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Challenges to Democracy in India

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Contents

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Introduction to the Journal

The study of society, its institutions and processes, its history and its economy play a critical role in the shaping of that society and its intellectual contours. Social science research is expected to enhance understanding of society and its functioning; track, document and initiate change; provide inputs for public policies; and generate ideas and knowledge that could be used for teaching at various levels of education. Social science research when disseminated widely provides the basis for public discourse that is critical to the civilizational development of society and its intellectual life. Romila Thapar succinctly and cogently discussed the disappearance of the 'Public Intellectual' in India. The relationship between society, economy and politics, and between academic and public matters, across political and ideological spectrums needs to be reestablished.

Academic publications and periodicals are the means by which social science is disseminated and reaches policy circles and the public intellectual space. Unfortunately, even a cursory review will reveal that the growth of social science journals in India has not met increasing expectations. As was pointed out by Indian Council of Social Science Research (ICSSR), most publications are in journals of sociology (including social work and anthropology), economics and psychology. A large majority of these publications are not peer-reviewed products. In consequence, these have neither contributed to the overall quality of social science dissemination, nor to the cogitation and dialogue that such research should prompt.

Quite clearly there is a need for creating spaces for vibrant discussion and debates. A journal welcoming thought-provoking, well-researched and argued perspectives is the need of the hour. The proposed *Journal of Public Affairs and Change (JPAC)* seeks to address the challenge of creating a space for public debate on issues of critical importance in a rapidly transforming society and democratic space.

The journal aims to provide researchers and the academe a forum to develop a body of knowledge on public affairs. Public affairs in this context is a term used to describe the intersection of government, politics, people, business and media. The scope of public affairs includes, but is not limited to, public policy (including sector specific policies), public administration and management, human security, international political economy, social and political sciences, economics, public relations, media, communications and cultural studies, psychology, anthropology, geography, interface between technology and politics, literature and law. Situating public affairs in the context of change is imperative. India is in the throes of unprecedented social, economic and cultural turbulence which is nudging public institutions, processes and practices.

The proposed journal will publish peer-reviewed articles, reviews, case studies, viewpoints and research results from practitioners of all grades and professions, academics, and other specialists. It will encompass a broad range of theoretical, empirical and methodological topics.

To begin with *JPAC* is being envisaged as an open access online journal, published twice a year. It will make full use of the internet technologies including social media to distribute the issues and their content and also to enable the easy submission and processing of contributions. With a core working group that will include young scholars, the journal is supported by a number of consulting editors drawn from various disciplines.

Editorial

Challenges to Democracy in India

Kannamma Raman

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 poste 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 have 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 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 *Brahaminical* 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 a 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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Decline of the Indian Parliament

Anuya Warty*

The Parliament is central to democracy as it reflects the will and aspirations of the people through their representatives; holds the executive accountable for their actions; sets out the tone for every other institution in the State and thus primarily ensures the real working of democracy in India. Over the years though, the Indian Parliament built on the Westminster Model has seen a major crisis in its working. Crucial human hours, public money and critical areas for representation remain unattended due to chaotic scenes on the floor of both Houses of Parliament. This paper analyses the crisis of trust in the Parliamentary affairs as also the possible structural and attitudinal reforms required towards achieving this end.

Keywords: *Disruptions, Parliamentary Instruments, Negation of Democracy, 'Unelected' Rajya Sabha*

India made a conscious choice when it preferred the Parliamentary form of democracy over the Presidential one. The Westminster Model was considered to be most compatible to requirements of India of the time. With the experience of having worked under the British as also the continuing influence of the Government of India Act, 1935, this was unsurprisingly the preferred choice. In addition, the bicameral legislature

technically assures us with inherent checks and balances on the actions of the legislature and the vigilance over and accountability it commands from the executive. It then broadens our understanding of legislature beyond a mere law-making body. The legislature is expected to and is constitutionally empowered to hold the executive responsible for its acts of omission and commission; to be vigilant and to exercise control over the expenses incurred by the executive among other functions. Parliament is the central institution which hears the will and aspirations of the people through their representatives; oversees the working of every part and agency of the government; sets out the tone for every other institution in the State and thus primarily ensures the real working of democracy in India.

Ideally, the two Houses under the bicameral structure are constituted to play a complementary role. The Lower House—Lok Sabha—comprises largely of directly elected representatives that brings the needs and aspirations of the common people on the floor of the House. The Upper House—Rajya Sabha—on the contrary represents the federating States through the indirectly elected representatives. The Constitution

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of India also provides for 12 nominated members for their expertise and service in particular fields of activity. The two Houses have therefore been constituted with distinct rationale and focus. While the former was constituted to represent the pulse of the public, the latter was expected to take a more nuanced look at the same issues coming in for discussions.

Equipped with parliamentary procedures, motions and immunity, one then expects the Houses to be places which bring alive the diversity and concerns arising in the country. The Constitution does not prescribe specific number of Members of Parliament (MPs) voting for issues to be raised, motions to be moved or the votes that are required. Baijayant (Jay) Panda, Member of Parliament (Lok Sabha) from the Biju Janata Dal (BJD) stated that there were "other structural impediments" in the parliamentary working that demanded reassessment and cited that apart from the no-confidence motion, "[a]ll other matters are essentially decided by consensus…" (Panda, 2015b) which has been increasingly difficult to achieve over the years.

Consensus in the Parliament

Over the decades, several commonly understood factors have contributed to the difficulties in achieving this consensus. Rise of regional political parties, recurring hung Parliaments and the consequential coalition politics have played a major role in fracturing the consensus. In addition, myopic considerations have had a detrimental effect on the quality of discussion and voting on the floor of the Houses. Party whips and the anti-defection laws have controlled the voting pattern and consequently any voice of dissent within the House. The nature of protests has changed substantially. As mentioned above, motions and parliamentary conventions equip the MPs to protest actions of the government and bring attention to the topic of urgent discussion or dissent. However over the years, powers of the Parliament have been subverted and bitter unparliamentary quarrels have been witnessed on the floor of the Houses. The frequency of disruptions, adjournments, failed sessions and deadlocks have increased through successive Lok Sabhas. As a result, the credibility of the Parliament—the highest deliberative body—has suffered considerably.

This paper particularly focuses on parliamentary developments during the Fifteenth (2009) and the Sixteenth (2014) Lok Sabha. These comprise of two different coalition governments with distinct allies and a changed equation of majority in the two Houses. These have repercussions on the number and quality of debates occurring in the Houses as also with the number of Bills passed by them as well.

Fifteenth and Sixteenth Lok Sabha

The United Progressive Alliance (UPA) led by the Indian National Congress (INC) in 2009 held 229 of the 545 seats in the Lower House of the Parliament in its second consecutive term in office. National Democratic Alliance (NDA) which formed the opposition alliance held 138 seats in the Lok Sabha. The five year period of this Lok Sabha was marked with several disruptions. In fact the Winter Session of 2010 saw the lowest productivity of both the Houses in 25 years with disruptions and protests over

how the then government was dealing with scams that some of its office bearers were involved in (PRS Legislative Research, n.d.).

The General Elections of 2014 brought the NDA into power with a clear majority of 336 seats. Bharatiya Janata Party (BJP) on its own won 282 seats; this makes it the first single-party majority in three decades. The INC garnered less than 10 per cent of the seats on its own in this election. However the equation is different in the Upper House as the government coalition holds just 72 of the 245 seats. It was thus evident that the newly formed government would not require too much effort in the Lower House during the passage of a Bill. The only way in which the opposition could control the government from bulldozing through the passage of any Bill would be through the Rajya Sabha. It is then a constant game of one-upmanship with the government trying to side-step the opposition in Parliament and the opposition attempting to thwart the government's attempts at it. Although this has escalated in the Sixteenth Lok Sabha, the previous governments have, in their own ways, subverted the parliamentary process. Acrimonious debates, rushing into the well of the House, staging walk-outs and forcing adjournments have been not unknown in previous Parliaments.

Disruption of parliamentary work and changed priorities

Over the years, the discussions and deliberations in the Parliament have dropped to tokenism. There are more disagreements and commotion than discussions and reflections in the Parliament. One finds that it can thus devote barely a few minutes per Bill. In the process the Parliament is increasingly "pushing through legislations faster" ("The progressive decline," 2015). Table 1 illustrates one such example regarding the time spent on each of the Bills passed in both the Houses of the Parliament during the Budget Session of 2016. It makes it evident that Rajya Sabha spent just two minutes discussing the vital Bill dealing with amendment to the Election Rules.

Table 1: Time Spent by both the Houses on each of the proposed Bills

Title	Time spent in LS	Time spent in RS
Election Laws (Amendment) Bill, 2016	1 hr 13 min	2 min
High Courts and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2015	3 hr 1 min*	5 min
Indian Trusts (Amendment) Bill, 2015	1 hr 4 min*	4 min
Rajendra Central Agricultural University Bill, 2015	4 min	4 min
Sikh Gurdwaras (Amendment) Bill, 2016	1 hr 7 min	2 min

**These Bills were passed by the Lok Sabha in previous sessions*

Source: PRS Legislative Research.(n.d.). Vital Stats. Retrieved June 18, 2016, from www.prsindia.org/parliamenttrack/vital-stats

This is also not unprecedented; 20 per cent of the Bills passed in 2009 in Lok Sabha were discussed for less than five minutes in 2009. During the Monsoon Session of

2010, 47 per cent of the Bills were passed in the Lok Sabha in less than two hours. Similar instances recurred in 2011 and 2012 (PRS Legislative Research, n.d.). This is also true with reference to demand for grants. Barely few heads and demands of two or three ministries were discussed for paucity of time. The rest were passed collectively.

Guillotining demand for grants

Lok Sabha is the sole and foremost authority to scrutinise the demand for grants of ministries. It is commonly understood that the Lower House 'holds the strings of the purse' for the government, and without its scrutiny and approval, 'the government cannot draw even a rupee out of the Consolidated Fund of India'. Technically it is expected to look into each of these heads and scrutinise the nature of demands made. However, one sees that the House has had only a cursory glance at the demand for grants before passing the rest en masse. During the Budget Session of 2016, Lok Sabha discussed only 1.4 per cent of the total demands while the others were guillotined, i.e. passed without discussion. This comprises of Rs 21,346 crore out of the total budget of Rs 19 lakh crore. In fact, in 2013-2014, all demand for grants were outright guillotined without discussion (PRS Legislative Research, n.d.). It is even more critical to note that it has occurred twice within a span of a decade. In the Fifteenth Lok Sabha, the trend was no different—84 per cent of demand for grants were guillotined in 2010; 81 per cent in 2011; 92 per cent in 2012 while it was 94 per cent in the first Budget Session of the Sixteenth Lok Sabha (PRS Legislative Research, n.d.).

Bills have also been passed in both Houses without any debate. Having seen this scenario recur often, many scholars have commented on how the role and integrity of the Parliament has been seriously compromised. The view that has emerged is that the ruling and opposition parties "have become partners in the crime of destroying Parliament" ("Undermining parliament," 2011).

Parliamentary performance over the decade

PRS Legislative Research points out that the Budget Session of 2016 has been particularly productive.

- The productivity of Lok Sabha was at 121 per cent (second highest after the Budget Session of 2015 with 122 per cent) which was the second highest in past 15 years.
- Highest number (27 per cent) of questions orally answered in the Lok Sabha in the past 15 years.
- Highest percentage (75 per cent) of Bills were introduced and passed within the same session in 10 years (PRS Legislative Research, n.d.).

This performance highlights the fact that the past decade has not necessarily been a productive one for the Parliament. In fact as mentioned earlier, the productivity was the lowest during the Winter Session of 2010. It is followed by the Monsoon Session of 2015 which stood in contrast with the Budget Session of 2015 mentioned herein above. The Parliament spent just one per cent of its productive time on legislative business with Rajya Sabha not passing a single Bill throughout the session.

There have been repeated disruptions and consequent adjournments of sittings during each of the sessions and the frequency of the same has increased over the years. In 1952, 408 topics were discussed on the floor of the Parliament. The number has slipped down to 146 in 2009 ("The progressive decline," 2015). The effectiveness of tenure has gone down while the rate of passage of Bills has risen consistently. It basically means that frequent disruptions affect the time available for deliberations leading to Bills being passed all together according to the stance taken by the whip. The basic role of the Parliament of discussing the issue at length, raising questions, voting and considering recommendations to the proposed Bills stands defeated in such a scenario. Disruptions have continuously affected the working of the Question Hour severely limiting the scope of holding the government answerable for its actions. In fact 25 MPs of the Lok Sabha were suspended for five sitting days by the Speaker during the Monsoon session of 2015; 17 in the Winter Session and 12 in the Monsoon Session of 2013 for their misdemeanour. Parliamentary democracy was at its lowest ebb when the Question Hour was conducted just twice in the Lok Sabha during the Winter Session of 2010 (PRS Legislative Research, n.d.).

Disruption of parliamentary procedure

BJP is known to be "the party that disrupted the Parliament the most in the last five decades…" (Kumar, 2015). The productive time in Parliament during the UPA II was the lowest in history with just 179 of the planned 328 Bills passed due to disruptions (Kumar, 2015). The disruptions led by the BJP were so numerous that the Parliament was unable to push through the Bills even without discussion. As a result several Bills such as the Women's Reservation Bill and Judicial Standards and Accountability Bill, lapsed.

However, the then Leader of Opposition (LOP) in Rajya Sabha, Arun Jaitley justified the commotion in Parliament by stating that it was "…a legitimate tactic for the Opposition to expose the government through parliamentary instruments available at its command" (Katyal, 2014). He even justified his stand by stating that they were "…not preventing work from being done" as what they were doing was "very important work itself" (Jayal, 2012). The view was also supported by the then LOP in Lok Sabha, Sushma Swaraj who opined that "…not allowing Parliament to function is also a form of democracy, like any other form" (Katyal, 2014).

The NDA led opposition which believed that "disruption can sometimes produce results that discussion cannot" (Venkatramakrishnan, 2015) had a completely contrarian view when its alliance came to power in 2014 and the congress led opposition started stalling their work in Parliament. On the other hand then Prime Minister (PM) Dr Manmohan Singh called the stalling of Parliament as 'negation of democracy' (Shah and Gilani, 2016). Paradoxically, in 2014 his political party, now in opposition, recreated exactly what the preceding Lok Sabha experienced. So, when the opposition staged a walked out during the Monsoon Session of 2015 over Sushma Swaraj's alleged role in the Indian Premier League controversy, Jaitley stated that she was "a pretext, a scapegoat" and that "[t]he real reason was they (opposition) wanted to prevent GST (Goods and

Services Tax)" (Venkatramakrishnan, 2015). Both sides remain indifferent to the fact that each Parliament day lost costs the nation 1.5 crore rupees and more crucially the damage inflicted on the institution.

Role of live telecast of parliamentary proceedings

While we discuss this, senior journalists like M. V. Kamath recommnded live coverage of the parliamentary proceedings. They considered this to be a way of shaming the MPs who stalled the smooth functioning of the Parliament. It was suggested that this would show them in bad light to their voters and in the process reduce this behaviour over time. The Railway and Union Budget has been televised since 1992. Entire proceedings of the Lok Sabha came to be telecast live over Doordarshan since 2006 (Sen, 2015). The idea behind this was to generate an additional sense of responsibility among parliamentarians about their role as deliberators and representatives being reflected across to the common people. However, this did not reduce their misdemeanour in Parliament. In fact, their behaviour took a downturn when some of the MPs realised that their antics generated the much sought after Television Rating Point (TRP) for the private news channels. Many MPs seem to then believe "that publicity, even bad publicity, especially if it makes it to the evening news is better than no publicity" (Kapur and Mehta as cited in Sen, 2015). At such a time then, the role of Rajya Sabha could be vital. It could bring in the necessary gravitas and maturity to the on-going discussions. The Upper House was in any case created precisely to play that role.

