

**FREEDOM OF SPEECH FOR WHOM**  
***Some constitutional and philosophical underpinnings***

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When I was asked, sometime last week, to deliver this Keynote Speech my initial reaction, momentarily, was to politely decline the invitation. The primary impulse was that the pace of events, the intensity of emotions being expressed, and indeed the manner in which they have begun to be expressed presents an immediacy that seems to make careful analysis and considered opinion more difficult. A knee jerk reaction would more often than not be destructive of reasoned and reasonable debate in a world that is necessarily to be viewed from multiple viewpoints, interests and heterodox perspectives.

The sorts of social, political and economic forces and narratives that have arisen and coalitions of them that are being coupled with various identity issues in a vicious cocktail, present only a very hazy picture, and there is a need for a great deal of introspection about where we had begun, with what goals, and what went wrong. The only thing that seems less hazy is the rapid retreat of the normative foundations of forms and purposes of collective action – on the international, national, sub-national and indeed even local levels. It wasn't too long ago many of us could speak of those normative foundations, of tolerance of multiple viewpoints and the power of peaceful discourse and ideas, as being strongly grounded in human cultures. The killing of more than 220 journalists in the past seven years across the world, that was slowly filtering through seemed to indicate a strong change in the direction of the winds. They implied a great churning.

The killing of Ms. Gauri Lankesh, as she was opening the gate of her house, literally rammed that churning into our homes. The murder of Santanu Bhowmik just a few days ago, and following so closely on the killing of Gauri Lankesh, almost seems like a further emphasis of the point of the killings: sporadic protestations do not have any impact on groups, political and cultural organizations that are bent on destroying the liberal spaces of open discourse and dissent. These killings seem to presage a great struggle looming before us.

Yet that momentary disinclination to speak was overcome by the need to speak. This so, not because I believed that what I have to say necessarily holds any magical keys or greater valence than what many other shocked voices have been saying. But, my choice to speak is based on my perception that speech itself is under attack. The very notion that we, as human beings, have a primordial right to express our opinions, describe our circumstances, have a say in how we are organized in various associations that we choose to be a part of at various levels of collective action and what we are organized to achieve, is under attack. That existential threat, increasingly perceived by many reasonable people as being pushed forward by forces of in-egalitarianism, needs to be fought. Many people realize that those forces undergird the argument that a small number has a social right to usurp most of the benefits of social action, leaving very little for the rest. And in the quest for greater and greater degrees of usurpation, those forces are increasingly attacking the foundations of liberal democracies – that human beings are capable of engaging in reasoned and reasonable debates to set and describe the paths to goals deemed as important for all, and that protection of human dignity of all is a necessary envelope in which those other common goals are to be achieved. Free speech is viewed as necessarily problematic to those who would usurp everything, and hence the destruction of free speech becomes an essential component of imposition of the logic of discipline upon the masses, their opinions and their voices.

I have always said on various platforms that it is important to organize public spaces for exchange of views. This is very important for those of us who specialize in various professions. As experts we tend to become limited in our perspectives by virtue of specialization. I believe that the range of ideas, concepts and structures of events that journalists and lawyers can discuss is vast. Yet, lawyers – with their intimate knowledge of institutional structures of democracy -, and journalists – as the primary purveyors of news and creators of platforms for public intellectuals – seem to meet more as adversaries rather than as collaborators in the task of taking forward the project of a constitutional democracy. This, I believe, is an unsatisfactory state of affairs, and something that we can attempt to rectify in the future.

Consequently, I suggest that what I say here be viewed as the tentative sharing of certain perspectives and view points, and to learn, in turn, from the ones assembled here, from their perspectives, of where we are as bearers of the right to “free speech” and to what purpose might that speech be used for. Given, the nature of that enterprise – its magnitude and complexity – I would also have to humbly submit that I am honoured to have been asked to contribute. Additionally, I would also like to further add, that I do not view such honour as deserved but only incidental to being given the space to deliberate with such an august gathering of public intellectuals.

