seminar

road to

February 2021

justice

a journal which seeks to reflect through free discussion, every shade of Indian thought and aspiration. Each month, a single problem is debated by writers belonging to different persuasions. Opinions expressed have ranged from janata to congress, from sarvodaya to communist to independent. And the non-political specialist too has voiced his views. In this way it has been possible to answer a real need of today, to gather the facts and ideas of this age and to help thinking people arrive at a certain degree of cohesion and clarity in facing the problems of economics, of politics, of culture.

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ROAD TO JUSTICE

a symposium on

thinking through the

rule of law

symposium participants

COVER
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The problem

THE World Justice Report, Rule of Law Index 2020, pegs India at 69 out of 128 countries. That is below the halfway mark and a drop from the year before.

On fundamental rights India declined eight places. On civil justice, which looks at whether people can access and afford civil justice, effective enforcement, the level of government influence and delay, India fell four places to 102 out of 126 countries. On criminal justice, a ranking that factors in effective investigation, delay, impartiality, and due process India fell one spot down to 78.

Nearer home in a first of its kind effort, the India Justice Reports of 2019 and 2020 use the dry truth of government data to measure the structural capacity of police, judiciary, legal aid and prisons – all subsystems of the justice delivery system – and rank each state's ability to provide its people with justice services. Even the best state, Maharashtra does not reach a 6 on 10 rating and the worst, Uttar Pradesh, struggled to keep itself just above three.

That was a world ago before the pandemic time of sudden prolonged lockdowns and persisting contagion. The outcomes of the disruption of justice delivery systems – oppression, exploitation, abandonment, violence, discrimination – have fallen heavily on the most defenceless while commercial uncertainties and endless delay in adjudication promise to thwart rapid economic recovery.

All this and the grief and tragedy of millions called out for immediate recompense in the shape of easily available even-handed access to justice. Instead, the judiciary reduced its functioning to bare bones, selectively listing 'urgent cases' at its discretion. The most vulnerable suffered abusive and selective policing. Prison populations held in overcrowded unsanitary settings became involuntary and unfair prey to the infection and the legal aid system found itself overwhelmed. The over 17O guardian institutions dotted around the country that are especially designed to safeguard the human rights of us all, and the special interests of the disabled, women, children, Dalits, minorities, and tribals – were, for all intents and purposes, missing in action. The too frequent violation of fundamental rights came to be seen as an acceptable inevitability rather than a focus for fierce protection. These reactions have left many in doubt about the justice system's future directions.

A critical examination of both past and present are an essential spur to fashioning future solutions: ifs and buts about future directions remain.

There is no doubt that the endemic structural infirmities of the formal justice system have existed for far too long without remedy. The stretching Covid era has only spotlighted the depth of crisis. Every subsystem and every one of their systems of oversight are hog-tied by financial and manpower shortfalls with all the consequent disarray and dysfunction that it brings.

Along with this comes an absence of a sure-footed value system on which to build future directions. Prevailing psyches within the system are riven between privileging ancient authoritarian notions of overlordship, danda, dhama, caste and class privilege and the imperative of new constitutional values that press for individual liberty, collective rights, freedom and reconstructive rather than retributive justice. The police are unsure if they are a service for the community or an alien controlling force; judicial pronouncements too often point up private belief dressed up as reasoned interpretation; and prisons remain uncertain if they are holding areas for inconvenient people or centres of rehabilitation.

Meanwhile, law and society constantly interact to evolve new norms. Even as we speak they are interacting to create influential perceptions of the relationship between families, communities and with government. Bolstered by manufactured apprehensions, the penal provisions of the Talak law, Citizen's Amendment Laws and the vicious anti-conversion laws are already shaping public perceptions of minorities and the limits of their rights and remedies. Meanwhile, the new labour and farm codes – whether resisted or accepted – will prove to be an inflection point in future power relationships between labour and capital. As we design legal responses for post-Covid times do we look

into the deep past to find a future we are culturally comfortable with or leave all that determinedly behind while we plough on into a brave new world?

Here too navigation is full of predicament. Barely does a new value proposition take hold when science and technology innovate to put forward new challenges. Jurisprudence and the resolution of ethical questions are unable to keep pace. Yet, in fear of being overwhelmed, modern technology is being adopted and encouraged as the magic bullet that can obliterate long-standing systemic challenges and criminal threats.

But it is unclear what overarching principles inform the acquisition and implementation of technology and whether they further or compromise fair trial norms, make the police more accountable, prisons more transparent and less prone to abuse of authority and violence.

The unthinking reliance on data and technology to bring equity and justice for all is belied by the strong resistance to accountability and opacities that seem hardwired into the system.

Presently the need for more and more surveillance and official, rather than citizen, convenience dominate acquisition. Inevitably the citizen is being digitized into so many bytes and algorithms that we must fear being atomized from individuals into mere numbers that can be configured to control our every move, predict our thoughts and perhaps even manipulate them to the purposes of the powerful. This is not fantasy. Even as we race forward, protection is feeble. Judges are not trained to understand sophisticated science in order to draw legal lines in protection of individual freedoms that must never be crossed. It will require much more skill and spine before the people can rely on the formal system to mediate power and deliver effective even-handed justice to all.

Yet, the experiences of the pandemic provide an opportunity to reimagine the delivery of justice. It offers the possibility to articulate a new vision of society and justice: of our relationship with each other based on equity, equality, mutual trust and respect (the essence of social capital) and our relationship with nature and technology.

The administration of justice cannot lapse back into 'normalcy'. 'Normalization' is an unsure desire. What was 'normal' before Covid swept over the justice system was much better for some and terrible for others. If Covid working and Covid slippages and Covid compromises with justice become 'routinized' its ravages will surely cripple our post-Covid democracy.

True, reform and repair are encumbered with the lassitude of the past, exacerbated by the health and humanitarian crisis unfolding across the country and is made more difficult to traverse by the uncertainties of the future.

But positive futures are possible. Undoubtedly the increased integration of technology into the system can ease at least some of its pathologies and data can assist in better fiscal and structural management. Reorienting the police to build community trust by becoming the law upholding part of it rather than the law enforcing outsider is a relatively easy pathway to embrace – if there is the will. Beyond skilling up the judiciary and increasing human and physical resources prioritizing localization for doorstep delivery of justice offers low hanging fruit to pick. Expanded mediation; the spread of legal aid deeper into the community; encouragement for legal awareness far and wide such that it becomes the accepted common language for conflict resolution, all offer practical pathways to build a society genuinely based on rule of law.

What will shape outcomes as we gradually emerge out of this fraught moment remains in the balance. Will it be empathy, reason, deliberation, and science management, is in question. Global responses to the pandemic demonstrate it is only these positive impulses that have worked as the basis for medical and governance success: or will it be retention of the past imperfect, expediency and the convenience of those who work the system?

The jury is out.

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MAJA DARUWALA and
VALAY SINGH

Ideas of justice in ancient India

UPINDER SINGH

MODERN democracies equate justice with freedom and the equality of each citizen before the law. In ancient Indian texts, justice was premised on the idea of the inequality of social groups based on birth. Of course there was some amount of social mobility and there was the possibility of escaping this inequality at a higher level – that of one who had attained perfect wisdom and insight or a devotee who had attained the heights of devotion to god in bhakti. But otherwise, in the ordinary mundane world, there was a general acceptance of the idea of natural inequality.

As for freedom, while the distinction between a free person and a slave was recognized, the sort of freedom most often spoken of in texts was freedom from the cycle of birth and death. Of course texts largely reflect the perspectives of upper class, upper caste men – their ideas of what an ideal social and political order should look like. What was happening on the ground is more difficult to ascertain. At the very least, we must assume a great deal of diversity across the subcontinent in ideas and systems of justice.

The main institutions and structures of inequality in the context of ancient India were the patriarchal family and household, *varna* (the four-fold classification of Brahmin, Kshatriya, Vaishya and Shudra), *jati* (caste), untouchability and slavery. The origins of some of these – patriarchy, varna and slavery – can be traced to Vedic texts, while caste and untouchability made their appearance in North India in the 6th/5th centuries BCE, and several centuries later in the South.

In fact, the early history of caste is inadequately understood. The growth

of the caste system and Brahminical privilege is connected with the proliferation of monarchical states and the expansion of agrarian society. But social inequality was also accepted by Jainism and Buddhism (though they placed the Kshatriya above the Brahmin). It was only in the a-social world of the monastic order that social distinctions were supposed to vanish, at least theoretically. Although the manifestations and degrees varied, gender inequality was deeply ingrained in social and religious practice across the board.

The mechanisms for the settlement of civil and criminal disputes in ancient times must have varied a great deal across regions and time, and involved groups such as village communities and headmen, assemblies and corporate organizations such as guilds. But at an early stage in the history of monarchy, the state asserted a powerful claim to have the preeminent right to adjudicate civil and criminal disputes and the right to impose pain, punishment and death on subjects. The following sections discuss certain aspects of the ideas about kingship and justice as revealed in a few Sanskrit, Pali and Prakrit sources. What happened on the ground across the regions of the subcontinent must have varied considerably and must have been greatly influenced by local custom.

The relationship between the king and his subjects (*praja*) is central to all ancient Indian theories about the origins of kingship. Taxes are presented as the king's wages for his performance of his duties, and foremost among these duties is *danda* (literally, 'the rod'), which means punishment and justice. The king's danda is said to prevent a descent into *matsya-nyaya* (the law of the fish), a situation of anarchy in which the strong devour the weak, where violence and disorder prevail, and neither life nor property are secure. Let us look at three accounts of the origins of kingship – two from the *Mahabharata* and one from the Buddhist *Tipitaka*.

The Mahabharata, composed roughly between about 400 BCE and 400 CE, contains extensive discussions of kingship and justice. The compositional history and structure of the work, consisting of long, rambling narrative and didactic portions, make it an excellent vehicle for expressing irreconcilable views and irresoluble dilemmas. The Shanti and Anushasana Parvas of the Mahabharata contain a long dialogue between Yudhishthira and Bhishma, the latter lying on the edge of death on a bed of arrows. Yudhishthira has many questions, especially about the dharma of a king, and Bhishma answers them all.

The Shanti Parva contains two accounts of the origins of kingship. The first begins in an age of perfection, when kingship and punishment did not exist because everyone followed *dharma* (righteousness, duty). However, at some point in time, men started falling prey to vices such as greed, desire and passion, and the Vedas and the sacrifices disappeared. The gods were alarmed and went to Brahma, who gave an intellectual response to the problem by composing a long work consisting of a hundred thousand lessons on dharma, *artha* (material gain) and *kama* (sensual pleasure). The gods then approached Vishnu for a more practical solution. Vishnu produced a mind-born son Virajas to rule over men, and he was followed by his two sons. These three refused to rule because they were inclined towards renunciation; Ananga was next in line and he ruled well, but his successor Atibala lacked control over his senses. Then came the evil king Vena, whose mind was dominated by passion and hate, and who did not discharge his duties properly. The sages stabbed him to death with blades of sacred *kusha* grass. They churned his right thigh, and out of it emerged an ugly man named Nishada (a forest tribal), who they told to go away because he was not fit to be king. Then they churned Vena's right hand and from that emerged Prithu, a man learned in the Veda, the auxiliary texts, dharma, artha, the military arts and statecraft. Prithu proved to be a good, exemplary king.

The second account in the Shanti Parva describes kingship as the result of divine intervention and a social contract. It begins with a description of the violence and anarchy of the kingless state. Oppressed by these conditions, the people made a pact among themselves to get rid of violent, aggressive men who stole, violated women and performed other such evil acts. However, this arrangement did not work. So they went to Brahma and begged him to appoint a king who could protect them. Brahma chose Manu, but Manu refused because he was afraid of the cruel acts he would have to perform as king.

The people allayed his fears and explained the full bargain – the sins incurred by his cruel deeds would disappear; the people would give him 1/50th of their cattle and gold, and 1/10th of their grain; one-fourth of the merit earned by them would go to Manu; and mighty warriors would follow him around everywhere. Manu accepted this pact and went around the earth, punishing the wicked and making them perform their duties.

The early Buddhist view on the origins of kingship is contained in the Agganna Sutta of the *Digha Nikaya*. This begins in a primordial, pristine age of perfection when beings were undifferentiated, luminous, made of mind, and fed on rapture. At some point, a

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decline set in. Largely due to greed, the evils of theft, accusation, lying and punishment reared their head, and one being stole rice from another being's field. The beings assembled and decided that some solution to this disorder was necessary. They approached the one among them who was the most handsome, charismatic and authoritative and offered him the following deal: he should protect everyone's property and punish those who committed crimes; in return, they would give him a portion of their rice.

The first Shanti Parva account is more dramatic than the second, but both tell a complex story. Kingship has a rocky start. Some of the earliest candidates have serious character flaws, some do not want to be king, some have to be cajoled, one has to be killed. In the first account, the gods and sages play key roles, and in the second, the gods and the people. The Agganna Sutta gives a simpler story and talks about a direct social contract between the people and the king, with no intermediaries. But in all three accounts, kingship is described as essential in order to bring an end to violence, crime and disorder and to prevent the recurrence of these things. The king's primary duties are the maintenance of social order, protection of private property and the imposition of punishment.

The king's punishment is supposed to be scrupulously balanced and fair. In the Mahabharata, Bhishma tells Yudhishthira that danda was created by Brahma for the protection of the world so that people performed their duties. It is the fear of danda that prevents people from killing each other. The king's punishment can take the form of censure, imprisonment, fines, corporeal punishment, banishment, bodily mutilation and death. However, this punishment must be measured, in accordance with proper judicial principles, proportionate to the crime and utterly impartial.

In matters related to punishment and taxation, the king should be both gentle and fierce, like the spring sun. This is part of a larger model of the ideal ruler who is a brave warrior, intelligent, learned, well-trained, disciplined, detached and self-controlled; one who does not give in to impulse or passion but listens to good advice and acts only after careful deliberation. It is only such a king who can be just.

References to this kind of ideal ruler are scattered across ancient Indian texts of many kinds. For instance, Kalidasa's *Raghuvamsha* describes the ideal king as wise, well educated, well trained, a brave warrior and skilled in the art of governance. The ideal king is *yuktadanda* – one whose punishments are fair and measured. Kalidasa describes the great king Raghu thus: '…by dispensing fair punishment he won the hearts of the whole world, like the southern wind which is neither too cold nor too hot.'

Why should a king bother to be just and perform his duties? The Mahabharata has a simple answer – good kings earn merit and go to heaven; bad kings earn sin and go to hell. But there is another angle too. The Mahabharata warns that a king's neglect of his duties can lead to justified violence *against* him. A cruel king, who does not protect his people and who robs them in the name of levying taxes, is evil incarnate and should be killed by his subjects as though he were a mad dog. Were such statements intended as a warning to kings to behave themselves, or were they endorsements of rebellion and regicide? It would be tempting to hold that it was the latter, but we should not get carried away. What we can conclude is that although the overall tenor of all the texts of ancient India is pro-monarchy, a window for critique is left open.

Such theories could be used to justify the use of force by the state against unruly subjects (whether they actually ever were directly used is unknown). In the Uttarakanda of the *Ramayana*, the otherwise compassionate Rama kills the Shudra Shambuka. His crime? Shambuka had violated the varna order by performing austerities and this violation led to the premature death of an innocent Brahmin child. Here, the king's punishment is directly linked to the maintenance of the social order. So actions against subjects who did not toe the line could be justified on the grounds of the need to maintain the social order. It could be argued that this was in the larger interests of the social group and the performer of the transgressive act himself.

Kautilya's *Arthashastra* is a brilliant treatise on statecraft that grounds kingship in pragmatic self-interest. Contrary to the popular belief that this work was written in the 4th century BCE during the reign of Chandragupta Maurya, recent scholarship places its composition between c. 50 and 300 CE. It is important to remember that the Arthashastra is a theoretical work on statecraft and describes a potential state. Although it contains the first detailed law code in India, there is no indication that its prescriptions were actually used to decide civil or criminal cases. Nevertheless, the text is of great importance in histories of political and legal ideas.

Kautilya's statements on the nature of the king's punishment are in line with the Mahabharata views cited above. The king must be impartial and his punishment must be rooted in discipline and self-control; only then does it brings prosperity to all living beings. A king who is severe with the rod

becomes a source of terror to all beings, and one who is excessively mild is despised. If the rod is used unjustly, through passion, anger, or contempt, it becomes dangerous. A king who metes out wrongful punishment will not escape punishment himself.

The Arthashastra gives primacy to the royal edict (*raja-shasana*) among the four legal domains, the other three being *dharma* (the higher, universal 'law'), *vyavahara* (laws related to legal transactions) and *charitra* (custom). It talks about the king as a dispenser of justice but also refers to various sorts of judges.

Kautilya distinguishes between two kinds of suits – *vyavahara* and *kantakashodhana*. Vyavahara refers to transactions between two parties, such as lawsuits related to commercial transactions, marriage, inheritance, property, debt, sale and gifts. In such cases, the trial was supposed to be conducted by three judges known as *dharmastha*s; most of the crimes in this category invite fines. Kantakashodhana (literally, 'the removal of thorns') refers to various criminal offences such as fraud, theft, corruption and murder. These were to be decided by three judges known as *pradestri*s; they invited punishments such as fines, torture, mutilation and death.

In the Arthashastra, as in other ancient texts, the idea of justice is rooted in the idea of natural inequality. The text recognizes several bases of inequality, but varna is the foremost. The varna of the defendant, complainant and other individuals involved are usually key elements in deciding on the appropriate punishment. Punishments in the Arthashastra include fines, confiscation of property, exile, corporeal punishment, mutilation, branding, torture, forced labour and death. The control over women's sexuality was central to the project of the maintenance of the varna (and caste) order. Hence, it is not surprising that some of the most violent punishments are for sexual transgressions across varnas. For instance, Kautilya recommends that a Shudra having sexual relations with a Brahmin woman should be burnt in a straw fire.

Kautilya accepts torture both as punishment and as a means of acquiring information during interrogation. Types of torture include striking, whipping, caning, suspension from a rope and inserting needles under the nails. The Arthashastra distinguishes between two kinds of capital punishment – simple death (*shuddha-vadha*) and death by torture (*chitra-vadha*). The latter refers to especially painful deaths which may have also involved public spectacle. The varieties of death by torture include burning on a pyre, drowning in water, cooking in a big jar, impaling on a stake, setting fire to different parts of the body, and tearing apart by bullocks.

The Arthashastra is often read as an endorsement for a totalitarian state and state violence. In my view, its entire discussion is premised on a recognition of the fragility of the king's power and the need for the king to use reason and consult others rather than acting foolishly, recklessly or impulsively. Kautilya advocates ruthless, carefully calculated and effective use of preemptive and post-facto violence *by* the state in order to prevent and respond to violence *against* the state. He talks of the dangers of the excessive force by the state and warns of the danger of popular disaffection and uprising against a king who is cruel or unjust. The term used for this is *prakriti-kopa* (the anger of the people).

The anger of the people can lead to the loss of power or even life for the king. Kautilya's greatest achievement was to ground kingship in real politik rather than dharma or pious sentiment. He was able to demonstrate that it was in a ruler's self-interest to rule intelligently, ruthlessly and well, and to ensure the prosperity of his people.

Although Brahminical texts such as the Mahabharata talk about nonviolence and compassion, these elements are taken to much higher levels in the Buddhist and Jaina traditions. The Buddhist Jatakas, which are stories about the previous lives of the Buddha, talk of good kings and bad kings. The good king protects his people and is truthful, just, and compassionate towards all creatures. For instance, the Rajovada Jataka tells the story of a *bodhi-sattva* (Buddha-to-be) who was king of Banaras; he was so righteous and administered justice with such perfection that the courts were deserted.

The most celebrated Buddhist king in ancient India is the 3rd century BCE Maurya emperor Ashoka. His inscriptions, inscribed on rocks and pillars in far-flung parts of the subcontinent, talk obsessively and incessantly of *dhamma* (Prakrit for dharma; goodness, piety). The delivery of justice was an important part of Ashoka's idea of the dhamma of a king. Ashoka's Separate Rock Edict 1, addressed to city magistrates, raises the problem of people suffering as a result of unfair imprisonment and harsh treatment, and exhorts officials to deal with such cases with fairness and impartiality. Justice is discussed in greater detail in Pillar Edict 4, which describes the duties of officers known as the *rajuka*s.

Ashoka urges them to understand what causes the people pleasure and pain, and to hand out rewards and punishments fairly, confidently and fearlessly. He states that there should be impartiality (*samata*) in judicial proceedings and punishment. He announces a three-day respite to prisoners

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condemned to death, to give their relatives time to persuade the rajukas to grant them life; or, if this failed, to give the prisoners time to distribute gifts or undertake fasts to attain happiness in the next life. This three-day respite indicates that Ashoka did not abolish the death penalty. Apart from enabling the convict to undertake last-minute measures to try to attain happiness in the next world, the edict suggests that in normal circumstances, execution swiftly followed sentencing.

So Ashoka sought to temper the violence inherent in capital punishment in three ways: by exhorting the judicial officers to be fair; by ensuring that there should be time and opportunity for a last appeal before the execution of the sentence; and if this appeal failed, by granting the condemned man an opportunity to prepare for his next life.

Ashoka did not rely on moralizing and exhortation alone. He also put in place a system of surveillance over the judicial officers – the *pulisani* were supposed to keep an eye on the rajukas, to ensure that they administered justice properly. The analogy used for the rajuka is that of an experienced wet nurse, associated with affectionate feminine care and nourishing. This was complementary to the paternalistic sentiment associated with the king himself. The aim of the rajukas is in fact the same as that of the king – to ensure the welfare and happiness of the people.

The most compassionate of ancient Indian kings did not try to change the *nature* of the laws. The focus was on fairness in their application and execution. He recognized and tried to remedy flaws in the justice delivery system. The king projected himself as a maintainer of justice and simultaneously distanced himself from instances of actual injustice, for

which the responsibility was placed squarely on his judicial officers. Ashoka saw the administration of justice as part of the higher goals of the state, namely to ensure the welfare and happiness of all beings in this world and the next.

These are just a few of the perspectives related to justice that have come down to us from ancient times. There are many others, expressed in other languages, for instance Tamil, which has a long and rich history. We do not know enough about the actual administration of justice in ancient India. Clearly, kings could not have controlled everything in their realm. Their effective power and control must have been strongest in and near their capital city. There must have been a great deal of variation in legal customs and procedures across the subcontinent, and these must have changed over time.

Using ancient India as a resource for our own time presents two temptations that have to be resisted – the temptation to glorify and the temptation to condemn. The aim should be to understand ideas and to assess them using the standards of their own time. As mentioned at the outset, ancient societies accepted the idea of natural inequality of social groups, which is diametrically opposed to the basic premises of modern democracies.

If we want to extract some takeaways for our own times from ancient texts, it can be the following ideas – that a ruler must be utterly impartial in the administration of justice and must not be swayed by considerations of personal favour or profit, and that the inflicting of excessive or wrongful punishment will invite dire retribution. In fact, Kautilya's idea of cruel and unjust rulers meeting their nemesis due to prakriti-kopa, 'anger of the people', suits modern democracies better than ancient monarchies.

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Law and justice in Hindi cinema

SHUBHRA GUPTA

IN 'Awaara', an iconic 1951 film, a man and a woman are in the middle of an impassioned argument. He tells her: *tum ek judge ki ward ho, aur main ek awaara, kya kahegi tumhari society?* (You are the ward of a judge, and I am a ruffian, what will your society say?)

The film arrays the pair on either side of a seemingly insurmountable divide, till true love rears its head in challenge. Raj, played by Raj Kapoor, and Rita, by Nargis, both legendary actors, exemplify the difference: he, brought up as a small-time lout, was born to a good family; and she has been brought up in wealth, but wasn't born to it.

The audience is privy to the secret that the film, directed by Kapoor, bases its conflict on. We know that Justice Raghunath, the father of the 'awaara' Raj, heartlessly abandoned the woman he impregnated. The same man has been magnanimous and caring to his ward. The film raises many pertinent questions – about nature and nurture, the complexity of human nature, the redemptive power of love, crime and punishment – and at the core of it all, the importance of justice.

In 1951, India was still a new nation, still addressing and dressing the deep wounds of Partition, still struggling to bring its staggeringly disparate peoples under one umbrella. This struggle for coherence was reflected in the era's cinema, which was using the power of storytelling to create an idea of a country, of composite-ness.

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Entertainment and education were expected to go hand in hand in those days: a film needed to be a message in a bottle to go mainstream, to spread its wares among the masses. India, then and now, has spoken in many tongues: popular Hindi cinema became, by default and design, the language everyone understood. By creating an accessible grammar, it allowed people to easily distinguish between good and bad, hero and villain, right and wrong, and familiar characters (and events). As it grew in reach and popularity, the language of cinema became the shorthand by which many socio-economic complexities became understandable. What's noteworthy is that by and large, the sway it holds on popular imagination remains undiminished.

The Indian film industry, one of the most robust and prolific in the world, had been a useful subversive tool during the independence movement. Sneaking in codes for nationalism and freedom past the British censors was a significant part of what the pre-Independence film community had busied itself with; post-1947, through the '50s, much of popular cinema became an integral part of nation-building, its makers called upon to create works[1] which would promote amity and peace. It also created a common, accessible framework of understanding for the new Indian in this bewildering new India, with its ever-widening chasms between class and caste, the pushes and pulls of traditionalism vs individualism, and subsuming all else, the concept of fairness and justice.

A sense of idealism and optimism was evident in the films of the time. But, as urbanization grew, and cities became the site of exploitation and crime, filmmakers began showing the harshness and alienation of city life. The contrast between the traditional and the modern became a staple thematic thread, too. The India vs Bharat debate, which found a home in mainstream Indian cinema, played out in as many ways as there were films. In 'Awaara', a film much ahead of its times, Rita is a free-spirited, independent, working girl. She has a profession. She is a lawyer, which is significant to the plot. But even with all her privilege, she has to bow to the wishes of her powerful male guardian, or at least, not actively disobey his commands. Her feelings for Raj stay steadfast, though, and that's one of the most 'modern' things about the film – her education and profession lead her to create a path of justice for the beleaguered Raj. She holds up a mirror to Justice Raghunath, played by Prithiviraj Kapoor, who confesses to his 'sins', begging his son's pardon towards the end.

The idea that some people were beyond reproach, spotless of reputation and scrupulously fair in intent and execution, is clearly seen in some of the early films of the time particularly in the character of the unbending, righteous, learned judge, who rules from on high. Courtroom dramas became a staple feature in the technicoloured, song-filled entertainers of the '60s, in which lawyers, both for defence and prosecution, conducted the trial accompanied by high drama: some of the most popular films of the decade (B.R. Chopra's 'Kanoon' (1960), Shankar Mukherjee's 'Baat Ek Raat Ki' (1962), Yash Chopra's 'Waqt' (1965) spent a substantial amount of their run time in courtrooms, trading colourful dialogues and scoring points. And providing us with a satisfying end, through which we lived happily ever after.

However, a degree of complexity, injected in cautious, calibrated doses, had started creeping into the plots. Primarily, of course, heroes still had to be unsullied, and heroines had to be pure and virginal, but sometimes these characters were allowed to be less than perfect. In the blockbuster musical, 'Waqt', the oldest son of a once-rich businessman is a thief, stylishly played a big star of the time, Raj Kumar: we enjoy his rakish shenanigans because we know that they will be short-lived. In any case, his saintly mother and squeaky-clean brother, played by the cherubic Shashi Kapoor, more than makes up for the moral ambiguities of the brother. Audiences were slowly getting used to the fact that their heroes could be a tad tainted, as long as they were made to pay for their sins, either by dying or going to jail. But legal luminaries remained beyond reproach.

In 'Baat Ek Raat Ki' (1962), Dev Anand's character, a lawyer, lies to the leading lady, played by Waheeda Rehman. But he does it with the best intentions, in order to save her from the gallows. It's a murder mystery, done with a degree of finesse, with some of the best music in the history of Hindi cinema, but the courtroom proceedings have equal weightage: '*kanoon ka sabse bada naara hai, chahe gyarah khooni bach jaaye, par ek begunaah ko hargiz sazaa nahin honi chahiye*' (even if 11 killers go free; one innocent should not be punished). These dialogues, delivered by the hero, assured us that in the fictional universe of the movies, at least, idealism still existed. The innocent would survive, the guilty would be punished.

It was in the '70s that radical changes began to sweep across India. It was a decade of great unrest and political turbulence, which led to the Emergency, and its fallout. The state,

1. https://www.thehindu.com/entertainment/movies/the-changing-face-of-nation-building-cinema/article26283650.ece; https://www.sahapedia.org/jawaharlal-nehru-and-rise-indian-cinema

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increasingly turning into a space of conflict and contention, was reflected in the rise of violence in the movies. A standard rule of thumb that came to be accepted within Hindi cinema was the distinction between law – symbolized through formal institutions like the courts and the police, and informally through codes of behaviour and mores and justice. The inability of the law to deliver became more pronounced as vigilante justice gradually established itself as acceptable: you could be on the wrong side of the law, but you should always be on the right side of justice.

Some of the best films of the time redefined the meaning of mainstream by borrowing from real-time events and situations. Such films as Prakash Mehra's 'Zanjeer' (1974), Ramesh Sippy's 'Sholay' (1975) and Yash Chopra's 'Deewar' (1975), a tryptich which created a memorable slate of policemen, lawyers, judges and criminals, tipped us over, definitively, from an era of idealism into the era of cynicism.

'Zanjeer' gave us our first flawed Hindi cinema hero, an upright policeman who uses anger as a weapon. What was also new was how that anger was used as a moral imperative, which spoke for the innocent, the deprived, the oppressed, the poor. Amitabh Bachchan's angry young man persona, represented the voice of the dispossessed: if you were unfairly done against, his character, very often named Vijay (victory), would fight for you, tooth and nail. He would fight alone, and he would emerge the last man standing. Bachchan's Vijay was the ultimate messiah, the hero the era demanded. It did not matter that his characters so often took the law into their hands, that they broke the law knowing full well that they were doing so. What mattered was that they fought for the people who couldn't fight for themselves.

The rough and ready ways of a cop beating up a bad guy started getting normalized, and gained full throated approval from the audience: they knew that the 'system' was rotten and corrupt, so the only way out was for the cop to turn vigilante. In a world where hope from conventional justice had become elusive, the righteous judge began receding from film plots: the vigilante policeman started becoming the default hero.

The standard climactic scenes in which a posse of policemen would arrive to carry off the villains, gave away to the solo cop towering over a cowering villain, bloodied and bowed. Courtroom high jinks stopped getting as much traction as they used to. The issues revolving around justice moved to the new realism-driven 'parallel cinema' of the '70s and '80s, which emerged as a pushback against escapist popular cinema. But the upholders of the law in these films were not the untouchables they once were. Cracks had begun appearing in the bastion which was once considered inviolable: the police and the judiciary were as susceptible to the vagaries of the system as were the rest of us.