Role of 'unelected' Rajya Sabha

Rajya Sabha is technically constituted as a Council of States or House of Elders which represents the needs of the federating units. It is a permanent House constituted largely through indirect elections. It is also expected of the MPs herein to bring a sense of considered sobriety and impartiality to the populist decisions taken by Lok Sabha. Consequently, it can veto or at least delay or ask for amendments to all Bills proposed by the Lok Sabha, except the Money Bills. Like the Upper Houses in the United States of America and the United Kingdom, Rajya Sabha too could play a major role in the parliamentary democracy.

However, unlike the US primaries, members of the Rajya Sabha do not face direct elections. They are political nominations largely based on political patronage (Panda, 2015b). Then again, as mentioned earlier, Anti-Defection laws now make it necessary for MPs to vote as per the party lines rather than taking an informed individual call on the topic. In fact Baijayant 'Jay' Panda—MP from Lok Sabha—has been vociferous about how the Rajya Sabha comprises of 'unelected' members who are dictated by the whips and thus should not be invested with such broad veto powers (Hebbar, 2015). He opined that their "lingering "unelected" presence in the Rajya Sabha gives enormous leverage against the public will to just a few individuals", and that is "untenable in the long run" (Panda, 2015b).

Indeed after the General Elections of 2014, as mentioned earlier, the government coalition is hugely outnumbered in the Rajya Sabha. It is then a fertile ground for the

opposition to pose challenges to the smooth passing of Bills. Rajya Sabha is now termed as "a chamber of naysayers" that stalls the working of the House on one pretext or the other (Gupta, 2015). This view is validated by the fact that Rajya Sabha succeeded in stalling several legislations including the Goods and Services Tax (GST) Bill.

Finance Minister Arun Jaitley who himself leads the government in the Rajya Sabha, spoke about the 'unelected' nature of the Rajya Sabha and how it was working a 'polarised politics' and how Congress was 'obstructionist' towards development and reform ("Arun Jaitley seeks debate," 2015). He contended that primacy had to be given to the opinion emerging from the Lok Sabha since it directly represented the people and hence had greater legitimacy. Constant disruption, non-conformation and blockading by the Upper House, then leads to the Lower House finding ways to side-step it.

Promulgating ordinances to side-step Parliament

Promulgating ordinances have traditionally been the method used by the executive in power to circumvent the Parliament completely. Technically, ordinances are to be promulgated only when the Parliament is not in session and usually in cases when the next session is not in the near future and when the matter is necessarily urgent in nature. These are not meant to replace the formally passed legislations and need to be tabled in the Parliament as soon as it convenes.

It is known in our parliamentary history that the first Speaker of the Lok Sabha, G. V. Mavlankar protested to the first PM of India, Pandit Jawaharlal Nehru "about the government's 'inherently undemocratic' practice of promulgating ordinances" as twenty-one ordinances had been promulgated in 1950 alone (Austin, 2003, p. 30). He pointed out that numerous ordinances gave an "undesirable psychological impression that 'government is carried on by ordinances'" and that the Parliament would sense that "it was being ignored" (Austin, 2003, pp. 30-31). While Nehru concurred with the view that ordinances should be reserved for 'special and urgent occasions' he maintained that the time-consuming parliamentary procedure would force the executives to use them (Austin, 2003, p. 31). This basically paved the way for future governments to promulgate ordinances as per their convenience and without the intention to even table them in the Parliament. This in turn has created the impression that the governments have tried to avoid the supervision of elected represented. This creates an atmosphere of hostility between the Parliament and government and a gradual loss of faith in each other.

In addition to these, what has complicated the matter is the recent attempts by the executive to use Article 110 to circumvent Rajya Sabha. At the centre of this development is the controversy over what is a Money Bill. Money Bill is the technical term used in the Constitution and the House rules to refer to a certain class of Bills which contain taxation proposals and proposals relating to money matters etc.

Dodging Rajya Sabha with Money Bills

Article 110 of the Constitution of India states that a Bill is deemed to be a Money Bill if it contains provisions dealing with all or any of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of borrowing by the government or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or Contingency Fund of India, and payments into or withdrawals from these Funds;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

Money Bills can only be introduced in the Lok Sabha on the recommendation of the President. Once passed by the Lower House and transmitted to the Rajya Sabha along with the Speaker's certification, the Upper House can only make recommendations within 14 days from the date of receipt of the Bill. This is in consonance with the practice in all the countries where the parliamentary system of government exists; the directly elected House alone has the final say in financial matters.

The Lok Sabha then has the prerogative to accept and incorporate or reject the recommendations. Once done, the Bill is deemed to have been passed by both the Houses. Also if the Rajya Sabha fails to return the Bill with or without its recommendations within 14 days, the Bill is deemed to have been passed by both the Houses in the form that was passed by the Lok Sabha. This underlines the supremacy of the Lok Sabha over Money Bills as also the fact that the Bill can at the most be delayed for 14 days by the Rajya Sabha. Again, since it is on the recommendations of the President that the Bill has been introduced, vetoing of the same or returning it for reconsideration at that end also is not provided for. It thus makes the position of the Lok Sabha extremely strong as compared to the Rajya Sabha.

The Speaker of the Lok Sabha alone has authority to decide on whether the Bill is to be notified as a Money Bill. Precedents show that the finality of the Speaker's decision has been accepted by the Rajya Sabha. As early as 1953, Prime Minister Jawaharlal Nehru, while commenting on the authority of the Speaker to certify a Money Bill, said, "It is now clear and beyond possibility of dispute that the Speaker's authority is final in declaring that a bill is a money bill. When the Speaker gives a certificate to this effect, this cannot be challenged. The Speaker has no obligation to consult anyone in coming to a decision or in giving his certificate" (Achary, 2015). An important implication of this is that such a move can restrict the role of the Rajya Sabha; it is this aspect that was used to pass some of the Bills stalled.

The NDA government, as mentioned earlier, has a clear majority in the Lok Sabha but struggles with the opposition in the Rajya Sabha. GST and other Bills saw several sittings disrupted and parliamentary sessions wasted. When the government decided to provide statutory backing for 'Aadhaar', it introduced it as the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill and tabled it as a Money Bill. This single action subverted the role of the Rajya Sabha and the Bill was passed by the Parliament without any hindrances; considering the riders discussed earlier in this section. The opposition in Parliament led by Jairam Ramesh pointed out at least five amendments that would have been necessary to the Bill. Given the fact that these could now be overridden, they sought legal recourse.

Despite being the Leader of the House in Rajya Sabha, Jaitley opined that while the Upper House could bring in checks and balances and question the Lower House, it could not happen repeatedly with every Bill and session. He believed that it was then a "serious question in a parliamentary democracy wherein bill after bill, the wisdom of a directly elected house is questioned by the indirectly elected house" ("RS Leader," 2015).

Jaitley had declared after the GST Bill failed to pass through Rajya Sabha that a Constitutional solution to this problem of obstructionism needs to be drawn. One such solution that he pointed out then was that "a lot of ordinary legislations will then have to be send [sic] as Money Bills…" ("Arun Jaitley seeks debate," 2015). This 'constitutional remedy' immediately saw light of the day with the Aadhaar Bill as discussed earlier. When the opposition protested this action, he pointed out Constitutional provisions which justified that it was indeed a Money Bill. He even reminded the opposition of "bills like the juvenile justice bill and the workman injury compensation bill that the Congress brought as money bills when it was in power" ("Aadhaar Bill," 2016).

Given the tit-for-tat approach that the government and opposition have towards each other on switching sides, things are bound to be unpleasant in the Parliament. So while Jaitley was systematically trying to convince the Parliament that Aadhaar Bill indeed was a Money Bill, several commentators disagreed. They stated that apart from the promised saving of some Rs 20,000 crore from underserving and leaking subsidies, Aadhaar Bill had nothing to prove that it was a Money Bill and it was a ploy to circumvent the Rajya Sabha and thus subvert the Parliamentary process. Even the Chairman of the Rajya Sabha, Vice President Mohammad Hamid Ansari "informally told political parties that the Upper House needs to be vigilant against such "liberal interpretation" of the tag of a money bill" ("RS Leader," 2015). He even underlined the fact that the dignity of the Council of States needs to be upheld and that the House should be relevant through the legislative process. However, there are significant other efforts—even from within the Parliament—recommending reduction in legislative powers invested with the Rajya Sabha and the need to reform it after all. They aim at reforming the structure and not completely doing away with the Upper House since bicameralism is a part of the basic structure of the Indian Constitution and thus cannot be completely disregarded.

Debate over reducing legislative powers with Rajya Sabha

As mentioned earlier, Jaitley had raised the issue of how the 'unelected' Rajya Sabha

could have such sweeping powers as to veto the Bills passed by the Lok Sabha time and again. He also pointed out the need to bring in reforms to that effect to reduce the obstructionist approach taken by the Upper House. The role of Rajya Sabha vis-à-vis Lok Sabha has been a matter of concern. For instance, Jay Panda, Lok Sabha MP belonging to BJD, has opined that the Upper House should not have veto powers on legislative matters although he understood the importance of checks and balances in the parliamentary system. Then again, he cited the impracticality of Joint sessions of Parliament and the impropriety of tagging all major Bills as Money Bills to bypass the Rajya Sabha. Through his consistent discussions on the subject, Panda has brought out the fact that United States of America, United Kingdom (UK) and Italy have over the years seen a change in the nature of powers with the Upper House and he believes that either of these reforms needs to be emulated in India as well.

(i) Reducing the veto power

The UK gradually reformed the nature of powers invested with the nominated membership of its Upper House—the House of Lords—over the years. All Bills except Money Bills could be vetoed by the House of Lords earlier. In 1911, amendments reduced this complete blockade to two years which was further reduced to a year in 1949. So the House of Lords can now, at the most delay a Money Bill for a month. This was done by the amendment passed by the Parliament itself.

Panda, in his newspaper column in November 2015 also cited the fact that Italy's Senate had "voted to drastically reduce its own powers, including its number of members and its power to block constitutional amendments and other key legislation [sic]" (Panda, 2015a). The Bill had received final approval from both the Senate and the Chamber of Deputies by April 2016. However, 59.11 per cent voters voted against the said reform in the constitutional referendum held on December 4, 2016.

So the first option that Panda puts forth is that the veto power of Rajya Sabha should be reduced with no other changes in the structure and functioning of the Upper House. It should be allowed to delay the process but not completely derail it. It is a matter of conjecture if the Rajya Sabha would ever vote to reduce its powers.

(ii) Direct elections to the Upper House

Panda pointed to another possible option in legislative history of the world that could be incorporated in the Indian structure. He cited the fact that the US Senate was also indirectly elected, quite like our Rajya Sabha until the reforms of 1913 when Senators came to be directly elected by the voters of each State (Panda, 2015a). It would then indeed justify the 'manifesto doctrine' discussed earlier in this paper and make their role in legislative matters less debatable.

However, Panda's views were strongly disputed. His own party—the BJD—distanced itself from what they termed as his 'personal' views. Six MPs from different opposition parties in the Rajya Sabha signed a notice alleging a breach of privilege and contempt of the Rajya Sabha. It was then submitted to the Chairman of the House Mohammad

Hamid Ansari which then requires a referral to the House of Panda's membership, i.e. the Lok Sabha.

Debate over the legislative powers with the Rajya Sabha

Media coverage to the obstructionist approach of the Rajya Sabha, failure of critical and high-profile Bills to pass through the House, the manner in which significant members of the government as also the former Chief Justice of India (CJI) K. T. Thomas reacted to it actually created an environment conducive to demand reduction of powers with the Upper House among common people as well. Online petitions addressed to the President and Vice President of India, the Chief Justice of India and the PM came up which demanded that the unelected representatives should not have legislative powers (Online Petititon, 2016). Although it has not secured too much of public response or support, it does create an environment of ill-considered public opinion. It shifted the focus of attention away from the core area of our concern which is the downslide of the Parliament as an institution.

Several commentators have severely criticised the proposal to dilute the status and powers of the Rajya Sabha. Considering the unpredictability of electoral politics, one cannot guarantee a similar numerical majority in the future Lok Sabhas. The Upper House then should be the "deliberative body that would balance what James Madison… called "fickleness and passion" of an elected Lower House" (Ramachandran, 2015). It should also bring a stabilising effect that one had envisaged for it.

Another rationale for dilution of Rajya Sabha's powers is that with the rise of regional political parties and their corresponding numbers in the Lok Sabha, there is no specific need to separately provide for a Council of States for the federating units with as much legislative powers. However, the constantly strained Centre-State relations cannot be understated. Rajya Sabha then ideally provides for such a channel of communication and should be utilised as such. To that effect, several feasible reforms are suggested such as: direct elections to the Rajya Sabha; equal representation of the federating units in the Upper House to avoid inclination or capture of decision-making by the bigger States with more members; fixed time period for the passage of Bills. Panda even went on to suggest that the total control of the party whip over the members voting should be restricted to Money Bills and the confidence motion in order to bring in a certain flexibility and use of one's discretion.

Having considered these issues at hand, it is then far more in the interest of the country that the government and opposition parties maintain the faith of the people in the parliamentary process. It is vital for any opposition to make use of parliamentary debates and procedures to bring to light the shortcomings of the government ("Parliament Deadlocked", 2015). It would then uphold the sanctity of public mandate and the standard of parliamentary affairs and stand up to the ideals of genuine parliamentary democracy.

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Democracy, Elections and Print Media in India: At the Intersections of Fictionalised and Partisan Narratives[i]

Gopalan Ravindran[*]

Democracies are nourished and promoted by healthy and well informed relationships between the politicians, citizens and news media. The famous American Journalist of last century, Walter Lippmann theorised in his three books published during 1920s, the advantages of having informed publics and the disadvantages of having "phantom publics." This paper employs the notions of Walter Lippmann to examine the contexts of fictionalised and partisan narratives in Tamil press during the 2016 Assembly Elections in Tamil Nadu. This paper concludes that the members of the Tamil Press were working as "unregulated private enterprises" in promoting fictionalised and partisan narratives during the 2016 Assembly Elections in Tamil Nadu to promote their political and casteist affiliations.

Keywords: *Indian Democracy, Indian Press, Tamil Nadu, 2016 Assembly Elections, Walter Lippmann, Fictionalised and Partisan Narratives, Dinamalar, Junior Vikadan and Media Regulation.*

> Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance (Nehru, 1947).

These were the defining words of Jawaharlal Nehru (1947), in his famous midnight speech on the eve of India's Independence on August 15 1947. These words were emblematic of a visionary who dreamed about India emerging as a modern, democratic and pluralistic State. This temporal moment turned the hopes of millions of Indians to gain their lost power and freedom. Nehru strove hard as the First Prime Minister of independent India to give meaning to his words 'India's soul finding its long suppressed utterance' in a new form, the largest democracy of the world.

India observed its 70th Independence Day on August 15 2016. The complex pluralism, diversity and democratic character of India are under severe test in contemporary times

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and what Nehru hoped for in his famous midnight speech, "a soul finding its utterance" is fraught with odds despite the marching of India as the largest electoral democracy. General Elections are being held in India at specified intervals, causing the installation of democratically elected governments at the Central and State levels. India's elections are dubbed as the world's largest event with 814 million voters and 9,30,000 polling stations (Election Commission of India, n.d.).

