constitution might just become another dead idea.

Thank you and God bless!