The standard content that one would expect a lifelong lawyer to deliver at such a meeting of journalists and media personnel would be about the various constitutional protections, and the constitutional gloss – in the form of various judgements by the Supreme Court of India about the guarantee of “freedom of expression” in Article 19 of the Constitution.<sup>1</sup> Much of the justification of that freedom, which has been interpreted to include the freedom of the press<sup>2</sup> as being equivalent to that of a citizen, has been premised on the utilitarian and instrumental purposes that such freedom serves in constructing, strengthening and protecting a deliberative democracy, and is to be treated, consequently, as a defining feature of democracy itself.<sup>3</sup> It is now well recognized in the Indian constitutional gloss that democracy as government by the people is vitally dependant on the availability, to citizens, spaces for frank and public discussion<sup>4</sup> subject only to reasonable restrictions. As observed by the Supreme Court:

*“Democracy is Government by the people via open discussion. The democratic form of government itself demands from its citizens an active and intelligent participation..... public discussion with people’s participation is a basic feature*

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<sup>1</sup> For a good summation see LIANG, Lawrence “Free Speech and Expression” in The Oxford Handbook of the Indian Constitution, eds – Choundhry, Sujit; Khosla, Madhav; & Mehta, Pratap Bhanu. Also see, BHATIA, Gautam “Offend, Shock or Disturb: Free Speech under the Indian Constitution.

<sup>2</sup> Sakal Papers (P) Ltd v Union of India AIR 1962 SC 305, Bennett Coleman & Co v. Union of India (1972) 2 SCC 788 and Indian Express Newspapers v Union of India (1985) 1 SCC 641.

<sup>3</sup> Romesh Thapar v State of Madras AIR 1950 SC 124; Superintendent, Central Prison v Dr. Ram Manohar Lohia AIR 1960 SC 633. Also see Liang, Lawrence, supra note 1 above, page 816.

<sup>4</sup> S. Rangarajan v P Jagjivan Ram (1989) 2 SCC 574

*and a rational process of democracy which distinguishes it from all other forms of Government.”<sup>5</sup>*

The concept of democracy, and the notion of a stake for the citizen – every citizen – in the decision as to who would hold the powers of the collective was itself considered revolutionary for India. Many constitutional experts had opined that - when our founding fathers had elected for universal adult franchise - with vast illiteracy and poverty the experiment with democracy would not survive for long. The danger that the poor and the illiterate would not take their right to vote seriously has been largely belied. As study after study has revealed, it is mostly the poor and the illiterate who turn out to vote in large numbers – or at least in much greater proportion than the well heeled and/or cultural elites. That India has survived, as a popular democracy for nearly seventy years, is largely due to the exercise of that right by the masses and the manner in which institutions of a constitutional democracy were carefully nurtured and built – on larger principles of tolerance, a deep commitment to an ontological assumption of political equality, and a leadership that was willing to accept and protect the formal trappings of political equality.

While the involvement of the masses, and in fact their consolidation for formation of political groupings to compete thrived, we seemed to have had a greater difficulty in constructing a broader culture of “epistemic justice”. The phrase “epistemic justice” refers to the rights and being repulsed by the consequences of the deprivation of those rights, to be involved and heard in the process of deliberation of who gets elected, what ends and goals are chosen for prioritisation and the methods used to pursue those goals, and how the nation and/or other political and social spaces are constructed and sustained.

M.N. Roy, one of the doyens of Indian Humanism, had very early in his deliberations (in 1946) understood the dangers posed by tendencies in parliamentary democracy to become fascist. His argument had been that charismatic leadership combined with the nature of competitive party politics, and competition for electoral office, could lead to centralization of power. With the review of performance of elected representatives being ultimately bookended only by elections – and the potential tendency of citizenry to

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<sup>5</sup> Ibid.

attribute legitimacy to all actions by the elected, especially when uninformed about the actions taken by those wielding power and the rationale for the decisions by the elites and their consequences, both to themselves and to others – M.N. Roy was worried that massive injustices could be carried out in the name of the poor and the masses. This was borne out by history, with the emergence of dictatorial and fascist regimes that used popular mandates, and the platforms of those mandates, to proclaim supreme power to take decisions and make the institutions of the State to undertake any and all actions without the citizenry itself having the rights to raise any questions about them. A plethora of emotive factors were used to sustain such claims: from religion, to ethnicity, from ideology to personality, and from language to skin colour – every possible division had been used to divide citizens into monads, concerned at best with the immediacy of their own circumstances.