One might wonder, how come one complains about the soul of the largest democracy not finding its utterance in recent times? The reasons are to be located in the serious erosion of pluralistic linkages within the complex democratic fabric of India in India, made possible by the Indian Constitution. The right to freedom of expression provides one of the linkages for individuals and institutions such as media under Article 19 (1) (a) of Indian Constitution. The other linkages include the diversity of the political actors and consequently the political choices available for the Indian voter when he goes to cast his ballot. The integrity of the above mentioned two linkages have been seriously eroded in the recent past with the emergence of "paid news" (wherein newspapers/ media take money and plant favourable stories for the political candidates and parties) and "paid voting" (wherein the gullible illiterate/economically voters are enticed with gift hampers and cash packets worth few thousand rupees days before the polls).

The Election Commission of India, established in 1950, is vested with constitutional powers to act with independence in conducting elections in a free and fair manner. It has been doing a great job in working overtime to stop the erosion of the linkages mentioned above. Nonetheless, the realities are still working against the Nehruvian imagery of the "soul finding its utterance"

India's democracy has registered a manifold growth in electoral terms: there were only 173 million voters in the first General Election during 1951. The polling percentage was 45%. During the last General Election in 2014, the total number of voters was 814 million and polling percentage was 66% ("India Votes," 2015). However, despite the remarkable success story of India functioning as the largest electoral democracy, there are serious threats to the emergence of India as the largest true democracy. The threats from within India's democracy, in the form of the self-destructive modes of linkages mentioned above (paid voting and paid news) are only two of the several villains against the emergence of India as the largest true democracy.

Like democracy, like newspapers

Indian Press is the familiar tag for relating to India's newspapers, magazines and other periodicals. The Registrar of Newspapers for India (RNI) informs in its 2014-15 report that Indian publications registered a growth of 5.8% during the year and there were 14,984 newspapers in the total list of publications (newspapers and other periodicals) of 1,05,443. (RNI, n.d.) It is not without reason that many hear the familiar statement in media circles that the Indian newspapers are enjoying a growth trajectory unlike their counterparts in the West. This is a familiar self-congratulatory note shared by the members of Indian press, particularly those who are on the side of management. What they are failing to read is that the requiem for Indian newspapers appears to be on the

anvil in view of the self-destructive modes of its operation and the growing inroads made by the Internet and mobile media. One of the self-destructive journalistic practices relates to the propensity of newspapers to either fictionalise news or cultivate strong traits of partisanship in news narratives. Fictionalising narratives is an act that is seen as antithetical to the tenets of journalism. Similar is the case of infusing partisanship in the news narratives and resorting to acts of planting "paid news narratives". Among the several narratives employed by the members of the Indian Press during times of elections and the period between two elections, the most striking seem to be the fictionalised and partisan narrative. And the malaise seems to be acute in the case of language newspapers, especially in States like Tamil Nadu.

Walter Lippmann, the famous American journalist and press theorist of last century, left us with several relevant notions to explore and examine the intersections between democracy, elections and journalism in contemporary India. His notions such as "manufacture of consent", "stereotypes," "phantom public", "unregulated private enterprise" and "objective criteria in journalism" (Lippmann, 1993,1995, 2004) were the first to conceptualise the threats to the noble pursuits of democracy and journalism. He wished that news media follow "objective criteria" of journalism to contribute to the wellbeing of the relationships between public, media and government in USA during the World War I. He warned against the "unregulated private enterprise" and "manufacture of consent" as they would jeopardise the pursuits of democracy and journalism and only contribute to the emergence of "phantom public" (Lippmann, 1993, p.77).

Ravindran (2015) argued that the local cultural norms are the primary definers of the characteristics of the different sections of the Indian press. He observed: the characteristics of the different constituents of Indian press underscore the primacy of the local cultural norms as the primary definers of their characteristics even as the tendencies to follow the universal norms of journalism are in place, albeit ephemerally. Undoubtedly, this makes the individual entities in the canvas of the Indian press more local and less-pan Indian; more discursive and less homogenous. In the process, the canvas itself turns out to be a misnomer (p.212).

And one of the domains which is subjected to cultural domestication is what Lippmann called as "unregulated private enterprise" that seeks to "manufacture of consent." According to Walter Lippmann (1995):

> Everywhere today men are conscious that somehow they must deal with questions more intricate than any that church or school had prepared them to understand. Increasingly they know that they cannot understand them if the facts are not quickly and steadily available. Increasingly they are baffled because the facts are not available; and they are wondering whether government by consent can survive in a time when the manufacture of consent is an unregulated private enterprise (p.8).

This paper seeks to explore the linkages between threats to both democracy and journalism from a Lippmannian perspective by exploring the nature and characteristics of the partisan and fictionalised narratives and their circulation in the domains of

journalism, politics and democracy. More importantly, this paper seeks to put to test the rule of Lippmann (2004):

> …the quality of the news about modern society is an index of its social organisation. The better the institutions, the more all interests concerned are formally represented, the more issues are disentangled, the more objective criteria are introduced, the more perfectly an affair can be presented as news. At its best the press is a servant and guardian of institutions; at its worst it is a means by which a few exploit social disorganisation to their own ends (p.197).

In the case of the Tamil newspapers, as elsewhere in the main category, Indian Press, the cultural domestication of Tamil press as the "unregulated private enterprise" is the probable cause for the emergence and circulation of what is antithetical to journalism – fictionalised and partisan narratives. This paper's premise also flows from another noteworthy pointer of reference provided by Walter Lippmann to help us delineate the fictionalised and partisan narratives from the non-fictionalised and non-partisan narratives. Here, the Lippmannian framework hinges on the relationship between news and truth.

The hypothesis, which seems to me the most fertile, is that news and truth are not the same thing, and must be clearly distinguished. The function of news is to signalize an event, the function of truth is to bring to light the hidden facts, to set them into relation with each other, and make a picture of reality on which men can act (Lippmann, 2004, p.194).

Such a premise is important in the present study as partisan journalism becomes a sure possibility when the *Lippmannian* logic of news is subverted/abandoned.

There have been a number of studies on the issues of media bias and partisan journalism ever since Lippmann's works appeared. In particular, during the past six decades, several important studies have appeared with the view to examine the relationships between the news content and the sources that seem to condition them. Key works on the processes of selection and rejection of news appeared in the wake of White's (1950) paper on the "gatekeeper"(pp.383–391). The significant roles of "gatekeepers" these studies revealed strengthened the validity of Lippmann's notions made during 1920s. Simultaneously, there was a trajectory of "bias" studies which first showed their presence during the late 1940s. Williams (1975) posited that there was an unsettled state in research concerning "bias" studies (pp.190-199). D' Allessio and Allen (2000) dealt with the triad of "gatekeeping bias", "coverage bias" and "statement bias" in their studies (pp.133-156). However, no study has attempted to use Lippmann's framework to study the whole relationship between the constituents of democracy, in particular the relationship between the political parties and their media agents. This paper seeks to study the relationships between the constituents of democracy and elections such as political parties and their media agents in the 2016 State Elections in the State of Tamil Nadu.

Times of elections provide very meaningful contexts to study the emergence and circulation of partisan and fictionalised narratives and these are also times when the fundamentals of the relationships between "informed choices" of the electorate militate against the facts of realities as structured by the threats to emergence of a true largest democracy.

Why the notion of "unregulated private enterprise", which Walter Lippmann posited in an entirely different context and age, is to be taken seriously in the context of the 2016 State Elections in the State of Tamil Nadu? Who are the likely contenders that might qualify as the agents of the "unregulated private enterprise" in such contexts? In what ways, these agents remain as unregulated (by the self-regulatory bodies as well as the legal/quasi-legal bodies) even as they "manufacture consent" through the content that is at once partisan and fictional?

The contextual/textual sources of the above questions and the plausible answers to them through a discursive analysis of the "choices" and "facts" conveyed by a leading Tamil daily newspaper, *Dinamalar* and the leading bi-weekly Tamil newsmagazine, *Junior Vikadan* are undertaken in this paper. These have been chosen as they hold the potential to stand in as the representatives of Indian press as the "unregulated private enterprise" as well as the sources of "choices and facts of reality" in their versions of partisan/fictional narratives. In short, an attempt has been made in this paper to understand the hitherto ignored culturally-derived categories within Indian press while studying the intersections of fictionalised and partisan narratives of both Indian Print Media and Indian democracy.

The 2016 Assembly elections in Tamil Nadu caused quite a stir among the journalists and their organisations, as it was seen as the "crucial" one, as every election in the past was labelled by the news media in the State!. Tamil Nadu is the southernmost Indian State (There are 29 States and 7 Union Territories in India) with an electoral population of 57 million voters (Population 72 million; Literacy: 80 per cent as per 2016 statistics) (Tamil Nadu Population Census, n.d.).

In the 2016 Assembly election voters cast their votes on May 16, 2016 to elect their representatives from 234 constituencies to the Tamil Nadu State Assembly.

There were three main political parties/alliances in the fray. They included the incumbent party, the All India *Anna Dravida Munnetra Kazhagam* (AIADMK – All India Anna Dravidian Progressive Party), the *Dravida Munnetra Kazhagam* (DMK - Dravidian Progressive Party) and the *Makkal Nala Kootani* (People's Welfare Alliance – an electoral alliance of two national level communist parties Communist Party of India (CPI) and Communist Party of India – Marxist (CPI (M) and three major State parties Viduthalai Siruthaigal (Panthers Party), *Desiya Murpokku Dravida Kazhagam* (DMDK - National Progressive Dravidian Party) and Marumalarchi *Dravida Munnetra Kazhagam* (MDMK-Renaissance Dravida Progressive Party)).

Tamil Nadu had a vibrant Social Justice Movement, Self-Respect Movement and Dravidian Movement during a good part of last century. The political party, which

emerged out of the movement, DMK, unseated the national party, Congress, in the historic 1967 State elections on the strength of the State wide anti-Hindi movement (caused by the imposition of the Hindi language in the State by the Congress government). Since then, Tamil Nadu has been ruled by either DMK or AIADMK, the State level parties.

The active fostering of the media such as films, newspapers and magazines by the Dravidian movement during the last century had a huge impact on the number and nature of ownership of television channels in Tamil Nadu, when the satellite television boom started during 1990s. The last 15 years has seen the mushrooming of television channels owned by political parties and their sympathisers. This trend, along with the growing tendency of Tamil newspapers, to be driven by the logic of partisanship has deprived the electorate of a fair and non-partisan coverage of news during election and non-election times.

While the elections in India are well regulated by the constitutionally empowered, independent agency, The Election Commission of India, which has successfully conducted several General Elections and State Elections, in a fair manner since early 1950s, the Indian news media are totally outside the framework of any regulatory mechanism in India. This profound irony of the Indian democracy stifles informed choices and drives home "manufactured choices" to the news audience who can not discriminate between their news sources and the quality of news content they get to read or watch in news media.

The Press Council of India, was established in 1966, as a legal entity to ensure standards in the functioning of print media, but it lacks powers to punish the erring newspapers and journalists. The Telecom Regulatory Authority of India (TRAI), which was started in 1997 to regulate telecom services is now looking after the regulation of television sector in piece-meal/ad-hoc manner. As a consequence, there have been serious violations of cross media ownership norms and fairness in coverage by news media. It is common for newspaper houses to own television and radio channels and film distribution companies and to have indirect ownership relations with television channels and theatres. It is common for political parties and the family members of party leaders to own television channels and exercise direct/indirect control over the newspapers.

There are also news organisations which fall outside the above dominant category of media ownership. These are owned by non-political entities, but love their partisanship in news coverage. The newspaper chosen for this paper, *Dinamalar* belongs to this category. Such papers are more problematic than the papers owned by political parties as they are unabashed in their sense of belonging to the caste that defines the ownership of the paper. Dinamalar and *Junior Vikadan* are owned by organisations founded by the members of the Brahmin community. While *Dinamalar's* coverage of news is generally seen as partisan across divergent content categories, its coverage of political news in general and election news in particular is emblematic of the *Brahaminical* caste bias. As in the 2014 General Elections, the newspaper was going overboard in eulogising the Hindu rightwing party, Bharatiya Janata Party (BJP- Indian People's Party) in its

coverage of the 2016 Tamil Nadu State elections. While it went soft in its criticism of the ruling AIADMK party, headed by a Brahmin, it had a penchant for ridiculing the other dominant political parties such as DMK, DMDK, MDMK, *Pattali Makkal Katchi* (PMK- Working People's Party), which are headed by non-brahmins.

Ever since the countdown for the 2016 Tamil Nadu elections started, *Dinamalar* brought out a tabloid size election supplement which was an embodiment of all the bad virtues of journalism as pointed out by Walter Lippmann during 1920s ("manufacture of consent", "stereotypes," "phantom public", "unregulated private enterprise" and "lack of objective criteria in journalism"). The supplement had eight pages. The first page was devoted to a partisan narrative, the second page was filled with satirical/fictional content, the third page was devoted to articles written by columnists, the fourth and fifth pages were devoted to an interview, the sixth and seventh pages were devoted to columnists and the eight page was filled with spoof content drawn from comedy tracks from Tamil films. In a limited sample drawn during the first two weeks of April 2016, the supplement had devoted four front pages of partisan narratives, which also had a penchant for fictionalising the content, to DMK; three for AIADMK; three for other parties; one for general non-party coverage.

In its issue dated 14 April 2016, the paper took the acidic dig at the DMK, headed by a non-brahmin leader, by fictionalising the alleged rift in the party between the leader of the party (M. Karunanidhi, who is in his 90s) and his son, who is a treasurer in the party, K. Stalin) in the finalisation of the candidates list. The headline of the story reads as: "Stalin Denies Seat to Karunanidhi". The first paragraph of the story reads as: The long running production, that is DMK's candidates' list was scheduled to be released yesterday. Stalin, who is the treasurer of DMK, was eager to release the list and brief the press, while going to the party office. He received a news that moment and rushed to the house of his father. He saw his father with the list. The conversation they had and the resultant anger forced Stalin to rush back to his house. What happened in between was chaotic fight. The reason for the chaotic fight is the fact that Stalin refused to concede the constituency his father demanded and the father refused to agree for the release of the candidates' list. As in other front page stories of *Dinamalar* election supplements, this story of fiction and partisanship had little or nothing to merit the traits of news Lippmann mentioned in his works. As in other front page stories of the election supplement, this did not have the name of the contributing journalist and only mentions the unprofessional tag, "Our Reporter". These stories are emblematic of the paper's penchant for non-news/fictional narrative structures and partisan coverage of election events and issues.

The other magazine under focus in this paper, *Junior Vikadan,* also had a merry kill of the reported rift between Karunanidhi and his son, Stalin, in its version of the fictionalised and partisan narrative of the issue. Its headline read as: "Karunanidhi Throws Away Pen." In a six page story, the magazine narrated the tensions in the family of the leader with regard to the list prepared by Stalin and the unhappiness of the father over the obstinate stand of his son in not accommodating the requests of his relatives, friends and acquaintances. The entire story was written in a non-news/fictional narrative style.

In one para, the story reads as: The next problem came through Karunanidhi's assistant, Nithya. Nithya wanted the allocation of Pallavaram constituency for E. Karunanidhi. But Stalin wanted Tha.Mo.Anbarasan to contest from that constituency. Stalin and Tha. Mo.Anbarasan were not willing to give up. Karunanidhi threw his pen after remarking "Can't you allocate one seat for Nithya who gave all support and assistance to me." The list could not be released on 13th morning because of this incident. Thereafter, Anbarasan agreed to change his constituency to Alandur. Throughout 13th, these emotional outbursts continued. That's why they could not release the list in the morning, as announced earlier; they could not release the same in front of the media persons in the evening, as announced later; they could only mail the list to the media.

This short exposition of the partisan and fictionalised narratives of Tamil newspapers, based on the above mentioned incident involving a major political party, is only emblematic of the deep rooted tendencies of the Tamil newspapers and magazines to work at cross purposes with the principles of objective journalism and their disservice to the cause of democracy and the cultivation of well informed electorate.

