

The 'Salwa Judum' Judgement

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THE SUPREME COURT HAS held that the use of extra-legal armed forces in Chhattisgarh is unconstitutional. Responding to a PIL filed by Nandini Sundar, Ramachandra Guha and EAS Sharma, the court's decision turns on the nature of the Salwa Judum and the appointment of special police officers under the Chhattisgarh Police Act. But if it were a judgment that had merely ruled on the technicalities, it would have been a welcome and competent order, but would have missed its moment of constitutional greatness. This judgment attains such greatness by virtue of its deft combination of insightful legal analysis, the articulation of a moral vision of constitutionalism and development and its sharp invocation of rhetoric (in the best sense of the term) and fiction to buttress its arguments.

Law has always produced and promoted legal fictions and the substantive interpretation of law often rests upon on a body of rhetorical figures and scenarios. The imaginative and moral character of legal fiction can often be found wanting, but there are times when the courts produce inspired moral visions that outdo even literature. Although fiction in the manner of its making, is pure philosophy, William Glass says that no novelist has created a more dashing hero than the handsome absolute, or conceived more dramatic extrications—the soul's escape from the body, for instance, or the will's from cause. Nandini Sundar v. State of Chattisgarh is an excellent example of the ways in which the law can productively use metaphor as legal argument ('our constitution is not a pact for national suicide').

There will be time in the near future to examine all the nitty gritty of the judgment, but for now let's celebrate this amazing judgment, there are some extracts which may be of interest, and highlighting some of the key metaphors that the judges use in describing the state of affairs in Chhattisgarh and India more generally.

The judgment begins with an argument that a collective commitment to a constitutional democracy requires an equal obligation to the demands of the discipline and rigour of constitutionalism, the cornerstone of which is the accountability of state power which 'can only be used for promotion of constitutional values and vision'.

This case represents a yawning gap between the promise of principled exercise of power in a constitutional democracy, and the reality of the situation in Chattisgarh, where the Respondent, the State of Chattisgarh, claims that it has a constitutional sanction to perpetrate, indefinitely, a regime of gross violation of human rights in a manner, and by adopting the same modes, as done by Maoist/Naxalite extremists.

It then goes on to invoke Joseph Conrad's *Heart of Darkness*, and repeats in different parts of the judgment the last lines of the novel, *the horror, the horror*. While a number of judges are fond of peppering their judgments with literary quotes, the integrity with which they quote is often questionable. In this case, the judges cite Conrad to draw a powerful parallel between the violence of the exploitative colonial state and what was happening in Chattisgarh.

In para 2 of the decision, the judges say,

As we heard the instant matters before us, we could not but help be reminded of the novella, "Heart of Darkness " by Joseph Conrad, who perceived darkness at three levels:

(i) the darkness of the forest, representing a struggle for life and the sublime; (ii) the darkness of colonial expansion for resources; and finally, (iii) the darkness, represented by inhumanity and evil, to which individual human beings are capable of descending, when supreme and unaccounted force is vested, rationalized by a warped world view that parades itself as pragmatic and inevitable, in each individual level of command.

They go on to say that as they heard more evidence about what was happening in Chhattisgarh,

—we could not but arrive at the conclusion that the respondents were seeking to put us on a constitutional actions whereby we would also have to exclaim, at the end of it all: "the horror, the horror."

They return to this image of horror when they say that pursuing policies whereby guns are distributed amongst barely literate youth amongst the poor to control the disaffection in such segments of the population would be tantamount to sowing of suicide pills that could divide and destroy society. The judges then say:

Our constitution is most certainly not a "pact for national suicide". In the least, its vision does enable us, as constitutional adjudicators to recognize, and prevent, the emergence, and the institutionalization, of a policing paradigm, the end point of which can only mean that the entire nation, in short order, might have to gasp: "The horror! The horror!" "

The judges also approvingly cite the report of the expert group constituted by the Planning Commission on "Development Challenges in Extremist Affected Areas" which describes the neo-liberal agenda as 'rapacious', a word that the judges interpret as referring to a predation for satisfaction of inordinate greed, and subsistence by capture of living prey, continuing with the theme of the descent into the heart of darkness. The judges argue:

Predatory forms of capitalism, supported and promoted by the State in direct contravention of constitutional norms and values, often take deep roots around the extractive industries.

Coming down strongly on the central government's claim that law and order and policing are state subjects, their role was merely limited to approving the total number of SPOs, and the extent of reimbursement of "honourarium" paid to them, the judges hold in para 34:

Given the tasks and responsibilities that the Constitution places on the State, it is extremely dismaying that the Union of India, in response to a specific direction by this Court that it file an affidavit as to what its role is with respect to appointment of SPOs in Chattisgarh, claim that it only has the limited role as set forth in its affidavit. Even a cursory glance at the affidavit of the Union of India indicates that it was filed with the purpose of taking legal shelter of diminished responsibility, rather than exhibiting an appropriate degree of concern for the serious constitutional issues involved.

Rejecting the urgency argument, the court constantly reiterates the need to address the underlying socio-economic roots of armed struggles, and brings back the question of just means into an issue where the state had virtually erased the difference between means and ends. The judges remind us that no conflict takes place in a normative void, and rejecting Cicero's thesis that laws are silent during war, the judges bring back the urgency of political ethics into their discussion on violence. In para 70, the judges hold,

It is true that terrorism and/or extremism plagues many countries, and India, unfortunately and tragically, has been subject to it for many decades. The fight against terrorism and/or extremism cannot be effectuated by constitutional democracies by whatever means that are deemed to be efficient. Efficiency is not the sole arbiter of all values, and goals that constitutional democracies seek to be guided by, and achieve. Means which may be deemed to be efficient in combating some immediate or specific problem, may cause

damage to other constitutional goals, and indeed may also be detrimental to the quest to solve the issues that led to the problems themselves. Consequently, all efficient means, if indeed they are efficient, are not legal means, supported by constitutional frameworks. As Aharon Barak, the former President of the Supreme Court of Israel, while discussing terrorism, wrote in his opinion in the case of Almadani v. Ministry of Defense opinion:

"... .This combat is not taking place in a normative void.... The saying, "When the canons roar, the Muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. The foundations of this approach is not only pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law, and in the name of upholding the law. The terrorists fight against the law, and exploit its violation. The war against terror is also the law's war against those who rise up against it." □□□

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