

Editorial

Challenges to Democracy in India

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India has long been a puzzle for theorists of democracy. The tryst with destiny on August 15, 1947 compelled an inexperienced government to deal with partition, mammoth transfer of population, widespread communal violence and social disorder. The major problems that India had to confront in the following decades were lack of industrialization, declining agriculture, caste system (which further took a new form of economic class system), acute poverty, illiteracy, lack of trained personnel, and poor health conditions. Despite dire predictions, except for 18 months in 1975-77, India has maintained its democratic institutions, and representative democracy operates right up to the local levels. Peaceful transfers of power between competing political parties/alliances have occurred at the Union and State levels. Election turnout keeps rising; exceeding the levels typical in several advanced Western democracies. The electorate has shown a sagacity that has brushed aside scepticism about extending the right to vote to the illiterate. The judiciary has by and large zealously guarded its independence and continues to be respected. It has a vibrant civil society and flourishing media. Despite a few hiccups here and there, India remains stable and unified. As the world's largest and most heterogeneous democracy India has disproved John Stuart Mill's (1958) proposition that democracy is "next to impossible" in multiethnic societies and completely impossible in linguistically divided countries (p.230). In a nutshell, the report card based on democratic checklist of institutional arrangements suggests that India's democratic system is in a reasonable shape.

Even while congratulating itself for achieving what very few Asian countries have managed India needs to introspect about challenges that are yet to be met. Whether it is education, health care, sanitation, or nutrition India's performance has been below par. Similar deficiencies can be seen in basic infrastructure such as power supply, water supply, drainage, garbage disposal and public transport. India is still a very unequal society; caste, religion, gender, and class based violence is still part of the fabric. Insurgency in Kashmir and simmering discontent in parts of India is a matter of concern. Many of those in power have misused their position; charges of corruption, bribes and kickbacks are revealed regularly. It is also clear that the acceptance democracy, both at a conceptual/normative level and institutional level continues to be tested.

To begin with, at the institutional level there is a discernable decline in the functioning of the Parliament. Though a Parliament is a multifunctional institution, representation, legislation, and scrutinising and holding the executive accountable are its three core

functions. In the first instance this means that Parliament should reflect the popular will as expressed by the electors at regular intervals. A democratic Parliament should also reflect the social diversity of the population in terms of gender, language, religion, ethnicity, or other politically significant characteristics. By this yardstick the performance of the Indian Parliament is mixed. Data do bring out clearly the decline of the power of the traditional elite and a progressive widening and deepening of democracy. Yet major lacunae exist; women continue to be underrepresented so also religious minorities. Further, political dynasties have become an all-pervasive factor. Dynastic politics undermines the very idea of democracy as it denies opportunities to those not born in 'political families'; in many cases denies even the right to dream for the highest positions in the party and government. The question is then: do political dynasties exist because some families are somehow more politically able or talented than others? Evidence suggests it has more to do with self-perpetuation rather than some divinely ordained talent. Justifications such as younger people, more often highly educated enter the Parliament due to dynasty is *ex post facto* justification. No one planned it to be so. It is more a vindication of Mosca's prediction that "even when political positions are open to all, a family tie to those already in power would confer various advantages" (As cited in Bó, Bó, & Snyder, 2008, p.115). Further, as many as 82 per cent of the new Members of Parliament (MPs) have assets worth over Rs. 1 crore each, making it the richest Lok Sabha as compared to 2009 (58 per cent) and 2004 (30 per cent). India's richest MP, Jayadev Galla of Guntur — is worth Rs. 683 crore (Rukmini, 2014). All this raises serious questions about the representative nature of the Parliament.

The quality of democratic life is dependent on the effectiveness with which Parliament carries out its central functions of legislation, budgetary control and oversight of the executive. What this entails is the recognition that, as Edmund Burke noted:

Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly ... where not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole (*italics as in the original*) (as cited in Judge, 1999, p. 51).

It is in this aspect that, over the recent past, the functioning of the Parliament has been far from satisfactory. As Anuya Warty points out in her article there has been considerable decline in the time spent on debates. This is primarily due to adjournments of the House due to disruptive behaviour of the MPs and the inability or the unwillingness of the Presiding officers to discipline them. Many Bills including those with massive financial implications have been passed without any discussions. Recently, the Income Tax Amendment Bill that was not even listed on Parliament's legislative agenda was pushed through without any debate in the Lok Sabha. The jury is yet to be out on whether increases in the intensity and scope of disruptions will destroy India's democracy. However, the danger is real. Successful democracies work because they avoid the temptation of majoritarianism—the notion that winning an election entitles the majority to do whatever it pleases. The fact that ordinance route is increasingly used by

the executive to bypass the Parliament is a step in this direction. Lack of debates and disruption could lead the country in that direction. Further, the debating chamber has also become a place to display party unity. The prevalent 'high command' culture in parties and anti-defection law stifles free speech in the parties and Parliament.