Conclusion

Is there a way out from the implications of the intersections of the fictionalised and partisan narratives of Indian press? At the moment, the answer is "no" as India remains the only major democracy in the world without a dedicated and competent communication regulator for the diverse media sectors. The history of the policy lapses and inadequacies in this regard is a shocker, to say the least.

India had the constitution of the First Press Commission, in 1952. The 1954 report by the Commission paved the way for the establishment of the Press Council of India in 1966 as a quasi-judicial body with the objectives of ensuring freedom of press and censuring newspapers which indulge in objectionable content. During the period of Internal Emergency (1975-77), the Press Council of India was done away with. After the end of Internal Emergency, a new Press Council of India was constituted in 1978 (Press Council of India, 2016).

However, with 28 members, headed by a retired Supreme Court of India judge, the Press Council of India has not succeeded in changing the character of the Indian press to be of good to the cause of Indian democracy or the readers of Indian newspapers for three important reasons. Firstly, its functions do not go beyond the acts of conducting inquiries into alleged violations by the Indian newspapers and censuring them. Secondly, there is no scope in the present framework to take punitive measures against the violators as in other democracies. Thirdly, it exists as a body that is more representative of the press than the public as 20 of the 29 members (including the Chairperson) belong to categories such as editors, working journalists and owners. In this respect, it exists more as a "self-regulatory body" than as a regulator.

In view of the shortcomings of the Press Council of India's legal framework, the Second Press Commission (Nireekshak, 1978), which was constituted in 1979, recommended punitive actions by the Press Council of India against violators. The major punitive action it recommended was denying accreditation to newspapers which are found

guilty of violating the content codes. But these recommendations remain on paper and penal powers for the Press Council of India have not been granted.

Another problem stems from the lack of wisdom in India to traverse beyond the logic of freedom of press as a one-way street, as expressed in the debates and discussions on freedom of press by the Indian press and the Press Commissions and the Press Council of India. It is a one-way street as the rights are seen as exclusive to the newspapers for their good (to gather and disseminate news as a right which is guaranteed as a right to "freedom of expression" under article Article 19 (1) (a) of the constitution) and not for the benefit of the right of their readers to know about news events in a fair manner. Moreover, we are yet to look at the issues of media regulation from the perspective of communication as a human/cultural right from either side (media and audience).

With the proliferation of cable and other sectors of communication during 1990s and 2000s, the Government of India initiated a few legal measures to regulate the sectors. The Cable Television Networks (Regulation) Act 1995 (CTNRA) was ushered in to regulate the cable television sector. The CTNRA was amended in 2001. The Telecom Regulatory Authority of India (TRAI) was setup in 1997 to check the chaos in the mobile market by virtue of the Telecom Regulatory Authority of India Act 1997 (with amendments in 2000) (TRAIA). In both versions, TRAI was mandated to take care of the operational parameters of the Indian Telegraph Act (1885) as well as the new telecom services such as mobile phone services, particularly the stages of licensing and tariffs. In 2004, there was a notification from Government of India (GoI) which required TRAI to look after broadcast services also. Here lies a unique case of India having a telecom regulator doubling up as a media regulator, without necessary competence.

It is a fact that both TRAI and the Ministry of Information & Broadcasting (MIB) have failed to check the content of the 847 private satellite channels (India. MIB, 2016) of different political, religious and caste denominations over the years. Among these, there are 398 news channels and 449 non-news channels (India. MIB. 2016). In addition, there are also 64 public service television channels in Doordarshan's Direct To Home platform (MIB, GoI, 2016). Undoubtedly, the absence of a regulator to oversee the functioning of a proliferating communication domain like the Indian television sector is a serious policy lapse. One is forced to conclude that this has not warranted attention from GoI so far because of the alleged conflict of interest between the roles of Indian politicians as owners of television companies and as lawmakers.

Another issue that has been rocking the boat of freedom of expression of the public in India relates to the frequent attempts by several State governments to invoke the provision of article 66 (a) of the Information Technology Act 2000 (with amendment in 2008). Despite The Supreme Court of India judgment in 2015 Shreya Singhal v. Union of India, 2015 which held the arrest of persons for posting "offensive content" under Section 66 (a) of the Information Technology Act 2000 as violative of the Article 19 (1) (a) of Indian Constitution, persons get arrested for posting comments and likes on Facebook in States like Tamil Nadu (Sivaraman, 2016). On the other hand, the newspapers, channels and cable distribution companies owned by political parties and the connected families go scot free for airing offensive content in the name of news

exposes, casteist and unethical stories of crime and violence, political propaganda in the name of news programmes etc..

The way out lies in the constitution of a competent and comprehensive communication regulatory framework which can equally work against threats to freedom of expression of all kinds (not only those perceived by the media), but support the communication and cultural rights of the audience and citizens as well. With the establishment of such a regulatory framework, the threats posed by the fictionalised and partisan narratives would also disappear. More importantly, such a framework should draw inspiration from the spirit of the *Sean MacBride's Report* (1980), which argued the cause of the right to communicate for the first time in a remarkable manner. As Traber (2008) argues, citing *Sean MacBride's Report*:

> In particular, the right to communicate is not the same as freedom of information, which is more likely to benefit those with more powerful (and profitable) means of information. One point often neglected in the crusade for free flow of information…is the concept, mentioned in the *MacBride Report* (p.24) and elsewhere, that the freedom to communicate implies responsibility, to use such a freedom wisely and with care. …The media should interact in new ways with their public, making them the principal subject, rather than as objects, of their reporting. Together, in mutual responsibility, media and public can develop a political culture which is participatory and free, jointly working for the common good of all (p.197).

In short, the need of the hour in India for the votaries of a healthy democracy is the establishment of a competent communication regulator which can ensure what Traber (2008) wants media and public to develop - " a political culture which is participatory and free, jointly working for the common good of all" (p.197).

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Protest and the Right to Freedom of Speech and Expression[i]

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Arrest of students in Jawaharlal Nehru University and resultant police intervention has kindled a debate on the legal and constitutional dimensions of the right to protest and freedom of expression. It is clear that freedom of speech and expression within the Indian legal tradition includes any form of criticism, dissent and protest. It cannot be held hostage to narrow ideas of what constitutes "anti-national" speech.

Keywords: *JNU, Freedom, Expression, Constitution Assembly, Constitution of India, Court Verdicts.*

The arrest of Kanhaiya under sedition charges, the manner in which the university administration had encouraged the police to intervene on the Jawaharlal Nehru University (JNU) campus, has brought sharply into focus the legal and constitutional dimensions of the right to protest and express one's political opinion. The right to protest, dissent and criticise, challenge State policy, and question the government which is squarely protected under the Indian Constitution. This right is enshrined in the Fundamental Rights Chapter in Part III of the Constitution in Article 19 (the fundamental right to freedom). Of the different kinds of rights under Article 19, the ones most closely connected to the right to protest are 19(1)(a) (the right to freedom of speech and expression) 19(1) (b) (right to assemble peaceably and without arms) and 19(1)(c) (right to form associations or unions). These three rights are inextricably linked, although in terms of case law, and it is 19(1)(a) jurisprudence that has dominated legal discourse. These reasonable restrictions can be *in the interests of* public order, security of the State, sovereignty and integrity of India, friendly relations with foreign States, decency or morality or *in relation* to contempt of court, defamation or incitement to violence. Since much of political speech and dissent has been curbed in the pretext of public order, the legal contestation on what amounts to reasonable restrictions on Article 19(1)(a) in the interest of public order is crucial for us to understand the scope of this right.

Unlike the United States where freedom of speech and expression is almost absolute, in India (and as every case reminds us) freedom of speech is subject to 'reasonable

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restrictions'. Intuitive as it sounds that all rights will be subject to a host of other concerns and values, it is our argument that this split between rights and restrictions gets politically calibrated along the lines of what is considered acceptable and unacceptable speech and to read cases that forcefully express such a restriction is to engage not only with the formal life of free speech doctrine but its substantive political career. Thus many of the responses to the JNU events would repeatedly point out that while there is freedom of speech in India, this did not mean that people could shout anti-national slogans. This, as we shall see is just not true in the law, and yet is so commonly accepted as to constitute a populist version of the contours of free speech.

The law of sedition was introduced by Sec. 124A of the Indian Penal Code in 1870 as a draconian measure to counter anti-colonial sentiments and most major leaders of the independence movement including Gandhi and Tilak were tried under this provision. Gandhi famously described Sec, 124A as the 'prince among the political sections of the IPC designed to suppress the liberty of the citizen' (Noorani, 2009, p. 235). Two years before Tilak was tried for sedition, he had been responsible for drafting the Constitution of India Bill, 1895, which comprised of a bill of rights which contained a broadly worded provision for free speech. Article 16 is relevant:

> Every citizen may express his thoughts by words or writings, and publish them in print without liability to censure, but they shall be answerable to abuses, which they may commit in the exercise of this right, in the cases and in the mode the Parliament shall determine (As cited in Rao, 1967, p. 7).

When the Constituent Assembly deliberated the scope and extent of restrictions that could be placed on free speech the prominent exclusion from what eventually became Art. 19(2) was the word sedition.[1]

Colonial continuity, sedition and public order

A recurring theme that emerges in evaluations of the state of free speech in India is the assertion that many laws which curtail free speech have their origins in colonial experience and their continued existence and use testifies to the fact that in the domain of speech we face a problem of colonial continuity (Burra, 2008). What is it about the colonial construction of the public sphere and the speaking subject that continues to influence the State and the judiciary's response to free speech issues? The constituent assembly debates reveal that the law makers were acutely aware of the political misuse of penal laws such as sedition to suppress free speech and their motivation to recognize a strong free speech right stemmed partially from their desire to distinguish the democratic republic from colonial rule. At the same time we encounter a paradox which began with the making of the Constitution and continues till date where we encounter a reluctance to recognise an absolute right of free speech since the Indian polity is not ready for it, thereby recycling some assumptions that had informed the logic of colonial governmentality.

[1]Art.13 in the Constituent Assembly debates. These can be found in the debate on 1st and 2nd December 1948, 16th October 1949 and 17th October 1949

It is my contention that the logic of colonial rule creates a split at its very origin between a universal rational subject (the enlightened European as a bearer of rights) and the native subject (marked by a hyper sensitive excess) and this foundational split gets recycled in the postcolonial context in terms of class, gender and literacy. In other words the realm of the political is circumscribed by an excessive social sphere which is unable to shed its positivity to emerge as the properly constituted public sphere (Dhareshwar & Srivastan, 1996). If one were to map this out onto the terrain of the Constitution one can see a mirroring of this split in the distinction between Art.19(1)(a) which imagines the citizen as a rational speaking and listening subject even as Art.19(2) circumscribes the possibilities of such speech through the incorporation of regulatory measures that have in mind an affective public sphere susceptible to outrage and provocation (Dhavan, 2007). Asad Ali Ahmed, outlining the evolution of hate speech laws in colonial India argues that the colonial subjects were portrayed by law makers like Macaulay and others as highly excitable subjects who were easily prone to taking offense and responding violently to such offense (Ahmed, 2009). These racially essentialist accounts created the context for the emergence of the colonial State as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence.

Arun Thiruvengadam characterises the different historical periods of free speech as encompassing a universalist nature (dominant during the anti colonial struggle) which were subsequently replaced (during the constituent assembly debates) by particularist concerns which led them to permit several grounds of restrictions of rights in response to such conditions (Thiruvengadam, 2012). We would add to this argument to say that one way of thinking about the paradoxes of free speech in India is to think of it as a right that is granted to all citizen but the question of who is can occupy the space of the properly constituted citizen is far more tenuous. Jaya Nandita Kasibhatla argues the coming-into-being of the Constitution and the citizen took place in the moment of Partition, a crisis that exerted a profound influence on the definition of the citizen that first clashed with, but was then incorporated into, the policy structure of social revolution. She claims that the Constitution is haunted by the crisis of the partition and many of the provisions effectively memorializes the partition and as a result of its incorporation of the idea of historical crisis, the effect on full citizenship is one of infinite deferral (Kasibhatla, 2005). Read in this context, we can see that if Art 19(1)(a) seeks to create a space of deliberative democracy, it is at best a partial project where the deliberative nature of reason underlying it is also accompanied by a sense of a nervous public sphere exemplified in Art. 19(2) with the full citizen and the infantalised citizen occupying the same sphere.

In the original draft that was up for discussion the word sedition had been included as one of the ground for restriction on speech. A number of the constituent assembly members took objection to this. Seth Govind Das in his speech for instance says:

> I would have myself preferred that these rights were granted to our people without the restrictions that have been imposed. But the conditions in our country do not permit this being done. I deem it necessary to submit

> my views in respect to some of the rights. I find that the first sub-clause refers to freedom of speech and expression. The restriction imposed later on in respect of the extent of this right, contains the word 'sedition'. An amendment has been moved here in regard to that. It is a matter of great pleasure that it seeks the deletion of the word 'sedition'.I would like to recall to the mind of honourable Members of the first occasion when section 124 A was included in the Indian Penal Code. I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section It is a matter of pleasure that we will now have freedom of speech and expression under this sub-clause and the word 'sedition' is also going to disappear (CAD VII(18), December 2, 1948).

Three speakers in particular anticipated some of the key constitutional questions around seditious speech. T. T. Krishnamachari argued that the word sedition was anathema to Indians given their experience of it and he suggested that the only instance where it was valid was when the entire State itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder. Any attack on the government, he claimed, ought not to be made an offence under the law. Somnath Lahiri provocatively asked Sardar Patel whether he wanted to create a police State and argued that as a member of the opposition it was his duty to criticize the government as harshly as possible (CAD III(2), April 29, 1947). And finally Damodar Swarup claimed that wide and restrictive provisions threatened to undo the very freedom granted by the Constitution. In particular, he argued that the phrase 'in the interests of general public' was too wide and would enable the legislative and the executive authority to act in an arbitrary manner (CAD VII(17), December 1, 1948). All these issues - whether a criticism of the government would fall under reasonable restrictions, the scope of the phrase 'in the interests of' and more generally the relationship between subversive speech and subversive action ended up becoming the defining battles over free speech in the postcolonial period.

A recurring theme that emerges in evaluations of the state of free speech in India is the assertion that many laws which curtail free speech have their origins in colonial experience and their continued existence and use testifies to the fact that in the domain of speech we face a problem of colonial continuity (Burra, 2008). What is it about the colonial construction of the public sphere and the speaking subject that continues to influence the State and the judiciary's response to free speech issues? The constituent assembly debates reveal that the law makers were acutely aware of the political misuse of penal laws such as sedition to suppress free speech and their motivation to recognize a strong free speech right stemmed partially from their desire to distinguish the democratic republic from colonial rule. At the same time we encounter a paradox which began with the making of the Constitution and continues till date where we encounter a reluctance to recognize an absolute right of free speech since the Indian polity is not ready for it, thereby recycling some assumptions that had informed the logic of colonial governmentality. How do we understand and reconcile this paradox?

It is our argument that the logic of colonial rule creates a split at its very origin between a universal rational subject (the enlightened European as a bearer of rights) and the native subject (marked by a hyper sensitive excess which needs to be regulated) and this foundational split gets recycled in the postcolonial context in terms of class, gender and literacy. In other words the realm of the political is circumscribed by an excessive social sphere which is unable to shed its positivity to emerge as the properly constituted public sphere (Dhareshwar & Srivatsan, 1996). If one were to map this out onto to the terrain of the Constitution one can see a mirroring of this split in the distinction between Art. 19(1)(a) which imagines the citizen as a rational speaking and listening subject even as Art. 19(2) circumscribes the possibilities of such speech through the incorporation of regulatory measures that have in mind an affective public sphere susceptible to outrage and provocation (Dhavan, 2007).