Parallel cinema focused on societal fault lines, for which the mainstream had no appetite, or skill. These were films made on the plight of the marginalized, those who belonged to the lower caste and class. Such filmmakers as Shyam Benegal, Ketan Mehta, and Govind Nihalani showed us how systemic brutality and oppression, and a dangerous mix of feudalism and curdled socialism, had caused the very concept of justice to disappear from chunks of our society. Landlords and moneylenders were still as much villains as they used to be in the 1950s classics 'Mother India', and 'Do Bigha Zameen', but now, in the '70s and '80s, no gun-toting mother would

come to the rescue of the poor tribal, no hero would come galloping to save the woman raped repeatedly by the wealthy men who employed her husband.

One of the most impactful films of the early '80s is Govind Nihalani's 'Aakrosh', which gives us a tribal prisoner, played by the late, great Om Puri. He is in jail for murder, and the lawyer assigned to his case, played by Naseeruddin Shah, tries very hard to get him to speak. It was one of the first Hindi movies to employ the power of silence: Bhiku Lahanya's muteness is heartbreakingly eloquent. As Shah unravels the corrupt nexus between the lawyers and the police and the privileged class, there is nothing he can do to help Lahanya, who comes from a section of society which has been nearly invisibilized, as if the progress that the nation had made till then has passed them by. The film is a searing comment on how privilege, position and male entitlement, become an impenetrable layer. Even the hope of justice from a system which is broken, is futile.

Nihalani followed this up with 'Ardha-Satya' (1983), which can be read as a companion piece to 'Aakrosh'. 'Ardh-Satya' is a textbook case of how a broken society leads to a broken law and order system, and the cycle that it sets up is vicious, never-ending. Puri plays Anant Velankar, a policeman who starts off humane, interested in the world around him, in poetry, in the love of a good woman, and who ends up as dehumanized as his corrupt, numbed colleagues. Watching it today, one is struck by just how deep the rot had already set in: Rama Shetty, played by Sadashiv Amrapurkar, is not the cartoonish villains we had been used to seeing, not the oversized Mogambos or the Shakaals who lorded it over in their

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dens with their equally cartoonish molls and goons. Amrapurkar is chillingly real, a man who has learned how to press the buttons of the people who can turn his wrongs into right.

Where is the idea of justice in a world that is ruled by the Rama Shettys? You did not even need to be a mobster to create an imbalance between a genteel, gentle old order and a new world full of bluster and ugliness; you could just be an urban landlord who is only interested in money. In Saeed Akhtar Mirza's 1984 'Mohan Joshi Haazir Ho', we see an old couple forced into going to court to demand their rights as tenants, and how the unholy nexus between a couple of greedy lawyers and an unfeeling, labyrinthine judicial system, drives them into the ground. The film was shockingly real, showing us how a normal citizen has no real recourse against injustice: the law works only for the rich. Bachchan's Kalia says in the eponymous film (1981) – *'aaj ki duniya mein jurm itna kamyab hai, aur kanoon kitna bebas'* (in this world, injustice succeeds and the law fails to uphold its duty). As villains began to triumph, the idea of meaningful justice began to wither away.

The conflicts between increasingly criminalized power structures and the corresponding weakening of upholders of law and order returned to mainstream Hindi cinema with the advent of the North Indian hinterland in Mumbai-centric Bollywood. Such filmmakers as Prakash Jha, Vishal Bhardwaj, Anurag Kashyap, Tigmanshu Dhulia, began altering the landscape, language, and iconography of the movies. The portrayal of a leaking, corrupt police-and-legal system and the political class became much more trenchant. The on-the-take lawyers and bent cops were no longer treated with shock and awe. Instead, they were pre-sented stripped of melodrama, and with as much matter-of-factness as Hindi movies allowed themselves.

'Gangajal' (2002), directed by Jha, is based on the 1980 Bhagalpur blindings. It gave us an upright cop, played by Ajay Devgn, up against an entire ecosystem hollowed out by caste and class oppression, and religious malfeasance. The film employed a language which we instantly recognized as new, even if Devgn was still an old-style hero who is primed to win. After 'Gangajal' came another similar cop-and-criminal story in E. Niwas's 'Shool', in which Manoj Bajpayee's straight-arrow policeman walks into Motihari, another Bihar small town, and is forced into picking up a gun to shoot the bad guys dead, in a hall of legislature. There was a time when this would be considered sacrilege. But given the nature of the beast, there is no other option, no other way to ensure justice. Both the wins (in both films) were hard fought, hard got.

In the new millennium, Big Bollywood's go-to vehicles have been the hyper-masculine, hyper-violent rage-and-revenge cop melodramas like 'Dabangg', 'Singham', 'Rowdy Rathore', 'Simbba', and other similar outings helmed by Bollywood superstars. The heroes are Robin Hood style characters, squaring up against vicious villains and standing up for the victimized common man, but their films are so full of misogyny and terrible anti-feminist tropes, that justice, when it does come, feels coarsened. The universe of female cops ('Mardaani') is as problematic as the ones dominated by their male compatriots: just the lead character being played by a leading female star doesn't change the complexion of these trigger-happy films.

What happens when we watch films which focus on the normaliza-tion of custodial torture and extra judicial violence? While audiences start by being repulsed, there is also the fear of being desensitized about ordinary people becoming collateral damage in a larger quest for 'justice'. In Hansal Mehta's 'Shahid' (2013), an incident of communal violence helps lure the protagonist to become the militant across the border; disillusioned by this he returns home and is picked by the police. Unsettling custodial torture takes place within the first 20 minutes of the film – we see Shahid stripped of everything except his Muslim identity. Vishal Bharadwaj's 'Haider' (2014) further deconstructs the idea of a highly securitized state and the consequences cycles of violence has on its people; raising the question: whose justice is being met?

Aniruddha Roy Chowdhury's 'Pink' (2016) is that rare mainstream Hindi film in which the portrayal of the 'victims' and the 'aggressors' is spot on. A group of young women have an unpleasant experience on an evening spent with some young men; instead of owning up to their mistakes, that bunch of aggressive, politically connected, entitled young men go after them, besmirching their reputation. Amitabh Bachchan, who plays their lawyer, defends them in court, with lines that hadn't been heard in Hindi movies before. His performance, heightened-by-drama but effective nonetheless, reminding one of Sunny Deol's memorable turn in Rajkumar Santoshi's 'Damini' (1993), is key to a judgement in favour of the young women. If a girl says no, it means no. Things are set to the right, and justice is delivered.

Lawyers can be fun too. Entertainment is the buzzword of such films as Subhash Kapoor's 'Jolly LLB' part one and two, and the films are careful to not get too dark, or too unappetiz-

ing. It's not as if we hadn't seen all of this before, but especially in the sequel (2017), in which Jolly (played by Bollywood star Akshay Kumar) discovers his noble side after a struggle with his dodgy side, we see the old-fashioned notion of justice (via a great act from Saurabh Shukla) being amped up, much to our satisfaction. There is always something to be said for the straight and narrow, and the just, and so what if it is fictional, right?

But for my money, if I had to choose one film which shows up the innards of the legal system being hung out to dry, it would be Chaitanya Tamhane's 'Court' (2015). It isn't strictly a Hindi film. Its characters speak Marathi, Gujarati, Hindi, English, and as it based in melting pot Mumbai, it feels right. A long-time activist is held responsible for the suicide of a municipal worker, and as the case winds its way through the courts, we see how torturously the wheels of justice grind, impacted by the prosecutor's prejudices and the defence's priorities. Tamhane's film is not interested in drama, or creating any noise. It stays steady for long moments, giving us a chance to observe people who don't really cross our sight-lines, and shows how the legal system works, or not, depending upon how connected you are, or not. A revolutionary poet is to be thrown into jail for the death of a man who cleans our gutters. Who really cares? That little snippet wouldn't make headlines, would it? It's a beautifully realized film that hits you where it hurts.

It can be argued that 'Court', not really 'mainstream', much more an 'indie' (independent) film, had the freedom to go where many fear to tread. But what's heartening is that a few prominent Bollywood filmmakers are now choosing strong realism over empty escapism, not just as a throwaway crutch, but as full-fledged flavour.

Anubhav Sinha's 'Mulk' (2018) and 'Article 15' (2019) are examples of how a filmmaker who has to be careful of commercial imperatives can still make a mainstream film with meaning. 'Mulk', which raises pertinent questions on the current dispensation's focus on religious identities, patriotism and nationalism, places one of its main characters (a lawyer) in the dock, and gets him to articulate important points on these contentious issues.

'Article 15' zeroes in on how even today, casteism, classism, patriarchy, ugly machoism, and all other concomitant 'isms', colour and define so many aspects of our lives, and how even the expectation of justice depends on which side we have been born on. The lead character, a policeman, played by Ayushmann Khurrana, acts as a disruptor in the rural outpost he takes charge of. The power play between outsiders and insiders, the age-old discrimination between castes playing out in subtle and not-so subtle ways, and its lethal outcome, are woven into the narrative. Despite its exaggerated flourishes, the film comes off as a powerful comment on our times.

Changes in the national ethos are decisively reflected in the films – from the optimism of the Nehruvian phase to the bleak tempestuousness of the 1970s and 1980s, and the rising political and social uncertainties of today's times. Justice (*insaaf*) and law (*kanoon*) retain their core meanings, even if their significance waxes and wanes, as does the fortune of the hero and the villain. While we still want good to win over evil, the conviction that justice will always be served, has become elusive. This is an unfortunate reality for too many of us, in today's India, where justice remains a chimera. Both real life, and reel lives tell us so.

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Interview

With **Ajit Prakash Shah**, former Chairman of the 20th Law Commission of India, also the Chief Justice of the Delhi High Court from May 2008 till his retirement in February 2010.

How would you describe the role of the judiciary in India's constitutional structure? Are the High Courts and the Supreme Court fulfilling that role?

The Constitution gives the judiciary powers to maintain the rule of law, to safeguard the supremacy of the Constitution, and to ensure that the government runs according to constitutional principles. The courts also have the powers of interpreting and protecting fundamental rights through the enforcement of writs. The judiciary is, therefore, designated as a sentinel to keep the other limbs of the state in check.

Unfortunately, the Supreme Court – especially in recent times – has failed the Indian people. There are a host of issues that beg judicial deliberation today, especially pertaining to transgressions of the executive, such as cases concerning 4G Internet and preventive detention in J&K, the constitutional validity of the Citizenship Amendment Act, suppression and criminalization of protests against this law, misuse of draconian laws like sedition and the Unlawful Activities Prevention Act (UAPA), electoral bonds, among others. Sadly, the Supreme Court is either watching silently, readily acquiescing or mostly looking away, as though nothing has happened. This is an abdication. In contrast, High Courts have performed a stellar role. Unfortunately, in some matters, such as the misuse of the UAPA, they are shackled by patently wrong precedents set by the apex court.

Is the sliding standard of judicial independence linked to larger systemic problems in our democracy?

On paper, we have a liberal, democratic, secular republic with all its wheels in place. We have fundamental rights protected by seemingly impenetrable firewalls. With a parliamentary government, separation of powers, and a federated division of responsibilities between the centre and states, our system is the envy of many. Unfortunately, this is all only on paper. In India today, every institution, mechanism or tool that is designed to hold the executive accountable, is being systematically destroyed. It is not just the judiciary that has fallen victim to this. Parliament has already failed us during the pandemic. Add to this list, the Election Commission, the National Human Rights Commission, the Information Commission, academia, the press, and even civil society.

We've heard a lot in recent years about the role played by the CJI as the master of the roster and the problems that come with it. Why is it that we're seeing it as a special issue today?

The difference between the past and present is the way in which the master of the roster is being strategically used and abused. I think the misuse was not so apparent earlier. It might also be because the executive and the legislature understood and respected the role that the judiciary played in preserving balance and harmony in the functioning of the state.

Today, there is no need to expend energy in packing the Supreme Court with pro-government judges. Finding over 30 judges who think alike would anyway be difficult, if not impossible. The combination of opaque systems like the 'master of the roster', and a certain kind of Chief Justice of India, and a handful of 'reliable' judges, is sufficient to destroy all that is considered precious by an independent judiciary.

The unprecedented judges' press conference recognized the problem with the master of the roster system, and it is acknowledged that viable alternatives exist. But no CJI is willing to let go of this power. Today's situation was foreseen many decades ago by Chief Justice Y.V. Chandrachud, when, in 1985, he observed, 'There is greater threat to the independence of the judiciary from within than without...'

Urgent reforms are necessary to the allocation of work. We can adopt systems from other jurisdictions, such as the European Union, which are either rule-based or truly randomized.

The framers of India's Constitution made great effort to insulate the judiciary from other wings of government. Are the present failings a product of the Constitution and its text?

The members of the Constituent Assembly were especially aware of the dangers of not having an independent judiciary and made every effort to ensure that this did not happen in India. This was done through various provisions, such as those that ensure security of tenure for judges, or protect the salary and perks of judges, etc. The conduct of a judge cannot be discussed in parliament or a state legislature.

Whatever little power was there, notably the power of supersession in the appointment of the CJI as used by Indira Gandhi, has since gone, since the appointment of judges is now in the hands of judges themselves. Arguably, we have far more elaborate provisions to ensure that the judiciary acts as a countervailing balance than say in the UK or the US. I do not think the Constitution is at fault at all. The best laid plans can be undone in the hands of the wrong people. Unless the people change, and their motivations change, I do not think the best-written constitution will be able to help.

The problems with judicial independence have been repeatedly highlighted – an opaque system that is used to appoint judges and post-retirement jobs chief among them. Are there other systemic ills that need fixing? And if so, how must those ills be fixed, what is the way forward?

The process by which a judge is appointed to the High Court or the Supreme Court is opaque, suffers from biases of self-selection and in-breeding, and the collegium itself functions like a club or cabal. The collegium system conflicts with the intent of the framers of India's Constitution; it detracts the judges from their principal judicial work of hearing and deciding cases; it resorts to ad hoc informal consultations with other judges, without investigating criteria such as work, standing, integrity and so on; it lays too much emphasis on seniority; assessments during consultations are sometimes warped or tainted, and sometimes better judges are overlooked or ignored. Additionally, the collegium system puts the courts outside the sphere of legitimate checks and balances.

The Constitution does not grant the Supreme Court any administrative control over the High Courts. But the Supreme Court has been exercising such control unsubtly through the collegium system. Today, even if a Supreme Court judge is not a part of collegium, they are invariably consulted in matters relating to their parent High Court, especially regarding the appointment, promotion or transfer of judges in those High Courts. Every Supreme Court judge, thus, carries a lot of clout. Effectively, through this, the career prospects of High Court judges are at the mercy of Supreme Court judges from their parent High Courts. This has also spawned a culture of sycophancy and subservience in the system. A classic case that seems to be a fallout of all this is playing out as we speak (i.e., the allegations involving Justice N.V. Ramana).

I think selection is the fundamental problem, and reforms are urgently needed. Someone like Justice Chelameswar emphasized this, by walking out of a collegium meeting when he was still a part of it, in protest against the lack of transparent procedures. Transparency requires that there are clearly established criteria for selection, and that records of selection meetings are properly maintained with views of those who participated properly recorded, to ensure that selections were not arbitrary.

The Supreme Court had a terrific opportunity with the National Judicial Appointments Commission (NJAC) Act judgement to reform a system that it itself acknowledged as being flawed. But it did nothing of the sort. It did not place safeguards within the NJAC that would have made it constitutionally valid. It also did not reform the collegium in any way.

It is never too late to fix this. But the judiciary is a deeply hierarchical institution. I think we need people that are eager and willing to bring about change, people who are interested in the greater good. Such a leader/team must also acknowledge that change cannot be brought about in piecemeal fashion, through small procedural tweaks or minor reorganization. The judiciary is at a juncture where change is needed at scale. We have many judges and exemplary lawyers who are sincere and committed to constitutionalism and to the rule of law. I expect they will rise to the occasion. More than 70 years ago, in the Constituent Assembly, Nehru had said that we needed judges of the 'highest integrity', who would be '[persons] who can stand up against the executive government and whoever might come in their way.' I am hopeful that we will once again be able to see judges like these thrive in India.

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The journey of labour regulation

KAVYA BHARADKAR and BABU MATHEW

PRESIDENTIAL assent was recently granted to three acts – the Code on Social Security, Industrial Relations Code and the Occupational Safety, Health and Working Conditions Code. Together with the Code on Wages passed in 2019, their passage marks the near-conclusion of an exercise first recommended by the contentious Second National Commission on Labour, 2002 – the amalgamation of Indian labour law into four operational codes.

The new codes subsume into themselves 29 central labour legislations. They were steamrolled through Parliament amid a raging pandemic, at a time of great strain in parliamentary processes with little debate – the Rajya Sabha passed all three within two hours. They are yet to be notified (brought into force formally), and the final rules for their implementation are awaited. While the bulk of protections brought under the codes cover the formal sector, these sweeping changes will have far reaching consequences for all Indian working people's lives, including those in the informal sector.

The working class was the backbone of the Indian independence struggle. A combination of factors, including the development of strong class solidarity in response to colonial subjugation, social democratism, and strong constitutional commitment towards a welfare state contributed to the development of the Indian labour regulation regime. These reforms will unsettle a century of labour jurisprudence accu-

mulated through trial and error, tussle between labour and capital, state and judicial intervention.

Over 90% of India's working population toils in informal employment. The International Labour Organization understands informal labour relations as relationships which are 'not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.).' The National Commission on Enterprises in the Unorganized Sector perceives unorganized employment similarly, noting that unorganized workers may be found in both – the unorganized sector (unincorporated and small enterprises that are usually owned by individuals or households, provide goods or services, and employ fewer than 10 people) and unorganized jobs in the formal sector. Informal jobs have been consistently growing due to a steady conversion of formal sector jobs into informal jobs.[1]

More than 95% of working women are engaged in informal work. There is a similar over-representation of socially and economically marginalized groups – Dalits, Adivasis, Muslims, and OBCs.[2] A critical question is: what do the new codes have to offer them?

The Wage Code subsumes the law on Minimum Wages (1948), Payment of Wages (1936), Payment of Bonus (1965) and Equal Remuneration (1976). It is commended as the first law

to universalize minimum wage protection for all workers. The Minimum Wages Act determined and protected statutory wages only for professions notified by central/state governments as 'Scheduled Employments'. The code abandons this – Section 5 prohibits all employers from paying employees below minimum wages. The Equal Remuneration Act sought to ensure parity at work between men and women, but the new Wage Code prohibits such discrimination based on 'gender' – a broader term; through which equal pay for equal work and non-discrimination for recruitment, promotion, transfers can be ensured for transgender people too.

The Wage Code however cannot help large portions of the workforce. Nearly a million ASHA (Accredited Social Health Activists)[3] and 2.6 million Anganwadi workers[4] are not entitled to minimum wages, as the government denotes them as voluntary workers. Gig workers, who perform a variety of urban services usually through mobile-based platforms too can't benefit from this code, since they are not recognized as 'workers'. The companies they work for/through denote them as 'microentrepreneurs' or 'independent contractors', denying them all labour protections and thus minimizing legal liability.

Half the workforce (52%), earning on an average, Rs 8,000 per month,[5] is self-employed and therefore out of the purview of this code. This includes unpaid family helpers who subsidize work carried out by their relatives without any pay (13.6%). Their labour remains unmonetized.[6] They require a different variety of reforms to improve and supplement their livelihoods. The NREGS has been one such measure. After the pandemic, demands for increasing the total days of work under MNREGA and initiating an urban equivalent to it have been raised. Unfortunately, they have not gained much political traction.

The 'need-based minimum wage' guaranteed by law is based on nutrition, clothing, housing and other norms first adopted in the 15th Indian Labour Conference.[7] This was affirmed by a constitutional bench of the Supreme Court in the Unichoyi judgment,[8] and augmented by it through the Raptakos judgment.[9] Except for a modification in the housing component, these are reproduced in the draft rules prepared for the code. The Committee on Fair Wages though refers to the minimum wage as a guarantee of not just bare

Accessible online at https://www.oxfamindia.org/sites/default/files/VIII.%20Social%20Discrimination%20in%20India-%20A%20Case%20for%20Economic%20Citizenship.pdf

3. Lok Sabha – Unstarred Question no. 3418 to be answered on 13 March 2020. Ministry of Health and Family Welfare, Government of India. Accessible online at http://164.100.24.220/loksabhaquestions/annex/173/AU3418.pdf

4. Press Release, Ministry of Women and Child Development: Anganwadi Sevikas. Posted on 12 July 2019 4:39 pm by PIB Delhi. Accessible online at ihttps://pib.gov.in/PressReleasePage.aspx?PRID=1578557

5. Santosh Mehrotra, 'Informal Employment Trends in the Indian Economy: Persistent Informality, but Growing Positive Development'. Employment Police Department Working Paper no. 254 (2019). Accessible online at https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—ifp_skills/documents/publication/wcms_734503.pdf

6. Periodic Labour Force Survey, 2017-2018 (Annual Report). Ministry of Statistics and Program Implementation, National Statistics Office. Available online at http://www.mospi.gov.in/sites/default/files/publication_reports/Annual%20Report,%20PLFS%202017-18_31052019.pdf

7. Report of the Fifteenth Indian Labour Conference, July 1957.

8. *U. Unichoyi and Ors. vs State of Kerala.* AIR 1962 SC 12.

9. *Workmen Represented by Secretary vs Management Of Reptakos Brett. and Ors.* 1992 AIR 504.

1. India Labour Market Update, ILO Country Office for India, July 2017. Accessible online at https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—sro-new_delhi/documents/publication/wcms_568701.pdf

2. Barbara Harris-White and Aseem Prakash, 'Social Discrimination in India: A Case for Economic Citizenship', Oxfam India working papers series, September 2010, OIWPS – VIII.

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physical sustenance, but preserving the efficiency of the worker by ensuring education, medical requirements and amenities. This wage level is linked to life with human dignity, above mere animal existence.[10]

Long ago, the Supreme Court breathed life into the Minimum Wages Act in the Asiad Case by referring to work performed for wages below the minimum wage as forced labour.[11] Justice P.N. Bhagwati warned: 'Where a person is suffering from hunger or starvation, …has no resources at all to fight disease or to feed his wife and children or hide their nakedness, utter grinding poverty has broken his back… would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage.'

The Wage Code codifies a new, lower wage level – the Floor Wage. No legislative or policy document explains what level of sustenance the Floor Wage will provide, even though it is a critical policy issue. Neither the code, nor the draft rules lay out the norms for its fixation – it is left to each successive central government to determine these.

The lack of a clear objective normative criterion is already creating confusion. Quite outside their competence, the Labour Minister announced a floor wage of Rs 179 last year, while the Finance Minister pegged it at Rs 202.[12] Both contradicted the Labour Department's Expert Committee on Determining the Methodology for Fixing the National Minimum Wage (2019) that identified household expenditure and nutritional and other norms and recommended Rs 375/day as the Floor Wage.[13] An unreasonably low floor wage is likely to drag market wages down and push crores of informal workers further into poverty.[14]

Measures such as Employees State Insurance, Gratuity and Maternity Benefit are accessible to establishments with over 10 workers, and Employees Provident Fund to establishments with over 20. Informal establishments and workers get a much lower standard of social security through central or state government schemes. In its Preamble, the Social Security Code states its goal is to make social security available to all workers – in the formal and informal sector. Universalization of social security has long been contemplated and was also urged by the Parliamentary Standing Committee on Labour.[15]

Superficial modifications have therefore been introduced – by granting the central government the power to extend these measures to establishments they don't currently cover (Section 1(6)), to make schemes for unorganized, gig and platform workers under EPFO (Section 15(d)), and extend underutilized ESIC hospitals to people outside ESI coverage (Section 44). Unorganized workers and their families can be brought under the ESI mechanism (Section 45). These enabling provisions only create legal space for progressive extension of better social security measures to the working class – it is neither guaranteed, nor can it be demanded legally. Presently it is merely a potentiality.

Despite being a 21st century legislation the Social Security Code retains the differential standard of maternity benefit for women in formal and informal employment. Establishments with over 10 employees are obliged to provide working mothers many benefits: 26 weeks fully paid maternal leave; protection from firing for asking for maternal leave; Rs 3,500; nursing breaks and a creche. Only 1.37% commercial establishments employ over 10 workers.[16] Over 95% of women must rely on a much lower tier of maternal benefits.

Illustratively, the Pradhan Mantri Matru Vandana Scheme provides a conditional cash transfer (Rs 5,000) via three instalments for the first child. The Janani Suraksha Yojana provides additional conditional cash transfer of Rs 1,400 to eligible mothers. The National Food Security Act, 2013, guarantees all pregnant and lactating mothers the right to Rs 6,000 as mater-

10. Report of the Committee on Fair Wage, 1948.

11. *People's Union for Democratic Rights and Others vs Union of India & Others*, AIR 1982 SC 1473.

12. Neither the labour minister nor the finance minister have the legal authority to make announcements of this nature – the Code on Wages lays down the due procedure for fixation of the floor wage, which wasn't followed before these announcements. Section 9 of the Code on Wages provides the procedure for its fixation.

13. Report of the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage. Ministry of Labour and Employment, Government of India, 2019. Accessible online at https://labour.gov.in/sites/default/files/Commitee_on_Determination_of_Methodology.pdf

14. As Mohan Mani notes, the poverty line measurement last done by the Rangarajan Committee of the Government of India pegged monthly poverty line expenditure at Rs 7035 per family in urban India, at 2011-12 prices. The poverty line at today's prices, after adjusting for inflation from the year 2011 to 2019, is Rs 11467 per month (CPI for January 2011=188; for January 2019= 307) or Rs 382 per day. 26 days of work, at Rs 375 per day would deliver a household income of Rs 9750, which falls below the poverty line.

15. Standing Committee on Labour (2019-20, Seventeenth Lok Sabha), The Code on Social Security. Ninth Report, Para 2.11. Accessible online at https://www.prsindia.org/sites/default/files/bill_files/SCR-Code%20on%20Social%20Security%2C%202019.pdf

16. All India Report of Sixth Economic Census (2013). Ministry of Statistics and Program Implementation, Central Statistics Office. Available online at https://msme.gov.in/sites/default/files/All%20India%20Report%20of%20Sixth%20Economic%20Census.pdf

nity benefit (without limitations on the number of existing children).

Given the severe humanitarian crises suffered by migrant workers, portability of social security becomes essential to their welfare in host and destination states. The Social Security Code gives a broad definition of 'interstate migrant workers'. It now covers workers engaged by a contractor, or directly by the employer, or workers migrating on their own who subsequently find work in another state.

The Standing Committee recommended enabling portability of social security benefits between states; disallowing disparity in protection between states; identifying interstate migrants as a separate category of beneficiaries; and a social security fund with contributions from sending and receiving states, employers and workers themselves. These have not been adopted into the Social Security Code, though the Safety, Health and Working Conditions Code (see below) provides portability of the public distribution system and benefits under the Building and Construction Workers' Welfare Boards.

In a first for India, the Labour Codes acknowledge people working in the digital platform economy – so called gig and platform workers. This sector currently employs three million, is expected to grow at 17% annually and will eventually provide 56% of all new employment.[17] Platform or aggregator companies call themselves a mere medium or marketplace that connects people seeking services to those providing them. Across the world, this obfuscation has come under question. Legislative and judicial actions in various countries have concluded that the nomenclature of partnership belies an employer-employee relationship between the platform and the gig worker.

However, the labour codes shed no light on the nature of relationship between aggregator and workers. No minimum standards are set for the measure of social security to be extended to them, or to unorganized workers generally. Nor do the new codes make any mention of their rights to minimum wages, collective bargaining, due process in employment related decisions, health and safety.[18] At some future time any social protection for this class may be funded through contributions from the government, aggregators, and perhaps the workers themselves.

The Industrial Relations Code grants trade unions a statutory right to be recognized as a union by the employer and a seat at the negotiation table (Section 14). This right was mooted soon after independence, but was only codified in 2020. Unfortunately, this code does not explicitly say how such 'recognition' is to come about. The 'secret ballot', which is the least corruptible method of deciding this vexatious but procedurally important question, finds no mention in the IR Code.

On the other hand, the IR Code severely restricts the right to strike. All workers intending to strike must provide notice of their intention to go on strike. Until recently this applied only to public utilities' workers. A strike notice triggers the commencement of conciliation proceedings. If conciliation fails, either party may seek adjudication, or jointly seek arbitration. It is illegal to carry out a strike without notice, or during the pendency of conciliation, arbitration or adjudication.

Strikes can legally occur only if the employer wants to facilitate a legal strike by not seeking adjudication after conciliation has failed.[19] Section 9 grants the Registrar of Trade Unions the power to cancel the registration of trade unions for violating any provision under the code, therefore implying that carrying out a strike can even end up in deregistration of trade unions. This brazen and targeted attack on industrial action in the form of strikes has a chilling effect on collective bargaining and collectivization.

The IR Code legitimizes fixed term employment, bringing into Indian law the concept of flexible labour. Fixed term workers are entitled to the same wages, benefits and conditions of work as their regular counterparts – except for security of tenure, which by design they must lose as their contract comes to an end.

In principle the protection of social security and equal pay are appreciable – especially since crores of Indian workers are already casually employed and denied job security. But fixed term employment is shortsighted from the point of view of career progression and upward social mobility – it will keep workers from gaining job security, promotions and stepping up on the socio-economic ladder. None of the codes (especially the Code on Social Security) articulate the legal protections available to fixed term employees during phases of unemployment – which are an inevitability given the lack of job security.

17. Statement issued by an Alliance of Labour Unions and Civil Society Organizations, 22 September 2020. Accessible online at https://focusweb.org/indian-labour-law-must-recognise-platform-workers-rights/#:~:text=Today%2C%20there%20are%20already%20three,percent%20of%20 all%20new%20 employment.

18. Kaveri Medappa, Rajorshi Roy, Mohammad Sajjad Hussain, 'Confronting Precarious Work: Beyond Social Security for Platform Workers', *The India Forum*, 2020, accessible online at https://www.theindia-forum.in/article/confronting-precarious-work

19. This interpretation is based on Section 53(1) of the IR Code read with Sections 53(6) and 62(1)(d,e, & f).

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The Occupational Safety, Health and Working Conditions Code (OSH) is symptomatic of the denial of labour protections to unorganized workers. The code applies to 'establishments' (Section 2(v)), covering places employing over 10 workers. A very small minority of Indian establishments cross this threshold.

The Code of 2020 affirmatively defines eight hours as the duration of the normal working day – extending a protection for factory and mine workers to all 'establishments' in India. However, it is unclear on the spreadover (that is, the total time over which the work day with breaks may extend), weekly maximum hours of work, and limits on overtime work. It empowers the central and state governments to notify these. This flexibility appears dangerous as we remember the haste with which states sought to deregulate and extend working hours during the pandemic in the hope of attracting manufacturing investment.[20]

The OSH Code repeals and subsumes the Inter-State Migrant Workers Act. The ISMW Act required registration of establishments and contractors engaging more than five migrant workers. The code increases this threshold to 10 migrant workers (Section 59) – excluding more than 98% of commercial establishments in India, and the inter-state migrants working in them, from the protections it seeks to codify for migrant workers. These include the portability of PDS and benefits under the Building and Construction Workers' Welfare Boards. The code also guarantees migrant workers welfare benefits at par with local workers, including access to provident fund, employee state insurance and health check-ups. A majority are excluded from this protection due to the high threshold for its application.