In such a setting, the role of the media was essentially conceived and expected to be that of a watch dog; to ensure that it provides the citizenry with the space for news, inter alia, about the decisions being taken and the reasons being asserted by those in power for such decisions and actions, and their consequences, both potential and actual. The primordial function of the media was to ensure that removal of citizenry from the communicative processes regarding state action would not lead to either misuse or of misdirected use of collective power. Democracy, in this sense was not just about voting, but about construction of institutions in the civil society – such as the media – to prevent the abuse of power and epistemic injustice to the citizens.

Consequently, even if one were to begin justifying the right to “free speech” on the instrumental ground that it enhances democratic participation, the right to free speech essentially gets located in the very notion of human dignity, the core minimal content of rights that each and every citizen/human being possesses by virtue of being human. If being “left alone” itself is a fundamental right as observed by the Supreme Court in the Privacy Case<sup>6</sup>, the source of this right is located in the notion of human dignity. But it goes beyond that. The right to be left alone, at least in certain zones of individual autonomy that ought to

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<sup>6</sup> Justice Puttaswamy v Union of India, WP (Civil) No 494 (2012)

be protected as an element of the right to life itself, and pursuit of life's goals, is also accompanied by the human desire, and necessity in life, of being a part of associations to achieve common goals. The Nation State, and its various sub-levels of political administration, is of course the most prominent and primordial of such associations for collective action. How that association is run, and to have a say in policy making – through raising voices in support or in dissent, to form opinions in favour of the ruling coalitions or in opposition – as well as in what the nation-state protects or does not protect is a vital ingredient, nay an essential component, of human dignity. Individual autonomy is not capable of being sustained in the absence of this aspect of epistemic justice. The citizens ought to have, and our Constitution guarantees, the right of the Citizen to not just be informed, but also to drive the public discourse about the affairs of the state and the public sphere in general.

I would have thought existing constitutional gloss had made this rather clear and hence it was a bit shocking to me to read that the Attorney General had argued, on behalf of the Union of India, that human beings who are poor and/or illiterate have no need for a right to privacy. This was a rather shocking submission to make, as it represented an assault on the very ontological foundations of what we have come to understand “human beings” to be – as embodiments of a substantive core of human dignity. In this regard, the Supreme Court of India very categorically and strongly, and I might add justifiably, rebuffed such a suggestion. The words of Justice Chandrachud in the recently delivered judgement are worth recounting *in extenso*:

*“In our view, the submission that the right to privacy is an elitist construct which stands apart from the needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position. Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV. The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilised through history to wreak the most egregious violations of human rights. Above all, it must be realised that it is the right to question, the right to scrutinize and the right to dissent which enables an informed citizenry to scrutinize*

*the actions of government. Those who are governed are entitled to question those who govern, about the discharge of their constitutional duties including in the provision of socio-economic welfare benefits. The power to scrutinize and to reason enables the citizens of a democratic polity to make informed decisions on basic issues which govern their rights. The theory that civil and political rights are subservient to socio-economic rights has been urged in the past and has been categorically rejected in the course of constitutional adjudication by this Court.”<sup>7</sup>*

Asserting that “[C]ivil and political rights and socio-economic rights do not exist in a state of antagonism”, Justice Chandrachud went on to elucidate some of the consequences of perpetrating epistemic injustices upon the citizenry: (i) Subversion of political freedoms making the task of ensuring the optimal allocation of social and economic welfare more difficult; (ii) Rent seeking behaviour (or corruption) enabling capture of social welfare benefits by those not eligible to receive them; and (iii) “Opacity” necessarily being conducive for monopolization of scarce resources. He went on to state:

*“On the other hand, conditions where civil and political freedoms flourish ensure that governmental policies are subjected to critique and assessment. It is this scrutiny which subserves the purpose of ensuring that socio-economic benefits actually permeate to the underprivileged for whom they are meant. Conditions of freedom and a vibrant assertion of civil and political rights promote a constant review of the justness of socio-economic programmes and of their effectiveness in addressing deprivation and want. Scrutiny of public affairs is founded upon the existence of freedom.”<sup>8</sup>*

Justice Chandrachud also recognized great merit in the work of Prof. Amartya Sen – one of the greatest scholars that this nation-state has produced.<sup>9</sup> Prof. Sen’s work on famines, and the realization that no famines have ever been reported in democracies, led to a great realization: the watchful eye of the citizenry, combined with the competition for their political affections, ensures that the elites and those who are manning the levers of power, do not ignore the signals of great calamities like famines. In that sense, the condition of

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<sup>7</sup> Ibid, para 155, page 216.