Turning towards the history of subversive speech in the postcolonial context one of the most important precedents in this area, one especially relevant to the JNU situation is the Lohia judgment. In 1954, Ram Manohar Lohia, then General Secretary of the Praja Socialist Party was arrested by the U.P. government for leading protests around the governments policy that had increased irrigation rates for water supplied for canals to cultivators. He was prosecuted under the U.P. Special Powers Act 1942, which criminalized instigating people to refuse to pay taxes. The Allahabad High Court and Supreme Court ruled in favour of Lohia, holding that the State government's action was in violation of Article 19(1)(a). In this case the Supreme Court held that for an action to be restricted under Article 19(2), there needs to be a proximate and reasonable connection or nexus between the speech in question and public order.

The Court said:

> In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a land owner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section (sic). We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark, which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations were accepted, it would destroy the right to freedom of speech, which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order. In this view, we must strike down 3 of the Act as infringing the fundamental right guaranteed under Art. 19(1)(a)

of the Constitution (*The Superintendent, Central Prison v Ram Manohar Lohia,* 1960).

The Court here firmly recognises the right to agitate and protest, while at the same time safeguarding the right to freedom of speech and expression by laying down the bar for when speech can be limited in the interests of public order. The Court's decision assumed enormous significance given that it is the public order restriction that is invoked in most cases dealing with protests, agitations, and criticism of the government.

The debate around the scope and constitutional validity of the sedition law also revolve around the question of the limits of legitimate protest, dissent and criticism of the government. After all, sedition itself is based on the premise that there is a category of speech that has to be criminalized because it causes "disaffection" or disloyalty against the State. The constitutionality of the sedition law was decided by the Supreme Court in a case that dealt with has been upheld as a reasonable restriction based on public order.

In 1961, a Constitutional Bench of the Supreme Court examined a challenge to section 124A of the Indian Penal Code (the sedition law) in *Kedarnath Singh v. State of Bihar,* (1962). The Supreme Court, bunched together a clutch of cases including sedition charges against Kedar Nath, a member of the Forward Communist Party in Bihar, who publicly attacked the Congress in Bihar, alleging corruption, black-marketing and tyranny and talking about a revolution that would overthrow capitalists, *zamindars* and Congress leaders. The other appeals bunched together were that of Mohd Ishaq Ihahi, who was prosecuted for having delivered a speech at Aligarh as Chairman of the Reception Committee of the All-India Muslim Convention in 1953; an appeal related to a meeting of the Bolshevik Party in 1954 organised in a village named Hanumanganj, in the district of Basti, in Uttar Pradesh, where the members were accused of inciting people to open rebellion against the government; the case was that of Parasnath Tripathi for delivering a speech in the village Mansapur in the district of Faizabad, in 1955, in which he is said to have exhorted the audience to organise a volunteer army and resist the government and its servants by violent means (*Kedarnath Singh v. State of Bihar,* 1962).

The Court in this case upheld the constitutionality of the sedition law, but held that at the same time curtailing its meaning and limiting its application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. The Court observed that if the sedition law were to be given a wider interpretation, it would not survive the test of constitutionality. One can see a slight disjunct here between the language of 'tendency to create disorder' used in *Kedarnath and Ram Manohar Lohia,* which as pointed out earlier lays down a much more speech protective test.

While the courts in India have recognised the constitutional right to protest, they have also laid down certain restrictions on the time, place and manner of protests in India. For instance, courts have upheld the constitutionality of a prohibition on meetings

within railway premises that (*Railway Board v. Niranjan Singh,* 1969). Similarly in *J.R. Parashar v. Prasant Bhushan,* (2001) the Supreme Court while dealing with the question of whether protests in front of the court related to its judgment on the Narmada dam amounted to contempt of court, observed that while holding that a *dharna* may not per se amount to contempt of court, the dharna is question ought to be discouraged for fear that "otherwise every disgruntled litigant could adopt this method of ventilating his grievance." The Court distinguished the dharna in question as "an inappropriate form of protest since the object…is either to raise public opinion or to exhibit the extent of public opinion against a decision of a court."

In *Communist Party of India v. Bharat Kumar,* (1997) the Supreme Court ruled that while other types of protests and strikes, such as holding signs along a public pathway or chanting in front of a public building or simply refusing to work, may generally be protected in most situations, there is a distinction between an ordinary strike and a *bandh* in that the latter causes or compels people to stop exercising their lawful rights and engaging in lawful activities. Specifically, the Court agreed in that the government "… being duty bound to protect the people, has to prevent unlawful activities like Bundh, Rally etc. which invade or threaten to invade their life, liberty, and property" (*Ranchi Bar Association v State of Bihar,* 1999).

In constitutional challenges related to the right to strike, courts have again not upheld blanket bans, (*Kameshwar Prasad v. The State of Bihar,* 1962), while at the same time ruling that there is not statutory provision allowing for government employees to go on strike. (*T. K. Rangarajan v. Government of Tamil Nadu,* 2003). Similarly, in a series of cases, courts have regulated the use of loudspeakers during public protests or meetings. Further local laws regulate the time, place and manner of protests, including designated zones for protests, and regulating demonstrations based on the number of persons involved.

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Surveillance and Democracy in India: Analysing Challenges to Constitutionalism and Rule of Law

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Advancements in digital and communication technologies have brought about changes in the nature of surveillance and this in turn has impacted functioning of democracy. Additionally, surveillance is regarded as a grand narrative, accreted as a cultural entity to reduce fear, insecurity, misgovernance, corruption, and provide access to speedy public service delivery and welfare. In this scenario, in order to exercise democratic rights, people need to interlace themselves with surveillance. However, the construction of such a narative conceals the potential corrosive effect of mass surveillance. This paper aims to explore the changes made in the domain of surveillance to face existential challenges and followed by counter effects of deploying sovereign power on democracy, constitutionalism and rule of law. Further, it will examine the significant changes occurring in legal measures and digital technological mechanisms of surveillance in India.

Keywords: *Surveillance, Democracy, Digital Technology, Democracy, India.*

Major terror attacks in early part of the twenty-first century was identified to be one of the major threats to the Indian State. The responses to it have had profound implications for democracy in India. One of the significant response has been the transformation in the nature of State surveillance; it has been linked to burgeoning global terrorism and the development discourse. Simultaneously, there is an unrelenting expansion and frenetic search for alibis to control ever larger areas of society and people. This paper will restrict itself to an examination of surveillance infrastructure, the legal and legislative framework in place and its implications for democracy in India.

In the first section the paper will map how surveillance has engulfed human lives. Then it moves ahead, to analyse the significant changes that have occurred in legal framwork and technological mechanisms of surveillance in India. The legal measures includes provisions for extraordinary and ordinary situation. The quest for increased surveillience was facilitated by technological innovations in monitoring and data-collection; State is now capble of controlling and monitoring its vast territory and population. The paper examines how profound changes have resulted in concern over the need to strike a balance between 'security' and 'freedom'. Later it specifically analyses the challenges and implications of surveillance on Indian democracy. It is an effort to understand and conceptualise the trajectory of continual reforms, innovations, exponential advances in surveillance techniques.

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Politics, legalities and mechanisms of surveillance in Indian State

According to David Lyon (2008) surveillance is the "purposeful, routine, systematic, and focused attention paid to personal details, for the sake of control, entitlement, management, influence or protection". Surveillance may be direct, face-to-face or technologically mediated; the latter is growing expeditiously and such pervasive and ambiguous proliferation needs methodological understanding (Lyon, 2007, p.1). Surveillance is a dominant organising practice of late modernity; it is used for varied purposes. "We can appreciate the centrality of surveillance to organizational end epistemological endeavourers if we simply step back and survey how various manifestations of watching have become a central institutional preoccupation" (Haggery & Samatas, 2010, p.3). Also, its varied roles in different conditions result in diverse outcomes.

From time immemorial there have been various techniques to monitor, observe, and control population. However, under the gaze of modern State, these techniques and practices of surveillance have become predominant. During colonialism the existence of colonial State depended on the successful mastering, manipulating, codifying, documenting, controlling, classifying, bounding, reporting, and investigating its subjects (Cohn 1996, p. 3-11), and "information order." As Chirstopher Bayly (1996) argued "without good political and military intelligence the British could never have established their rule in India" (p. 10). Under the post-colonial Indian State, surveillance is used as a legitimate means to protect citizens from terrorist attacks and also to govern distribution of rights and entitlements; this qualitatively differs from the erstwhile colonial surveillance. To accomplish that, the State by virtue of its sovereign power directs mass surveillance by biometric identification, creating population records or census, and even arbitrarily monitoring ubiquitously.

The 9/11 (2001) terrorist attack in US shook the entire world; it led to adopting UNSC Resolution 1373 on September 28, 2001 mandating concerted international effort against global terror networks. Later, attack on Indian Parliament building in New Delhi on December 13, 2001 stirred up the demand within India to enact new anti-terror regimes to counter modern terror and its global networks. The 26/11 (2008) terrorist attacks in Mumbai shook the Indian State and this led to major developments in the use of surveillance technologies (Singh, 2012; Singh, 2014).

During this period, the governemnt of India through series of reforms in anti-terror legal regimes acquired new techniques of surveillance for keeping tabs on electronic footprints of its population. The model legislation for interception of wire, electronic or oral communication (Section 14) followed from Maharashtra Control of Organised Crime Act 1999, which originated to deter organised crime. Its provisions included in the Prevention of Terrorism Act (POTA) 2002 in which interception of communication (Section 36–48) was permitted. While POTA was repealed in 2004, its perilous features of surveilling techniques were maintained by incorporating them in the Unlawful Activities Prevention Act 1967 (UAPA), like those relating to the "interception of telephone and electronic communications" (Section 46) (See Table: 1).

Table 1: Comparison of Anti-terrorism Legislation in India

Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The prevention of Terrorism Bill, 2000 (Draft Bill as recommended by Law Commission of India)	The prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
Interception of communications				
Interception of Communication in certain cities	No separate provision	No separate provision	Separate chapter 5 containing provisions regarding (1) description of communication meant for interception (2) appointment of competent authority by the Central or State Government for this purpose. (3) authorisation of such interception (4) review of order of interception issued by the competent authority by a review committee (5) duration of an order of interception etc.	No such provisions. However, Section 46 provides the following: Admissibility of evidence collected of communications- "Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or any other law for the time being in force, the evidence collected though the interception of wire, electronic or oral communication under the provisions of the Indian Telegraph Act, 1885 (13 of 1885) or the Information Technology Act, 2000 (21 of 2000) or any other law for the time being in force, shall be

Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The prevention of Terrorism Bill, 2000 (Draft Bill as recommended by Law Commission of India)	The prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
			(6) description of authority competent to carryout interception (7) interception of communication in emergency situations (8) protection of information collected (9) Admissibility of evidence collected through interception of communications (10) prohibition of interception of communications (11) annual report of interceptions	Admissible as evidence against the accused in the Court during the trail of a case: Provided that the contents or oral communication intercepted or evidence derived there from shall not be received in evidence or otherwise disclosed in any trail, hearing or other proceeding in any court unless each accused has been furnished with a copy of the order of the competent authority under the aforesaid law, under which the interception was directed, not less than ten days before trial, hearing or proceeding: Provided further that the period of ten days may be waived by the judge trying the matter, if he comes to the conclusion that it was not Possible to furnish the accused with such order ten days before the trial, hearing or proceeding and that the accused shall not be prejudiced by the delay in receiving such order."

Source: India. Second Administrative Reforms Commission. (2008). *Combatting Terrorism Protecting By Righteousness,* Eighth Report, p. 167. Retrieved from http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan045484.pdf

With such legal frameworks, the Indian State equipped and empowered itself to intercept, tap and eavesdrop telephonic conversations, scrutinise financial transactions and ban suspicious activities (Singh, 2007 , pp.70-75, 325; Singh, 2012, p.439; Singh, 2014, pp. 42-46).

Concurrently, as can be seen in Table 2, in order to protect and provide safeguards against any potential misuse of interception provisions, POTA contained institution of a review committee [Section 40, 46, 60].

Table 2: Comparison of Anti-terrorism Legislation in India

Sl. No	Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The prevention of Terrorism Bill, 2000 (Draft Bill as recommended by Law Commission of India)	The prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
	Review Committees				
	Review Committee	No separate provision	Clause 39 provides for setting up of review committees by the Central and State Governments to reivew, at the end of each quarter in a year, cases instituted by them under the Act,	Section 60 provides that the Central and State Governments shall constitute one or more review committees for the purposes of the Act.	Section 37 provides for constitution of one or more Review Committees for purposes of review of an order of the Central Government rejecting an application for denotification of a 'terrorist organsiation'

Source: India. Second Administrative Reforms Commission. (2008). *Combatting Terrorism Protecting By Righteousness,* Eighth Report, p. 168. Retrieved from http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan045484.pdf

However, the Central government failed to set up a Review Committee until several months after the Act came into force. Further, Section 48 of POTA mandated the placing of annual report of interceptions before the Houses of Parliament or the State Legislatures. The report is to give a full account of the number of applications for interception and reasons for their acceptance or rejection. It provides for public scrutiny and was, therefore, a potential check on government arbitrariness. However, in the absence of political will these safeguards were never activated. (Singh, 2007, p.153-154). Unlike POTA, UAPA does not have any provision of Review Committee or legislative review. This which makes actions taken under it opaque and not subject to public scrutiny with hardly any safeguard from potential misuse.

Here, the entire legal framework of "anti-terror laws are on extraordinary procedures, which bring into existence dual systems of criminal justice (ordinary and extraordinary), as they differ in terms of procedures" (Singh, 2007, p.314). In extraordinary law, telephone interceptions can be produced as primary evidence against an accused, which is absent in ordinary law (Singh, 2007, p.70). In the climate of global terrorism the Indian State in order to respond, shaped legal measures through state of exception and appropriated surveillance powers. It should be noted in this context that in India the debate surrounding state of exception was rigorously deliberated by framers in Constituent Assembly; they held divided positions on dilemma between liberty and national security. As of now, the state of exception hold constitutional basis in form of emergency and preventive detention provisions (Thiruvengadam 2010, p. 477-479). Apart from provisions for extraordinary situation, there is an array of normal provisions for normal times.

Beyond terrorism related surveillance, the pre-existing laws governing wiretaps permits the government to intercept information from computers to investigate any offense (Gitenstein, 2009, p.31). Telephone tapping and snooping became a serious concern in the post-emergency era. During the tumultuous period of 1980s and 1990s, there were major scandalous revelations about the involvement of several politicians in snooping. Political snooping even led to the resignation of Ramkrishna Hegde from Chief Ministership of Karnataka in 1988. After allegations by Chandra Shekhar, an enquiry by CBI revealed that there were widespread covert and even illegal snooping between 1984 and 1987. Not only the phones of their political opponents but also of their political allies, Members of Legislative Assembly, State ministers, trade union and religious leaders. (Chawla, 1991). Despite the guidelines given by Supreme Court in *People's Union of Civil Liberties v. Union of India* (1996) to regulate such political snooping, massive violations continued. This is the consequence of a legal regime, which authorises the State to intercept as per the procedure established by law. These include provisions as in s.5 (1) and (2) of the Indian Telegraph Act 1885, Rule 419(A) of the Indian Telegraph Rules 1951, as well as s.69 of the Information Technology Act 2009. Further, "while existing laws primarily relates to interception of calls, CMS (Central Monitoring System) expands surveillance across Meta-Data ... Access, transfer and retention of CDRs (Call Data Records) is weakly defined under the existing laws" (Singh, 2013). It empowers the State to intercept communications on the occurrence of any 'public emergency' or 'public safety', or when it is deemed necessary or expedient to do so in the following instances: in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, and for preventing incitement to the commission of an offence (Gitenstein, 2009; Singh, 2014). Undoubtedly, there is an extensive amount of electronic surveillance in India.