Overall, the codes mark some appreciable legal developments in Indian labour law – broader protection of minimum wages, scope for universalization of social security, recognition of trade unions to enable them to participate in collective bargaining, and codification of an 8-hour working day. But these are accompanied by a few anti-labour reforms, which threaten to break the backbone of the working class – especially the undefined Floor Wage, receding protections for migrant workers, differential social security standards for 7% and 93% of the workforce, indomitable barriers on the right to strike, legitimization of fixed-term employment without accounting for career progression or unemployment insurance.

The implications of the codes will come into better view once the rules for implementation are notified, given the heavy use of delegation of legislative responsibility to the government.

The codes have been oversold as a modernizing effort that creates a fairer playing field for all. In truth they are a mixed bag, often giving with one hand only to take away with another. The majority of Indian workers – working in the unorganized and informal sector – are still going to find themselves outside of all the seeming benefits of this mammoth legal reform. The power equation between employer and employee in the formal sector, meanwhile, has been firmly tilted in favour of the employer. Whether old laws or the new codes, implementation has always been a problem and disobedience, discrimination, and exploitation a habit. Despite seven decades of legislation, working people in India are still plagued by bonded labour, child labour, wage theft, and intensely precarious work.

The future of justice for workers depends on the ability to enforce legal standards in their places of work, create a reliable and sufficient social security system; and enable social dialogue and collectivization of workers. In speaking of an Atmanirbhar Bharat it is essential to seek *atmanirbharta* for the working class family too – through legislative measures to ensure a dignified and secure livelihood and acceptable conditions of work.

The recent pandemic has triggered mass unemployment, impoverishment, and withdrawal of children from schooling and greater vulnerability – which the hastily legislated codes may not have the capacity to address. Post-pandemic, the working class requires stronger legal protection – not more neglect or precarity. The recent parliamentary session reflects a lack of empathy or accountability towards the working class, who have not been mobilized around their shared concerns as a political constituency, but along narrower concerns based on identity.

It is time to think definitively about the protection of the human and labour rights of the remaining 93% of the workforce – in terms of a Fifth Labour Code, one rooted in the idea of a rights-based and participatory approach. Such legislation must be based on the Indian constitutional vision of equality equity and inclusion of all. More specifically it must guarantee the core labour standards as spelt out in the 'Declaration on fundamental rights and duties at work' of the ILO, which binds all members of the ILO including India. Only this will afford for all working people, floor-level of protections of decent conditions and make them a national priority.

20. PRS Legislative Research, State Legislative Brief: Assam, Goa, Gujarat, Haryana, Himachal, Karnataka, MP, Odisha, Punjab, Rajasthan, Uttarakhand, UP: Ordinances and Notifications Providing Relaxation of Labour Laws. Accessible online at https://prsindia.org/bills/states/state-brief-relaxation-of-labour-laws

Cops, covid and the citizen

JACOB PUNNOOSE

COVID, along with its prevention, puts citizens in double jeopardy: if it spreads unchecked, millions will die; but total lockdowns deprive people of rights and livelihoods, driving the marginalized to abject poverty, destitution, malnutrition and other diseases, which too will cost millions of lives. When, all on a sudden, we set out to contain the virus by a lockdown, we could not fully fathom its far-reaching consequences. It is indeed a Hobson's choice. We are fated to be victims either of Covid or of Covid defence – and perhaps of both. This dichotomy affects government policy, public attitudes, and the responses of those affected by restrictions.

The police are not Covid experts. The National Disaster Management Policy 2009 considers the police as the first and key responders due to their reach, 24-hour presence, local knowledge and organized capability for immediate response. As early as 1980, the National Police Commission had recommended that 'the police should... be trained and equipped… in providing relief to people in distress situations.'

These recommendations should have resulted in special training for the general constabulary in disaster rescue, but that has hardly ever taken place. With neither vaccine nor medicine in sight, the urgency of the situation led to a sudden lockdown declared in end March 2020. In form, if not in purpose, it was akin to curfew and social distancing was akin to crowd control. In these the police are pre-

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sumed to have domain knowledge. So, without special training or much preparation, the cops suddenly found themselves in the role of Covid fighters. And their early responses reflected that.

The lockdown presented an opportunity for a style of policing that relied on soliciting and emphasizing cooperation to achieve a common good. This is materially different from a curfew approach, where threat or use of force is the conventional systemic option to achieve the immediate purpose of quelling a riot. The goal remains the same: to get people to obey the rules.

Happily, at several places, many police leaders looked for non-confrontationist approaches alongside traditional enforcement. Constant vigil, social media propagation of proper Covid defence behaviour through innovations like dances, songs, dramas, interaction with people, distribution of food, sanitizers and essentials to the poor, outstanding acts of compassion, community engagement with NGOs were reported from all over India. The sincere work of field level officers catering to the needs of women, children, the aged and the disabled touched the hearts of many and was highlighted in the media.

For the first time law enforcement was understood and perceived as a need of the people, rather than that of any ruling class. An appreciation of the risks the police had to endure evoked admiration and sympathy. Organizations donated PPE kits while others were happy to ensure creature comforts at duty points. The goodwill for police personnel as virus-fighters far exceeded what they are used to muster as crime fighters!

In a country where for centuries the police has been held in mistrust, two factors contributed to the image change. First, the obvious hard work

and innovation that departed from customary style policing. The other was the perceived role of the police as guardian and risk taker on behalf of the community. When gripped by a new fear the one who guards becomes the hero of the dependent. The public admired a bit of excessive zeal and accepted that there was no practical option but a limitation on civic freedoms and leeway in adhering to procedural safeguards. Temporarily, trust levels zoomed.

Yet, it is idle to pretend that everything was hunky dory. Nearly all the basic rights of the people were negatively affected by the lockdown. To the very poor, the sudden loss of livelihood signified a bigger threat than the virus. Compliance with Covid protocols was often too burdensome or impossible. This made policing tasks very difficult. In most places, for want of any better alternative within the conventional behavioural and response system, aggressive domination, the bane of all post-colonial policing systems, governed police response.

In addition, the continuous nature of the duties, the occasional threat of violence toward themselves, the lack of sufficient manpower and resources coupled with lack of proper sensitization often made policing seem mindlessly non-empathetic. Arresting the vulnerable, harassing migrants, shaming people by frog jumps, using force on worshippers or even health workers were reported from many parts of India.

The pandemic might take more than a year to spend its fury. It will inevitably cause more economic devastation especially to the already poor and marginalized and to the aspiring young. Promises of improvements in quality of life will sound hollow as new norms and new styles of work eliminate these people from the workplace. This may

impel young people to gravitate to crime or extremism and will impact law and order. Public security may also become a major concern. Such a social situation will have serious consequences for policing styles and priorities.

The unilateral police domination over the citizenry pressed upon the public ensured protection from Covid. A police force under a good king would have done exactly the same. But in a democracy the 'saviour' image will be difficult to maintain over long periods. As people prepare to coexist with Covid, interference in daily life to make restrictions effective through continuous aggressive domination extracting unquestioned obedience, is bound to generate resentment and lead to the recurrence of all the evils that mar police public relations – including custodial violence and resultant injuries.

There is another danger too: the newly minted trust can quickly turn to antipathy as people realize they are fated to simultaneously suffer Covid, poverty and oppression. The weakest may swallow their dislike because they have no other option. But others will chaff enough to question whether the contagion could have been better contained by soliciting the healthy cooperation of the people and by acting in consultation with the community.

Inevitably then, in order to be effective, the style of future policing will have to be modified to accommodate a more meaningful consultative, proactive approach with the community. Any changes in future policing though will have to contend with their long held self-perception. Police sub-culture rather than legal maxims shape this. 'Being tough' with the public is seen as vital to 'prestige' and efficiency. Contrary to what many assume, because of the surge in trust levels, Covid related police activity

mostly reaffirmed their self-image of superiority and authority.

Police got unprecedented powers for regulating personal behaviour relating to, among others, movement, wearing masks, keeping distance, queuing, going to shop, and temple visits. In normal times, these would have been deemed interference in personal liberty; but now it was ordained by law. Tracking people through digital technology or body stamping or tagging or drones was common.

Government functionaries, without taking care to verify whether their diktats were in consonance with the logic of spread reduction, issued orders mandating a plethora of modifications in individual and public behaviour. Persons were prohibited to be outdoors, without working out what the homeless would do. 'Go back home' directions were given without corresponding provisions for transportation.

Simultaneously, 'nothing should move' orders brought everything to a standstill. Shops were closed without thought to how essential supplies would be provided. Opening hours were restricted, creating a rush during their limited opening hours. Travel passes and restrictions, certifying protocols, quarantine rules, containment identifications were left to individual bureaucrats without any rigid standards or standardized logic causing several authorities to work at cross purposes, resulting in much misery without yielding any significant dividends in easing Covid spread. Such impromptu 'social engineering' by bureaucracy and the attitude that 'the government knows best and the citizen has to merely obey' dominated much of Covid control. Little was done to take communities into confidence.

True, there were exceptions. For instance, Kerala organized community kitchens for the stranded when inexpensive hotels closed their doors and government took over the several thousand labour camps hosting more than a million migrant labour. A similar approach, systemically carried out all over India, could perhaps have mitigated the migrant related confusion. But elsewhere the confusion of sudden and contradictory diktats necessitated decisive and speedy exercise of police authority to ensure unquestioned obedience. This has reinforced both the justification for toughness and the associated belief that efficacy is more important than respect for procedure. The taste of sweeping powers whets the appetite for more, unless it is sobered by accountability, due procedure and review.

Willy-nilly, technology is changing everything including policing. Covid provided a taste of what the future might bring. It showed how digital identity was necessary for movement between states and districts in many places and how fast everyone got used to the idea of e-passes, quarantine monitoring, and Covid alerts through mobile apps.

Available technology already enables digital surveillance of public spaces. It also allows the state to gather huge amounts of data about each individual. Already each day sees the widening of technology to cover every aspect of the life of the citizen – banking, travel, credit cards, consumption and internet use help know opinions, relationships and preferences. Supercomputers can be programmed to correctly identify a person, garner views, predilections and inclinations. This data can be used to regulate behaviour, formulate policy or manage public thinking. Permanent and continuous surveillance can transform one's own residence into a digital open prison.

In a digital environment, the power of the state and the police over the citizen will increase manifold as policing systems are enabled to micro-monitor and micro-manage behaviour. Control and deterrence in the digital eco-system enables coercive steps, which were impossible in the past, to be come entirely real: illustratively, blocking access to banking, travel, communication or supplies. In an extreme eventuality, one's entire digital existence can be terminated.

With criminals taking to technology to commit crimes which would have been conventionally impossible, the digital mode of crime fighting will be a mainstay of policing. Citizens will readily agree to this – and may even like it – if greater safety is promised in the name of prevention of terror or serious crime, as they do with regard to airport security or Covid protocols.

The march of technology can't be resisted and the dangers of such capabilities being misused for denying democratic rights cannot be wished away. Inevitably the centralization of authority into the hands of a few will tempt their misuse. The administration of justice with procedural norms intact will probably be seen as a non-pragmatic ideal. Therefore, it is essential that the adoption and evolution of technology by the police force is enabled within the democratic space, under conditions which permit transparency, accountability and adherence to the norms of rule of law.

When faced with intense economic and social stress, as this Covid time and its follow on portend, human rights, the rule of law, and due process are likely casualties. The preferred style of policing will likely privilege anything that allows for immediate restoration of some semblance of order, to achieve absence of overt and manifest violence.

We had once logically believed that respect for liberty and equality

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will ultimately prevail. But now, partly driven by the possibilities above, individual liberty and tolerance for diversity which are the hallmarks of democratic policing seem to be in danger worldwide. Tribal loyalties, religious injunctions, racial prejudices, and vigilantism stemming from partisan moral fervour now hold sway.

But it need not be so. Technology has augmented democratic space. The speed, accuracy and inclusiveness of technology make population size and geographic remoteness irrelevant to governance. Social media allows for unlimited avenues of self-expression and vertical and horizontal interactions. Replicating the Athenian model of great citizen participation in civic life – and in policing – is entirely possible.

Already there is enough technological capacity within the country to ensure that every citizen can be in touch with his police station instantly as well as be familiar with the general policies at headquarters and the functioning and capacities of his local police station. Combined with allowing personnel greater discretion at all levels of public interaction and imparting better problem-solving skills to police personnel through training interventions, a different kind of policing with a stress on community cooperation can be nurtured.

In the first few months of the Covid onset, the significant success of Kerala in containing the spread of the virus was partly due to its ability to rely on community cooperation. The police were first responders in a coordinated multi-agency response that relied on them getting the public's willing support in preventing spread. To a large extent this was possible due to long years of steady efforts of the police to interface with the community through the Jan Maithri Community Policing Schemes, Student Police Cadet Pro-

ject, Senior Citizen Programmes, Child Friendly Policing and Traffic Safety programmes.

The pre-existence of active police-public interaction included habitual participation in local services and organizations like schools, hospitals, residents' associations, student groups, senior citizens, women self-help groups and the willingness to solve day to day pre-security issues such as drugs or women's safety or traffic safety or juvenile issues or elimination of public nuisances.

The goodwill, trust and the linkages with the community consistently developed over the years created a model of policing for ensuring Covid defence measures that involved several lakhs of cooperating persons in every nook and corner of the state. It turned Covid defence into community defence rather than a force-based police intervention thrust upon an unwilling public. Despite ten months of Covid, densely populated Kerala, with a high level of domestic and international travel, still has one of the lowest fatality rates.

This model – Democratic Policing – stresses policing through consent, consultation and cooperation. A sense of partnership must dominate the manner of delivery of policing services, treating citizens as allies rather than as antagonists. The success of this partnership depends upon the ability of the police to secure and maintain public approval and respect. Police systems must be seen to be consciously seeking the willing cooperation of the general public in the voluntary observance of the law, and personnel must be seen as active members of the community with a stake in its well-being and safety.

Force, must be an exception and not the rule. For this police forces need to change from taking pride in being

fierce and feared enforcers of the law to being accessible people-friendly officers of the peace, who provide security as a service to all. It is a well accepted policing principle that, in a democracy, the police carry out duties which every citizen ought to perform if the citizen had the time and disposition to do so. Community policing – policing alongside the community – requires continuous contact with the public. In turn the community spares resources like time, energy, facilities, for solving safety and security related problems. Instead of doing everything themselves, motivating local communities creates force multipliers. This helps conserve resources, enhance reach, provide services to vulnerable groups, get information that affects personal or collective security, and assist in the policing processes in mitigation of local pathologies – whether they be disease, disaster or crime.

However, community policing must not validate any unlawful act or omission and must not go outside the pale of proper control and accountability. The pretext of partnership with the community cannot be used to serve partisan or majoritarian objectives. It cannot mean the community substitutes for the police and it must not be a cover for either moral policing or for unlawful vigilantism. None should dilute the procedure warranted by law or any measure of enforcement to placate anyone. Most importantly, neither the collective nor the individual must dictate whether this or that case should be registered and charge sheeted. It is preventive in nature without being discriminatory or punitive.

Truly, no civilized society can live in peace without policing of some kind. Whether that should be a policing of the kind which heavily relies on weaponry, intimidation and militarized conduct or whether it is one which enters

into a partnership with people to ensure the security of all, is for us to decide, depending on the extent to which we are committed to democratic principles. In a democracy policing by consent is a much better option to secure safety and the fearless and lawful enjoyment of freedoms by everyone. Still, reflecting on the manner in which Covid prevention systems were, in general, enforced, we are forced to wonder whether as a nation we will ever come out of the vestiges of pre-democratic policing styles, within which we have been trapped since the dawn of independence.

On a historical time scale, democratic policing is a comparatively new phenomenon. It is too early to say that despite the great dignity it confers on the citizenry, the notion will ultimately survive. Yet a police group which flaunts authority and threatens immediate punitive consequence can effectively extract compliance only at those places and times where they are physically present. Given the manpower constraints of the Indian Police, not even a fraction of the population can be covered in this manner. Inflicting enforcement on an unwilling population will weaken democratic empowerment of the people in general. For democracy to survive, democratic policing must succeed. And for democratic policing to succeed, the policing policy, practice, provisioning, and performance have to change.

Over the past four decades, several reform suggestions and initiatives to make this possible have been put forward: far-reaching reforms in the structure, training, accountability and supervision have been suggested. But also steadfastly resisted. Police reform is a crying need, but sadly it still remains a cry in the wilderness. A humanized, responsive, people friendly police service is a democratic right of the citizenry. For how long can this right be denied?

Out of sight, out of mind?

CATHERINE HEARD

IN 1996 the Supreme Court of India delivered a ruling in the case of *Ramamurthy v State of Karnataka*. It called for action to tackle torture, ill-treatment, overcrowding, delays in trials, neglect of health and hygiene, inadequate food and clothing, and deficiencies in communication and visiting systems in the state's prisons. India's prison population was then around 220,000. It is now almost 479,000: the fifth largest in the world.

In 2016, further Supreme Court rulings followed, grouped under the case heading, *Re Inhuman Conditions in 1382 Prisons*. The rulings ordered states to address the high numbers of under-trial prisoners (almost 70% of the prison population of India); improve access to lawyers and legal aid; and use funds more effectively to improve prisoners' living conditions. The court declared that 'prisoners, like all human beings, deserve to be treated with dignity.'

In each subsequent year since 2016, conditions in Indian prisons have been described in US State Department reports as 'inhumane and frequently life-threatening' due to inadequate sanitary conditions, lack of medical care and extreme overcrowding.

Our recent research has focused on a group of contrasting jurisdictions, of which India is one. In this essay, I will reflect on some of the learning from this research. I will argue that the Covid-19 pandemic should prompt a rethink of our ever-increasing reliance on imprisonment. Since the pandemic was declared in March 2020, prisons across the world have seen large numbers of infections, their environments being especially ill-equipped to take the social distancing and hygiene precautions urged on us by governments and public health bodies. Those held in overcrowded prisons are especially vulnerable to Covid-19.

India is far from unique in having a severely and chronically overcrowded prison system. Overcrowding affects the prison systems of over 60% of countries worldwide, with grave consequences for health, rehabilitation and community safety. The Covid-19 pandemic throws those consequences into sharp relief, while also making ever clearer the pre-existing

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* The research team headed by the author monitors trends in world prison populations and examines the causes and the consequences of rising levels of imprisonment. A core component of the programme involves compiling and hosting the World Prison Brief – a unique database that provides free access to information about prison systems throughout the world. (All prison population data in this essay are drawn from the World Prison Brief site and reflect the latest available figures as at early January 2021. Country information is updated on the website on a monthly basis, using data largely derived from governmental or other official sources. At https://www.prisonstudies. org/.) For 20 years the Brief has been collecting and publishing the best available data on prison populations and reporting on trends in imprisonment worldwide. Today, it provides data for all but three countries in the world. (Those countries are Somalia, Eritrea and North Korea. Not all countries publish data on all categories of prisoner: notably, for example, China does not release information on people held in either pre-trial imprisonment or 'administrative detention'.)

health vulnerabilities of most prisoners – vulnerabilities which themselves reflect the social and health inequalities faced by the vast majority of the world's prisoners, in developed and less developed countries alike.

Covid-19 has made particularly evident the permeability of prison walls, as the virus spread from prison staff to prisoners and back into communities, taking a heavier toll in areas where prisons are located.[1] Just as it was impossible for prison administrations to keep the virus out, so, too, it is futile and dangerous to expect prison walls to contain the risk of crime or keep communities safe from harm.

It has long been known that prisons are epicentres for infectious diseases. Infections such as tuberculosis and even syphilis have been shown to spread rapidly between prisons and the community. We have found disturbing evidence of the impact of imprisonment on prisoners' health. Prisoners have described extreme overcrowding (for example, 60 men sharing cells built for 20 in Brazil); inadequate medical treatment, with too few doctors to deal even with routine health issues let alone serious disease outbreaks; constant hunger; lack of fresh air and exercise; shared buckets instead of toilets; not enough fresh water or soap; even having to eat while seated on the toilet due to lack of space in a shared cell. These are the realities of prisons across the world.[2]

1. In the USA, several studies have demonstrated the significant capacity for community spread of COVID-19 infections in areas with jails and prisons. See M. Ollove, 'How COVID-19 in Jails and Prisons Threatens Nearby Communities', 1 July 2020, Stateline, at https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities/

2. C. Heard, 'Towards a Health-Informed Approach to Penal Reform? Evidence From Ten Countries', Institute for Crime & Justice

So, when the pandemic began to take hold in early 2020, it was clear that overcrowded prisons would present the ideal conditions for the virus to spread. Levels of infection and death among prisoners and prison staff in many countries have been notably higher than in the communities outside. In May 2020 there had been around 36,000 reported cases among prisoners in 56 countries and at least 690 prisoners had died. By early January 2021, there had been over 311,000 confirmed cases in 118 countries and over 2,700 deaths. These figures do not include prison staff, among whom infection rates in many countries have been higher than among prisoners.

These numbers will be the tip of the iceberg. With prison health systems in much of the world struggling to provide even basic healthcare, many sick prisoners and prison staff will not have been tested. And without routine and regular testing in prisons, numbers of a symptomatic inmates and staff will present a further, unseen risk to those within and beyond the confines of the prison.

Prisons are the end point in a process usually considered to begin with a person's arrest by the police, although in reality the journey to imprisonment begins much earlier than arrest or criminal conduct. A complex array of factors – legal, procedural, systemic, but also political, socio-economic and cultural – influence who goes to prison, and how long they remain there. These diverse factors combine and conspire to produce a country's prison population, and to exert upward and downward pressures on it. Although levels and types of crime do of course affect the size of a country's prison population, they are far from the only

Policy Research, London, 2019. At: https://prisonstudies.org/sites/default/files/resources/downloads/icpr_prison_health_report.pdf/

factor: indeed, the correlation between crime rates and imprisonment is complex and highly contested among scholars in the field.

The India Justice Report, published November 2019, provides many insights into the causes and consequences of prison overcrowding in India today. Ranking the states and union territories on their performance across policing, the judiciary, legal aid and prisons, the report contains grim findings. Analysis of five years of official data revealed huge gaps between constitutional standards and on-the-ground reality. Enormous backlogs of pending cases, severe prison overcrowding, and disproportionate numbers of under-trial prisoners were identified as consequences of these failures.

The report highlighted something that researchers have found to be an invariable characteristic of criminal justice systems worldwide. The people who suffer most from state failures in delivering decent and humane justice systems are the socially and economically marginalized. It has long been the case in India that proportions of Muslims and members of some castes are much larger in national prison and arrest statistics than in the general population. Likewise, in Brazil, America, England, the Netherlands and Australia, we know that people from black, indigenous and other ethnic or faith backgrounds are grossly over-represented in prison populations.

This points to a pressing imperative to ask who is in prison and why they are there, and to consider what the answers to these questions reveal about our social, political and economic structures. These are questions for all of us, but they barely feature in public discourse: prisoners are 'out of sight, out of mind.'

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Incarceration as a response to certain forms of criminal activity is an unquestioned facet of current times, as it has been since at least the nineteenth century. Despite the large and enduring social and economic costs – for individual prisoners, their families, communities and wider society – there is no international consensus on the proper aims and objectives of imprisonment. Most legal systems do not specify the purposes that imprisonment should serve, or the mechanisms which can help ensure those purposes are met.

If we find it so difficult to identify the purpose or role of an institution – particularly one with so many adverse consequences for individuals and society – what does that imply about its legitimacy? Perhaps we do not ask this question because of the widely held assumption that we need prisons and that their supposed functions cannot be performed by any other means. But what purposes can imprisonment reasonably and realistically be expected to serve? They may be more limited than is commonly believed.

Theorists have advanced the following putative objectives of, and justifications for, the use of imprisonment: (*i*) punishment or retribution; (*ii*) denunciation of wrongdoing; (*iii*) deterrence; (*iv*) incapacitation (to manage risk and protect against further harm); and (*v*) rehabilitation or re-socialisation.

Before addressing prison's capacity to meet these objectives, I would pose the question whether *any* custodial setting could in reality achieve rehabilitation. Undeniably there are a few countries (for example, the Netherlands, Sweden and Finland) where prisons are exceptionally well resourced, with large numbers of highly qualified staff striving to create humane, supportive living conditions. Prison is treated as a last resort: when custodial sentences are used, they tend to be short. These countries' reoffending rates are low compared to those in England or the USA.

Putting this aside, even if we accept that each of the above objectives of imprisonment are, in themselves, capable of providing some justification for its use, how much weight should we give to each one? To what extent should punishment take precedence over rehabilitation – or vice versa? Too much credit is often given to the power of imprisonment to deter and to reform (objectives that are 'talked up' by politicians). Less attention is given to prison's poor record in preventing or deterring crime, or to its numerous adverse effects on individuals, families and communities.

What would help is principled guidance on the relative weight and value to be ascribed to the supposed goals of imprisonment, informed by the evidence of its harmful effects and of the capacity of other approaches to meet the same goals. For present purposes, here are some brief observations on the shortcomings of imprisonment in meeting its supposed objectives.

As to *punishment or retribution*, even if one accepts that curtailing a person's liberty is a necessary means of achieving these objectives, the use of imprisonment is open to criticism for going further than is usually necessary or proportionate. Moreover, imprisonment punishes not simply through the deprivation of liberty: in India, as in much of the world, that aspect of imprisonment is the least harmful one. Violence, intimidation, separation from family, untreated health problems, and worsening mental and physical health are also part of the lived experience of custody. After release, for many, the punishment continues, with lasting social stigma, diminished job and housing prospects, and weaker family and community ties.

With regard to *denunciation*, this is also achieved – potentially with much less collateral damage – by sanctions other than incarceration, such as community service, unpaid work, or a fine. The fact of a conviction and the resulting criminal record in themselves carry personal stigma, while the greater and lasting stigma associated with time spent in prison is often a major barrier to social reintegration. In the Netherlands and other Northern European states, fines and unpaid work penalties are used in cases that would, in many other countries, attract short prison sentences.

Research evidence on the (general or specific/individual) *deterrent* effects of imprisonment suggests that they are limited: certainty of detection and punishment is more likely to deter than the threat of imprisonment. In many jurisdictions, high levels of repeat offending by people who have been to prison point to custody's limited impact on behaviour at an individual level. Deterrence theory also fails to account for impulsive or irrational motivations, unmet mental health needs, the influence of drugs and alcohol, or the role of poverty and weak welfare or social support – all factors known to underlie much offending.

In many cases, the objectives of *incapacitation* and *risk management* can be achieved at less cost and with less harm through curfews, house arrest, affordable bail, or other forms of restriction or control. There will always be some offenders who present serious risks to the public, who should be in prison for as long as that risk exists and can be managed by no other means. However, the number of people falling into this category is small –

in many countries no more than a fraction of those actually in prison.

The supposed *rehabilitating* or *re-socialising* purposes of imprisonment are perhaps the most problematic. It is uncontroversial to hold that law-breakers can be 'reformed', for example, through programmes and support that encourage them to take responsibility for the harm their offence has caused, address the reasons for their conduct and receive educational or vocational training towards a better life after release. However, it is inherently contradictory to expect custodial settings to fulfil these purposes, involving (as they typically do) separation from family and community, hours of confinement in cells, forced cohabitation with other convicts, and exposure to harsh and sometimes violent conditions.

Given these objections, are there other criminal justice tools capable of achieving the same goals? Alternative sanctions and measures like probation supervision, unpaid work orders, curfews and electronic monitoring are the main examples of non-custodial measures in operation today in much of the world. In most cases, they are, at least in principle, capable of meeting all five of the objectives discussed above. If used sparingly and in a way that is tailored to the individual, non-custodial alternatives have a part to play in preventing excessive resort to custody, both at pre-trial and subsequent stages. Rehabilitation and reform are notoriously difficult to bring about in prison, but have better prospects in the community.

Only the objective of incapacitation might arguably, in certain circumstances, *necessitate* use of incarceration. The question then arises as to how the prison sentence – not only its length but also the way it is experienced by the individual – should

be calibrated to match the risk it is deemed necessary to manage. This difficult question often becomes highly politicized; for present purposes, two points deserve mention.

First, we have seen huge increases in the use of life sentences and mandatory minimum sentencing in many countries in recent years (often after use of the death penalty has ended). These harsher, more arbitrary sentencing regimes have greatly increased prison populations. In India today around half of all convicted prisoners are serving what are in effect whole life sentences. Secondly, a minority of countries do not use life or other indeterminate sentences at all, or do so exceptionally rarely. Our research on sentence disparity shows that a 23 year-old first time offender convicted of intentional homicide would, if sentenced in India, probably receive a whole life sentence, but if sentenced in the Netherlands, a custodial term of under 12 years would be the most likely outcome (perhaps with a stay in a psychiatric treatment centre to follow).

Many people who do not read criminal justice statistics tend to assume that prisons are full of people so dangerous, who present such a risk to public safety, that incapacitation is the only possible response. The reality is very different. In most countries, large numbers of people entering prison every year have been charged with non-violent crimes such as theft or the possession of drugs for personal use. Non-custodial alternatives are frequently cited as a better response in such cases.

We should, though, be cautious about seeing wider use of such measures as a panacea in the Indian context. Importing approaches from other jurisdictions can be problematic in itself: one size certainly does not fit all.

The frequent call for alternatives to custody as a way of reducing prison populations in countries where large numbers of people are in prison for relatively low-level offending is, in particular, worth questioning. Do we really want to see those countries implementing widespread use of electronic monitoring or unpaid work programmes, when research shows that these measures have done little more than widen the net of criminalization and stigma in England, America and the many other countries where they now proliferate?

Do we want all the apparatus of a probation system if it is, in effect, little more than another layer of social control carrying significant costs to the state – and burdens for those subject to it? The evidence from America and Europe shows that they have failed to make a dent in prison population rates, and have even increased prisoner numbers when prison is used routinely to punish non-compliance with supervision. Although there may be a case for greater use of electronic monitoring to reduce unnecessary pre-trial detention, this should be approached with care even in this more limited context.

Similarly, do we wish to see case backlogs cleared through use of fast-track justice and all it might entail? Plea and charge bargaining, sentence discounts for guilty pleas, on-the-spot penalties, and the myriad other forms of summary justice seen in many parts of the world have done nothing to drive down imprisonment rates. They have disproportionately impacted the poor and marginalized and simply served to entrench inequalities that have weighed communities down for generations. Suspects who can afford good lawyers end up getting community sentences, while the vast numbers who cannot are more likely to go to prison.

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The post-pandemic environment will see public expenditure plummet across all sectors, justice included. Instead of reaching for costly technological solutions or fast-track justice schemes to address case backlogs and reduce incarceration levels, the first priority should be to drive down the volume of cases passing through the formal criminal justice process.

There may be scope to decriminalize some forms of conduct altogether. In much of Africa, the prosecution of less serious, non-violent offences contributes to clogged justice systems and high levels of overcrowding and pre-trial detention. In a bid to address this problem, the African Commission in 2017 adopted the Principles on the Decriminalization of Petty Offences in Africa. The principles recognize that such offences tend to undermine people's ability to self-sustain, mandating criminal justice responses to socioeconomic problems. In India, too, this is a problem. There have been increases in convictions under 'special and local laws' (as distinct from offences set out in the Penal Code). Offences typically involve sale of illicit alcohol, marijuana and lottery tickets.