Further, as Warty points out, even live telecast that was expected to bring in transparency and hence some decorum has only resulted in the MPs playing up to their perceived constituency. This is expected in an era dominated by spectacles, images and pictures; publicity has lost its critical function in favour of a staged display (Habermas, 1989, p.206).

Two indices, among others, of a genuine democracy are independent judiciary and free press. Without a doubt despite some stray demand for 'committed' judiciary and some aberrations it has by and large remained independent. A matter of concern is the current logjam over judicial appointments. Effectiveness and independence of the judiciary is premised on the simple fact that it is adequately staffed to discharge its constitutional duty of rendering effective justice to all within a reasonable time. It is here that there is much cause for concern. Estimates reveal that if all the judges tried to clear the backlog without breaks for eating and sleeping, and closed 100 cases every hour, it would take more than 35 years to catch up (Lasseter, 2015). If executive and judiciary remain inflexible in their respective positions, India is headed for a crisis. Equally troublesome is the opaqueness in appointment. This is particularly so when it is reported that 70 per cent of all sitting High Court judges come from the same 132 families. It is still difficult for marginalised groups who do not have access to the same networks of privilege to climb up the hierarchy ("Give SC, ST, more representation," 2014).

Another issue of concern is that under the garb of independence and the Damocles' sword of contempt of the court the judiciary has almost insulated itself from any kind of accountability and transparency. Recent developments do show that the passive assurance of integrity of judges is insufficient at a time when there are charges of corruption against sitting judges. The only remedy for any offence committed by a judge is 'impeachment'. However, the impeachment process is complicated and long drawn out; it is not difficult for a judge to resign before being impeached and continue to enjoy the post retirement benefits due to them. Also, the unanswered question is what is to be done when a judge is guilty of misconduct but not serious enough to impeach him/her?

It is in view of this the Judicial Standards and Accountability Bill is vital. As Bhairav Acharya notes in his article the Judicial Standards Bill of 2010 was the culmination of many attempts to introduce accountability for judicial misbehaviour and indiscipline. He locates within the debate, or rather the absence of it, the proceedings in the Constituent Assembly to promote accountability and the subsequent efforts. As he rightfully argues judges must be insulated from the executive but independence should not preclude accountability.

It is clear that there is a growing mistrust in governance – whether executive or adjudicative. It is in this context that a vibrant and free press becomes even more vital. Despite suggestions to that effect in the Constituent Assembly freedom of the press is nowhere mentioned in the Indian Constitution. Dr. Ambedkar rejected the idea, saying that the press exercised freedom of expression on behalf of the people; it was the voice of the voiceless. Unlike the United States of America (USA) where freedom of speech and expression is almost absolute, in India it is subject to ‘reasonable restrictions’. It is interesting that, as the authors in this issue have also pointed out, while drafting the Constitution we moved away from what was the initial impulse of the freedom fighters. Right from 1895, the nationalists sought to provide strong civil rights protections. Gandhi argued that assemblies of people ought to be able to discuss even revolutionary projects. Yet, in the Constituent Assembly restrictions were placed on freedom of speech and expression. Somnath Lahiri accused the Fundamental Rights Sub-Committee of operating from the point of view of a “police constable” (CAD III(2), April 29, 1947). The restrictions were justified due to the touching faith that the free and independent State should not be regarded with suspicion; misplaced trust, as subsequent developments were to show. The right to freedom of speech as it has evolved, thanks to court verdicts, includes the right to publish and circulate one’s ideas, opinions and other views by resorting to all available means of publication. However, In India, the Constitution does not specifically forbid press censorship. Hence only check on the State in resorting to censorship is that it should be reasonable. Every government in India has sought to control/censor the press in the name of upholding public order, communal harmony, security of the nation and the like.

The relationship between politicians and press is symbiotic and yet complicated. Politicians and voters depend on the media to give them fair and informed views. What is interesting is that almost all politicians/political parties have complained about media bias. The very nature of bias is that it is a perception; hence impossible to establish. Ravindran’s article using case studies of a Tamil daily newspaper and a biweekly newsmagazine seeks to unravel the prevalence of fictionalised and partisan narratives that is emblematic of the *Brahminical* caste bias in Tamil Nadu. He also touches upon a scourge of Indian democracy: paid news. Simply put, paid news is a form of advertising that masquerades as news. Ravindran suggests what is needed is a competent and comprehensive communication regulatory framework which works against threats to freedom of expression of all kinds (not only those perceived by the media) and support the communication and cultural rights of the audience. This would include the right to be informed, the right to inform, the right to privacy, and the right to participate in public communication. This would also necessitate promoting diversity in terms of caste, gender, age, geographical location, disability, sexual orientation, social background, and – most important of all, diversity of thought. Such a framework is needed, as these are the Achilles heels as far as press in India is concerned.