Unlike the United States' Foreign Intelligence Surveillance Court (1978) to regulate surveillance and United Kingdom's Investigatory Powers Tribunal (2008) and Intelligence and Security Committee of Parliament to oversee and examine unlawful surveillance India does not have any of such institutional apparatus. In 1996, People's Union for Civil Liberties (PUCL) judgment, the Supreme Court of India retreated from providing 'prior judicial scrutiny' and declared that it is up to the central government to lay down

'procedural safeguards and precautions' from unlawful surveillance. However, it directed and placed restrictions on the class of bureaucrats who could authorise interception, and ordered the creation of a 'review committee' so that the right to privacy is protected. Besides several allegations of phone tapping by politicians on their rivals, there have been few prominent incidents. Gujarat government's surveillance on a woman architect in 2009 ("Fresh tapes on Gujarat," 2013) and the Radia tapes controversy in 2010, revealed a deep nexus between corporate, politics and interception, (Sharda, 2013), whereas the illegal phone tapping by State agencies in Himachal Pradesh in 2013 (Lal, 2013), and the clash between the two recently bifurcated States (Telengana and Andhra Pradesh) in phone-tapping row in 2015 (Singh, 2015) reaffirmed the same. It does reflect the failure of proper procedural framework to provide safeguards from unlawful surveillance and corrupt uses of power.

Major changes in India came about in the post-26/11 scenario to address challenges regarding national security and terrorism. Major initiatives for data-collection included launching of Central Monitoring System (CMS), National Intelligence Grid (NATGRID), an unmanned aerial vehicle (UAV) Netra, and Network Traffic Analysis (NETRA). It reflects how 'surveilling space' was injected into the 'democratic space' of the Indian territory. Such a massive technological establishment was to remould the Indian State. Minister of State in the Ministry of Home affairs, Kiren Rijiju while answering an unstarred Question in the Rajya Sabha noted that the Government of India launched CMS, which can carry out deep search surveillance including monitor mobiles, Short Message Service (SMS), fax, website visit, social media usage, and much more. (India. Parliament, Rajya Sabha, 2014b) It is carried out without any assurance of a matching legal and procedural framework, because it is held that under ordinary operation of the law, individuals could hide behind the law to avoid prosecution for their illegal behaviour (Austin, 2015).

The 26/11 Mumbai attack exposed several weaknesses in India's intelligence gathering and action networks and therefore NATGRID was launched. Minister of State in the Ministry of Home affairs, Kiren Rijiju while answering an unstarred Question in the Rajya Sabha noted that NATGRID will automate the existing manual processes for collation of Intelligence. It shall leverage information technology to access, collate, analyse, correlate, predict and provide speedy dissemination. It is a technical interface or central facilitation centre, with an integrated facility, which aims to link databases of 21 categories (e.g. travel, income tax, driving licenses, bank account details, immigration records, telephone etc.) (India. Parliament. Rajya Sabha, 2014a). In addition to this, its data would be shared with 11 central agencies (e.g. Central Bureau of Intelligence, Intelligence Bureau (IB), Research and Analysis Wing, National Investigation Agency (NIA) etc.). It is essentially 'dataveillance,' wherein the users' actions or communications are monitored and investigated, through which they can be tracked, monitored, intercepted and traced (Lyon, 2007, p.16; Lyon, 2009, p.50).

In order to facilitate, arguably, efficient delivery of welfare services, the Indian State unveiled biometric marking Unique Identification Number (UID) or Aadhaar card, which contains a standard form of 12-digit identity number. It comprises of interlocking

of technologies and mechanisms that serve a range of desires, including those for control, governance, security and much more. Especially by interlocking biometric card with Intelligence Grid and the National Population Register, the colossal database can be shared with various other intelligence agencies and government departments (Singh, 2014; Singh, 2015a). The pilot project UID commenced to provide universal identity and remove ghost-beneficiaries, now it is being linked with NPR data to find out ghost residents. Such an interlocking and convergence reflects that Indian State is not just concerned about efficient delivery of welfare or providing safety and security, but furthermore to keep a surveilling gaze on its population. In a whole this process reflects Haggerty and Ericson's (2000) conceptualisation of "surveillant assemblage" which describes it as a rhizomatic character of surveillance which brings together the multiple, overlapping governing practices which operates with different capabilities and purposes.

It all commenced under United Progressive Alliance (UPA) regime not through statutory law but with a notification in 2009 (Planning Commission, 2009); two years later an effort was made to give it a statutory backing. However, the Parliamentary Standing Committee on Finance rejected the National Identification Authority of India (NIAI) Bill 2010. The committee pointed out the absence of data protection legislation, dangers and issues like access and misuse of personal information, surveillance, profiling, linking and matching of databases and securing confidentiality of information. Later, the Bharatiya Janata Party (BJP - Indian People's Party) led National Democractic Alliance (NDA) government, on March 2016, passed Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Bill in the Parliament as a Money Bill despite severe furore. It does raise some serious questions as Clause 33 (2) says, "disclosure of information, including identity information or authentication records, made in the interest of national security" which shows an intention to use this data for national security and surveillance. In order to protect blatant misuse, this clause lays out "an oversight committee consisting of the cabinet secretary and the secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology." This committee would act as a channel to review any unlawful surveillance by the government. However, if we look into the legacy of the aforementioned committees we can understand corrupt uses of power.

An even more lethal surveilling mechanism is NETRA, an internet monitoring system capable of keyword-based detection, a monitoring, and pattern-recognition system for packetized data and voice traffic in virtual world ("Govt to launch", 2014). Additionally, Netra is also the name of aerial surveillance. These comprise of uninhabited, remotely controlled UAVs or Drones to keep an eye on suspect activity from a vertical position. In India, there has been an extensive utilisation of lightweight UAVs for public safety and security, patrolling, to manage violent protests, crowd management, police investigation and much more in several cities. Furthermore, it is widely used by civilians for private purpose. In October, 2014 Director General of Civil Aviation (DGCA) banned the usage of drones for civil applications citing safety and security concerns (Government of India. Director General of Civil Aviation, 2014). Later in May, 2016 draft guidelines

for drones were released in which it said Unique Identification Number (UIN) would be issued by DGCA. Every drone would be inscribed with UIN and Radio Frequency identity tag or SIM and also need to obtain UA Operator Permit (UAOP) if operated at or above 200 feet in uncontrolled airspace (Government of India. Director General of Civil Aviation, 2016). It shows that "Indian government has sought to monopolize all powers of surveillance" (Singh, 2014, p.50) by making any electronic surveillance by private agencies and civilians an offence.

In 2013 major revelations by Edward Snowden changed the global discourse of surveillance, it swung the pendulum back to the traditional meaning as being a sinister force having "connotations of surreptitious cloak-and-dagger or undercover investigations into the individual activities" (Lyon, 2007, p.13). His revelations were quite grievous about the scope of National Security Agency surveillance not only on U.S population but also on foreign countries, in which India was ranked fifth.

In recent years the data protection and privacy has fallen afoul with the 'third party' (Solove, 2011) i.e. non-state actors. In 2010, Blackberry was warned by the Indian State to either provide access to security agencies to monitor the information on their services or face ban and finally it had agreed to provide access to partial services. In 2010 Indian government asked Blackberry to provide access to monitor their messenger, internet and enterprise service. The company responded by providing lawful access to BlackBerry Messenger (BBM) and BlackBerry Internet Service (BIS) email, but it denied decoding of its intranet facility in BlackBerry Enterprise Service (Singh, 2012). Similarly, the Apple vs. FBI debate intensified issues regarding privacy and security, and it further widened the issues such as the role of State and non-state actors (corporate companies) in data protection.

In a nutshell, the first decade of the twenty-first century witnessed the Indian State making itself technologically competent to control and monitor its territory and population in the name of security.

"Two sides of a coin": conundrum of 'security' or 'freedom'

According to David Jenkins (2014) several legal changes occurred in a decade which he calls a "long decade" where legal systems evolved in reaction to global terrorism not only in India but around the world. Several scholars have tried to understand the nature of surveillance State, and the conundrum between 'security and freedom'. Jeremy Waldron (2003) strikes a note of caution when he states, *"(w)e must also be sure that the diminution of the liberty will in fact have the desired consequence"* (italics as in the original) (p.208). Reducing liberty consequently increases the power of the State and this might in turn cause harm or diminish liberty in other ways. Instead of trading off liberties for purely symbolic purposes and a consequential gain, there should be assessments about the effectiveness of such trade-offs.

However, Eric Posner and Adrian Vermeule advance a trade-off thesis between security and liberty. They argue that both security and liberty are valuable goods that contribute to individual well-being or welfare, and neither good can simply be maximized without regard to the other. One of the characteristics of emergencies or terrorist attacks is

the defensive measures where the government opts to increase intelligence gathering and monitoring. Also, during such period the executive which is swift and vigorous get the institutional advantages along with their secrecy and decisiveness. In contrast, the judges are at sea and the evolved legal rules seem inapposite and even obstructive possessing limited information and limited expertise (Posner & Vermeule, 2007, pp.15-57; Vermeule, 2014, pp.31-45).

Similarly, Richard Posner (2006) maintains that rights should be modified according to circumstance and that we must find a pragmatic balance between personal liberty and community safety. He finds the direct connection between liberty and security just as there is an automatic direct balance between them- a 'fluid hydraulic balance.' It shifts continually as threats to liberty and safety wax and wane (pp.31-41). According to him, "privacy is the terrorist's best friend" (p.143) therefore, the government has a compelling need to exploit digitization in defence of national security. The dangers of data mining, leakage of information should be prevented through sanctions and other security measures (Posner, 2006, pp.143-145).

The trade-off thesis sees the balance between security and liberty as a zero-sum trade-off. However, Daniel Solove finds this argument as completely flawed and argues that the balance between privacy and security is rarely assessed properly. Instead he argues that the real balance should be between "security measure with oversight" and "regulation and security measure at the sole discretion of executive officials" (Solovo, 2011, pp.33-36).

In the West in general and US in particular the role and responsibility of judiciary in times of counter-terrorism and surveillance is considered to be crucial; it is the guardian of constitutionalism and human rights. Jenkins (2016) argues that the judiciary through judicial review has to protect procedural fairness. In order to play a greater role it needs to counter 'pull of deferentialism,' which erodes the particular responsibility of judges (Scheinin, 2016). In this scenario one of the fundamental problems, that judiciary around the world and particulary in India face is how to calibrate the balance between security and freedom.

In India, the concept of freedom does not merely revolve around providing security from potential terrorist attacks, which were actually addressed by several legislative reforms and introducing technologies of surveillance. Rather, it also involves freedom to access welfare schemes and entitlements, freedom from misgovernance and corruption. With this idea, the grand biometric identification project was initiated. However, such an idea diluted the notion of privacy, because there is a general agreement that there is 'nothing to hide' and that it is a 'false trade-off' of privacy in the name of welfare. It is to this aspect that we will now turn our attention.

Challenges to constitutionalism and rule of law

On February 2, 2016, Indian President Pranab Mukherjee, in his inaugural speech at the Counter Terrorism Conference 2016 in Jaipur said, "terrorism is undoubtedly the single gravest threat that humanity is facing today. Terrorism is a global threat which poses an unprecedented challenge to all nations…important aspect of counter-

terrorism strategy is capacity building to prevent attacks through intelligence collection and collation, development of technological capabilities, raising of special forces and enactment of special laws" (India. Press Information Bureau, President's Secretariat, 2016). He highlighted not merely the graveness of the unease but also the need for counter actions.

As mentioned earlier Nation-States around the world are facing the most complex and intertwined menaces of global terrorism. In this scenario, State surveillance is tailored as a legitimate defence to protect democracy and freedom. At a conceptual level surveillance and democracy are antithetical and the relationship is complex, contextual and multifaceted. Its impact on our lives making it critical to understand the complexity of the relationship between each other.

Aftermath of Orlando Attack in United States (June 12, 2016), D.C. Pathak (former Director of IB) contended that preventive action taken on an intelligence assessment, if questioned in the human rights plane in all cases would weaken the security of a democratic state. He further argued that intelligence set up in a democracy is wedded to an apolitical pursuit of threats to national security and its professionalism would normally not be questioned by any other wing or agency of the government. (2016). Further, Uday Bhaskar (2005) argues that democracies remain vulnerable and if the freedom of personal movement is not to be ruthlessly curtailed, preventive measures will have to be reviewed and appropriate surveillance procedures introduced. In other words, it is often imperative for a functioning democracy to curtail the illegal behaviours and activities which can pose a threat to democratic intuitions (Haggery & Samatas, 2010, p.7). According to Kevin Haggerty and Minas Samatas (2010), democracy involves a system of open procedures for making decisions in which all members have an equal right to speak, have their opinions counted and for protecting individuals from the corrupting effects of power. Further, they assert that one of the significant things about democratic governance and surveillance is that the democracies are accountable to their citizens. The main contention being that democracy and surveillance can co-exist. It is due to that that despite opposition surveillance continues; it is believed that it is near impossible to penetrate complex criminal organisations through conventional police work.

In India, during post 9/11 and 26/11 scenarios, interception clauses were enabled through series of legislative reforms enacted after lackadaisical parliamentary debates. Even debates in civil society were eschewed in the name of national security or development of the state and were addressed with nationalist jingoism. Most appropriate case of eschewing would be Armed Forces (Special Powers) Acts implemented in particular areas which provided immunity and powers to armed forces to constantly monitor and surveil civilians from last five decades.

Such developments most importantly abridge the right to privacy and it gets more complex due to the sheer absence of persuasive jurisprudence of privacy protection supplemented with legislative silence in India. Contrary to the absence of privacy law, there are numerous laws which trample and trespass the right to privacy. In 2012,

the committee of experts on privacy, chaired by Justice A.P. Shah (Shah Committee) suggested among other things a constitutional basis for the right to privacy. The Committee highlighted how different forms of surveilling clauses have created an unclear regulatory regime which is non-transparent, prone to misuse and does not provide remedy for aggrieved individuals. The recommendations refer to the chequered history of telephone tapping and political snooping in the hands of the State and raise questions on the standard and procedural legal framework to safeguard individual privacy and personal liberty. Instead of looking at it narrowly as a privacy issue we must look into broader issues such what are the goals of State surveillance and the extent to which it is required to counter terror, protect national security and to streamline service delivery.

In this scenario, the major challenges for democracy and surveillance appears around constitutionalism and rule of law. Their basic idea is to maintain institutional restraints and insulate fundamental liberties from oppressive actions by the State by turning it into a subject of the law. Under the 'long decade' these notions were transformed, in response to changing threats to national security. To evade unpredictable catastrophic risks, uncertain and unanticipated threats, or any extra-ordinary and emergency situations, the Indian State created discretionary space to respond to these situations. Such discretionary space is what David Dyzenhaus calls as legal "black hole" and legal "grey hole", the former is "a situation in which there is no law," the latter is "a facade or form of the rule of law rather than any substantive protections" (Dyzenhaus, 2006, p.3).

The government instituted major intelligence organisations and surveillance infrastructure, without any legal basis or statutory existence, which is a legal "black hole." It gave enormous power to the executive without any accountability and transparency in their functioning. On February 23, 2016, Supreme Court dismissed Public Interest Litigation (PIL) from non-governmental organisation, Centre for Public Interest Litigation, to bring accountability and transparency in the functioning of intelligence agencies. The judiciary maintained that the intelligence agents are bound to have secrets which the courts could not scrutinise (Choudhary, 2016). Apart from this legislature, to address extra-ordinary situations and public emergency, it framed laws they are basically a legal "grey hole." It is not a lawless void, but a legal space in which there are some legal constraints on executive action. Even so the constraints are so insubstantial and inadequate that it is unlikely to provide substantive protections from potential dangers of unlawful surveillance and corrupt uses of power.