It is also vital to scrutinize proposed *new* offences to assess their likely impact on prisoner numbers and arrest rates. An unwelcome development in this regard was India's Citizenship (Amendment) Act. This served to increase detainee numbers by several thousand while doing nothing to improve social cohesion or community safety.

In 2003, in a lecture at Harvard's Kennedy School of Government, Angela Davis said: 'Our most difficult and urgent challenge to date is that of creatively exploring new terrains of justice where the prison no longer serves as our major anchor.' In 2008, America's total prison and jail population peaked at a staggering 2.3 million. Perhaps the most shocking part of the American story is the sheer speed of that growth: in 1980, the prison population had stood at around half a million.

Billions of philanthropic dollars are supporting America's push to end mass incarceration and re-channel the roughly US$100 billion spent on policing and US$80 billion spent on prisons annually. The justice reinvestment approach has been part of this. It involves mapping locations hit hardest by crime and criminalization, and funding the health, education, housing and other community needs in those areas, instead of criminal justice interventions. Perhaps most importantly, the contribution made by the Black Lives Matter movement has been enormous, revealing the deep social and economic scars left by the mass criminalization and incarceration of black communities.

America still has a long way to go. Despite significant falls, its prison population remains the highest worldwide, at 639 per 100,000. The attacks on George Floyd and Jacob Blake and the protests that followed are the latest in a line of reminders that the country's black community still bears the brunt of state violence in the form of brutal, dehumanizing law enforcement. The jail incarceration rate of black/African Americans is still over three times that of white citizens. Demands in some states to 'de-fund the police' suggest that the justice reinvestment programme did not go far enough.

By American, and indeed international, standards, India's prison population rate is low: indeed, one of the lowest in the world, at 35 prisoners per 100,000 of the population. This is no cause for complacency. The prison population rate is higher today than it has ever been, as is the total number of prisoners, far too many of them under-trials. This unrelenting upward pressure on the prison population has had devastating consequences for health and rehabilitation. The India Justice Report revealed serious deficiencies in numbers of prison medical staff levels across virtually all states, with some prisons lacking a single medical officer.

So, what of justice reform and the wider political context that shapes it? As Einstein observed, in the midst of every crisis lies great opportunity. Can we hope for a silver lining from the Covid-19 cloud, in the shape of a health-informed approach to criminal justice reform? In March 2020, when the pandemic was declared, some countries moved decisively to reduce prisoner numbers in order to minimize the risk that overcrowded conditions would present. For this and other reasons related to the pandemic, it is likely that prisoner numbers across the world will fall during 2020-2021, following decades of growth. If these lower levels can be maintained, cost savings could be reinvested in health and social interventions known to reduce crime.

Perhaps, too, the pandemic will prompt us to demand better from our politicians. Voters may tire of the strongman or 'charismatic' leadership style embodied by Trump, Bolsonaro, Johnson and others, with their disregard for science and experts, even in the face of a devastating health crisis. The new public enemy is a virus that does not stop at borders and does not recognize uniforms: unlike economic migrants, Muslims or other convenient targets, it cannot be walled off or legislated against. Covid-19 has revealed our shared human vulnerability, showing that we cannot build walls to contain or keep out every risk. It may serve to illustrate that 'out of sight, out of mind' is a flawed strategy for keeping communities safe.

Broken courts, uneven justice

MADAN B. LOKUR

THE problems confronting the judiciary today have been around for almost 100 years. Some of them have been documented from time to time beginning with the Justice Rankin Committee Report of 1926. However, over this extended period we seem to have regressed, slowly but surely, and today we are virtually at the point of no return. I propose to consider two 'perennial' problems and possible solutions.

Do we require more judges? The predominant conversation or focus, of late, has been on the number of judges required for an efficient justice delivery system. The Law Commission of India (LCI) in its 120th report (1987) introduced the concept of judge-population ratio. It was noted that we have 10.5 judges per million population while countries like Australia and the United States have between 41 and 107 judges per million population. The LCI recommended we have at least 50 judges per million population.

The recommendation was accepted by the Supreme Court about 15 years later in the All India Judges Association case.[1] The court directed that an increase in judge strength 'should be effected and implemented with the filling up of the posts in a

1. All India Judges Association v. Union of India, (2002) 4 SCC 247.

phased manner …but this process should be completed and the increased vacancies and posts filled within a period of five years from today. Perhaps increasing the judge strength by 10 per 10 lakh people every year could be one of the methods which may be adopted thereby completing the first stage within five years before embarking on further increase if necessary.'

Almost 20 years later, we are nowhere near complying with the directions of the Supreme Court. For a population of 1.38 billion, the total present sanctioned strength of judges in the district courts is 23,413 and in the High Courts it is 1079. On these figures, it is clear that the Indian judiciary has achieved a judge-population ratio of 17.7 judges per million population.[2] But there are a total of 5,589 unfilled vacancies thereby reducing the working strength to 18,903 judges.

In reality the real number of working judges per million population is only 13.7. So, after 20 years the judge-population ratio in India has actually increased by only 3.7 per million. The figures mentioned in the Economic Survey 2018-19 provide an even more dismal picture.[3] Even the most optimistic observer will accept that implementing the direction of the

Supreme Court in letter and spirit is impossible.

Even on a staggered basis it is not realistically possible to get such a large number of competent judges. Second, it wouldn't be possible to get the support staff required. An unpublished study conducted by the Asian Development Bank (in which I was involved) showed that a staff of eight is required per judge. Third, it is not possible for the state or central government to arrange for necessary finances and infrastructure. Finally, with an increase in population of 14 million per year, we are looking at creating, every year, an additional 700 posts for judges – and eight times more for staff – to achieve the target of 50 per million population. I dare say, and repeat, this is impossible.

The Law Commission of India in its 245th report (2014) changed tack and suggested a different method of calculating the required number of judges. The number of cases instituted in different parts of the country varies and therefore a more scientific basis for calculating the requirement of judges would be to introduce the 'Rate of Disposal Method to calculate the number of additional judges required to clear the backlog of cases as well as to ensure that new backlog is not created as more pragmatic and useful. This method, generally speaking, addresses two important concerns: (*a*) a large existing backlog of cases and (*b*) new [cases] being instituted daily which are adding to the backlog.'

Illustratively, in Bihar, taking the existing backlog into consideration and accounting for new intake, the Law Commission report worked out that on a timeline of between one to three years there was a need for between 360 and 978 additional judges in the higher judicial service and between 1788 and 5035 in the subordinate judi-

cial service. Delhi would need between 25 and 93 additional judges and between 0 and 78 in the higher and subordinate judicial service respectively. For Gujarat, the figures were between 54 and 224 additional judges and between 449 and 1677 in the higher and subordinate judicial service respectively. Similar calculations were made for 11 other district courts based on figures supplied to the LCI by their High Courts.

Today, six years later, these figures have become irrelevant. The pandemic and consequent lockdown and closure or minimal working of courts has made these calculations completely meaningless. Moreover, the problem of finances and infrastructure have not been addressed by the LCI.

The Economic Survey 2018-19 provides a third perspective by introducing the concept of Annual Disposal Rate (per judge). This confounds the existing confusion. This concept proceeds on the basis that on average, a judge in the district court disposes of 746 cases annually.

Taking the total number of cases instituted in 2018, the Economic Survey found that 89% of them were decided. Thus, the Case Clearance Rate was taken as 89%. Therefore, to achieve 100% case clearance an additional 2,279 judges would be needed and this is within the already sanctioned strength of 22,750 judges (the working strength being 17,891 judges). In other words, the sanctioned strength of judges is more than adequate and need not be increased. However, just to clear the backlog over the next five years, the Economic Survey calculates that 8152 judges are needed: 'This is no more than a rough calculation, but it shows that efficiency gains are also required.'

As far as the High Courts are concerned, the Economic Survey pro-

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2. *Court News*, April-June 2019, published by the Supreme Court of India is the most recent publication on this subject on its website. The figures are derived from this publication. Sanctioned strength of High Court judges is 1079 while the sanctioned strength of judges in the District Courts is 23413. The population of India today is 1.38 billion.

3. The Economic Survey 2018-19 volume 1 page 103 states that the sanctioned strength of judges in the district courts is 22,750 while the working strength is 17,891 thereby leaving 4589 positions vacant. The sanctioned strength of judges in the High Courts is comparatively minuscule and has not been taken into consideration. However, as per the Economic Survey the sanctioned strength of High Court judges is 1079 while the working strength is 671 leaving 408 positions vacant.

jects 93 High Court judges are required to achieve 100% Case Clearance Rate in a year. This too is well within the present sanctioned strength of High Court judges. However, 361 additional High Court judges are required to clear the existing backlog in five years. As far as the Supreme Court is concerned, the requirement is only one judge for achieving 100% Case Clearance Rate in a year and eight judges for clearing the existing backlog in five years.[4]

The second biggest problem confronting the judiciary is the number of cases on the docket of the district and the High Courts. The caseload is phenomenal and increasing. In July 2020, the National Judicial Data Grid showed 33.46 million cases were pending in district courts and 4.42 million in the High Courts.[5] Three months later, thanks again to the Covid pandemic, the figure has risen to 34.59 million in the district courts and 5.21 million in the High Courts.[6]

The government of India and its 'agencies' are the biggest litigants in the country. A government report, 'Government Litigation: An Introduction (2018)' states that 'Though no verifiable data is available, various sources, including a recent document by the Ministry of Law & Justice, state that the government, including public sector undertakings (PSUs) and other autonomous bodies, are party to around "46 per cent" of court cases.'[7] Seemingly, this does not include court cases in which the state governments, their agencies (including municipalities) and

union territory governments are a party. If these were taken into account the percentage would rise well above the 50% mark.

With a view to curtail government litigation, the Government of India did introduce a National Litigation Policy (2010) but it has not had any appreciable effect. This policy was to be reformulated in 2015 but except for announcing a proposal, no further steps appear to have been taken. In 2017, an Action Plan to Reduce Government Litigation was announced but apart from a power point presentation, there has been no positive outcome of this exercise.[8]

Despite several state and central formulations for reducing government implicated litigation, over the last decade, litigation where one or other government is party seems to have increased.

The two principal problems facing the Indian judiciary are a shortfall in the number of judges and an enormous caseload. Can these issues be tackled and if so, how? Caseload management offers a partial but significant solution. It is an art but little attention has been paid to it. Some judges in the district courts have far too many cases on their docket while others have a manageable number. Caseload management requires verifiable data, which is unfortunately not easily available. It also needs overseeing district and high court judges to intervene proactively in case distribution.

In the absence of any policy on distribution of cases, matters drift. Realizing that caseload management requires a managerial exercise to be carried out, the 13th Finance Commission had recommended that each district should have one court manager and each High Court should have two

court managers to assist the judges. Unfortunately, the recommendation was not earnestly implemented and subsequently given up.

In the absence of any caseload management, means it becomes impossible to carry out an impartial performance assessment of the abilities and capabilities of a judge. Effective performance audits would allow for correctives to be applied through state judicial academies which could assist judges to improve performance and help them iron out weaknesses.

The absence of case load management compounds the problem of delay. The India Justice Report, 2019 points out that on average in the district courts, it takes between 2.7 years and 9.5 years for the disposal of a case.[9] This is unacceptable. Trial court judgements are of course subject to appeal and the appellate process which also takes its own time adds to further delay.

The National Judicial Data Grid tragically reveals that in the district courts and High Courts there are more than 85,000 cases each pending for over 30 years. Whichever way one approaches the problem, there simply cannot be any justification for keeping cases pending for years together.

To make any progress the first order of business must be to implement the case management system and frame uniform rules across all courts at every level. As early as 2005 a committee headed by Justice M. Jagannadha Rao, a retired judge of the Supreme Court and chairperson of the Law Commission, undertook the laborious exercise of drafting the Model Caseload Management Rules for all civil and criminal cases, both at the trial and the appellate stage. The Supreme Court in *Salem Advocate Bar Associa-*

4. Since then, the sanctioned strength of judges in the Supreme Court has been increased by three and now stands at 34 as against 31 when the Economic Survey was published.

5. www.njdg.ecourts.gov.in Accessed on 27.07.2020.

6. www.njdg.ecourts.gov.in Accessed on 28.10.2020.

7. Vidhi Centre for Legal Policy.

8. https://doj.gov.in/sites/default/files/action%20plan.pdf Accessed on 28.10.2020.

9. India Justice Report, 2019 supported by Tata Trusts, p. 59.

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tion, Tamil Nadu v. Union of India[10] accepted these rules.

Daksh, a civil society organization based in Bengaluru, in its report, Case Flow Management Rules in India (2017), notes the rules, 'have not been enacted uniformly across the High Courts. As on date, 17 High Courts [out of 24 at that time] have brought Case Flow Management Rules into effect. In some states, the Rules cover only subordinate courts, while in others they cover only civil courts.'[11] It is common knowledge that even where framed, the rules have not been implemented. In its absence, we can expect the already crumbling system to collapse entirely under its own self-inflicted burden.

Let us look at the proactive involvement of decision and policy makers.
1. *Policy and Plan*: Several solutions are available to tackle the manifold problems facing the Indian judiciary, but too often there is no political will or internal leadership interested in implementing them. An attempt was made in 2012 when the the Chief Justice of India[12] released the National Court Management Systems Policy and Action Plan. Unfortunately, this action plan has not been taken seriously and therefore not implemented and eight years later, it has lost its efficacy.
2. *Mediation*: There are other methods of curtailing litigation. Firstly, vigorous implementation of the 2002 amendment to the Civil Procedure Code (CPC) and the 2006 amendment to the Code of Criminal Procedure (CrPC) which offer the judiciary readily available tools to improve efficiencies in disposal. The 2002 amendment to the CPC urges judges and the litigating parties to attempt a resolution of their disputes through mediation outside the court system but under its aegis (referred to as court annexed mediation). Used frequently, mediation could reduce the load on the courts as well as give litigants the satisfaction of early and inexpensive closure.

Mediation centres in Delhi's district courts have successfully mediated over 2,10,000 cases (including connected cases).[13] The movement for mediation is slowly gaining traction, but it must be recognized that importance was given to it way back in 2005 by the then Chief Justice of India R.C. Lahoti. Fifteen years is a long time for effective implementation of a law.
3. *Plea Bargain*: A 2006 CrPC amendment introduces plea bargaining. This involves a mutually satisfactory disposition of criminal cases that do not relate to heinous offences or offences against women and children along with a few other exceptions. More importantly, a plea bargain is possible only if the victim is satisfied. The process is simple, effective and expeditious. Unfortunately, plea bargaining has not received the blessings of any Chief Justice since 2006 and therefore remains a dead letter.
4. *Finality to Local Laws*: Laws enacted by Parliament are applicable throughout the country and those by state legislatures are applicable only to the concerned state. The interpretation of laws enacted by the state legislatures must achieve finality in the High Court of the state. There is no reason why the Supreme Court should interpret local laws or laws that do not have an impact throughout the country and only apply to one state. If the High Court of a state dons the role of the Supreme Court of that state, it will not only reduce the burden of litigation on the Supreme Court but also make justice delivery more accessible and affordable to litigants. Of course, if the decision given by the High Court is not acceptable, it can always be reviewed or overruled by a larger bench of judges of that High Court.
5. *Judicial Restraint*: Many years ago, the Supreme Court had expressed the view that if an order is within the jurisdiction of the authorities, whether it is right or wrong, the High Court should not interfere with it under Article 226 of the Constitution.[14] This principle should be applicable not only to orders passed by the executive but also to orders passed by courts. The reason is that no court can correct every erroneous decision and it should not even venture to do so.

This is not to say that every decision should be accepted as correct but there should be a judicious mix of discretion and circumspection by a court while deciding when to interfere with an order passed by the executive or by another judge. If courts spend time on correcting orders having little or no significance or raising trivial issues, they are bound to get bogged down thereby sacrificing efficiency and, in a larger context, access to speedy justice by millions of litigants.

For example, if a person is granted anticipatory or regular bail, the order should not be interfered with by a superior court, unless it is perverse – cancellation of bail results in loss of personal liberty. Similarly, in civil cases, grant or refusal of an injunction or amendment of a written statement should not be interfered with. The CPC makes provision for the review of an erroneous judgement and there is also an appeal process provided in the hierarchy of courts. Therefore, it is not

10. (2005) 6 SCC 344.

11. https://dakshindia.org/case-flow-management-rules-in-india/ Accessed on 27.07.2020.

12. https://main.sci.gov.in/pdf/NCMSP/ncmspap.pdf Accessed on 27.07.2020.

13. https://delhicourts.nic.in/dmc/statistical.htm Accessed on 29.10.2020.

14. M.G. Abrol vs. Shantilal Chhotalal and Co. (1966) 1 SCR 284.

as if a litigant is left helpless and without a remedy against an erroneous order but at some point in time, there must be finality attached, even to an erroneous order.

6. *Substantial Questions of Law*: As far as the Supreme Court is concerned, the Constitution of India has a few very important provisions which unfortunately have been victims of desuetude. Broadly speaking, Article 132 of the Constitution provides for an appeal to the Supreme Court on a certificate given by the High Court deciding the case that it involves a substantial question of law as to the interpretation of the Constitution; Article 133 provides for an appeal to the Supreme Court if the High Court certifies that the case involves a substantial question of law of general importance and in its opinion that question needs to be decided by the Supreme Court; Article 134 provides for an appeal to the Supreme Court in a criminal case under certain circumstances, including in a case where the High Court certifies the case as fit for appeal.

If the application of these constitutional provisions is insisted upon, there is no doubt that the assistance given by lawyers to the High Courts in the first instance would greatly improve and thereby the quality of judgements delivered by the High Court would also greatly improve. Additionally, access to justice coupled with relatively inexpensive justice for litigants would be collateral benefits. Unfortunately, now the flavour of the day is to ignore the constitutional provisions by routinely filing a special leave petition under Article 136 of the Constitution which overloads the Supreme Court, jacks up lawyer's fees and delays justice delivery.

7. *Technology*: Finally, the importance of technology in justice delivery cannot be overstated. It plays a pivotal role in access to justice. A very large number of processes can be (and have been) streamlined through technology, as has been demonstrated in Phase II of the eCourts project. Timely issuance and service of summons, deposit of dues and fines in the courts and obtaining a record of case proceedings have traditionally been extremely burdensome and frustrate litigants and lawyers. However, these issues have been sorted out with comparative ease through effective use of technology.

Policy and decision makers need to think of the future and better utilization of services through the Internet, as the pandemic which shut down the courts for a couple of months, has shown.

Online courts and virtual courts that were contemplated for a long time are now in actual use and video conferencing has become the norm at least in the higher courts. True, there are some perceived disadvantages in conducting cases through video conferencing. For example, it is not easy for a judge to assess the demeanour of a witness or for a prisoner to instruct his or her lawyer or for judges to consult one another. Over times with use these concerns will be resolved. There will perhaps be a greater need to rely on written rather than oral submissions. Some lawyers might not like this, but the interests of litigants and justice delivery have to be placed on a higher pedestal.

Today, access to information is easily available and affordable. Gone are the days when a litigant had to chase a lawyer's clerk (and perhaps pay some speed money) to get hold of the result of a hearing. Research through available data and judgements on the Internet have made life much simpler for judges and policy makers. And yet, utilization of technology remains minuscule.

Hopefully, Phase III of the eCourts project will build on the foundation laid by the earlier two phases resulting in the evolution of a hybrid system where there is a balanced mix of physical hearings, online hearings and virtual courts coupled with an acceptance of the importance of written submissions being supplemented by oral submissions. A huge change in mindset is required from all stakeholders in justice delivery. On this will depend the future.

8. *Weak Budgets*: Budget inadequacies compound existing problems. The India Justice Report refers to the Memorandum to the 15th Finance Commission on Budgeting for the Judiciary in India (December 2018), which categorically refers to the low priority accorded to the judiciary in the state and Union budgets.[15] It states: 'The priority accorded to the judiciary in the Union government's budget is low as evident by the meagre proportion (0.08% of Union Budget) spent by the Union government on it. All States' spending on judiciary constitutes 0.61% all States' total spending. Total public spending on judiciary is less than 0.4% of the gross budgetary expenditure of Centre and States taken together. The effects of this are visible in measures of courts' performance.'

Inadequate and sometimes sub-standard infrastructure and absence of facilities and support systems, all add up to systemically poor delivery of justice.

If access to justice and the justice delivery system are to be made effective and meaningful to the people of India, urgent steps are required. A slew of recommendations and suggestions await implementation. Action is needed – sooner than later.

15. https://www.cbgaindia.org/wp-content/uploads/2019/01/Memorandum-on-Budgeting-for-Judiciary-in-India.pdf p. 3. Accessed on 27.07.2020.

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Mediation

SRIRAM PANCHU

COVID-19 has upended our existence, and along with it our dispute resolution systems. Courts, for many years now, struggling to come up with a modicum of performance in meeting delivery standards, have been struggling to go beyond listing the most urgent cases. The spectre of backlogged litigation, and that which will sprout from post-Covid scenarios, is awful even to contemplate, let alone come to grips with. Judges and lawyers realize the shortcomings of online conduct of litigation, but have little option now. One does not know when things will go to which kind of normal, it's as uncertain as that. It is a bleak horizon if we employ only the lenses of the standard adversarial system.

Fortunately, we have another prism with which we can see a differently layered world of dispute resolution with the focus being on consensus; this world is that of mediation. Much like the silver lining of a dark cloud, mediation offers that ray of hope. And its array of backers includes virtually every prominent member of the judiciary. In essence, it is a consensual method of dispute resolution where the mediator, the third party neutral, facilitates the disputants coming to a mutually acceptable agreement; he does not impose a result on them. The process is voluntary; any party has the right to terminate the mediation at any stage, without fear of consequence. It is confidential, and this is safeguarded by law; statements, suggestions, offers made in mediation are privileged against disclosure. And the choice of mediators lies with the parties.

One needs only to contrast this picture with that of the adversarial litigation system to realize that one is looking at polar opposites. Mediation is all about party autonomy and party focus; it endeavours to create the capacity in the disputants to reorient themselves and their view of the dispute and each other, to look for commonalities not just divergences, to talk to each other at a common table, and to attack the problem rather than each other. It induces different perspectives. One is of time; a long-term vision shows that litigation can stretch into virtual eternity. Continued fighting also brings lasting repercussions. Another is space – a widening of the picture shows that others in the family or company or community are adversely affected by the fight one is engaged in.

A third is realism – an impartial experienced mediator can give you a very sobering appraisal of what awaits you in a court of law, and a more realistic assessment of your chance of victory than what your lawyer may have provided. Another is freedom and opportunity – that you are free to participate actively in the resolution of your own dispute, not having to regress and watch bewildered from a corner of a courtroom, and that you, and the other side, can engage in coming up with suggestions on how to end this dispute.

Yet one more is the difference between verdict and solution. A judge will give you the former but it may not do much to end the conflict, which will replay in a higher court. It may be legally sound but not practically feasible to implement and sometimes a verdict may rest on a technical point of jurisdiction or limitation which does absolutely nothing to address the conflict. A solution on the other hand is what one is expected to craft when sitting in mediation – a result which is

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practical, feasible and ends the dispute effectively.

Reams have been written about the benefits of mediation, and although many come from adherents who are virtual evangelists, much of it is true. It is indeed comparatively miraculously quick and inexpensive; most cases finish in three to six sessions. Schedules can be as quickly as parties want – so we are talking of a few months, possibly weeks and sometimes days. Complex ones will of course take longer. But the litigative system can take half a score of years to dispose off relatively simple ones. Since time is pared down, so is cost. Lawyers' bills in litigation stretch to minor booklets because there are dozens of hearings and adjournments and cases in courts have to go through the gamut of fact and statute and case law; they cannot be resolved by the application of simple common sense, a rule of thumb and beneficial give and take.

One other factor, so primordially important in our lives, is relationships; litigation in courts destroys these ruthlessly. Whether personal or commercial or community, every relationship is a casualty in a court case, and to make things worse it is put into a category of 'collateral damage'. A truly depressing sight for lawyers is the sight of clients at the end of a long litigation sifting through the remains and wreckage of their emotional lives, salvaging to find some things that corresponded to a better reality. Worse yet is the plight of those who are drawn into and affected by a fight they didn't start and take no joy in continuing – need I mention how much children are harmed in parental conflict, and how families are riven apart for generations in business family disputes.

A couple of more points of advantage: One of the easiest things to do is to enforce a mediation agreement. It has the status of a court decree or an arbitral award by consent depending on whether it is a court-mandated or a privately conducted mediation. Either way, the courts enforce them without permitting objections to be raised, save for force and fraud. All the pettifogging objections which dog and delay execution proceedings in civil litigation have no place here simply because this is an agreement reached by consent. Moreover, when parties have entered into an agreement for mutual benefit, they go about implementing, not challenging it. It's a rare mediation agreement that needs to go to court for enforcement because the other side is not complying. In my nearly 30 years of practice as a mediator I have yet to see an agreement I mediated land up in court because a party refused to implement it.

It works. The success rates of resolution of cases taken to mediation is quite high; across the board jurisdictions seem to achieve a minimum of 50%, some as high as percentages in the 80s. When you give people the opportunity to haul themselves out of conflict they will do so, with some help from their mediator.

India's tryst with mediation is of recent origin. As the problems of adversarial litigation continued to mount, it was realized that the old ways lead to the same old ends; therefore, we had to devise and experiment with new ways. Some of that thinking motivated a few judges and lawyers in the early years of the 21st century to look at mediation in India.

Enabling legislation had been passed in 1996 in the shape of amendments to Section 89 of the Code of Civil Procedure and a new Arbitration and Conciliation Act. The former enabled judges in pending cases to refer the case to mediation as one of the ways of alternative dispute settlement, and a decree to give effect to the agreement. If none was reached, the case would be heard by the court. The latter provided for virtually the same process (here labelled as conciliation) to be conducted privately (i.e. not through a court); an agreement here would have the status of an arbitral award by consent and hence enforceable by court without much difficulty. The statutory umbrella was thus created.

The country's first court annexed mediation centre was started on 9 April 2005 in the Madras High Court (I had the privilege of being its first operating head). Its modest beginning was in two rooms presciently located at the entrance to the main High Court building. The initiative of having a mediation centre as an official part of the court was that of Justice Markandeya Katju, then Chief Justice at Madras.

Justice Katju allotted space, staff and a supply of cases to mediate. But funds he had none. The small group of pro mediation lawyers did the rest; brought in the funds and furniture, and flew down a superb trainer from the US, Geetha Ravindra, head of the Court's Dispute Resolution Centre in Virginia. A handpicked group of lawyers, several not quite sure what they were getting into, became the first group of trainee mediators. That's all you really need – a bit of space, a good trainer, some potential mediators. And an idea whose time had come.

Early successes included a 12-year pending company case between the workers and creditor banks of Standard Motors Ltd (makers of the iconic Herald car) for a pay out of Rs 50 crore being the sale proceeds of the company in liquidation. It resolved in mediation in three months to the satisfaction of both parties. This made news for the quantum but even more for the human element – 2196 workers were finally getting their dues; in

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several cases the breadwinner had passed on and it was the wife and children who came up to receive the cheques from Justice A.P. Shah, the then Chief Justice of the court.

Shortly after, President Dr A.P.J. Abdul Kalam visited the centre, wanting to see for himself the work dear to his father, who was a mediator in their village. His blessings and his message took the movement to the national level. A Mediation and Conciliation Project Committee set up by the Supreme Court of India helmed by Justice S.B. Sinha and later by Justices R.V. Raveendran and Madan Lokur made remarkable progress in establishing court annexed centres in different courts, with the help of the already trained mediators.

Over the years there came to be court annexed mediation centres in the Supreme Court, all the High Courts and considerable part of the lower judiciary; there are in this system a few thousand mediators, who resolve a few lakh cases every year with a good success rate. The cases range from matrimonial disputes to a wide swathe of property, banking, civil, commercial, corporate and consumer disputes.

Slowly, but surely, and somewhat quietly, the ground beneath the litigation battlefields is undergoing a seismic shift and churn, as the soil gets prepared for different gardeners, seeds, farming methods and produce. Which then means that a large mass of cases can get the attention they need from the courts of law – criminal cases, writ petitions filed against wrongful state action, public interest litigation, and others where the court's interpretation or direction is necessary for resolution. Today, these fight for space and attention with property and corporate matters, and sadly, quite often lose out. But it is only the courts which can handle this other category of cases, and it is

these cases which make up the social and political index.

If only we can shake up the legal system to move personal and civil and commercial disputes to mediating tables where they are better resolved procedurally and substantively, and keep the courts for enforcement of rights against the state, expeditious disposal of criminal cases, handling other matters which need the direction of court, we will be on our way to having a proper justice system.

Court annexed mediation is firmly in the saddle now. The job on hand now is to popularize and professionalize the use of mediation in the private sphere, by which I mean outside the courts. There is no need to go to a court to access mediation; one ought to be able to start the process and get a satisfactory solution which is enforceable without resorting to the bruising strategies and pleadings of the adversarial process.

For this to happen across the board several things are needed. Mediators in sufficient number and of good quality – this will happen once it is seen as a professional avenue where competence is key. Awareness in the user public especially in the commercial sectors of the potential and benefits of this process – this will happen as success stories do the rounds and they see trusted names in the lists of mediators. Buy-in by law firms and lawyers – this has started to happen, by seeing this process as benefiting clients and also having sufficient monetary incentives for the lawyers. Ease of enforcement – this gets taken care of when a mediation settlement agreement becomes the equivalent of a decree of a court.

Four factors in the recent past herald the coming of mediation on to the centre stage. I am tempted to call these the 'four beneficial horsemen to avert the legal apocalypse'.

One – The Singapore Convention on Mediation. Officially the UN Convention on International Settlements resulting from mediation, it provides for worldwide enforcement of a mediation agreement in any country which is a signatory to the convention. This removes the one stumbling block in business minds when it came to using mediation to settle trans-border disputes with investors or business partners – where and how will I enforce it if the other side reneges? Now enforcement is to be had for the asking – take the agreement to a court in any country where the defendant carries on business, and file it for execution. The defences are minimal, and the other party cannot argue the matter on merits. Compare this with the ever present headache in trying to enforce an arbitral decree obtained by contest or a litigative decree, where execution is merely the beginning of the second season of lengthy episodes.

Two – a recent amendment to the Commercial Courts Act mandates mediation prior to institution of litigation where the value of the claim exceeds three lakh rupees, which is basically a catch-all. Right now there is an easy opt-out whereby one can avoid mediation if an urgent interim order is sought, but it doesn't take long to plug that hole and provide that mediation must be resorted to after the interim petition is decided. This amendment was framed in a bit of hurry, perhaps, to get that all important favourable rating in the World Bank's Ease of Doing Business ranking, with the result that the mechanism devised of putting the National Legal Services Authority in charge was not fully thought through.

However, this too can be easily remedied by providing parties the option to choose their mediator, which aspect is greatly conducive to the success of the effort. And as a default,

the state, ideally through the court annexed mediation centres, should provide a mediation service to parties who are not able to find their own mediator. If implemented in a sensible way, this will divert a large critical mass of personal and civil litigation away from courtrooms to mediation tables.