Precisely because communication is such a fundamental human need, those who control communication also control people. The history of communication is a long history of silencing freedom of speech and expression. It is also a history of people’s struggle to speak up publicly. Governments, both at the Centre and States, have

used draconian laws, sedition to suppress free speech on issues ranging from singing against liquor policy to protesting against nuclear projects to allegedly shouting anti-national slogans. The record of the Supreme Court's track record on free speech has been chequered. The Court has upheld colonial era blasphemy laws, obscenity laws, and sedition laws. It has upheld pre-censorship of films and wide police powers to curtail free association

The matter came into sharp focus when, as Lawrence Liang and Siddharth Narrain note, Kanhaiya Kumar was arrested under sedition charges, and university administration encouraged the police to intervene on the Jawaharlal Nehru University (JNU) campus. This episode focused on the legal and constitutional dimensions of the right to protest and express one's political opinion. Liang and Narrain examine the claim that free speech precludes shouting what is perceived to be anti-national slogans.

What is often neglected in all the brouhaha over so called anti-national slogans is that the best way to destroy an undesirable idea is to air it in public; it will die a natural death. The disquiet echoed by most people would have resulted in the slogans dying out. On the contrary if the slogans did receive a much larger support the logical way would be to deal with the rationale for it; suppressing it would only make it more potent. Surely, it is time to disprove the colonial government's argument that language that may be tolerated in England "... is unsafe to tolerate in India, because in India it is apt to be transformed into action instead of passing off as harmless gas" (Colonial Officer as cited in Bhasin, 2010, p.66). It is time Indians trashed the colonial construct that Indians are incapable of critical reflexivity needed for deliberative public reason. The self-respect of every Indian should therefore demand the right to free speech and expression. Parties that claim to have fought the British and those who talk about national pride have much to answer every time they reaffirm the colonial discourse.

Democracy requires informed choices this requires information and knowledge. It is in this context that the debates around intellectual property law and access to knowledge need to be examined carefully.

Western legal mechanism is unique in its conception of intellectual property, i.e., its notion of knowledge as something that can be owned, with the rights consequent to such ownership protected by law. Unlike land, capital and labour, knowledge is what economists call non-rivalrous, good. Once knowledge is discovered and made public, there is no marginal cost to sharing it with more users. Hence, legal measures like patents, copyrights were framed in order to supposedly protect the creator. What is masked in all this is that historically the underlying reason for promoting copyright was the coming together of commercial interest and Queen of England's belief that it could be an effective way to squash sedition and dissent. The imagery of romanticized author slaving away and 'creating' something out of nothing due to creativity was an after thought. In any case over the years copyright has more to do with the publisher and less with the author. Even when it comes to issues such as fair use and exceptions and limitations, countries have been constrained by USA inspired discourse. It is in this context that the Delhi University (DU) Case becomes vital. Swaraj Barooah examines

the verdict given by the Delhi High Court. As he points out the court has made it clear that there is no “inevitable, divine or natural right” of authors and it can be traced primarily to laws made by a competent legislature.

Further, as Barooah notes the discourse surrounding the high profile case has dragged copyright out of the context-less silo and placed it squarely within an ‘Access to Knowledge’ framework. We need to reconceptualise the terrain; move towards openness, collaborative production, freedom with respect of information goods. This will merely mean recovering the etymological meaning of data (datum in Latin) which means a thing given, the neuter of which is “to give.” It is heartening that some of the faculties at Harvard University and Stanford University voted to give online open access to their academic publications. Similarly many leading academics in India took a stand against publishers they were writing for in the DU case. Academics and others have also started informal initiatives to share articles and books. This has resulted in some of the bigger publishers joining hands with different forces to push toward a Big Brother dystopia. Anti-piracy oriented private electronic surveillance has been put in place and this has serious implication for freedom and privacy of the individual.

While surveillance was not unknown in earlier times, never before have free citizens been spied upon so systematically by snooping governments, private companies, copyright owners, insurance companies, employers and other prying organisations; we are a surveillance society.

Surveillance by the State is by and large premised on threat from terrorist and danger to national security. As Arun points out in his article following the 2008 Mumbai terrorist attacks, India has implemented a wide range of data sharing and surveillance schemes. Additionally, data sharing and surveillance mechanisms are projected as means to reduce fear, promote security, reduce misgovernance, corruption, and provide access to speedy public service delivery and welfare. From food rations to marriage certificates, salary, entrance exams to train ticket concessions, mobile phone cards to banking, Indians are now being asked to produce a 12-digit Aadhaar number at every point. While individuals are becoming more and more transparent to public gaze the powerful are more and more closed off.