The dangers of surveillance do not merely arise from its use during emergencies; rather its use for ordinary purpose is far more lethal. The presence of political surveillance turned out as a dragnet to surveil and prevent oppositions, movements and disagreements against the Indian State and induce State's ideological and developmental discourse. In doing so, it limits the possibility of alternative political constituencies to emerge or become effective and it can have disastrous consequences for the prospect of nurturing a democratic public sphere (Haggery & Samatas, 2010, p.5). According to John Tropey (2000), the State monopolised the legitimate means of movement in modern century. Such monopolization gave immense power to the State to trace and

monitor individuals, then prevent and expropriate right to travel and right to freedom of expression. For instance in 2016 Gladson Dungdung's passport was impounded, in 2015 a look out circular was issued on Priya Pillai and prevented to travel abroad, and in 2014 Christian Mehta was deported. As Ashis Nandy (2010) has argued that with the development of modern technology, management systems and information control modern State's control over citizen's rights and freedoms are more absolute. Moreover, it leads to formation of a State which successfully plucks out the escape routes and maintains social order and management. In doing so surveillance by the State not only violates right to privacy and free movement but also inhibits freedom of expression.

The major challenge for democracy in India is to strike a balance between often-corrosive surveillance measures with civil liberties. The State has the power to monitor and control people. Even if there are laws, they are substantively fragile to protect the democratic rights and constitutional freedoms from unlawful surveillance and corrupt uses of power. In coming future the relationship between surveillance and democracy would remain unsettled until the issues such as constitutionalism and rule of law related to them are addressed.

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Death Penalty: A Paradox in a Democracy

Reena Mary George*

Death penalty has produced endless discourse not only in the context of prisons, prisoners and punishment but also in the legal arena - about the validity of death penalty: right to life, torture, so on and so forth. This paper aims to examine death penalty within the Indian context and locate it within the larger frame of its impact on democratic process. It relies on the study with death row prisoners which concludes that death penalty is a constructed account by the state machinery. Further the paper also leans in favour of the abolitionist perspective that death penalty contradicts basic democratic principles such as human rights and rule of law. For an effective contribution to the debate on the paradox of death penalty in a democracy, the paper discusses death penalty in the realm of democratic and legal context where it discusses the processes leading to death row and finally bringing in the relation between rule of law and death penalty.

Key words: Death penalty, Capital punishment, Democracy, India, Prisoners, Death Row,

The death penalty has produced endless discourse not only in the context of prisons, prisoners and punishment but also in the legal arena – about the validity of death penalty: right to life, torture, and so on and so forth. One of the most significant movements around the world is the one seeking to end death penalty. It is increasingly recognised that death penalty violates human rights and every civilised society should ban it. It is in view of this that, Garland noted, "what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited" (Garland, 2011, p. 61).

India's unique and complex democracy is the world's largest and it retains the death penalty and continues to hand out death sentences. However, there is a notable decrease in the number of prisoners sentenced to death each year. In 2007, 186 prisoners were sentenced to death; in 2011 it came down to 117 prisoners; in 2013 it was 125 and in 2014, it was 95 prisoners but went up to 101 in the year 2015 (National Crime Records Bureau, 2016; George 2015).

The purpose of this paper is to contribute to the existing debate that death penalty is a paradox in a democracy. This paper will firstly situate death penalty in the realm of democratic context in India. Secondly it will locate death penalty in the legal context in India. Thirdly this paper will examine the processes leading to death row including the brief description of demographic profile of prisoners on death row in India. Finally, this paper will deliberate on the paradox of death penalty with reference to one of the principles of democracy i.e. the rule of law.

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Death penalty in the realm of democratic context

One of the key principles of democracy is the rule of law. In 2004, the international community agreed on the following working definition of rule of law:

> A principle of governance, in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (United Nations Security Council Secretary-General, 2004).

In India, there was a general lull on matters related to death penalty after the execution of Dhanojoy Chatterjee (*Dhananjoy Chatterjee Alias Dhana v. State Of West Bengal*, 2004). Also known as Dhana, he was convicted in 2004 and executed for the rape and murder of an 18 year-old woman. Dhana maintained until his death that he was innocent. While many newspaper reports indicated that the victim was a 13–14 year-old schoolgirl the judgment stated the victim was an 18 year old woman. India saw an execution-free period of seven years between 2004 and 2012.

However, in the recent past, death penalty has generated immense public debate. At the end of May 2011, the ex-President Pratibha Patil rejected the mercy petitions of Devinder Pal Singh Bhullar (*State of Punjab v. Devinder Pal Singh Bhullar & Ors.,* 2011) and Mahendra Nath Das (*Mahendra Nath Das v. The Union of India and Ors.,* 2013). A mercy petition is sent to the Governor or the President seeking pardon or mercy after all the appeals have exhausted. Bhullar was sentenced to death in 2001 for plotting the terrorist attacks that killed nine people in Delhi in 1993; Das has been on death row since 1997 for committing a murder in Guwahati, Assam, in 1996. The President also rejected in August 2011 three mercy petitions of Murugan, Santhan and Arivu alias Perarivalan, assassins of former Prime Minister Rajiv Gandhi (*Union Of India v Sriharan @,Murugan & Ors.,* 2014). A Special Anti-Terrorist Court sentenced them to death in January 1998; the Supreme Court of India confirmed it in May 1999. The common factor for all of the above cases was that their mercy petition was with the President for a considerable period of time. Even though the President rejected the mercy petitions of the above prisoners the courts suspended executions for these prisoners. This was to allow consideration of separate legal challenges on the delay in the decision of the mercy petitions and the constitutionality of their prolonged stay on death row.

With the rejection of mercy petitions, the debate on the death penalty started gaining momentum in India. The next wave of public opinion on the death penalty accelerated after the 'secret' execution of Ajmal Kasab on 21st November 2012. The news of Ajmal Kasab's execution appeared in media broadcasts (print and electronic) only after his death. Kasab was the lone surviving 'gun-man' of the Mumbai Terror Attacks in 2008.

After his execution, people celebrated it as one would celebrate festivals in India – with drumbeats, crackers and colours. At the same time there was a group of individuals criticising the barbaric and secretive execution of Kasab. Added to the debate was the 'secret' execution of Afzal Guru on 9th February 2013. His family was not informed in time about his execution. This deprived them of an opportunity to meet him for one last time and he did not have a chance to tell them goodbye. His body was not returned to the family for last rites and burial, in violation of international standards. Afzal Guru was convicted for the attack on the Indian Parliament in 2001 (Roy, 2013). To avoid what happened to Afzal Guru and Ajmal Kasab in terms of not being able to inform their families, a recent judgment stated that the families should be informed and prisoners should know about their execution 14 days in advance (*Shatrughan Chauhan & Another v. Union of India & Ors.,* 2014). Afzal Guru was also denied the opportunity to seek a judicial review of the decision to reject his mercy petition (Amnesty International, 2012). Finally, the gang rape and eventual death of 'Nirbhaya' (Delhi rape and murder victim) acted as a stimulus to the 'popular upsurge' in the demand for chemical castration and death penalty for rapists (Press Trust of India, 2012). The more recent instance is that of Yakub Memon who was accused of taking part in sponsoring the 13 blasts that rocked Mumbai in 1993. He was executed on July 30, 2015; sparking off considerable debates on the role of death penalty. Those who argued against death penalty maintained that, state death is never a deterrent; it merely exacts retribution. However, as things stand today death penalty is permitted within the legal framework.

Death penalty in the legal context

The provisions relating to capital punishment are embodied in the Indian Penal Code, 1860 and the Criminal Procedure Code, 1973. It provides capital punishment for eight categories of offences namely:

- waging war against the Government of India;
- abetting mutiny by a member of the armed force;
- fabricating false evidence with the intent to procure conviction of a capital offence, with the death penalty applicable only if an innocent person is in fact executed as a result;
- murder;
- murder committed by a life convict;
- abetting the commission of suicide of a child or insane person;
- attempted murder actually causing hurt, when committed by a person already under sentence of life imprisonment;
- kidnapping and dacoity with murder (Indian Penal Code, 1860 (Section 121, 132,194,302,303,305,307,364 (a) and 396).

In handing over death sentence, the Supreme Court evolved with the doctrine of 'rarest of rare crimes' in *Bachan Singh v. State of Punjab* in 1980. Though what constitutes the 'rarest of the rare crimes' was not defined explicitly some principles were laid down. It said that the extreme penalty of death should be given only in the gravest cases of extreme culpability; the circumstances of the 'offender' should be taken into consideration along with the circumstances of the 'crime'; life imprisonment is the rule and death sentence an exception; and that a balance sheet of aggravating and mitigating circumstances should be drawn up along with its mitigating circumstances. It further said that the crime had to disturb the 'collective conscience' of the society (*Machhi Singh and Ors. v. State Of Punjab,* 1983).

Processes leading to death penalty

The legal framework provides an understanding of the crimes and circumstances under which death sentence is handed over in India. However, it is also crucial to understand from the experiences and perception of prisoners of death row themselves the processes in the criminal justice system that leads to death penalty. This section will examine the study that captured the voices of prisoners on death row in India. The objective of this study was to enquire if the dignity and rights of the prisoners were upheld while confronting the criminal justice system and while surviving in the death row. A total of 111 prisoners on death row and their families were interviewed from 16 prisons in six states in India (George, 2015, p. 35). This study was underpinned in the phenomenological approach to understand the meaning of events and interactions to ordinary people in particular situations (Bogdan & Biklen, 1998). At the same time, a perspective was required for viewing the dialectic between the prisoner and the social structure of the organization in this case the prison. Symbolic interactionism appeared to provide such a perspective (Blumer, 1986). The age group of prisoners ranged from 18 – 60 years upwards with 44 per cent in the 30 – 40 years age group. Most of them (99 per cent) were men. Around 53 per cent worked as daily wage workers or casual labourers, 13 per cent carried out own business, 5 per cent were professionals like engineers, chartered accountants or computer professional, 15 per cent were unemployed and 14 per cent refused to disclose their occupation. Among these 111 prisoners, 17 per cent were illiterate and have never been to a school or even registered as a child in a school, a relatively small proportion of 12 per cent completed their bachelors, masters, professional degree or vocational training and 15 per cent of the prisoners refused to disclose their educational level. Majority of prisoners were Hindus (67 per cent) followed by Islam (14 per cent); Christians (six per cent); Sikhs (five per cent); and Buddhist (two per cent). Around four per cent refused to disclose their religious identity and two prisoners insisted on putting down their religion as Marxist and Atheist respectively. Nearly 37 per cent of the prisoners on death row belonged to scheduled castes or scheduled tribes or other backward castes, 44 per cent of prisoners refused to identify their caste, 19 per cent of prisoners belonged to upper castes. There were prisoners speaking 14 languages.

The process of death penalty has emerged from the narration of the prisoners about their experiences and perceptions from their arrest till they were sentenced to death.

The data revealed seven processes, namely, their arrest, being in the lock-up, appearance before the magistrate for the first time, either sent back to lock-up or sent to judicial custody (prison), being in judicial custody, trial and being sentenced to death. The first process is that of an arrest. An arrest is defined as depriving a person of liberty by legal authority; in the technical criminal law sense, to seize an alleged or suspected offender to answer for a crime (Gifis, 2010). The research highlighted three characteristics of the first process, namely 'class and/or caste', 'coerced' and 'charged'. Of these prisoners 37 per cent of the prisoners belonged to lower caste or ethnic or religious minority. Prisoners were 'coerced' into being arrested where they were taken to a police station with an assurance that they would be sent home immediately. However, in reality, they were never let out even on bail and finally were awarded the death sentence. Some of the prisoners were initially charged with theft or petty crimes but later 'charged' for the offences that fetched death penalty.

In the second process, a prisoner is in the lock-up, which is typically in a police station. The prisoners described their physical, sexual, mental and emotional torture while in police lock-up. The torture methods included electrocuting them, inserting objects or chilly powder in their genitals, placing snakes in their cells to scare them, pouring petrol in their anus, making them eat faeces and drink urine. The third process is of appearing before the magistrate for the first time. This process included tutoring them to say that they were arrested within 24 hours and threating them with further torture in case they did not parrot what was tutored. The fourth process is either sending them to a judicial custody or sending them back to the lock-up. Most of them are sent to the judicial custody. In the fifth process is being in the judicial custody; a health ticket is issued and this implies prison officers are not responsible for the death of a prisoner in case s/he was tortured in lock-up. Another process that takes place in judicial custody is an 'identification parade' where the officers coerce eyewitnesses. Many reported that prison officers beat them when they came to judicial custody. There was one positive account of judicial custody from a prisoner who said that judicial custody was not as intimidating as the police lock-up.

The sixth process leading to death penalty is 'trial'. A charge-sheet must be filed within 90 days of arrest (The Code of Criminal Procedure, 1973 (Section167 (2) (a) (ii)). Once the charge-sheet is filed, the case is committed to a sessions court or lower court or district court and the trial begins. A court date typically occurs after every 14 days. The longest trial went on for 12 years while the shortest was for one year and two months; the average number of years a person spent as an under trial was six years. Further, citing security reasons they were not taken to the court hearings regularly. The law in India prohibits the handcuffing of prisoners and, if handcuffed, only with a court order (*Citizens For Democracy v. State Of Assam And Ors*., 1995). Yet, they were all handcuffed and sometimes tied with ropes to other prisoners to prevent them from escaping. The prosecutors called them devil, blood-thirsty wolf, savage and ruthless person– and argued that the prisoner should not be acquitted or given life imprisonment or he might kill many more. Sometimes their own defence lawyers, who were mainly legal aid lawyers, demanded, despite being paid by the state, money from their families. Sometimes the defence lawyers advised them to 'demand' death sentence

on their own, as it would be easier to acquit them from a death sentence than from life imprisonment in the High Court. The legal aid lawyers often missed important hearings or managed to lose crucial documents. The prisoners also alleged that the judges who presided over the case were often transferred due to pressures from political parties. The seventh process is being sentenced to death where prisoners were called wild beasts that could not be reformed. According to the prisoners, they received the death penalty because of political pressure, or due to their class or religion or caste or low or no educational background. Very rarely some accepted that they committed the crime.

The 'death row phenomenon' or 'death row syndrome' is the result of the mental trauma, harsh conditions experienced on death row, the length of time that they have experienced and the anxiety of awaiting one's own execution (Hudson, 2000, p. 833). Classic studies document the nature and problems of being on death row. Although varied in their approaches, each of these classical works offers a glimpse of the wider social structures within which death row prisoners were positioned (Camus, 1960; Foucault, 1977; Bentham, 1996). Apart from these classical studies numerous scholars have documented the severe mental trauma due to stress associated with death sentences (Schabas, 1994; Radelet, 1990; Mello, 1987; Strafer, 1983; Holland, 1985; Johnson, 1979; Hussain & Seymour, 1978; West, 1975; Gallemore, Panton & Kaufman, 1972; Bluestone & McGahee, 1962). In India, commenting on a prisoner who had been on death row for many years, a judge noted that the person would be more of a vegetable than a person and hanging a vegetable is not death penalty (*Rajendra Prasad Etc. v. State Of Uttar Pradesh,* 1979). The length of the time experience has been well expounded in various literatures including many court judgments both in international law and national law (*Soering v. United Kingdom,* 1989; *Smt. Triveniben & Ors. v. State Of Gujarat & Ors.,* 1989). The 111 prisoners interviewed in this study have been waiting from 5 – 17 years on death row. However they have been incarcerated for longer – the longest for over 22 years. Prisoners mentioned that they feel like being killed every second; the wait for their appeals makes them anxious and nervous. Describing the anxiety of waiting for one's own execution, one prisoner narrated of 'ghosts' haunting him in the prison, or feeling of heaviness on the chest while sleeping, or having a sword hanging over the head constantly, nightmares and insomnia. Prisoners also described the loss of agency as being part of the death row for such a long time. Some discussed how they do not know how to talk to a woman; others suggested that they felt like a dummy. Some said that they were not afraid of death and that they just wanted to have their honour back. However, each of them voiced that living on the death row is a daily struggle, tortuous, oppressive and that they were afraid of the impending death sentence.