Three – India is on its way to creating a comprehensive mediation law. The 1996 enactments suffered from inconsistencies and gaps, no blame to the draftsmen because this was an entirely unfamiliar field. Other laws like the Industrial Disputes Act and Family Courts Act make references to mediation and conciliation, but the whole picture now is one of bits and pieces hardly forming a neat system.

A stand-alone unifying and codifying mediation law is necessary, and it is heartening that both government and court are alive to the need and responding to it. This one will cover the principles and practice of mediation, provide for safeguards of confidentiality and observance of ethics, bring in a regulatory body, devise standards of training and accreditation, create the structure for court annexed mediation, provide for cross border mediation and so on. When set, it will provide the foundation and housing for full-fledged and wide based practice of mediation.

Four – Covid-19. Disastrous in many ways, it has given mediation a boost. The pandemic points to the urgent need to create and access alternative dispute resolution methods. It shows us that we are far too reliant on the traditional court system, which cannot take the shock and strain being placed on it. What is key is that mediation is essentially a process of facilitative discussion unlike the essential court process of argumentative debate; therefore the online facility suits the former extremely well. Where the mediation involved parties and

advisers from different cities and countries, getting convenient dates was a mammoth task. Now one can schedule sessions at short notice and have on screen people from all over the globe, with the need only to pay decent regard to time zones. It is by now clear that online is not virtual, it is a concrete reality and will continue as an integral part of our working lives.

I now tell my mediator family – Carpe Diem! One can see how far along the path we have travelled but we still have a long way to go. We must allow and encourage mediation to grow in different quarters. Matrimonial, personal and commercial disputes are the obvious starters, but the field is much larger. Community mediation is a span from disputes between neighbours to larger neighbourhood disputes to zoning and siting issues to communal conflict. Consumer, medico-legal, building construction are other areas well suited.

Peer mediation inculcating the idea of both sides emerging winners from conflict is key if we want to bequeath a better world. Public disputes also need mediation; when we have to share scarce resources, we need to foster understanding and commonalities, else we have to suffer political divides for electoral advantage. At one level we need to realize that mediated attempts will help us overcome the broad-spectrum conflict tangles we have got into with neighbouring countries.

At the other end of the spectrum we can devise a truly going back to roots mediation initiative. Our Panchayats after all are the acknowledged forerunners for mediation of a kind – trusted elders sitting with the disputants and aiming for consensus (not very confidential, however, and a bit weak on party autonomy). If we build good capacity at the panchayat and

gram nyayalaya level with proper training, evaluation, review and supported by external expert input we can tackle conflict at the incipient stage. That can be linked up with the police stations where a lot of civil dispute now washes up either to get rejected or handled ultra-forcefully. Instead it can easily be diverted to mediation rooms. Indeed, each locality should have a space, call it Zone of Peace or what you will, where disputants can gather to have a conversation on the theme – 'How can we make things better'?

At a structural level of dispute resolution, the role of the Bar is very important. Lawyers were expected to resist mediation fearing loss of income if cases are resolved quickly and simply; (ADR means Alarming Drop in Revenue was the quip), but they surpassed themselves, have taken to mediation wholeheartedly in large numbers across the country to form the backbone of the court annexed systems. However, looking ahead, if we want mediation to be widely and well established, we must ensure that its practice is financially remunerative, and that it is treated as a full-fledged professional activity. And also realize that mediation does well when it has lawyers representing parties who are for the process, and it helps when such lawyers also operate under a fee structure which assures a good remuneration for the efforts in securing a good settlement for clients.

And one last truly revolutionary thought – our systems and styles of governance have given us the administrative service, the police service, and the tax service, among others. What if, in response to the all important need to reduce conflict and enhance harmony across the board, India creates a National Mediation Service. Will that not be finally putting some part of the Mahatma in action?

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Data and justice: connecting the dots

NIYATI SINGH

NOTHING has emphasized the value of data in recent times as much as the Covid-19 pandemic. Data, big or small, is the principle means by which to understand the virus: compute the numbers of those infected, map patterns, and predict how it is likely to continue to spread in the future. It shapes public policy as much as it does private response. It is no exaggeration then to say access to data and its implications can be the difference between living and dying. From data we gain not only an understanding of the public health situation but also off-shoot socioeconomic dimensions like how the pandemic heavily penalized the poor and marginalized.

Publicly available official data presents huge opportunities. Maintained through tax payers' money, it is key to identifying problems, setting objectives, creating innovative solutions and measuring outcomes. Nationally, a number of surveys are undertaken for public services; for instance, perception studies, or for the evaluation of outcomes. In health for instance, large population-based surveys such as the National Family Health Survey (NFHS) and the District Level Household Survey (DLHS) aim to provide high-quality data for development of policy and planning, monitoring and evaluation. Such surveys, among others, have been used to gather information on aspects such as fertility, mortality, and family planning.

Data for the justice system ought to work in much the same way. Yet, there are numerous drawbacks with data collection methods across the justice system.

Consider the following: (*i*) As of August 2020, there were 3.36 crore cases pending across courts in India. 8 states have over 20% of their cases pending for more than five years in

their subordinate courts; 37% of West Bengal's cases fall into this category; (*ii*) Prisons in 21 states/UTs are beyond 100% occupancy, with Uttar Pradesh's prisons being overcrowded by nearly 70% over its own sanctioned limit; (*iii*) Across police, prisons, judiciary and legal aid, there are high vacancies in essential positions. On average, 20% in police, 31% in prisons and 20-42% in the judiciary; and (*iv*) Women are poorly represented in police and prisons. Their overall share in the workforce, across functions and hierarchies, ranges from 10% to 35%.

The data above has been sourced from disparate government agencies and dashboards: reports published by national data collection agencies such as the Bureau for Police Research and Development (BPR&D), the National Crime Records Bureau (NCRB); or the National Judicial Data Grid (NJDG): seen as the putative source for real-time national data on pendency and case disposals across courts. Each data point has implications for other areas along the ribbon of justice. But in real life each department and indeed state has different times for collecting and publishing data and different methods of recording it. For the most part valuable information inputs remain siloed in individual departments. This makes it hard to harmonise information in service of holistic policy interventions.

Since independence, innumerable commissions and committees have made recommendations to improve the functioning of the justice system. The 245th Law Commission Report on Arrears and Backlog: Creating Additional Judicial (wo)manpower,[1] for instance, called for 'urgent steps be taken to evolve uniform data collection and data management meth-

ods' in courts. The NJDG, though real-time, is a repository of limited information (relating only to pendency and disposal across courts). Illustratively, the Supreme Court's own Annual Reports have also been critiqued[2] for data errors and inconsistencies regarding the number of cases pending and disposed of annually.

Recommendations are also provided for by these bodies for each sub-system individually. In reality the working of all are interlinked. Just as efficient functioning in one may bolster the other, the consequences of deficits in one reverberate across the whole. The constellation of available figures achieves greater clarity and relevance once brought together to present the whole picture.

In some ways the India Justice Report 2019[3] sought to overcome this deficit. Conceived as a first of its kind ranking of the capacity of the justice system to deliver to mandate, it consolidates data, otherwise disparate and siloed, to present a composite picture of the state of justice delivery for policymakers, dutyholders, civil society and other stakeholders. Using only government data, it measures quantitatively the capacity of four 'pillars' – police, prisons, legal aid and the judiciary – that support the architecture of the justice system. These are filtered against six main themes – budgets, infrastructure, human resources, workload, diversity, and 'five-year trends' – to assess where a state stands, not simply vis-à-vis others, but against the standards they have set for themselves.

Moreover, given that the justice sector has been largely inaccessible to reformative efforts driven by the pub-

lic, unlike in the case of sectors such as education or health, the ranking of states is an effort aimed not only to propel states to improve themselves, but serves as an important base document: first, in providing a birds-eye view of the system, policymakers are encouraged to understand the correlations between the different sub-systems, and second in that the report allows for a deep-dive into system-specific data, to see where quick remedies can be implemented.

Set side by side the collation revealed the extent to which each individual sub-system is starved for budgets, human resources and infrastructure. There were, for instance, huge vacancies across all four pillars and in each state. On an average, the police have a vacancy of 23% (January 2017), prisons 33-38.5% (December 2016) and the judiciary between 20%-40% across the High Courts and lower judiciary (2016-17). These have more or less stagnated, mapped against the most recent data. The figures in some states are nothing less than alarming. While in 2017, in Uttar Pradesh's police force, there was a shortfall of 63% among officers; in the Bihar and Madhya Pradesh of January 2020, 1 out of 2 police officer posts was vacant.

The data threw up proof of the distance between policy promises and practices. For instance, against a pledge to have 33% women, in its police forces in 2017, in thirty states and UTs, amongst officers, the share of women was less than 10%. In 2020, Tamil Nadu had increased this to 25% from 9%, with Himachal following at 20%. Interestingly, if recruitment rates remain the same as they did in 2017, data demonstrates that Maharashtra would take 14 years to reach 33% women in police while states like Madhya Pradesh and Chhattisgarh would take over 200 years.

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1. http://lawcommissionofindia.nic.in/reports/report245.pdf

2. https://dakshindia.org/are-judicial-statistics-just-another-sheet-of-paper-in-the-pile/

3. 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid', Tata Trusts, New Delhi, India, 2019.

This throws up massive gaps in equal access to justice services, otherwise not evident. Mapped in terms of police stations, the data demonstrates that rural India faces greater hurdles in reaching institutions of justice delivery than urban India. Many rural police stations in Bihar and Maharashtra for instance served populations three times larger than their urban counterparts; while serving areas roughly 10 times bigger. Conversely, in terms of average area coverage, rural police stations in Mizoram (about 854 sq km), service areas twice as large as some of the largest states such as Madhya Pradesh (nearly 641 sq km). There may indeed be reasons for such arrangements but highlighting such disparities invites a re-examination to see if traditional logic still holds against the right of every citizen to have equal access to the institutions of justice.

The report also unpacks persistent problems that erode the capacity of the system to deliver. Each subsystem for instance complains of being starved of funds. Financial inadequacy has a direct correlation to capacity enhancement and the maintenance of core competencies of the formal justice system. For instance, on average, no state or UT apart from Delhi spent even 1% of its budget on the judiciary. Nationally, India spends 0.08 %.[4] In human resources, inadequate budgets imply increasing vacancies in future. In 2016-2017, 42% of judge posts in the High Courts were vacant, while in subordinate courts the vacancy was at 23%.

This problem of fund inadequacy exists along with an under utilization of funds. For instance, modernization grants from the Ministry of Home Affairs to states can only be used for infrastructure, capacity building, repair and maintenance, among others, and cannot be used for resolving much-needed manpower requirements. In 2016-17, only three states were able to utilize even 80% of their modernization fund. So, while there is money in fact available, the system is unable to plan, monitor budgets to overcome historic human resource shortages. This suggests that the need to streamline the processes by which funds are allocated, synchronise their disbursement to the capacity to absorb and hire.

The use of collated and disaggregated brought side by side therefore allows for identification of specific deficits which, if repaired, could remove bottlenecks to efficient functioning. Data, therefore, becomes a force multiplier to promote *evidence-based* policies which benefit their target audience.

All too often the possibility of rational planning is negatively impacted by irregular or delayed data collection and publication that does not align with fiscal, recruitment and planning cycles. States reporting on one thematic, say policing, also use different formats to gather the same information or collect it without reference to other sub-systems so they can't be usefully analysed to understand their knock-on effects on other subsystems.

Both data collection agencies – the BPRD and the NCRB also often change the categories of data collected from year to year. For instance, while in 2017 the BPRD collected disaggregated data of women in civil and district armed reserve police, the following 2018 data consolidated all women personnel in one block category for district armed reserve police before disaggregating it once more for the most recent report. Similarly, prior to 2016, the NCRBs *Crime in India*, listed numerous categories of human rights violations by personnel and the stages at which they were: from how many complaints were received and registered, to the number of police persons charge sheeted, the departmental proceedings initiated, personnel arrested, sent up for trial, convicted and acquitted. Subsequent reports now only make mention of judicial action; all unhelpful in mapping patterns of abuse.

At the same time, the continuous datafication of society – the generation, collection, analysis and use of data – is the product of myriad actors and interests in society that shape how it is used and what *needs* to be datafied. This information becomes an extremely powerful tool in the hands of various stakeholders. It contains within it a broad spectrum of points about whole populations. While these can be studied to derive crucial findings that are socially meaningful, often this information is selectively put out/withheld, affecting the rights and remedies of individuals.

Take the collection of data on minority communities in the police. Data was collected and over fifteen years, from 1999-2013 it showed Muslim representation in the police remained consistently low, at 3-4% (including Jammu and Kashmir pushes it up to 8%), as against the 14.2% population that is Muslim. Inexplicably however, since 2013, the NCRB has ceased its reporting of the level of Muslim representation in the police. Since last year, the NCRB has also withheld data it had otherwise collected under the sub-heads mob lynching, murder by influential people and killing ordered by khap panchayats on grounds that it was 'unreliable'.[5]

4. http://www.cbgaindia.org/wp-content/uploads/2019/01/Memorandum-on-Budgeting-for-Judiciary-in-India.pdf

5. https://indianexpress.com/article/india/mha-on-ncrb-report-data-on-25-categories-withheld-as-it-was-unreliable-6082930/

Enhanced efforts for capacity-building of stakeholders would enable them to use data effectively. This would also allow for increased civic engagement and participation, promoting transparency and accountability within systems. Linked to this is the need to ensure that concerned parties can access data effectively. This requires governments proactively disclose information (as provided for in Section IV of the RTI Act, 2005), allowing for data to be accessed easily and within a reasonable time period, from anywhere in the country. Improvements in transparency within the justice system can be enabled through the regular publication of verified and accurate data. Ensuring compliance with Section 4 of the Right to Information Act, 2005 with its obligations of proactive disclosure would go a long way in achieving this.

Supplementing this, state governments should also ensure the undertaking of periodic empirical research, to study different facets of the justice system. For instance, institutions of police oversight remain complied with only on paper; prison and judicial mechanisms remain hidden from public knowledge while legal aid ones are still in a nascent stage. It is only ensuring compliance with such practices that can help rekindle trust in the system and would help foster a culture of transparency and accountability.

Fulsome data can at best tell half a story and sometimes a misleading one. Recently, in order to deflect growing scrutiny on the safety of women in Uttar Pradesh, a narrative has emerged that Rajasthan is the worst-performing state when it comes to crimes against women – with the total rape cases registered amounting to 5,997 cases, followed by Uttar Pradesh with 3,065 cases. Drawing simplistic conclusions purely based on case numbers may be misleading, as there are a number of factors that play a deciding role – such as the willingness of authorities to take note of the crime and register a case; where higher numbers may point either to fewer barriers to reporting, a genuinely high incidence or both.

Reliable policy making and response to ills that beset the justice system requires data to be augmented by research into the cultures within the systems, its real life responses to the public and the perceptions and experience of the public. Kerala for instance, scored in the bottom percentile for the police ranking in the India Justice Report 2019, owing largely to vacancies at the officer level and share of women in the police. These figures, however, are unable to offer an accurate picture of the performance and perception of policing within the state. While filling vacancies, as Uttar Pradesh has done for its police in 2019-2020, would objectively increase its score and ranking in the report, one cannot say – particularly in light of recent events – that the latter's police is better than Kerala's.

The perception survey in the Status of Policing in India (2018) report illustrated that Kerala performed well on parameters such as positive police contact, satisfaction with the police and police autonomy. A combination of data and statistics combined with audits of how satisfied users are would be the answer to truly gauging justice delivery.

Data is the new oil. However, like all resources it needs to be used for the benefit of all and not for the accretion of power in the hands of the few. After all, it is a powerful tool to ensure that access to and delivery of justice gets actualized and doesn't simply remain etched in paper as the first promise made in our Constitution.

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Justice and the future of technology regulation

DIVIJ JOSHI

ON 4 August 4 2019, all telecommunications and internet services were suspended in Jammu and Kashmir, which would become the longest communications siege effected by the Government of India on its citizens. The orders were not made public, were passed without public deliberation, and provided no mechanism of redress. January 10, 2020, 159 days after the shutdowns, the Supreme Court of India reviewed the Internet suspension orders and found them legally infirm. Despite this, secretive and unaccountable internet shutdowns in Kashmir have continued, in violation of the Supreme Court order, without parliamentary or judicial oversight, and in brazen defiance of the rule of law.

This story encapsulates a broader trend in technology regulation in India – an area increasingly driven by boundless executive discretion and decision-making. This discretion has been buoyed by the failure of democratic and constitutional institutions – courts and the legislatures – to effectively contend with the dynamics of emerging technologies and their impact on legal and constitutional rights. This article explores how this came to be, its implications for democratic and constitutional values, and how we may re-centre justice in technology regulation.

The Constitution of India attempts to ensure the delicate act of checks and balances on state power by providing for the separation of powers between various organs of government. Subject to narrow exceptions, the power to make laws is vested within Parliament and state legislatures, the power to apply and enforce legislative policy is vested with the executive and the bureaucracy, and the power of judicial review and oversight of legislative and executive action lies with the judiciary. The modern history of developments in the regulation of technologies, however, have seen both the legislature and judiciary abdicate their respective function as checks on unbridled executive power.

Take the example of the Information Technology Act, which provides the central government wide powers to regulate the internet and related technologies. The IT Act exemplifies the abdication of crucial

lawmaking functions to the executive. The legislation provides wide deference to the central government to establish norms of technology regulation – ranging from data protection to online speech and the conduct of social media platforms. This wide delegated power has recently been wielded for the censorship of hundreds of mobile phone apps by the central government; or the recent proposal by the Ministry of Information Technology to require all social media platforms to use algorithmic systems to censor any content deemed 'unlawful'.

This unfettered executive fiat over matters of technology regulation has extended over other crucial domains, exemplified particularly by the use of technology by government agencies. For example, matters crucial to the policy and schema of the Aadhaar project – from determining the scope of the use of digital identification, to data protection norms, to the very architecture and technical design of the project – have been delegated to rules and regulations made by the executive.[1] Similarly, technologies like biometric identification and predictive policing have proliferated in policing agencies, in the absence of clear legal norms of criminal procedure through which they may be assessed.

Several of India's large technology projects have been implemented without individual and social legal protections which are fundamental to realizing justice in the use of information about citizens. Between 2009 and 2016 Government of India's Aadhaar digital identification project existed without any legislative sanction. The Aarogya Setu mobile application has been developed and deployed pervasively, without any anchoring legisla-

tion, relying instead on the broad power of the National Disaster Management Act, 2005.

The development and deployment of both Aadhaar and Aarogya Setu had serious consequences for constitutional rights. There are demonstrable concerns about informational privacy and misuse of intimate personal data, as well as about punitive action and exclusion resulting from the legal mandates for use of the technology, including preventing access to welfare and government services on which millions are dependent. In spite of this, their governance is unbound by legislatively determined rules or policy.

The judiciary has also failed to act as a check on executive discretion, by failing to apply constitutional frameworks to emerging socio-technical issues and failing to interrogate the claims about technology forwarded by the government. The Supreme Court's judgement deliberating upon the Aadhaar project followed upon the heels of a landmark 9-judge decision in *KS Puttaswamy v Union of India*, which had affirmed the fundamental right to privacy, particularly in the context of emerging information technologies and biometric technologies.[2] However, when the court had the opportunity to apply this precedent to the Aadhaar project, it did not interrogate the government's claims about the technical architecture of Aadhaar, particularly in relation to the claims about the failure rate of biometric identification, as well as its claims of appropriate data protection mechanisms.[3]

The court's inaction in the case of Kashmir's internet shutdowns provides another example of judicial evasion. In *Anuradha Bhasin v Union of*

India,[4] mentioned above, as well as *Foundation for Media Professionals v UT of J&K,*[5] the court had the opportunity to consider the arbitrary manner in which internet communications were shut off on executive whim (notably, through executive rules made under the Telegraph Act of 1885). Even while it recognized that the internet shutdowns were unlawful, and did not even abide by the executive's own rules under the Telegraph Act, 1885, the court refused to hold the executive to account for its illegality, and delegated even the act of oversight and review to the executive itself.

Deficits in both legislature and courts are interlinked. In the absence of clear legislative standards against which to substantively evaluate the impact of emerging technologies, the court bows uncritically to scientific or technical evidence forwarded by the executive in determining matters of technology regulation, as is evident in claims about the infallible nature of biometric identification in the Aadhaar case; or the claims about how online media influences extremism and violent mobilization in Kashmir.

Digital technologies and systems built on 'data' and computational analysis are increasingly becoming embedded within every facet of public life. Crucial domains of civic life, such as the criminal justice system, are increasingly adopting emerging technologies like 'data-driven' predictive policing, or mass surveillance technologies like facial recognition, without acknowledging how they are transforming, and in some cases, debilitating long held norms like presumptions of innocence, or fairness and equality, which are at the heart of criminal procedure.

1. https://caravanmagazine.in/vantage/aadhaar-bill-another-legistlation-leaves-power-centre

2. Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

3. Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

4. Anuradha Bhasin v. Union of India, 2020 SCC OnLine SC 25.

5. W.P. (D) 10817 of 2020, Supreme Court of India.

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The use and regulation of these technologies have consequences which go to the very heart of democratic ideals and constitutional rights. Without a course correction, these ideals and rights could easily be forsaken. These technologies have material effects on democratic participation – for example, through enabling or disabling freedom of expression and communication in an increasingly online society; and can fundamentally alter the relationship between the citizen and the state – for example, how Aadhaar determines who is capable of holding and exercising rights to government welfare.

Visions of social justice have always co-evolved with technological developments, and require us to re-evaluate and reshape claims to individual and collective rights and interests. These claims are expected to be clarified and upheld by institutions like the legislature and courts, through the legislative commitment to democratic accountability, and the judicial commitment to constitutional justice. In their absence, however, technocratic and bureaucratic values of technological regulation have taken hold. These prioritize claims to efficiency over claims of justice. They cast emerging technologies as legitimate and unbounded instruments for furthering state power and managing populations. This deference to the executive over claims of scientific and technological knowledge has to be seen in light of the political economy of emerging information technologies and the re-making of regulation to achieve goals and values identified by the 'free market', which relegates claims which lie outside the paradigm of the market to the domain of the non-expert and non-technical, liable to be cast aside.[6]

What, then, can an agenda for social justice for the future of technology, foregrounded in democratic and constitutional ideals look like? How can and should the law evaluate and respond to claims of justice in how the state regulates emerging technologies? I offer two approaches towards reorienting regulation towards social justice.

First, the use and regulation of technology must be critically assessed on the touchstone of its impact on constitutional rights and freedoms. Technology regulation must adopt a rights-based approach, as opposed to an approach which unilaterally assumes control over this domain. Substantive rights in information technology can manifest through different legal instruments, and should approach information technologies both as enabling individual rights like privacy and freedom of speech and expression, and also foster their status as socially valuable public goods – encouraging fairness and equity in their development and use. There is important precedence which adopts this approach – for example, in the Supreme Court's recognition of the right to informational privacy in *Puttaswamy I*, or the Kerala High Court's pronouncement on the right to internet access in *Faheema Sharin v State of Kerala*.[7]

Second, the concept of due process must be reinvigorated as a touchstone on which to judge matters of technology regulation. The Constitution already recognizes that fair hearings to affected individuals or populations are instrumental to achieving what has been termed 'natural justice', for example, by providing for clear notice to affected persons, providing justifications for specific regulatory decisions and allowing them to be challenged through a fair hearing.

A due process standard incorporates justice through evaluating the fairness of the procedure used to achieve a particular result, without necessarily adjudicating on the merits of the result itself. Administrative processes which target specific entities or individuals are generally held to this standard, but claims to procedural justice can be invoked across the administrative process – from seeking input from affected populations as part of rule-making processes, to conducting post-facto impact assessments.

Further, by establishing standards for providing notice and hearing of affected individuals and groups, a due process standard requires technology regulation to specifically consider incorporate evidentiary claims of individuals and populations which may be affected by the use and regulation of technology. Procedural fairness can also be invoked within government procurement processes for technology systems and project, to allow public oversight and interrogation of the technologies deployed by public agencies.

Evolutions and transformations in technology materially impact the exercise of legal rights and freedoms and also change the frameworks by which we evaluate just processes and outcomes, which requires democratic participation and is rooted in constitutional values. We must constantly reconfigure our expectations from science and technology, measure and balance conflicting conceptions of what justice entails in this domain, and critically engage with technologies not only as matters of technical 'expertise', but equally as social and political constructions where democratic and constitutional engagement is necessary.

6. Linnet Taylor, 'What is Data Justice', *Big Data & Society* 4(2), available at https://journals.sagepub.com/doi/10.1177/2053951717736335.

7. Kerala High Court Declares 'Right to Access Internet' as a Fundamental Right', SFLC, available at https://sflc.in/kerala-high-court-declares-right-access-internet-fundamental-right.

The future of technology

USHA RAMANATHAN

WE need another imagination around technology.

In the closing years of the last century, a problem presented itself to programmers which, if their panic proved justified, would have paralysed computer systems around the world. It was given the grand appellation of 'Millennium Bug' or, more modestly, the 'Y2K bug'.

Computer programmers between the 1960s and 1980s had contracted the depiction of the year in the date on the computer to its last two digits: 1970 was 70, 1979 was 79. As the years approached 2000 AD, uncertainty erupted in the community of programmers that the missing numbers denoting the century may turn the clock back by nearly 100 years. Banks, for instance, had widely adopted computerization and interest rates were calculated on a daily basis. If the bug were to hit the systems, 'instead of the interest rate for one day, the computer would calculate the rate of interest for *minus* almost 100 years!'[1]

The US, UK and Australia, which were among the countries where computerization had happened on scale, spent millions on treating the Y2K bug, and a fair share of this went towards making India's technology companies, and their promoters, wealthy. In 1998, 40% of the nearly $ 2 billion revenue of Indian software companies 'came from Y2K contracts.'[2]

As it came to pass, when the calendar crossed the dreaded date nothing dramatic occurred, and countries that had done little to nothing to prepare for the feared cataclysm had no more technological problems than those that had not. And, 'due to the lack of results, many people dismissed the Y2K as a hoax or end-of-the-world cult.'[3]

Then it was the turn of the dot.com bubble; it burst some time in 2001. Dot.com companies, by definition, do most of their business on the internet. In the decade of the dot.com, they 'vowed to "change the world", had crazy high valuations and were wildly unprofitable.'[4] This is whence the language of 'ubiquity' and of 'killer-apps' found their everydayness. The over-ambition and underperformance of the dot.com companies saw it peak in the market in 2000 and bottom out

1. 'Y2K Bug: The Y2K Bug Was a Computer Flaw, or Bug, That May Have Caused Problems When Dealing With Dates Beyond December 31, 1999', *National Geographic*, available at https://www.nationalgeographic.org/encyclopedia/Y2K-bug/ (21 January 2011).

2. 'India Leading Y2K Charge', *CNN Money*, available at https://money.cnn.com/1999/03/17/technology/y2k_pkg/ (17 March 1999).

3. Supra note 1.

4. Brian McCullough, *A Revealing Look at the Dot-Com Bubble of 2000 – and how it shapes our lives today*, TED, available at https://ideas.ted.com/an-eye-opening-look-at-the-dot-com-bubble-of-2000-and-how-it-shapes-our-lives-today/ (4 December 2018).

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in October 2002. That left the technological surge in the lurch.[5]

The industry was stumbling around, seeking a perch from which to perform when in March 2002, the European Union heads of state meeting in Lisbon discussed how they could put to use the power of information technology. At Lisbon, Heather Brooke writes, 'there was widespread agreement that the struggling IT industry which had suffered the dot.com bust would be subsidized by states keen to expand their power. Each EU country was to develop its service delivery by electronic means or 'e-government'; the stated aim – to offer citizens faster, more efficient services by also stimulating the IT market.'[6]

The next few years, e-governance seemed to have taken over the imagination of governments around the world. By 2010, the UN was rating countries on their 'progress in e-government development.'[7] It is important not to forget that e-governance was launched as a way to help the tech industries find business, and for governments to find ways to expand their power over the people.

In India, the National Knowledge Commission set up a special group with Nandan Nilekani as chair 'to study e-governance.'[8] 'Mission-mode' projects were mooted to re-engineer the government processes around the 'e' in e-governance. The UID was a Mission Mode project.

The UID saga is now widely known. That the project began with no feasibility study, no law and no privacy protection. That it moved swiftly from an identity, to an identification, project. That it inverted the meaning of voluntary, making voluntary mandatory. That its ambition was to make the number unique, ubiquitous and universal. That the Parliamentary Standing Committee rejected not just the 2010 Bill[9] but also the project, and asked that both be taken back to the drawing board; and that the government decided to just carry on without a law.

That, many years later, when in 2016 the Aadhaar Act was passed into law in Parliament, it was introduced as a Money Bill, which the majority in the Supreme Court had to work through contortions to justify. That the use of the UID database by private companies was struck down by the Supreme Court, only to be brought back first by Ordinance – a use of extraordinary executive power. That the Data Protection Bill remains pending. And more, much more, speaking to the deeply problematic nature of this project.

There are so many questions that this project has raised which remain unanswered. Biometrics, and the rolling out of untested technology over an entire population is such a one.

Biometrics: this is the strange tale as presented in the project's documents – paraphrasing could incur disbelief, if this indeed could truly be what the documents said – so here are some excerpts. In a 'Notice inviting applications for hiring of biometrics consultant' in January-February 2010:

'For the western world, NIST (National Institute of Standards and Technology) for instance has invested tens of man-years of work to come up with recommendations for biometric capture process. … While NIST documents the fact that the accuracy of biometric matching is extremely dependent on demographics and environmental conditions, there is a lack of a sound study that documents the accuracy achievable on Indian demographics (i.e., larger percentage of rural population) and in Indian environmental conditions (i.e., extremely hot and humid climates and facilities without air-conditioning). In fact, we could not find any credible study assessing the achievable accuracy in any of the developing countries.'[10]

That was the state of knowledge (*sic*) in the months before enrolment began. A Proof of Concept (PoC) study of biometric enrolment was done between March and June 2010. In explaining the demographic it chose to test the technology, the UIDAI said: 'The goal of the PoC was to collect data representative of India and not necessarily to find difficult-to-use biometrics. Therefore, extremely remote rural areas, often with populations specializing in certain types of work (tea plantation workers, areca nut growers, etc.) were not chosen. This ensured that degradation of biometrics characteristic of such narrow groups was not over represented in the sample data collected.'[11]

5. Id.

6. Heather Brooke, *The Silent State: Secrets, Surveillance and the Myth of British Democracy*, 2010, p. 27.

7. United Nations E-Government Survey, 2010: Leveraging e-Government at a Time of Financial and Economic Crisis. United Nations Department of Economic and Social Affairs, available at https://publicadministration.un.org/egovkb/portals/egovkb/documents/un/2010-survey/complete-survey.pdf (2010).

8. Report to the Nation 2007, National Knowledge Commission, Government of India, available at https://epsiindia.org/wp-content/uploads/2019/02/Knowledge-Commission-Report-20071.pdf (2007).