Technically, people have a choice: they can refuse to opt for Aadhaar; there is no opting out once you enroll. Now it is linked to access to so many services and goods that not accepting it is not really an option. The convenience of use conceals the potential corrosive effect of mass surveillance. The outcome of surveillance is that governments, multinational corporations, or politicians do not have to exert force in order to control. All they have to do is instill the fear of observation. The new form of control:

...leaves the body free and directs its attack at the soul. The ruler no longer says: You must think as I do or die. He says: You are free not to think as I do; your life, your property, everything shall remain yours, but from this day on you are a stranger among us. Not to conform means to be rendered powerless, economically and therefore, spiritually to be self employed (Adorno and Horkheimer, 1998, p. 133).

Surveillance does not only involve privacy rights; it leads to self-censorship regarding what we say and whom we associate with. Additionally, personal relationships such as respect, love, trust, friendship, affection for others are all premised on privacy (Fried, 1968, pp. 475, 477-78, 484). In other words, surveillance will redefine all aspects of life like never before.

What is problematic is the ratchet effect or function creep; this implies that so called anti-terrorism measures progressively expand to areas beyond their initial intended impact. This includes steps taken to: making it easier to obtain warrants to use surveillance against terrorist suspects; reducing legal thresholds to obtain electronic/digital records; enhancing the government's ability to share personal information. We live in an open and easily accessible data era. States and corporations are watching us through data, and we are watching each other through data. India urgently needs a nuanced debate on data mining, surveillance and privacy.

While India has fared reasonably well in terms of civil liberties an extremely problematic issue is the continuation of death penalty. What is significant is that prior to independence a concerted effort was made to end death penalty. In March 1931, following the execution of Bhagat Singh, Sukhdev and Rajguru by the British government, the Indian National Congress moved a resolution in its Karachi Session demanding abolition of death penalty. However, by the time the Constituent Assembly took up the issue of capital punishment atmosphere was vitiated by Gandhi's murder. Thus, when on November 29, 1948, Z.H. Lari, a Muslim League member of the Constituent Assembly from the United Provinces moved an amendment to abolish capital punishment it was turned down (CAD, VII(15), November 29, 1948). This stand was taken despite the fact that both Gandhi and Ambedkar were personally against death penalty. It is indeed depressing that the liberal discourse changed from a more progressive stand during the pre-independence era on issues like free speech and capital punishment.

The ambivalence towards capital punishment has continued. For instance, The Law Commission of India, agreed with many of the reasons advanced against capital punishment. Interestingly, it cites the fact that even the Courts have acknowledged the subjective and arbitrary application of the death penalty and how it has led "principled sentencing" to become "judge-centric sentencing", based on the "personal predilection of the judges constituting the Bench (Law Commission of India, 2015, p. 10). Yet, Commission goes on to recommend that there is no reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences (Law Commission of India, 2015, p 87).

Reena George explains, on the basis of an empirical study with death row prisoners, that death penalty is a constructed account by the State machinery. It is this that accounts for the fact that marginalised sections of the society is disproportionately given death penalty. She brings out very powerfully the trauma that those in death rows go through; sometimes for decades. Based on this she makes a case for the abolitionist perspective that death penalty contradicts basic democratic principles such as human rights and rule of law. The politics of death penalty comes through clearly when George

points out that while hanging Ajmal Kasab and Afzal Guru or Yakub Memon was easy, strong political compulsion prevented the same in case Balwant Singh Rajoana (for the 1995 assassination of Punjab chief minister Beant Singh) and Murugan, Santhan and Perarivalan (for the 1991 assassination of former Prime Minister Rajiv Gandhi). Supreme Court has however not been consistent in applying its own guidelines of 'rarest of cases'.

What is noteworthy is that those who defend the deterrent value of the death penalty offer little systematic research to support their view. On the other hand what is very clear is that, as Albert Camus notes, death penalty is not simply death:

It adds to death a rule, a public premeditation known to the future victim, an organization which is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal's deed, however calculated, can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life (italics as in original)(As cited in Mandery, 2012, p. 4).

It is time for India to take its rightful position among those who have banned capital punishment. This does not mean that the fear expressed in the Constituent Assembly that a man who kill's another will be released after seven or eight or ten years; life imprisonment can mean staying behind bars for life.

Some of the recent developments such as increasing episodes of violence against women and minorities, increasing inequality, lack of basic facilities, criminalization of politics, corruption and lack of transparency and accountability are matters of concern. Democracy can only be as good as people choose to make it; it cannot be accomplished through a simple organisational trick. This calls for considerable introspection and reasonable discussion and debate among citizens.

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