<sup>8</sup> Ibid, para 156, page 217.

<sup>9</sup> Ibid, paragraphs 157-160, pages 217- 220.

freedom itself becomes a mark of development – because the innate autonomy of the citizen and necessity of agency of the citizen in having a say in working of the levers of power are essential to the citizen herself being in a position to demand respect for her innate human dignity; and protect herself against misdirection of the collective power away from ensuring the maintenance of the core content of human dignity of human beings. The implication is clear:

epistemic injustices, in which the citizens are denied both the information about the happenings with their elected government, as well as non-communication of their dissent or approval to the elected government could lead to great tragedies.

Democracy, as a system of government by the people, would be undermined if the rights to information, rights to freely speak and right to be heard are denied to them.

I am, I submit, a bit perplexed as to why public intellectuals, professionals in the press and the broader media, have not commented more about the nature of the submissions made to the Supreme Court that fundamental rights, such as right to privacy and human dignity, are less relevant to the poor and the illiterate and that they are essentially elitist concepts. I am actually positively shocked to hear that, in certain regions of our country, at least as reported in the media, government servants have been asked to take photographs of men and women defecating in the fields to “shame them”. The gap between what the Supreme Court asserts as essential to “human dignity” and the manner in which administrative officers treat citizens could not be more flagrant. How could it not be, when we have individuals who are wielding constitutional powers are reported as claiming that “mid day meals” have rendered schools as places to eat and not to learn. And yet the implications of such actions – to the notions of human dignity being entertained within the portals of governance and the contempt that the poor and the illiterate, the marginalized and the lowered castes are subject to – have not yet become a cause for much greater and sustained scrutiny and critique by the media and the public intellectuals who fancy themselves as being capable of forming public opinion.

The “right to be informed”, and the “right to be heard”, as a part of condition of epistemic justice, and their violation as denigration of human dignity needs to be unpacked a bit more.

Arguing that while we have managed to overcome the limitations of extreme poverty and the shackles of ignorance in sustaining the project of constitutional democracy, Professor Amartya Sen argues that we seem to have had greater difficulty in constructing spheres of reasoned, and reasonable debates, so that tolerance can inform us with regard to the opinions of others and description of the conditions of others. Let us take the last point up – the condition of others.

According to Sen, while we may justifiably congratulate ourselves for sustaining formal institutions of democracy, we ought not to be satisfied with just that. He argues that we also ought to be able to pursue the critical analysis of what we have achieved, through our collective action via the State, by way of material, cultural and socio-psychological developments for our people. This immediately places in focus the issues regarding what development (or what developments) have been achieved in the nearly seventy years of the working of a constitutional democracy, especially for those at the bottom of the socio-economic totem pole. And we will have to readily admit that the results here are, however charitable we might be, rather mixed, and as Professor Sen points out, this may be a case of not quite an immeasurable failure as of “measurable underachievement”.

In the middle of 1940s, Babasaheb Ambedkar also noted – after surveying the rubble of World War 2 – that liberal parliamentary democracies tend to become fascist, and while achieving some modest economic gains might end up legitimating, on a much wider scale and with greater intensity, the dehumanization of those who have been subjected, historically, to unconscionable social and economic injustices and deprivations. In his speech on the occasion of ratification of the Constitution, Dr. Ambedkar drew a very vivid contradiction between the grant of political freedom, based on notions of political equality, and the conditions of graded and unconscionable inequality, in the social and economic sphere. His worry was two-fold: (a) that graded social and economic inequalities would

imply, in real terms, the inability of the weak, the marginalized, the lowered castes and those pushed into ignorance, to protect their political freedoms; and (b) that the institutions of political democracy could be destroyed, either by the masses and/or in combination with the elites who eviscerate the normative content of institutions of constitutional democracy.