9. The National Identification Authority of India Bill, 2010, Standing Committee on Finance (2011-12), 42nd Report, Fifteenth Lok Sabha, Ministry of Planning, Lok Sabha Secretariat (December 2011) available at https://uidai.gov.in/images/report_of_the_departmental_standing_committee_on_finance_on_the_bill_13012017.pdf

10. Notice Inviting Applications for Hiring of Biometrics Consultant, Unique Identification Authority of India, Planning Commission, Government of India, available at https://docplayer.net/18863674-Notice-inviting-applications-for-hiring-of-biometrics-consultant-a-11016-07-10-uidai.html (2010).

Problems encountered in the process of enrolment were mentioned in passing, for instance:

'In conjunction with the age and occupation captured in the demographic screen, we were also able to analyse the average capture time and average number of capture attempts by age and by occupation. *This was important since there are several occupations where repeated rubbing and scratching of fingers result in worn out fingerprints.*'

The enrolment on the UIDAI database, and the harvesting of biometrics began on 29 September 2010. In November 2011, in an interview with *Frontline*, Ram Sewak Sharma, the Mission Director of UIDAI made an extraordinary admission:

'Capturing fingerprints, especially of manual labourers, is a challenge. The quality of fingerprints is bad because of the rough exterior of fingers caused by hard work and this poses a challenge for later authentication. Issuing a unique identity with iris scans to help de-duplication will not be a major problem. But authentication will be because fingerprint is the basic mode of authentication.'[12]

It was March 2012 before a PoC of fingerprint authentication was made public. Its findings:

'Every resident seems to have certain fingers that give better authentication results… Therefore, …tools and processes may be required to help residents identify these fingers.'

'Multiple attempts of same finger further improve the chances of successful authentication.'

'Mechanisms may be required for capturing more distinct fingers if a resi-

dent is not able to authenticate with a single finger.'

'Effect of resident age on authentication accuracy: Residents in 15-60 years group showed the best authentication accuracy.'[13]

And more in this vein, which explains the 'recommendation': 'Iris authentication helps provide an alternative biometric authentication mechanism for those residents who cannot be authenticated using fingerprints. Further studies need to be undertaken in this regard.'

So, it was known that fingerprints were unreliable; and iris still needed to be studied. Yet, it was rolled out, and the distribution of rations, midday meals, social security pension and payments through banking correspondents built fingerprint authentication into the system.

The Iris Authentication Accuracy PoC was dated 14 September 2012, a mere three months and some before UID was made mandatory for a torrent of purposes, from the distribution of rations in PDS to cooking gas to everything done through the Revenue Department in Delhi, for instance, including the registration of marriage. The report started with an extraordinary claim:

'Iris as a biometric modality', it read, 'promises certain unique characteristics in Indian environment. Iris technology literature lists several benefits.' It then goes on to list them, beginning with this strange declaration: 'The iris does not get worn out with age, or with use. In addition, iris authentication is not impacted by changes in the

weather.' This didn't stand to reason – that there was any part of the human body that did not age. And, contemporaneously, a research study published adverted to the 'assumption' that the 'appearance of the iris is stable throughout a person's lifetime' having been 'accepted by the research community since the beginning of iris biometric research.' Basically, it hadn't been investigated. The study[14] did find, though, that 'template aging' (which is what they were studying) certainly occurred. This, they suggested, could be remedied by re-enrolling the iris biometric at set intervals.

In August 2015, the UIDAI added a segment to its project description: UBCC and Research, UBCC the acronym for UIDAI Biometric Centre of Competence. 'Nature and diversity of India's working population adds another challenge to achieving uniqueness through biometric features', the document read. 'Like other technology fields such as telecommunications, we do not have experience like developed countries to leverage for designing UIDAI's biometric systems.'

The 'Mission' was, therefore, 'to design biometrics system that enabled India to achieve uniqueness in the national registry. The endeavour of designing such a system is an ongoing quest to innovate biometrics technology appropriate for the Indian conditions.' Six years after the project was launched, five years after enrolment had begun, close to three years after biometric authentication had been made mandatory for a range of services on which the citizenry relied, the UIDAI was saying that they were still reeling around in the realm of the unknown in biometrics.

11. Ibid.

12. G. Srinivasan, 'The Aim is Inclusion', interview with Ram Sewak Sharma, DG and Mission Director, UIDAI, *Frontline,* 2 December 2011.

13. Role of Biometric Technology in Aadhaar Authentication, Iris Authentication Accuracy-PoC Report, Unique Identification Authority of India, Planning Commission, Government of India, available at https://www.yumpu.com/en/document/read/3558488/iris-authentication-accuracy-aeur-poc-report-uidai (14 September 2012).

14. Samuel P. Fenker and Kevin Bowyer, 'Experimental Evidence of Template Aging in Iris Biometrics', 2011, at https://www3.nd.edu/~kwb/Fenker_Bowyer_WACV_2011.pdf

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In 2016, Ram Sewak Sharma, wrote a blog about the adoption of iris when the Biometric Standards Committee, in December 2009, said that fingerprints would fall short for enrolment. (At that point, they were not yet worrying themselves with authentication.) He wrote with charming candour that 'The (Biometrics Standards) Committee was not ready to recommend inclusion of iris.' And proceeded to make this admission:

'Yes, it is a fact that when the project was started, UIDAI had no data to prove that biometrics will be able to bring about desired accuracy or to disprove other contentions relating to large percentage of failure to enrol, inaccuracies in authentication etc… Obviously, there was no data relating to authentication… One was not sure whether any system will be able to function and produce results when the data size became very large… The question was: should UIDAI go ahead and do the project on the basis of 'untested' technology at this scale? …it is similar to a Moon shot.[15] Nobody has done it before and yet you do it because nobody will ever do it before you. …it should be realized that de-duplication algorithms have never been tested and scaled up to such numbers which will eventually happen in this case.'[16]

Some years later, when fingerprints began to fail in the PDS which is where it was deployed, 'aadhaar deaths' had

happened, been reported to the court and elided over, a 'Compendium' was issued by the UIDAI relating to biometrics. A few illustrative excerpts:
'It is expected that a small percentage of aadhaar holders (forgive them their euphemisms) will not be able to do biometric authentication …if fingerprint is not working at all even after multi-finger authentication, then alternate (*sic*) such as iris or OTP must be provided… If the schemes is family based (like PDS system), anyone in the family must be able to authenticate to avail the benefit. This ensures that even if one person is unable to do any fingerprint authentication, someone else in the family is able to authenticate. If none of the above is working (multi-finger, iris, anyone in the family etc.) the agency must allow alternate (*sic*) exception handling schemes using card or PIN or other means …In case biometric authentication through fingerprints or iris scan or face authentication is not successful, wherever feasible and admissible authentication by aadhaar OTP or time-based OTP with limited time validity …shall be offered.'[17]

And so on, and on, and on. This explains why, by 2019 when talk of One Nation One Ration began to be heard, it was being said:
'Under the system, consumers are required to undergo biometric (fingerprint etc.) authentication', but 'reports/feedback' say that 'failure of authentication in case of old-aged persons/hard-working labourers was causing difficulties in collecting rations in

PDS shops.' The incredible alternative prescribed was 'providing ration card nominee facility.' That is, I nominate you to lend me your biometrics because my fingerprints fail me. There, finally, was the admission that the UID is no identity at all.

It is more than just biometrics that was an experiment that failed to deliver. Nilekani spoke of himself self-effacingly as a plumber, in a project that was to plug leakages.[18] Corruption and inefficiency would wilt and wither with the UID becoming the gateway to services including PDS, NREGA, pensions, salaries and scholarships. This was not to be, but it was the press that spotted it, which then did its own investigation. The UIDAI stayed silent.

Starting 31 October 2020 and going through November and into December, the *Indian Express* reported on an investigation their reporters had undertaken which revealed gaping holes in a scheme to provide minority scholarships.[19] The first reports spoke of extensive fraud in the state of Jharkhand. The headline was terse: 'Aadhaar obtained, account hijacked, and hostel faked.'[20] The report spoke of 'how the scam had ensnared schools, students and parents across four districts in Jharkhand despite multiple checks in place, including aadhaar IDs,

15. See, Natalie Grover, 'Operation Moonshot "Llike Building Channel Tunnel Without Civil Engineers",' *The Guardian*, 16 November 2020 at https://www.theguardian.com/world/2020/nov/16/operation-moonshot-like-building-channel-tunnel-without-civil-engineers-covid-testing. For what had to precede the actually moon landing, though, see Charles Fishman (2019), 'One Giant Leap: The Impossible Mission that Flew us to the Moon' or Andrew Chaikin (1994), 'A Man on the Moon: The Voyages of the Apollo Astronauts'.

16. Ram Sewak Sharma, 'UIDAI's Public Policy Innovations', 6 September 2016, at https://www.nipfp.org.in/media/medialibrary/2016/09/WP_2016_176.pdf

17. Compendium of Regulations, Circulars & Guidelines, Unique Identification Authority of India, Government of India, pg. 67 available at https://uidai.gov.in/images/resource/Compendium_30042019.pdf (2019).

18. R. Sukumar, 'Nandan Nilekani, Chairman UIDAI', *Live Mint* available at https://www.livemint.com/Leisure/zKPVegCX1kxYbnb23aehdJ/Nandan-Nilekani-chairman-UIDAI.html (28 December 2012).

19. A. Angad, 'Direct Benefit Transfer is Direct Siphoning of School Scholarship', *The Indian Express*, available at https://indianexpress.com/page/2/?s=scholarship+scam (1 November 2020).

20. A. Angad, 'Jharkhand Scholarship Scam: Aadhaar Obtained, Account Hijacked, and Hostel Faked', *The Indian Express*, available at https://indianexpress.com/article/express-exclusive/scholarship-scam-jharkhand-aadhaar-hostel-students-6913027/ (2 November 2020).

fingerprints, bank accounts, and an online database.'

The report is replete with the ease-of-misuse of the UID: 'I gave the middleman my aadhaar number account details. My wife and I received Rs 10,700 each, and we gave half the amount to the middleman.' 'I had given my fingerprints and aadhaar details but I didn't know an account had been created in my name.' 'Several students across at least six districts in Jharkhand have had their aadhaar cards and fingerprints taken, and scholarships disbursed in their names, but many have received only a fraction of the amount – if at all anything.' The investigation traced the scam to Assam and Bihar; there's no saying yet how far, or how deep this would go, or for how long it has been on.

Even as this remained front page news for days, a discussion on the UID project on 9 November 2020 with four retired bureaucrats, including Ram Sewak Sharma, whose recent book[21] was being discussed, seemed unaware that there was any problem with the project. It was like the reports in the *Indian Express* never happened. The project has chugged on unimpeded by evidence and experience, creating exclusion, scams and devious devices as in the passage of the Aadhaar Act as a Money Bill.

In 2017, the next stage in harnessing personal information for profit was introduced to us as 'trickle up'.[22] The West, this theory went, was already wealthy before becoming data rich. That is not true for India where poverty is pervasive. But, and this was a significant 'but', Indians are data rich. All they needed to do was work at letting the data trickle up, to reach those who would convert it into wealth. In 2018, the Srikrishna Committee, which was to have been working on privacy,[23] displayed admirable honesty in calling its report 'A Free and Fair Digital Economy' and added in a subheading, in acknowledgement of why the committee had been set up, 'Protecting privacy, empowering Indians.'

Rights, 'of which the right to privacy is an example', the committee wrote, are 'tools… necessary for the realization of certain common goods. The importance of a right… is not because of the benefit that accrues to the rights holder but rather because that benefit is a public good that society as a whole enjoys. This is a critical distinction', the committee continued, 'and often missed in the simplistic individual-centric accounts of rights.'[24] This impatient dismissal of the rights that are fundamental to every person opened up a flood of possibilities for converting our personal information into many products.

The Economic Survey 2018-19 rode on this tidal wave of tech utopia and advocated for data being 'treated as public good'.[25] 'As people increasingly use digital services to talk to each other, look up information, purchase goods and services and engage with local leaders, data is being generated at an unprecedented scale… As people shift their day-to-day activities online, they leave digital footprints… Put differently, people produce data about themselves and store this data on public and private servers everyday of their own accord.' Data which would have been 'laborious… to gather a few decades ago is today accumulating online at near-zero cost, although it is scattered across sources.' The push was for a 'government-driven data revolution.' Of course, whittling down rights is for the 'welfare of citizens'!

A while later, a committee, headed this time by another founder of a technology major (Infosys), Kris Gopalakrishnan, was constituted to draw up a 'Non-Personal Data Framework'. The 'key take-aways' in the report are clear and succinct:
'The world is awash with data. …Data inter alia contributes to economic value and wealth… Organizations have been discovering ways to generate value from data. The digital economy is witnessing the emergence of a few dominant players and a certain imbalance in the market. Given the increasing importance and value generation capacity of the data economy, governments around the world realize the need to enable and regulate all aspects of data, both Personal and Non-Personal Data.' *Government is to 'enable' the conversion of data into economic value.* Personal data becomes non-personal data by being anonymized.

About 'Public Non-Personal Data', which is data collected by governments, 'the committee believes that since it 'is derived from public efforts,

21. Ram Sewak Sharma, *The Making of Aadhaar: World's Largest Identity Platform.* Rupa Publications, Delhi, 2020.

22. 'Startup Awards: India to be Digitally-Rich Before Being Economically Wealthy', *Economic Times*, 21 August 2017, at https://economictimes.indiatimes.com/small-biz/startups/et-startup-awards-india-to-be-digitally-rich-before-being-economically-wealthy/articleshow/60151874.cms.

23. K.S. Puttuswamy & Anr. v. Union of India, (2017) 10 SCC 1.

24. Page 9 of the Report (2018) available at https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf

25. Chapter 04: *Data* 'Of the People, By the People, For the People', Economic Survey of India, 2018-19, available at https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/echap04_vol1.pdf (July 2019).

26. Report by the Committee of Experts on Non-Personal Data Governance Framework, Ministry of Electronics and Information Technology, Government of India, pg. 27 available at https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf (2020).

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the datasets created partake of the characteristics of a national resource.'[26]

Amidst hunger, unemployment, lack of education, poverty, impoverishment, induced vulnerability, and the certainty of uncertainty, this is how the person, the community and the public – the three classes into which the Non-Personal Data Framework Committee is corralling us – are being given an entirely new meaning: as data.

If this dream of the data merchants were to morph into the nightmare that it will become, the kind of altered reality reflected in places like the Institute of Human Obsolescence (IoHO) may well become our life and labour. You read that right. Human obsolescence. Founded by Manuel Beltran, it is described as 'an artistic research project investigating the repositioning of human labour in a time where manual and intellectual labour is increasingly being performed by machines and new forms of inequality arise.'[27] The IoHO tells a chilling tale: 'Machines are ousting us. As it happened some time ago to horses after the invention of the steam engine, humans are becoming obsolete mechanical labour. Soon, with the advance of artificial intelligence, it will also affect our possibilities to be useful workers performing intellectual labour.'

Sounds a long way off? Or too highly improbable that we can cast it into the cosmos of science fiction and dust ourselves off and walk away? May be this deserves more serious thought. Just may be? Remember Stephen Hawking's warning: 'The development of full artificial intelligence could spell the end of the human race.'[28]

The lure of data is overwhelming: the profit, the control, the role for the technology provider, and the global reach into all persons – think digital certificate for vaccination – and all systems and sovereignties. Rights are obstacles. All else is petty beside the promise that a world governed by data holds out. We are walking into this blindfolded. That doesn't seem a good idea.

There's more. Vint Cerf, known as one of the fathers of the internet, is speaking of a 'digital dark age'. He is worried about another form of obsolescence: the dating and disappearance of hardware and software as each generation of technology renders obsolete the previous, and as each generation of humans leaves behind the history recorded in the previous.[29] Our technologists tell us with hardly repressed glee about going 'paperless' and 'presenceless'. In a day not far, the retired machines and code may leave us with no memory to pass on into history.

Cerf finds his answers in preserving every piece of software and hardware in digital form, on a cloud, so it never disappears. A technology solution to be provided by a technology monopoly for a problem created by technology.[30]

We may want to do our own thinking.

27. Barbara Dubbledam, 'Data Production Labour – an Investigative Discussion with the Institute of Human Obsolescence', Institute of Network Cultures, available at networkcultures.org/blog/2018/11/15/data-production (15 November 2018).

28. Rory Cellan-Jones, 'Stephen Hawking Warns Artificial Intelligence Could End Mankind', British Broadcasting Corporation, available at https://www.bbc.com/news/technology-30290540 (2 December 2014).

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Books

ON 30 September 2020, a 19-year-old Dalit woman from Uttar Pradesh's Hathras district died in a hospital after being raped allegedly by four men from the Thakur caste. The case sparked outrage owing to the police's forced cremation of the victim's body, and its apathy and inaction. But it also rekindled a public conversation on narcoanalysis after a Special Investigation Team constituted by the state government proposed to conduct narcoanalysis on the victim's family. The proposal was criticized by legal experts – and senior advocate Prashant Bhushan referred to narcoanalysis as 'akin to torture' – but, perhaps instructively, met with approval from local Brahmin and Thakur communities who felt the 'truth tests' were needed to make the poor Dalit family tell the truth.

Jinee Lokaneeta's new book, *The Truth Machines: Policing, Violence, and Scientific Interrogations in India,* while questioning the adequacy of existing theoretical frameworks to understand police violence as a site of state power in liberal democracies explores this question – whether these truth extraction practices are plain torture or rather a 'techno-political' solution to replace physical torture.

A professor in political science and international relations at Drew University, Lokaneeta reviews the emergence of truth machines (three forensic science techniques – narco-analysis, brain scans and polygraph tests for police interrogation) and deftly sifts through the interplay of law, science and policing to analyse the frameworks under which the relationship between state power and legal violence can be understood.

The slim volume builds on her previous work, *Transnational Torture: Law, Violence, and State Power in the United States and India* (2011), which looked at the nature of violence and state power in liberal democracies.

Thoroughly researched and buttressed with extensive field work and interaction with police officials, forensic psychologists, medical professionals, lawyers, activists, The Truth Machines interrogates the motivations of state and semi-state actors (the book refers to forensic psychologists as semi-state actors and compares it to the police, the state actors) for the expansion of these techniques. It questions the adequacy of the Weberian conception of unitary state action and explains the idea of a contingent state to understand everyday practices and contingencies among state and semi-state actors and its importance in analysing the relationship between state power and police violence.

The book traces the journey of these truth machines in India from its first use in the 1960s to individual practitioners working with the police to now when they are featured in Ministry of Home Affairs reports and Central Bureau of Investigation's bulletins. Through interactions with police, forensic psychologists, academics, lawyers, amongst others, the book suggests varied motivations of different actors in the use of truth machines. Truth machines fit India's desire to modernize, based on science and experts. She also contextualizes the growth of these 'scientific' techniques with the expansion of civil liberty groups, human rights movements, the constitution of the National Human Rights Commission post the Emergency and therefore the need of liberal democracies to respond to this by 'managing' its own violence. Some of the other motivations attributed for the prevalence of these interrogative tech-

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niques include the police's need to buy more time for interrogation. To these are added the vehement defence of the success of these techniques by select forensic psychologists and tech companies born perhaps out of commercial concerns and patents, and court's submission to technology as means of replacing physical torture which they have failed to curb.

One of the most fascinating aspect of Lokaneeta's book is the remarkable ethnography of the state forensic architecture – the revealing interaction with forensic psychologists, their claims that their practice humanizes interrogations, their relationship with the machines, the therapeutic and scientific role of practitioners, their attempt to distinguish themselves from the police and their practices, the underlying commercial interests and the recognition of the claims of accuracy of these techniques by the state. These layered and intimate descriptions provide an insight into the multitude of factors that play into determining the emergence and expansion of these truth machines. These insights reveal that state actions are not as intentional as theories on state and police claim.

While lucidly explaining the forensic architecture, its expansion and motivations, the book also highlights the scientific community's disavowment of these practices and the evidence of lack of scientific accuracy or reliability of these invasive and discredited truth extraction techniques. The 2010 Supreme Court's judgement in the *Selvi* case made the involuntary use of truth machines unconstitutional, but the book rightly critiques the court falling short by allowing 'voluntary' administered tests in accordance with Section 27 of the Indian Evidence Act.

It is disingenuous to imagine that the court is not aware of the ease and frequency of custodial coercion. In fact, narratives of inmates who had participated in these tests and were subjected to slaps, pliers and worse attest to the fact that mental and physical torture is a part of these invasive and regressive techniques. The book incisively posits that while these techniques claim to replace third-degree interrogation, their real intention is to prevent custodial deaths.

The Truth Machine rightly calls out this allure of technology and scientific methods to save the broken criminal justice system. I was reminded of another current judicial-governmental obsession: video conferencing. In the last couple of decades, there has been a growing and unquestioning appeal for the use of video conferencing in criminal proceedings with claims of it being cost-effective, convenient and safer mode for 'producing' inmates for court hearings. Its growing popularity with officialdom exists despite the serious challenges it poses to fair trial safeguards. Just like with these truth machines, there are different motivations for its growth from different quarters, and the brunt of the consequences of these technological advancements is to be borne by those in custody.

The book, through narratives from survivors, civil society reports and court judgements, explains the inability at best and complicity at worst of the judiciary and medical practitioners responsible for safeguarding rights and preventing torture. While insights from the engagement with lawyers have added value, perspectives on the opportunity and ability (or its lack) of defence lawyers to participate and intervene in these sites of police violence would have been important to understand. The role of a defence lawyer during police interrogation – even though it's a constitutional safeguard – has been often contested in practice and unpacking this denial (which could be due to lack of role clarity, lack of a mechanism or other factors) would have been a crucial insight.

An important aspect in the book is its reference to targeting by the police on the lines of religious identity. It describes the inhumane violence and indignity meted out in two high profile terrorism cases – the Mecca Masjid case and the Mumbai Blast case. These two cases etch a pattern of state violence of picking up Muslim men, subjecting them to torture, both physical as well as through the truth machines and on occasions simultaneously. However, limited engagement of the book with the systemic custodial, and everyday, violence that the state and the police inflict on people from scheduled castes, is a clear gap. Further, while it is encouraging to see such strong reliance on Indian scholarship for understanding police violence and use of truth machines, the book would have also benefited from greater reliance on anti-caste literature on police violence, especially given the disproportionate incarceration and higher susceptibility to everyday police violence of people from these communities.

This combination of thorough academic research, detailed engagement with academics and practitioners and rich ethnographic investigation of forensic infrastructure introduces us to the inner workings of another confessional site for interrogation and warns about the creation of newer confessional sites. It has also made us reflect that these sites of power and violence operate in queer ways and not necessarily through intentional state acts. How do these confessional sites hide or manage the violence? The book discusses the Foucauldian 'scaffolding of rule of law' which masks state violence through formal legality of procedural

safeguards being met. So, the medical examination reports will have no mention of injury signs, the police records will indicate that the arrestee was produced before a magistrate within 24 hours as is mandated – on record no illegalities or violence has ever taken place.

Wahid Shaikh, the only person acquitted in the 2006 Mumbai Blast case, reminds us of the grim choices before the tortured: '*aapko police ka torture bardasht karna haih. Yaad rakhiye tees din ka torture ya tees saal ki qaid.*' (To survive police torture, you must remember: 'thirty days of torture or thirty years in prison'). By engaging with those who have felt these truth machines and the cruelty integral to their use, the author opens a pathway for officials, experts and civil society activists to open an informed conversation about uncritical acceptance of technological solutions to deeper problems of criminal justice – complicity, who is being targeted and the politics and prejudice that grounds it. Engagement with experience of violence can undermine the scaffolding and open up the dark spaces of secrecy which presently prevent accountability, remedy and recompense to its victims. But is anyone listening or will the truth always remain out there?

Raja Bagga
Senior Programme Officer, Police Reform
Programme, CHRI, Delhi

CAPTURING INSTITUTIONAL CHANGE: The Case of the Right to Information Act in India by Himanshu Jha. Oxford University Press, India, 2020.

WHAT was essentially a *privilege* of elected representatives to the legislatures in India became the *right* of every Indian citizen through the adoption of the *Right to Information Act* in 2005. This momentous shift towards an accountable government requires an in-depth examination of why and how it came about. Himanshu Jha's book views the adoption of RTI as a landmark of institutional change in the Indian state. He puzzles through the factors that allowed the Indian state to open itself up to public scrutiny when this would likely expose embedded vested interests. He poses two questions – What explains this institutional change? And how did it come about?

The author argues that the 'RTI Act was the culmination of an incremental, slow-moving process of ideas that emerged endogenously from within the state' while highlighting the importance of the state-society interaction through epistemic communities bound through ideational linkages on openness. He also shows that 'global norms had both demonstrative and operative influence on the ongoing institutional change in India.'

His work complements other prior studies which emphasized peoples' movements, the role of elite networks and civil society coalitions. A considerable amount of evidence provides a *layered* account of ideas emerging in the periphery of the state through the protests of opposition parties and a vigilant press. It also shows that the institutions within the state are not static but a considerable part of institutional change. Jha makes a significant contribution on how institutional changes came about in the developing world. Prior works have 'primarily engaged with the advanced economies of the West' and this 'contributes to the larger corpus of literature on institutional change.' Hitherto the focus has usually been on economic policy paradigms.

The book is well structured in five chapters wherein chapter one and chapter two provide a chronological account. In chapter one the author looks at developments within the state from Independence in 1947 till 1989 and chapter two from 1989 until 2005 when RTI was adopted. They reveal the churning within the state, especially within Parliament through debates, discussion and introduction of draft bills.

In chapter three, the author turns toward the judiciary and presents a comprehensive account of the jurisprudence around 'Article 19(1) which moved categorically towards citizens' (fundamental) rights and towards recognizing the right to know and to information as integral to the freedom of expression and speech.' While the existing literature highlights the landmark cases, Jha provides a compendious account of judicial verdicts which capture the jurisprudence 'from various vantage points, such as the press, national and sub-national politics, environmental issues, criminalization of politics, and probity in public life.'

Chapter four is the most substantial chapter wherein he traces the work of organizations and individuals who are also currently engaged with the promotion and protection of RTI. Here we find an exhaustive account of state-society interactions which he traces through the work of the Mazdoor Kisan Shakti Sangathan (MKSS) and the National Campaign of People's Right to Information (NCPRI). The grassroots work of MKSS is recounted in a nuanced way which shows how the movement evolved and grew in strength, to compel the state to commit to provide access to information.

In this chapter he also argues that the ideas about openness, transparency and accountability demanded

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by grassroots movements resulted in a conflux of progressive elements from the press, bureaucracy, judiciary and academia resulting in an epistemic community which had the necessary expertise and knowledge to further the demand. This epistemic community managed to engage in forceful advocacy, deepening the discourse around openness and intervening in policy making by providing legal inputs. Throughout the book, several helpful tables encapsulate the findings of each chapter. Illustratively, a table (4.3) summarizes the policy recommendations pithily capturing the role of the epistemic community.

The final chapter shows how global norms of openness, transparency, and access to information had a demonstrative and operative impact on the indigenous process of institutional change. This makes a new contribution to the consolidating literature on the dynamics of norm diffusion through localization.

In situating state-society interaction the author argues that, 'had the ideas within the state not moved favourably towards the norm of openness, the state would have dealt with the same social actors differently', but this claim of how the state would have dealt with the social actors differently, is not interrogated in the book. Could this have depended on which political party coalition was in power – the National Democratic Alliance which passed the Freedom of Information Act 2002, but did not implement it or the United Progressive Alliance which adopted the RTI Act 2005 with an explicit commencement date written into the law?

While the author argues that the RTI Act is distinct from other rights-based legislation like the National Rural Employment Guarantee Act 2005, the Forest Rights Act (FRA) 2006, the Right of Children to Free and Compulsory Education Act 2009 and the Right to Food Act 2013 and the Land Acquisition, Rehabilitation and Resettlement Act (LARR) 2013 as it 'does not represent policy continuity but rather a complete departure from the previous policy regime', he hasn't mustered adequate evidence to justify this claim of newness. The FRA and the LARR also have their origins in the colonial period and these legacy laws were severely contested in post-independent India, akin to the Official Secrets Act. The changes to the FRA and the LARR were in response to the pressure on the government by a multitude of progressive people's organizations and movements in India. Maybe if the author had compared how the other rights-based legislations were adopted then his argument of an endogenous institutional change would have been more robust.

The author makes a strong case that this institutional change is irreversible on two counts – 'that any government in power cannot withdraw this constitutionally granted legal right and a right that was non-existent prior to 2005 was systematically instituted with the promulgation of the RTI Act.' While this is what one hopes would be the case, the author's reliance on the *norm* of openness taking root and reaching a tipping point in 2005 begs the question – What happens if the ruling party adopts the norm of secrecy? To give an example, in 1993 the then Attorney General of the United States Janet Reno had issued a memo which directed officials to 'apply a presumption of disclosure' when implementing the Freedom of Information Act (FOIA), which was renounced by her successor John Ashcroft who went as far as to promise legal cover to agencies coming down on the side of non-disclosure. This is quite evident under the current administration in India, where despite the promise of *Quest for Transparency* by Prime Minister Modi, a slogan on the Prime Minister's website, the experience of RTI requesters is one of delays, evasion and even non-compliance.

Overall, the book is a very valuable addition to the growing corpus of works on transparency and accountability and a very good read. The author's diligence is clearly evident, and he provides a compelling narrative which will engage the reader's attention.

Rajdeep Pakanati
Associate Professor, O.P. Jindal Global
University, Sonipat

THE TRANSFORMATIVE CONSTITUTION:
A Radical Biography in Nine Acts by Gautam
Bhatia. HarperCollins India, 2019.

The Transformative Constitution, released in 2019, has been a core topic of discussion amongst professionals as well as academics. It was also shortlisted for the Tata Literature Live! Book of the Year Award for Non-Fiction. Gautam Bhatia is perhaps best known to many of us in the legal field as the creator of the wildly successful and influential blog *Indian Constitutional Law and Philosophy*. Bhatia, an advocate practising at the Supreme Court of India has had a front row view of several cases of immense consequence. He is thus in a position to bring a unique practitioner's perspective to issues with a distinctive academic flair.

In The Transformative Constitution, Bhatia undertakes impressively extensive research in the fields

of legal history and constitutional design to present a novel way of interpreting the Indian Constitution. One doesn't have to agree with Bhatia's assertion that Indian judgments have broadly taken the 'view of conservatism and continuity' in order to appreciate his claim that the Indian Constitution is 'fundamentally transformative'. Using the context of colonial era legislations and the debates of the Constituent Assembly, and the writings surrounding these processes, Bhatia argues that the judiciary has careened between the two poles of constitutional interpretation: living-tree constitutionalism and constitutional originalism. He proposes the middle path of transformative constitutionalism which is about creating a 'framework that makes democratic politics possible.' This innovative tool of constitutional interpretation neither 'seeks to interfere with the democratic process' nor 'determine outcomes as opposed to the PIL vision of contemporary jurisprudence' but with removing the 'asymmetries in power' by 'deepening democracy in the public sphere.'

His methodology is as novel as it is ambitious. Bhatia chooses nine cases from the 'detritus of the Indian constitutional cannon' which fall neatly into the categories of dissenting opinions in Supreme Court judgments, High Court judgments overruled by the Supreme Court, and 'ignored or marginalized' Supreme Court decisions. Interestingly, he has been directly involved in at least four of these nine cases, including *Naz Foundation*. He aims to use these cases to highlight the 'transformative vision of the Indian Constitution.' Half of these cases are famous in the sense they have been read by all who have studied constitutional law while the remaining are truly those which many would not have encountered. This proves to be one of the many strengths of this book. Constitutional law syllabi across law schools are constrained by time and other practical considerations. Students and instructors mostly engage briefly with only the most important constitutional law judgments. Bhatia's book then becomes a much-needed resource that can supplement outside-the-classroom learning of those interested in venturing further in this vast terrain. Not only is the subject matter new and unexplored, the method (sometimes dwelling on dissent) is equally unique, refreshing and perhaps most useful for practicing lawyers.

Reading the Prologue sets the book alongside Zia Mody's brilliant and crisp *10 Judgements that Changed India*, which was an accessible compilation of comments on landmark constitutional law cases. Bhatia has also chosen nine landmark constitutional law cases but they feature on the margins of his analysis rather than being its centrepiece. The cases are used as pegs to decipher wider themes and ideas. The range of analysis not only includes Constituent debates and comments but also includes expositions by legal giants like Ambedkar, Dworkin, Munshi and the like. This book is essentially a compilation of essays on the topics dealt with in these chosen cases and not a comment on the judgments per se. It reads like a detailed constitutional law textbook which focuses on certain provisions of the Indian Constitution, providing an in-depth and well reasoned analysis of those clauses, with extensive reference to Indian and foreign judgments and doesn't limit the scope of its enquiry to the nine chosen cases. One then wonders about the need to portray this book only as a story told through nine judgments when it is so much richer in its texture and more in its scope.

Part II of the book which deals with Fraternity seems to be the weakest link in this liberty-equality-fraternity chain. Bhatia is unable to establish why the chosen articles fit the category of Fraternity better than Equality and Liberty, where they are traditionally placed. His explanation that the categories are 'not hermetically sealed off from each other' and one can read one only in conjunction with the other two, is somewhat insufficient. The Preamble to the Constitution of India identifies four goals: justice, liberty, equality and fraternity. Bhatia also makes the claim that it is the individual that is at the centre of the discourse since ours is not a socialist Constitution. It then becomes difficult to justify the authorial intention to pick *fraternity* as the theme that better fits cases of discrimination by private entities rather than *justice*, even though it is clear that this constitutional trinity was chosen because it, in B.R. Ambedkar's words, embodies the meaning of social democracy.

Does the transformative potential of the Constitution only reveal itself in the rights granting (or recognizing) provisions of the Constitution? Bhatia has chosen to concentrate his analysis on Part III of the Constitution of India which deals with the fundamental rights granted to citizens and persons. These articles justifiably garner most of the attention of constitutional law scholars, dealing as they do with some of the most fundamental aspects of human life. Nevertheless, it would have been interesting to see what Bhatia's novel way of interpretation would have made of the other articles of the Constitution, for example the ones dealing with the imposition of an Emergency or those demarcating the separation of powers between constituents of the state, both vertically and horizontally. Seen in this light, Bhatia's insistence to remain wedded to the liberty-

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equality-fraternity theme has precluded interpretation and experimentation in the often-overlooked corners of the Constitution's text.

Bhatia is indeed very knowledgeable and this reflects in his broad range of analysis. This book is a dense read and usually uses a language that is peculiar and more familiar to law students and legal scholars. Providing a research scheme at the beginning of each chapter gives it the feel of a law review article. The arguments put forth and his unique take on the judgments, are such that will enrich and inform the understanding of the country's Constitution for all. As he states early on – 'the Constitution is for all to interpret' – and given how the judiciary has captured popular imagination, it would be apposite that more people, especially those not trained in law, are able to understand and imbibe Bhatia's message. All things said, Gautam Bhatia's book in an insightful and thought-provoking read. It is certainly a rich addition to the field of constitutional jurisprudence in India.

T.S. Eliot once remarked, 'History has cunning passes, many contrived corridors.' Ideas, issues and themes that had somewhat been settled in the past arise before us in current times. It is here that Bhatia's book perhaps becomes most useful. The chronology of interpretation and application of philosophy and legal principles helps the reader to gain a unique and deep insight into the workings of the Constitution. It contextualizes ideas and arguments we hear each day, of constitutional values, equality and indeed fraternity. The opening chapter notes that 'By reading our constitutional history against the grain, it is a vision that is open to us to retrieve and claim.' This certainly is an interesting and, some might say, exciting proposition. It is also a perspective that one rarely encounters. Bhatia justifies this and inspires an innovative paradigm of thinking, both for academics as well as practitioners. The gaps that are left in judicial decisions – often ignored – are what seem to be most interesting under this new light.

Bhatia has many feathers to his hat – as a lawyer and a writer. He has recently explored the world of science fiction whilst also working on his authoritative blog. The hope remains that he will follow this book with contemporary ideas, to reflect the transformative nature of not just the Constitution but also the scholarly debates that nourish it in our times.

Shivangi Gangwar
Assistant Professor, Jindal Global Law School and
Vishavjeet Chaudhary
Advocate, Delhi

KUKNALIM, Naga Armed Resistance: Testimonies of Leaders, Pastors, Healers and Soldiers by Nandita Haksar and Sebastian M. Hongray. Speaking Tiger Publishing, Delhi, 2019.

REPORTING on terror and conflicts, for long a subject of heated debate, saw a fierce renewal when *The New York Times* reporter, Rukmini Callimachi, came under intense scrutiny for her podcast series *Caliphate*. The lead character of the award winning series, Abu Huzayfah whose actual name is Shehroze Chaudhry, was arrested by the Canadian police in September 2020 for impersonating an ISIS fighter.

If the explosive piece by the Times' Ben Smith is anything to go by, followed by their official rejoinder, Callimachi's editors were complicit in allowing falsities to creep into the series (possibly in her other stories too) for the sake of a morally righteous flavour of narrative journalism. Enunciating the challenges of reporting on an extremist group, Smith wrote, 'If you get something wrong, you probably won't get a call from ISIS press office seeking a correction.'

You won't, unless you were reporting on the Government of People's Republic of Nagalim, particularly the late Isak Chishi Swu and Thuingaleng Muivah led faction of the National Socialist Council of Nagalim (NSCN), the political militant outfit that has been fighting for an independent nation for the Nagas since 1980. Beyond the estimated 5000 strong Naga Army that the IM commands, their Ministry of Publicity (MIP) deserves special journalistic attention and scholarly scrutiny.

Over the years, the MIP has blacklisted several news media outlets for publishing stories they believed were either fabricated or had misquoted their leaders. On 1 May 2019 they issued a statement blacklisting News 18 for failing to correct a quote by V. Horam, an Executive Member of the NSCN Steering Committee, saying it was 'annoying the way News 18 dramatize Horam's statement' (sic). In another instance, the MIP blacklisted *East Mojo*, a regional news website, after it ran a report of an alleged meeting of Muivah and two Naga politicians over a change in chief ministership in Nagaland. Stating that the news came as a surprise, the MIP said, the group nevertheless 'exercised restraint and showed courtesy to contact East Mojo to refute the report.'

The self-styled government(s) headquartered in Nagaland wields influence and operates all over India's Northeast and beyond, in Myanmar, since the last 23 years after the NSCN entered into a ceasefire agreement. Of course, the Naga movement for an independ-

ent, sovereign state is much older, dating back to the days of the Indian freedom struggle.

In *Kuknalim*, human rights activists, Nandita Haksar and Sebastian M. Hongray offer previously unknown insights into the NSCN faction of the longest running separatist movement in the Indian subcontinent. The book features interviews with Isak and Muivah, the pioneers who led batches of rebels across Myanmar to be trained by the People's Liberation Army in China's Yunnan province. They were also the first to openly condemn the 1975 Shillong Accord signed by select Naga National Council (NNC) members with the Government of India. In the agreement, the NNC accepted the Constitution of India. In the absence of a statement from Angami Zapu Phizo, the father of the Naga nation, the NSCN became the flag bearers of the Naga movement, pushing for independence through years of jungle warfare and political negotiations.

Other leaders interviewed include V.S. Wungmatem, former Naga Army chief who is a crucial part of the peace talks today, and Thinoselie Keyho, President of the Naga National Council (Non-Accordists). Through first person testimonies recorded immediately after they came overground in '97, each of the five chapters enlighten readers to their early life and personal journeys of finding and fighting for their identity that drove them to join an armed struggle for nationhood. The Naga struggle is particularly unique in that it is a collective call for an independent homeland as much as it is to consolidate their diverse tribal cultures, customs and languages under a single socio-political umbrella of Naga identity.

The chapters take us across the geography of the Naga hills in Manipur, where Muivah and Atem spoke of subjugation under the hegemony of the Brahmin Hindu Meiteis, the dominant ethnic community in the valley that made up the erstwhile Kangleipak kingdom, and the Sagaing division of Myanmar, where leaders like Nuri (Saw Saw) sought to democratize and modernize the Eastern Nagas to compete at par with the majority Burmese. Their testimonies bring to life the harsh realities of ethnic fault lines that run deep in a region, where the relatively nascent idea of nation state is still taking shape.

Reading these interviews may seem dated in the present discussion of bringing finality to the historic framework agreement signed between the IM and the Government of India in 2015. But these narratives need telling and had long been absent in the mainstream discourse about the Naga movement. Earlier writings are patted down mostly to artillery, jungle operations and

Machiavellian games between several competing factions. However, traversing the violent escapades of the first batches of Nagas who crossed the border, and walked through the dense forests of Myanmar towards China, serves as necessary background to their demands for a separate flag and constitution. Without this context, their resolve, or ambition to unite, can easily be seen as reductively 'unrealistic'.

Kuknalim, also fills a crucial gap in the historiography of the Naga movement through the stories of women nationalists like Khulu Eustar, a member of the National Socialist Women's Organization of Nagalim who was married to the former Chairman, Swu. I had first read about Avuli Chishi Swu, who was among the 20 women in the second batch of 375 men led by Isak in 1974 to trek to China in Rashmi Saxena's *She Goes To War*. Eustar's journey in the first batch of women cadres held a pioneering moment for women stepping into the shoes of their male counterparts in the revolution.

The female gaze on their encounters in the jungle are some of the most engaging portions of the book, serving as a window to the complex structure of patriarchy and gender roles in a tribal society fashioning itself into a socialist, Christian republic. Unice Shatkamla, a Tangkhul Naga woman from Muivah's village, Somdal, in Manipur took off for China with the Naga Army in 1976. Her interpretative visions of the future as an 'oracle' were patronized by senior Naga leaders. Yet her commander would repeatedly dismiss her in the treacherous trek, where they were evading and escaping the Indian Army, Burmese Army and the Kachin Independence Army. 'The commander told me I was always scared and that is why I was always seeing the enemy but I told him, "Whenever I have seen the enemy, they have attacked us for real",' she said. Yet, time and again Eunice was asked to '*sit down*'.

At best, Kuknalim's contribution lies in being a collection of narratives of how ordinary people – students, intellectuals, preachers, wives – committed to a lifelong movement, not knowing how long it would last or if they themselves would survive. However, as a non-fiction anthology of a struggle that spans decades, its linear chronology of events and sketchy musings lacks sufficient context – illustratively, we are not told the reason for Atem's contempt for Kukis. For those unfamiliar with the history and political development of the Indo-Naga conflict, the book is not a useful primer into a rather complicated and dense subject.

The book can be seen as a faithful record of the NSCN-IM, which in itself deserves a dispassionate and detailed look, but without fear or favour. Wherever points

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of dissonance appear in characters – when for instance, Eustar recognizes that Naga women don't have land rights, an invested reader is left wanting for more tension, or nuance. Instead, it is quickly ironed out and resolved all too neatly for the sake of the larger Naga cause to achieve nationhood first. 'We would like to lay down the foundation of our organization first and then slowly discuss the necessary problems', Eustar told the authors even as she acknowledged it was a topic 'not easy to touch.'

The authors do bring out some contradictions within the political discourse of the IM vis-à-vis angling for support from China, which Muivah appears to be far more in favour of than Isak, and its control of Tibet that the leaders were not permitted to visit. Similarly, the Naga allegiance towards the British – who after conquering their land, sought to 'modernize' them through education and Christianity – is riddled with 'White man' saviourhood in fighting for a unique identity of their own.

Historical figures of any hue must be subjected to proportionate doses of credit and criticism, sympathy and scrutiny – Kuknalim offers both but not nearly enough of the latter.

Of course, neither Isak or Muivah, nor any of the other characters documented in the book, are comparably as dodgy as Callimachi's Abu Huzayfah. But if the ISIS suffers from a distortion of truth as an overreaching macabre force in the western media, in left liberal discourse the NSCN-IM holds an untainted revolutionary image, largely due to the international narrative cultivated by Phizo and Muivah.

Much of the historiography of the Naga movement suffers from the extreme binaries of decidedly pro and anti narratives of the NSCN. Kuknalim is sympathetic to only but a faction of leaders in the movement, no doubt the ones who have been steering the talks and have been the contemporary faces of it. But a book entirely based on interviews, where probing questions appear more rarely than they should, and information isn't triangulated with other sources, is not Haksar's most scholarly work.

Eunice the 'Oracle' once told the authors, 'There is no stability on earth and the earth is shaking and there is a landslide. I see people trying to build a big church but it will not stand because the land is sliding down and people are scared and holding on to the branches of trees to prevent from sliding down.'

I only wish the authors had more narratives and voices on a house as divided as the Naga movement, including those holding on and others sliding down.

Makepeace Sitlhou
Journalist, Guwahati

SEX AND THE SUPREME COURT: How the Law is Upholding the Dignity of the Indian Citizen by Saurabh Kirpal. Hachette India, 2020.

THE book under review, *Sex and the Supreme Court: How the Law is Upholding the Dignity of Indian Citizen* by Saurabh Kirpal, is an anthology of essays which explore the complex relationship between liberal law, individual identity and collective mores. With the object of foregrounding the nuances of this relationship, the essays focus on those judgements of the Supreme Court which deal with questions of sex and sexuality. The book traces the myriad interactions between law and the sexual to expose the transformative capability of the Constitution and the conception of constitutional morality. However, one has to bear in mind that until constitutional morality takes into account the lived realties of subjects, its transformative goals remains elusive.

The first part of the book begins by delineating the progressive history of decriminalization of homosexuality and reading down of Section 377 of the Indian Penal Code. Saurabh Kirpal in his essay, collapses the distinction between act and identity which was the central thesis of *Suresh Kumar Khoushal case*. While doing so he, like the court, is silent on the question at hand which was with respect to interpretation of the term 'against the order of nature'.[1] Coming from a lawyer one would expect a more honest engagement with the letter of the law rather than an exclusive focus on ideals of constitutional morality and transformative constitutionalism. Further, in celebrating the judgment for its path-breaking stance, Kirpal forgot about the class character of the judicial reasoning. Ashley Tellis, an LGBTQI+ activist, asserts that the judgement is decriminalizing only private sexual activities, thus leaving *hijra* public sex unaddressed.[2] Kirpal concludes that the 'pride parades and social gatherings have increased' which along with the 'power of social media' will bring about a change in the attitude of people. Such a position presents no critique of the neoliberal character of these parades and contests for those who view them as exclusionary and elite.

In the same part, which deals with questions of autonomy and sexuality, Justice Madan B. Lokur discusses the *NALSA judgement*. The essay, rather than being a critical engagement with the judgement, dwells more on the institutional changes that have taken place

1. Ashley Tellis, 'The Lack of Honest Toil', *Seminar* 721, September 2019, pp. 67-72.
2. Ibid.

since the judgement. However, an uncritical acceptance of the western definition of transgender people, as done by the court and the author, should be rethought in light of the ground realities of the transgender community in India.

The essay cogently lays down the developments in Kerala, Karnataka and Tamil Nadu which manifest strong organizing efforts around voter cards, ration card and other rights. The essay argues that the Transgender Person (Protection of Rights) Act, 2019 has diluted the progressive judgement of NALSA.

The next part of the book deals with the judicial reactions to the entanglement between the liberal notion of consent and communitarian assertions. The essays in this section examine the famous cases of *Shafin Jahan*, *Sakti Vahini* and *Joseph Shine* and *Independent Thoughts*. In each of these cases the apex court not only delve into questions of consent but also problems of desire, marriage and familial logic. The essays raise some very important legal question about the presumption of constitutionality in pre-constitutional laws, and the manner in which public-private divide subjugates the woman subject. However, the common thread in the arguments of both the essays is the neat binary between social morality and constitutional morality. In doing so the essays discursively construct constitutional morality as a realm which is impervious to the social. It is important to note that feminists have contended that a clear distinction between legal and the social is not possible as both of them inform each other.[3]

The essays while presenting a unified image of constitutional morality hide the contradictions and tensions that exist in the liberal law framework. For example, Arundhati Katju and Menaka Guruswamy celebrate the historic judgement of *Joseph Shine*, but they do little to acknowledge that marriage conceptually restricts the scope of intimacy until we start understanding marriage as inherently non-monogamous.[4] Further, in case of *Independent Thoughts,* though the authors cogently make a case for deletion of the marital rape exception, difficult questions of child sexuality and the possibility of sexual governance which the subject matter raises, have to be asked. Or be it the doctrine of *Parens Patriae* (as presented even by the counsel for the respondent in the *Shafin Jahan case*) and its incompatibility with the assumption of a free

human subject that the concept of constitutional morality is upholding. Unless these complexities are taken into account while engaging with the judgements, we would continue to flatten the contradictions immanent even in the Constitution of India.

The interaction and negotiation between individual rights and the institution of religion form the crux of the final part of the book. The issues of Triple Talaq and entry of women in the Sabarimala temple become the focal point of the study. Madhavi Divan in her essay on Triple Talaq highlights the manner in which a plea to hear the constitutionality of *nikah halala* or polygamy were rejected to make way for religious assertions. She contends that as the All India Muslim Personal Law Board had not claimed that triple talaq was an essential practice of Islam, hence the reasoning of Justice Kehar and Justice Nazeer is fallacious. Interestingly Divan points out at the constitution of the bench, which did not have even a single woman. Further, she asserts that the 'issue of triple talaq has been examined almost entirely through the prism of personal law rather than from the standpoint of gender justice.' Such insight goes a long way in displacing the patriarchal character of a judgement which is being hailed as path-breaking in the field of women rights. However, while dealing with the woman question, Divan creates a homogenous category of women. She states that 'women constitute half of the population of every community, transcending the barriers of caste and religion.' Such a position does not take into account the intersectional nature of the identity of a Muslim woman.

In Divan's conceptualization of a Muslim woman's identity, she turns a blind eye to the narrative of those women who would not have wanted to take recourse to a secular law. For example, an Islamic woman may contest patriarchal regimes of *Quaranic* interpretation at home, while at the same time articulating a sort of global solidarity.[5] Further, she advocates the carceral stance taken by government with respect to criminalization of triple talaq, which again reduces the Muslim woman to a subaltern subject. The essay talks about Muslim Women only in broad strokes, thereby becoming another universalistic rhetoric which erases the multilayered narrative of the Muslim woman to one of victimization.

Mukul Rohatgi presents a very interesting analysis of the *Indian Young Lawyers Association case* (also known as Sabarimala case). He states that the apex court in this judgment collapses the distinction

3. Pratiksha Baxi, 'Legacies of Common Law: "Crimes of Honour" in India and Pakistan', *Third World Quarterly* 27, 2006.

4. Latika Vashist, 'Joseph Shine v. Union of India', *Newsletter ILI*, 2018.

5. Upendra Baxi, *Future of Human Rights*. Oxford University Press, New Delhi, 2008.

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between public morality and constitutional morality. Justice Misra in his judgement, while dealing with the use of the term public morality in Article 25 and 26 of the Indian Constitution, holds that 'the term public morality has to be appositely understood as being synonymous to constitutional morality.' Rohatgi maintains that in the same judgement Justice Misra asserts that 'public morality must yield to constitutional morality', thereby pointing out the patent contradiction. Such a close reading of the judgement shows the manner in which the judges get trapped on account of judicial verbosity. However, in the author's narrative around Article 25 and 26 of the Constitution the woman subject is lost. Wouldn't a discourse which advocates banning entry of women reinstate the stereotype of women as agents of contamination and fuel majoritarian anxieties about menstruating women in the so-called 'secular and modern courts'?

The anthology puts together a comprehensive analysis of cases and is a diligent effort to create a database for understanding of legal processes. However, any critical work which deals with the complicated interaction between the Indian Constitution (with its rights based approach), and the hegemonic social realities has to acknowledge that the journey of constitutional law is full of paradoxes. It is important to recognize rather than repress the contradictions in the text of the Constitution. It is only through engaging and creatively negotiating with the tensions in the text can we hope to build a constitutional morality (in every case) which is more than just a transcendental conception. The only way to build a resilient Constitution is to truly understand the spirit of Dr B.R. Ambedkar's last speech in the Constituent Assembly when he asserts that India is entering into a life of contradictions and in exploring contradictions one understands both the dynamism and the deficiencies of law.

Avantika Tiwari
Academic Tutor, Jindal Global Law School
Jindal Global Law University, Sonipat

THE MARGINALIZED SELF: Tales of Resistance of a Community edited by Rahul Ghai, Arvind K. Mishra and Sanjay Kumar. Primus Books, Delhi, 2020.

MARGINALITY as a part of social condition has had a long history in human life. Marginality as discourse is relatively recent, not more than two centuries old. The dominant pattern of the discourse has shifted along with the changes in the orientation of social science itself. As the 19th century telescope of social science was replaced by the 20th century microscope, one question on marginality acquired a new salience: is it possible to combine economic integration with cultural autonomy of the marginalized groups? In other words, do the marginalized groups have the option of achieving affluence without paying the price of cultural submergence? The dilemma is not easily resolved, either for the marginalized groups or for the social scientists. This dilemma is also at the centre of this important volume on the Musahar community of Bihar.

The volume has a generic theoretical component and a specific empirical component about the Musahar community. The Introduction to the volume informs us: 'The Musahars are classified as SCs in Bihar and number around 1.4 million, accounting for almost 2.5 per cent of the total population of the state. Predominantly engaged in agricultural labour and casual labour at the brick kilns, the Musahars are mostly settled in the districts of Gaya, Nadwa, Munger, Bhagalpur, Purnea, Muzaffarpur, Darbhanga, Saran and Champaran. Apart from Bihar, the Musahars are also found in the neighbouring states of Jharkhand, Uttar Pradesh and Bengal.' (p. 10)

The specific empirical essays (Chapters 3, 4, 5, and 6 by Badri Narayan, Rafiul Ahmed, Sanjay Kumar and Arvind Kumar Mishra, respectively) have taken up specific issues relating to the economic and cultural life of the community. Chapter three highlights how the community has used its own cultural resources for effective social and political mobilization. Chapter five is a story of how change in the food preference of the upper castes towards pork has created economic and social opportunities for the pig rearing sections of the Musahar community. Chapter four talks about how cultural assumptions of the social and political elites often come in the way of successful implementation of welfare schemes meant for the marginalized groups such as the Musahars. Chapter six takes up the concrete life stories of the important leaders of the Musahar community (Dashrath Manjhi, Bhagwati Devi and Baleshwar Prasad) and the actual transformation of a Musahar settlement (Bapugram, pp. 141-44), brought about by the community with its own hard work. The concrete stories narrated in the chapter feed into larger generalizations pertaining to the complex relationship between the mainstream and the margins, the attempts at appropriation from the apex and resistance from the margins.

The big question is: why is it that the struggles of the marginalized groups for cultural freedom, social dignity, political empowerment and economic increments tend to soon reach a dead end or a ceiling in transitional societies such as India? Why is it that all the legitimate economic, socio-cultural and political aspirations often tend to cut across rather than facilitate one another? India's record in this respect – though possibly better than some of the other developing countries – remains quite patchy. Many of the aspirations – political empowerment, cultural freedom and economic betterment – do not push each other up. Often one comes at the expense of the other, or also obstructs the other.

This is a supremely important question. The volume under review does not directly answer it but provides some data which should enable us to engage with the question. A clue to the answer may be found in the following matrix: Marginality under modern conditions is fundamentally different from traditional marginality. The traditional marginality was accompanied by entrenched hierarchy and segregation. The segregation was reinforced above all by culture and was thus not so painful for marginalized groups. The isolation fed into cultural freedom. Modernity destroys segregation and substantially alters hierarchy. It also erodes the cosiness of cultural cocoons and makes life really painful for marginalized groups.

Modernity does, however, offer compensation. It engenders mobility – social, economic and above all occupational. This mobility undercuts the foundations of rank and status and paves the ground for egalitarianism. The egalitarianism of the western world is rooted as much in economic growth as in mobility.

India, for various historical reasons, experienced not just 'arrested economic development' but also 'restricted mobility'. The tidal wave of modern economic growth was simply not powerful enough to demolish structures of rank and status. As a result the restricted mobility has turned into a system of 'rotation'. This system is marked by a rotation of social personnel in a basically unchanging social order. Rotation without mobility ensures that the circle does not enlarge (or enlarges ever so slowly) to reach out to the margins. The social structure is able to successfully accommodate incremental changes without the risk of breaking down. The interlocking circle of economy, polity and culture thus remains closed without the possibility of an exit route. This scenario necessitates struggles by marginalized groups but also ensures that these struggles remain at best only partially successful. The groups at the margins are thus doomed to struggle sometimes for inclusion and sometimes against it. The volume under review has highlighted, through its case studies, the enormously complicated nature of the struggles of the marginalized communities and their predicament.

Salil Misra
Historian, Ambedkar University Delhi

KUDANKULAM: The Story of an Indo-Russian Nuclear Power Plant by Raminder Kaur. Oxford University Press, New Delhi, 2020.

Kudankulam is a location that concretized the dissent cartography of India – a cartography that otherwise paradoxically dons the embodiment of woman, *bharat mata* (Mother Bharat/India) while the women in India are ripped off their agency and raped every day.[1] The protest that began in 2011 at Kudankulam is sustained by a blank slate in *Our Lady of Lourdes Church* and the bodies of fisher women (and men) of Kudankulam. Every day the fisher women of Idinthakarai mark on the slate how many days it has been since the protests began. In May 2011, the people of Kudankulam came together in tens of thousands to protest against the Kudankulam Nuclear Power Plant. Some say that the protest was a result of the roots of fear that spread from the Fukushima Daiichi nuclear disaster, 2011. What *Kudankulam: The Story of an Indo-Russian Nuclear Power Plant* proves is otherwise: that the communities of Kudankulam have always resisted the plant and the plant was constructed without due regard to the dissent against the plant since its inception.

While many endeavours in understanding nuclear energy politics in India resort to political science analysis placing irradiation and nuclear politics between dissent and state, this book uses a variety of tools from anthropology, Science and Technology Studies, New Media Theory, postcolonial studies and political science to explicate the many layers of radioactive burdens experienced by people of Kudankulam. The book explores the 'greater truth embodied in people and the environment' about nuclear politics and irradiation experience (p. 3). As the reader turns page one of the book, Kaur states that the radioactive burden experienced by people of Kudankulam is 'biomedical, eco-

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1. This review is being written in the background of New Indian states passing laws like the Prohibition of Unlawful Conversion of Religious Ordinance, 2020 that undermines the agency of Hindu women in choosing their partner or religion.

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logical, economic, socio-psychological and political' – a much need analytical clarity in nuclear studies that concern India (p. 2). The rest of the book slowly unravels the multiple layers of each of this layer imbued by casteist, religious and patriarchal politics, not only of the people of Kudankulam but also of the Indian state, its nuclear and non-nuclear bureaucrats and elites. In doing so, Kaur attends to the dissent localities of Kudankulam critically, by wrapping them in the concept of 'criticality'.

First, the critical and 'multi-situated' anthropological approach locates the Kudankulam nuclear power plant (KKNPP) in its nuclearity[2] and in India's three-stage nuclear energy programme amongst its other locations with accessible language yet poignant words. The book then attends to both uranium based nuclear energy production at KKNPP and the thorium extraction from the monazite sands of Manavalakuruchi – a problem the southern coast of India that has the world's largest thorium resources will have to grapple with, if not already, as the Indian nuclear state moves towards phase three of its nuclear energy programme in its usual poorly regulated fashion spewing radiation unabatedly.[3] Second, she locates Kudankulam in its 'criticality' – a key take away for scholars interested in scientific and technological controversies, development politics and dissent.

Attending to both of the above points, the chapter 'Nuclear Paradise' brings together the nuclear *essentials* in the region that is its depleting, degrading and contaminated land and water and the *emergence* of the place itself *as nuclear* or the nuclearity of the region. The non-innocent approach of criticality through questions concerning irradiated essentials from a materialist standpoint is particularly refreshing in the field of nuclear studies that was otherwise ushered into questions of nuclearity placing importance in institutional analysis of nuclear energy. Through criticality, Kaur tweaks the concept of nuclearity to attend to nuclearity's 'backstory' that involves 'rare mineral mining, transport networks, other constructions, and commercial opportunities' and enthuses novel engagement in the 'frictions' that emerges in 'change',

'encounter' and 'transformations' in 'transnational' and '(post)colonial' nuclear spaces (p. 38; pp. 17-19). Criticality transcends the formal structures of nuclearity and attends to both the formal and informal politics of nuclearity. Reading through the pages that explains criticality, the reader will be left with the question, 'has India reached its criticality?' One also senses the missed opportunity of theorizing criticality from a feminist standpoint especially as the book attends to the gender politics and patriarchy in the region both before and after 2011. However, this book is not just for scholars and researchers.

Erudite conclusions on the muffling of dissent that is covered between Chapters 2 and 10 is conveyed using the humour, irony, cynicism embedded in the words of the people of Kudankulam, making it accessible for non-academic readers. The book attends to everydayness of living with sedition charges among others – over 9000 villagers of Kudankulam were slammed with sedition charges since 2011.[4] It explicates how the burden of state excesses is borne by the people and has further constrained the social mobility of an already marginalized people. She further shows how the protest that was against state excesses and neglect was also constrained by the same, forcing people to bid a very complex farewell to their dissent against the plant and other mining activities in the region. Yet, the spark of anti-nuclearism hovers over in the region as the book's concluding chapter narrates.

In telling the stories of dissent, marginalization and irradiation to larger audience, the book also locates the struggle in the wider context of New Social movements, Indian environmentalisms and in the background of the various *cultures of dissent* in the dissentious post- and anti-colonial Indian peninsular. Chapter 3 on Cultures of Dissent will attract the interest of scholars, students and activists studying social movements that concerns the intersections of new left and livelihood struggles, risk movements, anti-nuclear movements in the subcontinent and wider South Asia, nonviolence resistance and peaceful protests, the saliency of democratic values in enacting protests among others. The analysis transverses the ideologies, identities, tactics, strategies, action, demands and alternatives put forth by protest campaigns.

Chapters 4 to 10 also espouse a commitment to analyzing various scholarly conceptualizations about the nuclear and non-nuclear Indian state.