Yet, notwithstanding his deep and intimate understanding of the extent of discrimination and dehumanization that Dalits had been subjected to, Dr. Ambedkar had posited a condition that could make the elites and the ones commandeering for themselves most of the fruit of social action much more empathetic towards their fellow citizens. He believed that a move towards a humanist oriented society, in which citizens are allowed to identify with, and feel an empathetic resonance with fellow human beings – recognition of the essential equality and oneness with each other – might lay the foundation for a more secure social democratic polity. The Directive Principles of State Policy, in Part IV of the Constitution, and in particular the emphasis in Article 38 and Article 39 – the former demanding instantiation of social justice in all institutions of national importance and walks of life, and the latter demanding that the State establish a welfare state, in which economic forces and common resources are not concentrated in the hands of the few to the detriment of common good – were expected to undergird the scrutiny of how the society and economy are constructed and used to deliver the benefits of social action. Those principles were to provide the foundations for our empathetic resonance for fellow citizens, and inform our voices with an urgency to eliminate the conditions that dehumanize a vast majority.

Over the past few decades, much of the elite discourse has acted as if the Directive Principles of State Policy do not exist. We seem to have constructed an era of “I, Me, Mine”, in which “laissez faire free markets” on a Global scale are supposed to be the only legitimate institutions, and the philosophy of “greed is good” being the only worthwhile value to pursue. If we were to critically evaluate the dominant content of our discourses, at least of the voices that have captured the ears of the political elites, all that the poor and the marginalized require are meagre benefits that might “trickle down” to them as the “animal spirits” of predatory capitalists are left free to indulge in rapine, plunder and loot.

At best.

Some of the more recent statements by certain individuals, who maybe presumed to be very important opinion makers in the broad camp of a particular ideological regime, have even claimed that: (a) the State does not have any responsibility to modulate the economy to ensure the creation of jobs; and even more shockingly, that (b) the very concept of welfare is alien to Indian ethos and culture, and that such concepts were introduced into India by the foreigners, specifically British. When I read these reports I was left scratching my head as to whether these gentlemen occupying important positions, official and unofficial and with apparently influential voices – as either ideological mentors or professional advisers – in policy making, have even read the Constitution of India in general, the text of Directive Principles of State Policy in particular and much of our constitutional gloss that India, as a nation-state, was established to instantiate, progressively, a welfare state in which human dignity will be protected.

What is even more shocking is that few commentators, in the media and in public discourse, have sought to critically analyse and debunk such claims and propositions. On second thoughts, that should not really be shocking, isn't it? After all, in the rush to be a part of the global elite, riding on cultural assuredness of the few that was built on the demolition of the human dignity of the many, hasn't it been a long time since we spoke about "welfare of the people" as the primordial reason to be of the nation-state? In the trickle down model, how could it possibly be? When the welfare of the people, who are being left behind in illiteracy, squalor, bad health, want, poverty and still subject to unconscionable levels of discrimination, is to only be what leaks through to them, because the ones at the top have allowed benefits of social action to seep down, or have missed preventing it from seeping down, then human dignity is no longer an a-priori goal. And in degradation of its ontological status we would have effectively degraded our national commitments.

Writing in late 1990s and early 2000s, sociologist Prof. Manuel Castells talked about the impact of neo-liberal agenda on the social and psychological aspects of the persona of those being left behind. As the voices that normatively prioritise the well being of the rich

and the powerful – including the voices in the press – dominate, even the scope for articulation about the full extent of the problems of those who have been historically marginalized, those who continue to be marginalized, and the new ones being made to join the ranks of marginalised would be systematically squelched. Prof Castells then posited that, as uncertainty about economic welfare sweeps across an economy that is constructed on a network of the global elites, the social reality would be that the ones being left behind and/or marginalized would fall prey to the seduction of identities provided by cults and hate groups.

Notwithstanding such warnings, there has been much glibness in the elite frameworks that posited that the only purpose of collective power and action is the allowance of free play of individual economic interests – almost as if humans could only be epistemic and ethical monads, with no space for value systems based on the deep potential of human beings to construct a consciousness that was concerned by welfare of others in a shared world. That glibness is now coming home to roost, as identity politics and politics of deep hatred for the others have emerged with a rapidity that proponents of neo-liberal order have completely missed and/or were unprepared to countenance as definitive possibilities.