2. In *Being Nuclear,* historian Gabrielle Hecht asks the question, 'What things make a state "nuclear", what makes things "nuclear" and How do we know? Are the criteria for nuclearity scientific? Technical? Political? Systemic?' See Gabrielle Hecht, *Being Nuclear: Africans and the Global Uranium Trade*. The MIT Press, Cambridge, MA, 2012, p. 13.

3. See Itty Abraham, 'Geopolitics and Biopolitics in India's High Natural Background Radiation Zone', *Science, Technology & Society* 17(1), pp. 105-122. doi: 10.1177/097172181101700106

4. Arun Janardhanan, '8,856 "Enemies of State": An Entire Village in Tamil Nadu Lives Under Shadow of Sedition', *The Indian Express*, 12 September 2016. Accessed 10 November 2017. http:/

After reading Kudankulam using concepts of deep democracy, coloniality and postcoloniality, mosaic fascism, governmentalities, slow violence, cultures of secrecy, the paradoxes of belligerent benevolence and ignorance/knowledge, nuclear exceptionalism, citizen science, Kaur's analysis fructuously culminates in assessing Kudankulam via Mnembe's necropolitics and Agamben's bare life. The deep engagement with the manner in which the nuclear state 'makes live' and 'lets die' miners and people protesting against poorly regulated nuclear developmental projects taps onto the commoner's conscience.[5]

By wrapping in the politics of 'othered selves' or alterity with necropolitics, the book attempts to showcase to the readers the violative, embarrassing and suffocating practices of India's nuclear-industrial-military state complex against anti-nuclear dissent. At times, such practices also involve the forfeiture of basic health and biomedical infrastructures, as Chapter 7, Discipline and Deviance, shows. 'Othered selves' and necropolitics conveyed together enables readers to resonate with the painstaking and traumatizing experiences of necropolitical state neglect. As Gabriele Schwab writes, 'nuclear subjects are traumatized subjects.'[6] The necropolitical lens talks to a newness in reading India's political systems which could be of interest to political scientists and humanities scholars. The reader, however, has to partake in the task of teasing out the conceptual work that seems distributed across the book.

The book, like many other books on environmental politics and injustice, time and again mentions state/industrial neglect of contaminated communities. However, 'neglect' exercised as a socio-technical tool (not just psychological) by the state and polluting industries to validate or invalidate illness experiences of contaminated communities receives little scholarly attention and analysis. It will be a particularly useful political and counter-hegemonic work for scholarship in India's nuclear studies and Critical Nuclear Studies to attend to 'nuclear neglect' – a composite of things, bodies, knowledges and relations that are not cared for in order to maintain the theatric of nuclear nationalism or being nuclear.

/indianexpress.com/article/india/india-news-india/kudankulam-nuclear-plant-protest-sedition-supreme-court-of-india-section-124a-3024655

5. Michel Foucault, *Societies Must Be Defended: Lectures at the College De France, 1975-76*. Edited by Arnold Davidson. Picador, New York, NY, 2003.

6. Gabriele Schwab, *Radioactive Ghost*. University of Minnesota Press, Minneapolis, MN, 2020, pp. xiii.

As the text gets stuck in the quagmire of marginalization, necropolitical or otherwise, it branches out to contemporary topics of interests in Indian politics including Digital India, the toxygen (toxic oxygen) of media sting operations, politics of NGO and FCRA, Hindutva – thereby engaging the readers. In conclusion, this book engages both academic and non-academic readers by telling stories of everydayness at Kudankulam. It is a much-needed book on Kudankulam and the Indian nuclear-industrial-military complex that torques the lives of those it affects. Regardless of who reads this book, the stakeholders, especially the employees, technologists and scientists of the Indian nuclear-industrial-military complex including the Indian Rare Earths Limited, Nuclear Power Corporation of India Limited, must read this book. It's innocent to expect any disruptions in their hegemonic apparatus after they read *Kudankulam*, particularly in a state of neoliberal and authoritarian Hindu nationalist politics, and that's the sad state of nuclear and radiation affairs in the country.

Misria Shaik Ali
PhD candidate, Department of Science and Technology Studies, Rensselaer Polytechnic Institute, New York

THE BRASS NOTEBOOK by Devaki Jain. Speaking Tiger Publishing, Delhi, 2020.

The Brass Notebook is renowned feminist economist Devaki Jain's memoir. Her life has been blessed with rich experiences given the freedom her father allowed her, which was unusual for the time. She had been fortunate that her Tamil Brahmin father did not impose the same restrictions and rituals upon her as he did on her elder sisters when it came to education, marriage, travel among others. Astonishingly she was even permitted by her father to stay alone in London after he had taken her there on an official trip as a companion.

Her trip was eventful; she managed to spend a few days with the then High Commissioner of India, Vijay Lakshmi Pandit. Later, Devaki attended a two-week seminar organized by the Quakers in Saarbrucken, Germany. There she met a Dane who persuaded her to accompany him. His plan was to hitchhike to England after taking a short detour to Copenhagen and then Sweden. Devaki agreed. Later she did an overland trip from England to India with another friend. She does remark in amazed wonder that 'Looking back, it is surprising how little my father

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resisted.' At this time, charmed by the idea of attending Oxford University, even though the admission process was over, she was admitted to Ruskin College, a relatively 'new' college that catered mostly to the working class and offered subjects like economics and industrial relations.

Years later when she met the principal H.D. Hughes and asked him why he had let her in, his reply was 'Pure amusement …at the sight of this evidently upper class Indian girl in her early twenties, asking desperately to be allowed to study alongside men and women in their thirties with more than ten years of hard manual labour behind them. How, he said, could he resist such a social experiment?'

Devaki's adventurous spirit permitted her to challenge her boundaries constantly. She did this even by marrying out of her caste to the prominent Gandhian, L.C. Jain, a Jain from Rajasthan. It was this very feistiness that enabled her to very early on in her life begin to question inherited traditions of culture and knowledge. For instance, in one of her earliest publications, an essay, 'The Social Image', that she wrote for *Seminar* ('The Indian Woman', #52, December 1963, pp 20-23), she states categorically that the social image of women is mostly a patriarchal construct that is enabled by their veneration of the panchkanyas – Sita, Ahalya, Draupadi, Tara and Mandadori. She argues that this imagery fails to accommodate many women who fall outside 'this Sita orbit'. This neglect creates both environmental and internal pressures. For example, the woman who stays unmarried and follows a career is considered an aberration. Instead she sought for the celebration of more rebellious women in the ancient Hindu traditions, women who stood up for themselves, and didn't define themselves in relation to men: Amrapali, a cultured and worldly courtesan; Gargi, an ancient philosopher; Avaiyar, a Tamil poet and scholar, among others.

Later she was fortunate to have her values endorsed while she was enrolled at St. Anne's College for her PPE course. Her tutors, Iris Murdoch, Peter Ady, Jenifer Hart: three supremely intellectual women, took her seriously as a fellow thinker – a respectful intellectual engagement. 'I was a woman among other women, and we were bound by ties of intellectual sympathy. I was being valued for my intelligence, hard work and achievement.' A bond of sisterhood that she learned to value later as an economist and at the helm of Institute of Social Studies Trust (ISST).

Devaki Jain is known for recognizing the value of a woman's labour in real economic terms, whether towards the national economy or in the personal space. It was a slow and methodical process as she accrued experience as an economist, first by writing *The Democratic Alternative* at Minoo Masani's invitation. Later as a lecturer in the Economics department, Miranda House, University of Delhi, she taught public finance. She would often walk across to the Delhi School of Economics to converse with eminent economists like Amartya Sen, K.N. Raj, Sukhamoy Chakraborty, and Jagdish Bhagwati to name a few. By 1972, she quit the university and the Indian Council for Social Science Research (ICSSR) helped her set up a new field-based project on the unrecognized contribution of women to the economy. Later she was commissioned by Sheila Dhar, Director, Publications Division, to edit *Indian Women*, to coincide with the UN International Year of Women, 1975. Contributors included, among others, Andre Beteille, Veena Das, Ashok Rudra, Romila Thapar, and Qurratulain Hyder. Ester Boserup, working on women in African agriculture, demonstrated the significance of gender roles in social analysis. Ashish Bose, a demographer, presented for the first time the falling sex ratio in India. The ratio declined from 972 females per 1000 males (1901) to 930/1000 (1971), prompting Amartya Sen to coin the phrase 'India's missing women'. Women of many different kinds were described in 'Indian Women': nuns, teachers, nurses, students, matriarchs. Later the Government of India also set up a committee to report on the status of women in India entitled 'Towards Equality'.

This project pushed her into exploring her hunch that 'the official figures on women's participation in work were seriously underestimating the facts on the ground; I also suspected that what lay behind this underestimation was a deep methodological flaw in the approach to measurement.' Her proposal to Raj Krishna's Institute of Social Studies Trust (ISST) brought together her two interests – growing fascination with women's role in labour, and her specialization in statistics. Her findings that the measurements were all wrong and much of the time data on women's economic contribution was not even being collected. She also discovered that the female work participation rates were in fact higher than participation rates for men amongst the landless in India, 'landless' being a proxy for extreme poverty. This challenged the long-held belief that the main breadwinner of a household was generally a man.

The string of accomplishments Devaki Jain garnered are endless. For instance, she was one of three women who was invited to participate in Julius Nyere's

twenty-eight member South Commission. It was constituted to give voice to the shared perspective of the South, drawn from the experience of Non-Aligned Movement countries, and not simply imported from northern models that may or may not be suited to the conditions of these societies. She has worked with various national and international agencies committed to a gendered understanding of economics. Her strong friendships with well known feminists like Gloria Steinem and Alice Walker, have only strengthened her perspective on women's rights. In fact, it is the fundamental principle that she agrees with and so heartily endorses Walker's view that there is no problem in being called a 'feminist' or a 'womanist', whatever it takes for women's liberation to be recognized and for a woman to earn her freedom – that is all that matters.

In keeping with her strong characteristic of recognizing her self-worth and preserving her dignity, she documents the sexual harassment she faced from her maternal uncle and later by a well known Swedish economist at Balliol College, Oxford in 1958. She was interviewed for the job to be his junior research assistant from Asia to work on his magnum opus, a three-volume work on development. She had been interviewed at the home of the then Swedish Ambassador to the UK, Alvar Myrdal. Reflecting upon the incident in the wake of the #MeToo movement, Jain realizes that in 1958 she had no recourse to retribution as there is now for women who work for men and are sexually harassed. Different age, different rules. But why a doyen of feminism like her chooses not to reveal the name of the aggressor, when she doesn't hide the specific familial relationship with her maternal uncle (who she also doesn't name) is puzzling. At any rate, it was her choice to make and must be respected.

The title, The Brass Notebook, has been inspired by Doris Lessing's *The Golden Notebook* where Devaki Jain uses 'brass' as for her it has warm associations with her childhood, but it is also 'a hardier, homelier metal than gold. It represents not perfection or unity, but an honourable imperfection consistent with my own limits.' This clearheaded understanding of what it means to be a woman, chart her own career and who values her labour were pathbreaking concepts then and to some extent are even now – nearly six decades later. The Brass Notebook is a snapshot of a life well lived by a pioneering feminist and an excellent role model for subsequent generations.

Jaya Bhattacharji Rose
Publishing consultant, Delhi

In memoriam

Roddam Narasimha 1933-2020

PROFESSOR Roddam Narasimha (herafter RN), one of India's leading scientists, researcher and teacher passed away in Bangalore on 14 December 2020 at the age of 87. Having obtained a basic degree in mechanical engineering from UVCE, Bangalore he graduated with a Masters from the Department of Aeronautical Engineering, Indian Institute of Science (IISc) in Bangalore. At IISc he was mentored by Professor Satish Dhawan, one of the founders of the indigenous Indian space programme and Director of IISc for over 20 years. RN went on to do his PhD under Hans Liepmann, who had also supervised Prof Dhawan, from the prestigious California Institute of Technology (Caltech), in the USA.

RN belonged to that generation of Indian students who pursued higher studies in Europe or the USA and then returned to nourish and build research traditions and capacities in the just turned independent nation, with an insistence on excellence and quality. He was to become Professor at IISc in the now renamed Department of Aerospace Engineering over a near four-decade period. He also served as Director of the CSIR's National Aerospace Laboratory (NAL), Bangalore, was closely associated with the Jawaharlal Nehru Centre for Advanced Scientific Research (JNCASR) for 14 years and was also Director, National Institute of Advanced Studies (NIAS), Bangalore. Throughout he maintained a close relationship with IISc. Over the years he received several prestigious awards, including being elected Fellow of the Royal Society.

RN made fundamental contributions to a number of areas in fluid mechanics, especially in the study of turbulence, the application of parallel computing to problems in fluid dynamics, and finally modelling of the monsoon. In a landmark paper published on the vibration of an elastic string, RN derived an equation that has since been named after him. RN took on the challenging task of building scientific institutions in sovereign India very seriously, inspiring students to work on new scientific problems, building a tradition of scientific research while at the same time working on problems relevant to India's developmental needs. This he did as one involved both as an engineering scientist in India's aerospace industry and as a policymaker. At NAL he

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participated in a number of projects such as the development of the indigenous Light Combat Aircraft (LCA), and initiated work on parallel computing for a number of applications.

Two months ago I received an email from RN that was the last I would receive, asking me about when a book a colleague and I had edited would be released. He had an article in this forthcoming volume on German engineering science and its extended genealogy, and its links with Caltech and the India Institute of Science, Bangalore. Like some of the leading scientists of that generation their commitment and work in science in no way exhausted their contributions or personality. He was a scientist well informed about the history of his own discipline, the sciences of the West and India and made salient contributions to these interdisciplinary fields. In the coming days and weeks many scientists will turn back and reflect upon and commemorate his contribution to the engineering sciences and the fields of investigation and research programmes that germinated from these contributions. The Indian Space Research Organization (ISRO) and the aerospace industry, particularly the public sector Hindustan Aeronautics Limited, benefitted immensely from RN's work and that of his colleagues and collaborators.

In what follows I shall not discuss his scientific and technological work for the obituaries by his colleagues and students have addressed them with competence, accuracy and a deep fondness. In the years when I met him frequently there was another side of his immense learning that I encountered and about which I shall present a few reminiscences. This was in the late 1980s and early 1990s when I was working with the history and philosophy of science research programme at NISTADS and had just published my first papers in the philosophy of science and the history of science. Amongst other things I was curious about documenting the vocation of research programmes that commenced at the so-called periphery of the sciences and acquired global visibility. I had come to know of the long commitment of RN's research group to understanding the 'onset of turbulence' and the turn this research programme had taken in RN's own research. And so I decided to study the programme just mentioned and was affiliated with RN's group at NAL where he was the Director even while he remained a professor at the Institute of Science. It was agreed that we would meet at his office, not at NAL, at the Centre for Atmospheric and Ocean Sciences at the Indian Institute of Science that was then located in the building of the Centre for Ecological Studies.

Late on Saturday afternoons after he had met his PhD students and collaborators I would get some time with him. I couldn't complain for being the last because the discussions were never hurried since nobody was waiting to meet him after me. My queries invariably began with the early attempts of the research group to understand the onset of turbulence and then extended to his and his students' research on the phenomenon of relaminarization of turbulent flows – an interesting problem in fluid mechanics with applications in the aeronautical industry as well. I was attempting to trace how this research programme evolved over the next decades and the new areas of research that branched out of the same.

While I collected and read papers published by the group I was constantly talking to two former doctoral students, G.S. Bhat and Sudarsh Kailas. The Saturday meetings gradually became occasions to discuss other matters I was researching at the time with my colleague S. Irfan Habib in Delhi and RN took time to comment on some of the drafts I presented him with interest. It didn't take long to encounter not just the wide breadth of his interests but of his reading on the history of sciences and the history of mathematics. Larger questions on the history and philosophy of science often came up for discussion – and though we agreed upon much, there were many issues about which we thought differently, given the distinct different disciplinary frames we employed to approach the object of discussion – but these differences never came in the way of the interesting and edifying conversations that followed. Though my reading at the time extended beyond the purely internal accounts of the history of sciences and technology, I learned a great deal from his close and nuanced internal accounts of technology at every meeting during those years.

It was around this time that he asked me to look into the life of Mokshagundam Visvesvaraya, the grand old man of Mysore and engineer whose life fascinated RN – not just for the engineering but the larger social context within which the former lived and about which he himself knew a great deal. And here RN was proactive in helping me meet some of the people who were aware of the socio-economic and cultural life of Mysore in the 1930s. So one day we went off to meet the literary icon of old Mysore, Nittur Srinivas Rao, who was then possibly in his late 90s and after having introduced me RN left me to pursue my interviews with him. He promoted a number of such efforts that were collated in a volume he edited entitled *Dialogues across Disciplines*.

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After I returned to my institute in Delhi and our meetings naturally became less frequent, the exchanges continued over email. What continued to intrigue me, as Peter Galison has pointed out in other contexts, was how the empirical, theoretical, matters of instrumentation and personal orientations and resources were so entangled in steering the trajectory of scientific research programmes. For example, how did the interests in relaminarization and the experimental issues that needed to be sorted out in that domain lead up to the Monsoon Boundary Layer Experiments. And how did these interests dovetail with that of other colleagues leading up to the formation of the Centre for Atmospheric Sciences. RN with his colleagues played a role in the creation of the Centre and much later he was responsible for impressing upon the government the need to create a Ministry of Earth Sciences.

During our conversation on the history of sciences, it became evident that P.C. Ray's *History of Hindu Chemistry* had left a deep impression and he often wondered how much more had been said on the matter since the publication of Debiprasad Chattopadhyaya's *Lokayata* that had marked a milestone inasmuch as it highlighted the origins of materialist thought in India. RN may have been wary of Debiprasad's Marxist account of the history of scientific thought in India, but he did play a role in instituting an award for Debiprasad Chattopadhyaya in recognition of his work, probably a year before the latter passed away.

I next had the chance to work with RN when he chaired INSA's National Commission for History of Science. The Commission was till then comprised largely by scientists and historians of science. RN made it a point to bring in historians as well. One of the issues that came up for discussion over the years was the historiographical distance that had come to separate the scientist's history of science from the professional or disciplinary history of science, which was beginning to have a deleterious effect on the discipline in India. RN took cognizance of the problem that was difficult to resolve given the conceptual momentum and sociological segmentation of disciplinary movements, but in his patient and considered way he carried the different views of the Commission.

As mentioned earlier, we had different ways of looking at questions on the history and philosophy of science. His generation of scientists, who were students in the late 1940s and 50s, was schooled in Butterfield's and Koyre's historiography of the 17th century Scientific Revolution and as a result were drawn to responding to the Needham question in non-European contexts.

Those who entered the field in the 1980s were schooled in the idea that the big picture of the 17th century scientific revolution needed to be decentred. I read the drafts and commented on papers RN published in his attempt to answer the Indian half of the Needham question.

The essays in a book a colleague and I edited to commemorate Needham's historiography following his demise in 1995 did not stray down the line of Needham's question, but disputed with Needham's ideas and how to work towards a genuinely global history of science in our own times. RN's classic paper on Tipu's rockets was well within this transcultural problematic. When it was first published it was framed by the idea of a neglected episode on the history of technology – of presenting a seemingly unrelated object in a new context of technological evolution. The paper when read through the lens of contemporary concerns of historians of science and technology is about the transcultural circulation of ideas and technological objects and the improvisation and redefinition they undergo in the process of circulation. There is much in the latter part of the paper, which should be material for historians of science and technology to look into. Hence its salience.

RN was deeply committed to thinking about history in the civilizational paradigm. And here too trends in disciplinary history had moved away and historians looked skeptically on the concept of civilization – both historians and scientists are well aware that concepts and theories have half-lives. Sanjay Subrahmanyam and Romila Thapar had urged scholars to rethink their civilizational histories and categories. The concept was seen by historians to embrace far too much diversity spread over vast geographical expanses and durations of time into a unitary whole. But RN's characterization of the Indian exact sciences as premised on computational positivism will stand the test of time in perhaps marking one important phase in the history of the exact sciences in the South Asian region.

Over the last two decades I never missed the opportunity to meet him on my visits to Bangalore. Agreement during the conversations that followed was always accompanied by a charming smile and a triumphant exclamation: 'That is correct', as if something had been achieved. But when we failed, there was a sigh and a long drawn out 'Wellll?' and the conversation continued for that became an opportunity for more thinking and engagement. This attitude of constant intellectual engagement and an enviable enthusiasm of inhabiting the world of ideas made of him the exemplary academic. And that RN indeed exemplified this ideal is evident in his standing that extended beyond discipli-

nary boundaries. Many of us outside the world of science, or studying social and cultural aspects of science, will certainly miss his farsighted encouragement of the need for dialoguing across disciplines in an academy splintered into three cultures.

Dhruv Raina
Professor, School of Social
Sciences, JNU, Delhi

Sunil Kothari 1933-2020

SINCE the eminent dance critic and scholar Dr Sunil Kothari succumbed to Covid on December 27, there has been a remarkable outpouring of affection and admiration for him. Dancers in particular but also dance writer colleagues and friends from all over the world have written eulogistic obituaries that recount treasured memories of his friendship and, most of all, of his encouragement and support of them and their work.

Yet, gregarious as he was, flitting around the world to attend dance performances, conferences and other events, he rarely spoke much about himself, his family, his childhood, and even less about the struggles and difficulties that only his bosom friends were privy to. Few knew he was the youngest of 10 siblings, though he did admit, intriguingly, in a video interview that, as the four year-old son of Dahiben and Manilal Kothari of the Kheda district in Gujarat, he never even knew his three sisters.

Most people know of him from his heyday as dance critic for the *Times of India* and author of at least ten books on various forms of Indian dance. Since books on dance are heavily illustrated, too many people regard them as 'coffee-table books', a pejorative term that belies how well researched they were. I often use them as reference books when reviewing performances or writing and lecturing on Indian dance.

Having delved into the information available on-line about him, I find it curious how little one learns about his early days. Stellar Kathak dancer and fellow Gujarati, Aditi Mangaldas, recently remarked on her own shortcoming in never asking him about *himself.* Most dancers, people he loved, watched and befriended, related to him as 'the critic', for he usually approached them about *their* work. Only *after* his leaving us have there been anecdotes about *him*.

I first met him in New Delhi in 1961 as friend of painter Amrita Sher-Gil's sister, who married India's second Chief Election Commissioner, the Sanskrit scholar K.V.K. Sundaram. Sunil had jumped the gate of 5 Race Course Road late at night, thrown pebbles at the window of the room I was sharing with their daughter Navina and, instead of going to see his *saheli* Mrs Sundaram, stopped to chat with us, regaling us with anecdotes that had us giggling late into the night.

Over the years our friendship blossomed, and I enjoyed many an inspired evening with him at a dance or theatre performance in New Delhi, in Chennai, in New York. We usually sat together; whoever arrived first saved the adjoining seat for the other. Sometimes he would murmur amusing comments into my ear, making me chuckle. More often we shared our rapture over a particularly splendid performance. The last time was during the Madras Music Academy Festival barely a year ago. Registering our delight with Odissi dancer Bijayini Satpathy's performance, we both spontaneously stood up to applaud her.

Dr. Sunil Kothari with Rajika Puri prior to Opening of Madras Dance and Music Festival 2019.

Dr. Sunil Kothari family photo – with his siblings and their progeny circa 1950.

Sunil Manilal Kothari was born eleven days before the end of 1933 in the Kheda district of a Gujarat that was then still part of Bombay state. The first memories we have of him are as a four-year-old being taken by his mother to the shrine of Lord Krishna at Nathdwara in Rajasthan and staying there for several days. Apparently, his mother asked him to dance to the *pakhawaj* drum being played at a temple. She also taught him a *sloka* that he never forgot and which led to his fascination with Sanskrit, in which he received an MA while also studying to be a chartered accountant.

While at Mumbai's Sydenham College (where he later taught during the '50s), one of his brothers – on noting his fascination with a recital by Sitara Devi – engaged a Kathak teacher for him at a school near Mumbai's Opera House. A performance by the Travancore sisters then led Sunil to Bharatanatyam guru Kalyan Sundaram Pillai, also based in Mumbai. For many years he combined his profession of chartered accountant with his extracurricular fascination with dance, so much so that he captured the attention of eminent scholar and writer on Indian dance, Mohan Khokar, then head of the newly formed Department of Dance at the MS University in Baroda, Gujarat.

Fascinated by *Marg* magazine's September 1957 issue on *Bharatanatyam*, the young Kothari asked Dr Khokar to introduce him to eminent author Mulk Raj Anand, also founder and editor of the path-breaking art magazine. Dr Khokar then urged him to attend Sangeet Natak Akademi's legendary All India Dance Seminar and Festival that brought together leading figures in India dance of the day from Rukmini Devi, founder of Kalakshetra and art scholar Kapila Vatsayayan to Mrinalini Sarabhai and Manipuri dancer Nayana Jhaveri. Dr Kothari thus met the stellar practitioners of our major dance traditions about which he later edited his most popular books: on Bharatanatyam, Kathak, Odissi, Kathakali, Kuchipudi, Sattriya, most of which were published by Marg.
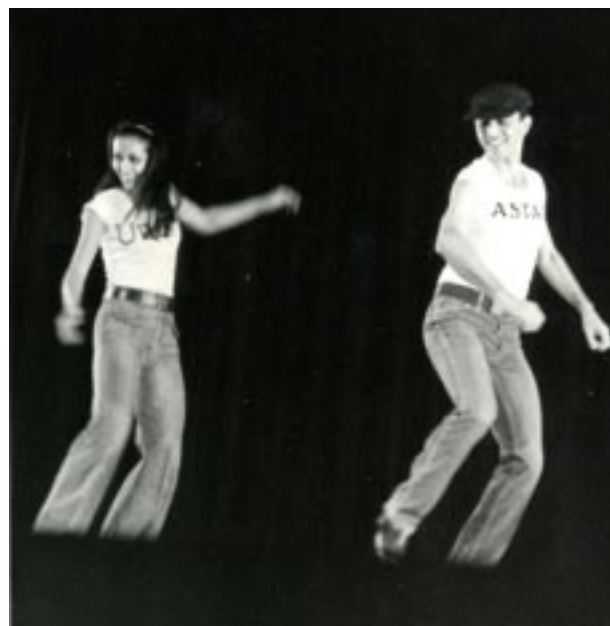
The rest, as they say, is history. We can only hope that the manuscript of his memoirs in Gujarati, sent to a publisher in Ahmedabad just before he died, is not only published but also translated into English so that dance lovers worldwide have access to his wide-ranging love and knowledge of virtually *all* the dance forms of India.

Rajika Puri
Dancer, dance presenter,
on-stage lecturer, New York

Astad Deboo 1947-2020

Astad Deboo was born in Navsari, on Agiary Street, a sacred site for Zarathustrians like himself. Sadly he passed way in his home in Shapur Baug Grant Road, Mumbai, shortly after he was diagnosed as having pre-Hodgkin's lymphoma, despite chemotherapy. His sisters Kamal, and Gulshan, and cousins, Eruch, Cawas, Manek, Aban and their families survive him. He grew up first in Calcutta and then Jamshedpur, where his father worked at TISCO (now Tata Steel).

I first met Astad in 1967 when I was auditioning dancers for an event that I choreographed called *The Joyous Cosmology*, at the Vallabhbhai Patel Stadium, over Christmas. Among the applicants was one who got up and turned around and around, spinning away in total abandon. That dancer, Astad, spoke directly to my heart with his total involvement without inhibition and went on to similarly entrance many generations of audiences. As it turned out, spinning, sometimes dionysiacally fast, and later in a meditative pace, was to become a motif in Astad's performances.

Two aspects of Astad's personality shine out for me. He loved dancing and he loved people. Despite his stellar appearances as a dancer all over the globe, Astad did not have an easy time as a pioneering male contemporary dancer. But he always kept his head up and used to advise me, 'Loving dance,' he would say, 'is worth far more than allowing oneself to be distracted by uncomplimentary reviews and nasty comments.' Astad was deservedly recognized with two of India's highest

Uttara and Astad, JazzIndia, Mumbai 1977.

Astad with Hema Rajagopalan and company, Chicago, 2019.

work *Thanatomorphia*, asked if death is liberation or celebration. His solo dance *Mangalore Street* that he performed at the East-West Encounter in 1984 was a satirical spoof. Later works like *Rhythm Divine, The River Runs Deep* (2017) he created were in collaboration with the Manipuri pung dancers. In fact, Astad worked with thang-ta and pung cholom artists over a period of at least 16 years. He collaborated with Dadi Pudumjee's spectacular puppets. He collaborated with postmodern choreographer, Rani Nair of Sweden in August 2017, with Bharatanatyam dancer-choreographer, Hema Rajagopalan, 2019, (MacArthur Foundation grantee, Chicago) and on and on.

awards, the Sangeet Natak Akademi Award in 1996 for performance and choreography, and the Padma Shri in 2007 for his contributions to Indian cultural life.

Astad had wings on his heels. In 1969, he boarded a cargo boat and made his way hitchhiking through Europe to reach New York in 1974. From then on he never stopped moving. He danced in exotic sites, such as on The Great Wall in China, in the snowy Alps, as well as in metropolitan cities. I recollect his performance at Lincoln Center (2009), and the Metropolitan Museum in New York, as well as performances in Mumbai. He had a brilliant way of literally thinking on his feet and adjusting to a variety of situations.

Astad Deboo told Ketu Katrak in October 2005: 'I haven't spent a year in any country for the last forty years… it is now a way of living. Nothing is really exciting me to ground me. I need that change, not change in my work. My work is with me all the time. I just need that change of environment. I need the change of food, of music, of people, that is a sort of stimulation for me.'

Some like Nandini Nair and Anita Ratnam saw Astad as a 'lonely warrior' riding off into endless sunsets. While the act of performing involves solitude, in that the performer-choreographer has to draw the performance and dance out of his/her own self, I would like to point out that gregarious Astad had or made friends everywhere he went. As a friend himself, Astad was a rock of support, sympathy, creative suggestions and generosity of spirit.

As he kept on dancing, his dances always imaginative, became more finely structured with more nuanced details and elegance. His presence grew more densely focused. His dance became strongly evocative, rather than narrational. Some, like his earlier solo

An avid philanthropist in his own way, Astad believed not just in giving back, but in paying it forward by working with hearing impaired Action Players of Kolkata, at the Clarke School for the Deaf in Chennai, and Gallaudet University in Washington DC. He recruited and taught dance to street children of Mira Nair's Salaam Balak Trust and raised funds for tours for these young dancers of their joint performances. Through all these morphing and varied collaborative works, Astad always managed to stay true to his own personal style which he had evolved with elements of Kathakali, Butoh, and other contemporary forms.

Astad's choreography, his costumes specially designed for his movement and personality, his corn row hairstyle, his use of Dadi Pudumjee's masks, all spoke to his minute attention to and ability to realize stunning visual effects. He understood the power and emotive qualities of colour and scale. He also paid close attention to the international music scene, and on one of his visits shared with me some wonderful CDs of contemporary Indian music. Astad Deboo, dancer, choreographer, philanthropist, and friend to many, will be missed.

Uttara Asha Coorlawala
Professor, (Adj) Dance,
Barnard College, New York

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