That is what we are increasingly facing – all across the world aren't we? As Edward Luce<sup>10</sup> points out, no fewer than 25 democracies have failed in the past two decades. After examining the implications of growing inequalities, the threat of emerging technologies such as Artificial Intelligence on top of a technological paradigm that makes rapid obsolescence of skills a necessary fact of life, and massive interdependence implying inability or disinclination to protect those inside national boundaries from uncontrollable economic and social forces, Edward Luce goes on to analyse the resulting degeneration of Western politics:

*“We are taught to think our democracies are held together by values. Our faith in history fuels this myth. But liberal democracy’s strongest glue is economic growth.... When those fruits disappear, or are monopolised by a fortunate few, things turn nasty. History should have taught us that. The losers seek scapegoats. The politics of*

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<sup>10</sup> LUCE, Edward: “The Retreat of Western Liberalism”, Little, Brown (London) 2017, p 12-13.

*interest group management turn into a zero-sum battle over declining resources. The past also tells us to beware of ... Times of stark and growing inequality. It rarely ends well.”<sup>11</sup>*

Nearly a century ago, John Maynard Keynes had proposed that while inflation is bad, unemployment is worse. Paraphrasing him, he basically said unemployment makes the young of the country feel unwanted, and unloved. That is a dangerous proposition for a country like India. The Supreme Court of India, in the context adjudicating the legality of using tribal youngsters as SPOs with guns to fight the Maoists, recognized that demographic promise could turn into a demographic curse and observed: “Tax breaks for the rich, and guns for the poor isn’t a political economy that our constitution mandates.”

In response to the above, one of your brethren threateningly proposed that maybe it is time to pack the Supreme Court with “committed judges” – i.e., the judges who will kow-tow to the executive that is hell bent on delivering a neo-liberal order.

It is against the foregoing background, that one needs to analyse the brutal assassination of Ms. Gauri Lankesh. By all accounts she wasn’t a “successful” journalist in the sense of one who is a prima donna at the national or state level. Working with limited budgets, and at times starved for funds she ran a regional publication whose circulation was barely 10,000 or so. But the power of her ideas was of far greater purport. Her voice threatened an established political economy that was increasingly choosing to elide out of reckoning the poor, the marginalized, the exploited and the oppressed. Her voice was for social justice, and its articulation a matter of moral urgency, and constitutional means, and their assertion a matter of moral necessity. And that voice was brutally silenced. And like so many times before, the spirit of the Constitution of India and the soul of this nation was yet again brutalised.

The optics of her killing are no less chilling. In front of her own house, a woman who was just opening the gate to park her car is brutally killed by an assassin emerging from the dark. The message was clear: those who will speak about constitutional means, assert an

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<sup>11</sup> Ibid, page 13.

innate right to freedom of speech, and will speak on behalf of the marginalized and against those who will loot the nation for the benefits of the few – even your homes would not be safe.

What are we to do? How are we to go ahead with fearless journalism in a world such as this? Where the first principle of journalism – of speaking the truth to power – is seen as being anti-national?

There could of course be many, many answers. But here is a small submission: if journalism, and its underlying value - freedom of speech as an essential element to construct human dignity – are to be in service of “speaking truth to power” – then speak that truth fully. Especially about the degradation of human dignity of the masses. That is the singular truth that stares at us in the face, and which we refuse to acknowledge and speak about it – to ourselves, and to those who wield power in our name, and on our behalf.

In any nation, and more so in a democracy, the moral force of institutions is intimately linked to whether the masses – especially the vast numbers in our country – continue to believe that the State, and the elites, are thinking about them – at least in some small but meaningful measure. When the hope that empathy of fellow human beings may be aroused to action, to ensure greater justice, is lost we end up losing the greatest protection we have when we speak truth to power. Unless the powerful, and the groups they control are made to believe that the people will punish them if those who speak truth to power are not protected, all of us may face what Gauri Lankesh and Santanu Bhowmik have. A retreat cannot be an option. For we could be attacked for something else. Until, every aspect of our human dignity is ground afoot. If Gauri Lankesh’s death is to mean anything, then we need to relearn to speak the truth to power, and that too about the truth of what is happening with and what is being done to the disempowered masses.

In the hope that each one of you will assert back the moral foundations of the enterprise of “speaking truth to power”, I take leave.

Jai Hind.