Death penalty: A constructed account by the state machinery

Among other findings, the above study highlighted that death penalty is a constructed account by the state machinery. Death sentence in India is handed only to the 'rarest of the rare crimes'. The prisoners narrated that stories were extracted through torture and stories were constructed during their period of torture. These stories are recorded in their charge sheets and these were used to establish how 'gruesome' the crime

was. Further, the arguments in the court are then based on this charge sheet. Most of the prisoners on death row did not have competent lawyers who could contest these charges or cross-examine the witnesses. In the end, they ended on death row. The contentious reasons for handing over death penalty is that it shakes the conscience of the nation; or when higher courts dictates to the lower court what crimes come under 'rarest of rare' (for example, honour killing); and lack of adequate reasons or analysis. Legal researches analysing jurisprudences reveal that the principle of awarding the death penalty in the 'rarest of rare' cases has outlived its utility (Deva, 2013, p. 252). Further it also reveals that the application of the 'rarest of rare' guidelines of *Bachan Singh* is applied inconsistently and in an arbitrary fashion (*Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 2009).

Similarly, other studies reveal that where the crime is similar, some are awarded death sentence, calling it a "lethal-lottery" or "shifting sands" of 'rarest of rare' (Amnesty International India & People's Union for Civil Liberties, 2008; Bindal & Kumar, 2013). Capital punishment was used extensively in colonial India by the British Empire to control its colonial subjects and reinforce its sovereignty. This punishment was more often given to those belonging to lower castes and class (George, 2015).

A culture of capital punishment exists in India where, as in the example of *Machhi Singh And Others v State Of Punjab,* 1983 judgment, it is contended that any sentence less than death would 'denigrate' the seriousness of the offense (Johnson, 2013). This judgement in other words states that the 'rarest of rare' requirement is satisfied when the 'collective conscience' of the community has been 'shocked' and when the balance sheet of aggravating and mitigating circumstances indicates that a sentence of life imprisonment would be 'inadequate' because it would denigrate the seriousness of the crime. This phrase of 'collective conscience' was introduced by Durkheim as a label for 'the totality of beliefs and sentiments common to the average members of a society' (Durkheim, 1933). Punishment is a raw exercise of power. Yet at other points, and for other people punishment is also an expression of moral community and collective sensibilities, in which penal sanctions are authorised response to shared values individually violated (Garland, 1991, pp. 156-157). Demands that governments should 'crack down' on offenders are reproduced in the 'tough on crimes' discourse and translated into harsher penalties, comprehensive and punitive community reporting, and stringent release plans (Pratt, 1977). This has led to what Garland claims as a kind of retaliatory law making, acting out the punitive urges and controlling anxieties of expressive justice. Its chief aims are to assuage popular outrage, reassure the public, and restore the credibility of the system, all of which are political rather than penological concerns (Garland, 2001).

However, collective conscience has no uniformity when demanding justice for the individual or group that is violated. People who demanded justice for Nirbhaya forgot to demand the same for Suzette Jordan (Singh, 2015) or the mother and daughter from a Dalit family in Khairlanji, Maharashtra in 2006. The mother and the daughter were stripped, paraded naked, beaten black and blue with bicycle chains, axes and bullock cart pokers in public. They were publicly gang raped until they died. Some raped them even after that and finally, sticks and rods were shoved into their genitals. The two sons

of the same Dalit family were beaten up, their genitals mutilated, faces disfigured and their bodies tossed in the air, before they lay dead on the ground. (Vij, 2006). No one seems to ask for the death penalty here, nobody's conscience seem to be disturbed. Similarly, no one has any pangs of conscience when it came to Soni Sori. Sori was in police custody when Ankit Garg, the Police Superintendent in Chhattisgarh, allegedly, verbally abused Soni and directed police personnel to torture her. Sori contended that Garg watched as junior police personnel stripped her naked, administered electric shocks and assaulted her. According to her lawyers, a medical examination found two stones in Soni's genital tract and another in her rectum. No action was taken against the police personnel; Ankit Garg was awarded the Police Medal for Gallantry in 2012 for his raid on Maoist supporters (Sethi, 2012).

Perhaps President (of the Court of South Africa) Arthur Chaskalson foresaw this when he penned down the judgement abolishing death penalty in South Africa. Chaskalson wrote that:

> Public opinion may have some relevance to the enquiry but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication ... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process *(State v. Makwanyane and Another,* 1995, para 88).

Similarly, France abolished capital punishment in October 1981 at a time when 60 - 65 per cent of the French people favoured capital punishment. (International Commission against the Death Penalty, 2013). Public opinion played no role in abolishing capital punishment in these countries.

Research on attitudes toward capital punishment abounds in the United States. In India, a recently collected data revealed variance in levels of support for the death penalty among Indian college students. Almost 44 per cent express some degree of opposition, 13 per cent are uncertain, and 43 per cent express some degree of support. Some of the statistically significant reasons for supporting death penalty included retribution, instrumentalist goals, and incapacitation; while significant reasons for opposition included morality and the belief that deterrence could be achieved by imposing sentences of life without parole (Lambert, Pasupuleti, Jiang, Jaishankar, & Bhimarasetty, 2008).

Further, studies also reveal that the family members of death row prisoners are perceived as being as culpable as the offender and most of them are left to their own device to survive the entire process, including the execution and the aftermath (Kandelia & Hodgkinson, 2013; Arditti, Lambert-Shute, & Joest, 2004). This is very true, for instance nobody cared for Dhanajoy's, Afzal Guru's or Yakub Memon's families after their execution.

Rule of law and death penalty

Death penalty has no place in a civilised democratic society. (Balagopal, 1998, p. 2438). It also violates Article 6 of the International Covenant on Civil and Political Rights, on the right to life (Schabas, 2002). In a democratic country, the judiciary has the role of interpreting and applying laws and adjudicating upon controversies between citizens and between citizens and the State. The functioning State and judiciary uphold the Rule of Law. In a country with a written constitution, the judiciary also assures that the government runs according to law. It has an additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and by keeping all authorities within the constitutional framework. The judiciary in all the States in India has practically the same structure with variations in designations (Jois, 1984). A commonly held view in the West regarding the prevalence of death penalty policy and practice in China is a lack of democracy as the main factor (Yunhai, 2008, p. 141). With regard to India, this view is nullified, as we are the largest democracy in the world. If we agree to the above view then India's death penalty policy and practice highlights that there is lack of democracy or these policies and practices undermines democratic processes and the rule of law.

In a democracy, the functioning judiciary maintains the rule of law. Justice Bhagwati in his powerful dissenting judgment against death penalty in the *Bachan Singh* case quite categorically mentioned that the death penalty is unconstitutional as it violates Article 14, 19 and 21 of the Constitution of India.[1] He further said that, "Death sentence has certain class complexion or class bias in as much as it is largely the poor and downtrodden who become victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows" (As cited in Ali, 2013).

Death penalty has given rise to more disturbances in society and it undermines the democratic process. I tend to agree with Garland that "the death penalty is not an isolated practice standing alone. It functions as an element in a larger system of sanctions, and its place in this system needs to be considered a part of its meaning" (Garland, 2002, p. 474). Thus it is a daunting task to preserve and respect basic human rights in a functioning democracy. There has to be a shift towards a more humane form of governance and punishment (Hobson, 2013). In a country like India, which upholds the rule of law and has a functioning democracy, awarding death penalty to satisfy the collective conscience of the society is a paradox.

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[1]Article 14 states: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.; Article 19 states: Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. ; Article 21 states: No person shall be deprived of his life or personal liberty except according to procedure established by law.

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Creating Cogent Copyright Policy for Course-Packs – A Look at the DU Photocopy Case

Swaraj Paul Barooah*

The Delhi High Court's judgment in the recent "DU Photocopy Case" legitimised the photocopying required to create Course-Packs, by stating that the education exception in India's Copyright law permitted such reproduction. This note attempts to pry into the theoretical underpinnings of Copyright law, by dissecting the relevant Natural Rights and Utilitarian justifications for Intellectual Property (IP). In doing so, it identifies types of policy level considerations, including an education exception as defined by the Delhi High Court, that would ensure the greatest access to works while also continuing to provide the necessary incentives to continue publishing.

Keywords: *DU Photocopy Case, Copyright, Education, Access to knowledge, IP Theory*

In August 2012, three international publishing houses (Oxford, Cambridge and Taylor & Francis) initiated a copyright infringement petition (*The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services,* 2016) against a photocopy shop associated with Delhi University (DU). The petition centered on the legitimacy of academic 'course packs' used in universities.

'Course packs' are compilations of required readings, often certain excerpts or small portions from a wide variety of text books, brought together as one collection to be used by students in a course. Given the high costs and the impracticality of students purchasing each of the many textbook from which readings are assigned, this has been the default mode of instruction in several Universities across the country.

The high-profile case rightly caught the attention of students, academics, publishers and the general public at large, with much being written (Mohanty, 2012; AFP, 2013; Basheer, 2013) about how a negative decision could very well affect the cost of, and thereby access to education. This also led to interventions being filed in the suit by a student group (Association of Students for Equitable Access to Knowledge), and by a group of academics (Society for Promoting Educational Access and Knowledge). Notably, 33 of the authors whose works had been reproduced in the course packs had also joined in asking the publishers to drop the case (Guha, 2013). Nonetheless, the publishers, being the copyright holders, continued to press forward with the case.

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In their suit, the publishers argued that the photocopying that takes place in creating these course packs amounts to copyright infringement. The defendants argued that this reproduction of materials was being done for educational purposes and therefore fell within the exceptions provided by the Copyright Act. Finally nearly four years later, in September 2016, the Delhi High Court came out with its judgment dismissing the suit and clarifying that no copyright infringement had taken place as the education exception provided by Section 52(1) of the Copyright Act protected such activity.

In the course of the 94-page judgment penned by Justice Endlaw (*The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services,* 2016), he mentions three major points as to why the suit was dismissed:

a) That copyright is a statutory right and not a natural right, and thus any rights granted by the statute are also limited by the exceptions and limitations provided for in that same statute. In this case, Section 52(1) of the Copyright Act provided that reproduction done for educational purposes would not constitute copyright infringement.

b) That this provision allowing reproduction by a 'teacher/pupil in the course of instruction' should be interpreted very widely, so as to not restrict such reproduction to a particular student, teacher, lecture or classroom; and that when hand-scribing of texts for a course is not considered infringement, the use of technology to make the task less onerous does not convert it to infringement either;

c) That Copyright is not a divine/natural right but should be considered in context of its purpose of increasing the harvest of knowledge.

While this landmark decision marked the acceptance of 'course-packs' as legitimate in Indian copyright jurisprudence, much of the discourse surrounding the high profile case has dragged copyright out of the context-less silo it had been in, and placed it squarely within an 'Access to Knowledge' framework. Indeed, of those celebrating the Delhi High Court's decision, many were not celebrating the legal or technical interpretation of Section 52(1) of the Copyright Act, but rather the wider ramifications that such an interpretation has, or the context-driven interpretation of the Copyright Act, which led to this decision.

Justifications for copyright

In clarifying that copyright is not a natural right, Justice Endlaw dove straight into an age-old debate regarding the justifications or the basis for intellectual property rights (IPR). The "Natural Rights" justification which stems from a more Lockean approach (Locke, 1821), places property owners' rights central to the grant of such entitlements. Here, owners are seen to 'deserve' such state sponsored exclusion rights (copyrights in this instance) due to the labour and resources they have directed towards socially valuable endeavours. This narrative is often further supplanted by work from the Chicago School of Economics (Demsetz, 1967) which views individual caretakers, and thus private property as the best way to prevent the 'tragedy of the commons', i.e., to prevent inefficient use of physical resources.

However, the primary criticism of the Natural Rights approach, and one of the main criticisms of how maximalist IP policy tends to be implemented, is that it draws upon theory that relates to tangible goods. Intangible goods such as information, the subject matter of Copyright, in contradistinction to tangible goods, are 'non-rivalrous' in nature (Arrow, 1962, p. 623). This means that one person's consumption or usage of such a good does not diminish the good in any way for any other user. Rather, the 'non-rival' characteristics of information goods imply that sharing such information widely is a more efficient usage of such resource.

Given the freely reproducible and therefore accessible nature of information goods (in the absence of such exclusion rights), it is also often very difficult to proportion appropriate credit towards the so called 'creator' who has reached that position by using information collected from various other sources (Fisher, 2001, p.168). In other words, creators nearly always reach where they are because they are standing on the shoulders of giants. Thus, in the context of intangible goods, both, the idea that a private owner 'deserves' to have exclusive rights over information goods, as well as the idea that a gatekeeper would ensure the optimal usage of such resource holds little weight.

Justice Endlaw doesn't expound upon the reasons he rejects the Natural rights approach but he certainly does draw upon the utilitarian 'incentive theory' (Fisher, 2001) when he says:

> [Copyright] is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public. (*The Chancellor Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services,* 2016).

While it isn't incorrect to say that the incentive theory balances users' rights with creators' rights, it would perhaps be more accurate to say that the incentive theory *allows* creators' exclusion rights *only* where society at large is benefitted.

To clarify this point, the 'non-rival' nature of intangible goods must be looked at again. While it may be more efficient to freely share an intangible good at a given point in time, it is nearly always the case that some amounts of material resources, time and effort have been used in the process of creating new information goods. Once created though, these information goods can be easily reproduced by any other party at marginal cost; leading to the potential problem of free riders dissuading creative activity. As per the incentive theory, exclusion rights that prevent this free-riding are granted to ensure that creative activity continues to be incentivized. In economic terms, this is a trade-off between accepting 'static inefficiencies' (i.e., the inefficiencies caused due to exclusion rights preventing the optimal usage a resource at a particular point in time) in order to secure a continued/higher rate of creative activity over time, (i.e., 'dynamic efficiency').

Where such free riding does in fact dissuade creative activity, public policy consideration requires allowing only as much 'static inefficiency' as is required to ensure the desired

rate of 'dynamic efficiency'. In other words, at a policy level, creators' rights are acceptable only up to the extent that they actually incentivize creation. Therefore the question of determining the necessary limits of creators' rights (static inefficiencies) in IP policy turns on determining exactly how much of such free-riding would hamper further creative activity.

Sectors where heavy capital investment is required (e.g., pharmaceuticals, biotechnology, etc.) are usually presented as the poster-child case for granting these exclusion rights, since these are businesses that claim they must multiply their initial investments in order to continue innovating, and therefore have a lot to lose from free-riders who can reproduce their work at marginal cost. However sectors with low capital investment often see creators participating in the creative process for a varied range of reasons, and not necessarily with financial considerations, especially with the advent of more digital technologies where the production and distribution costs are dramatically reduced. Further more, creators in these sectors often find that they can also benefit from more sharing of their work, as this could facilitate cooperation as well as new productions of works (Krikorian, 2010, p. 575). Academic authors are one such segment – where academics produce texts for a variety of non-monetary reasons including securing tenure, reputation gains, sharing in the spirit of scientific inquiry, etc. (Lessig, 2011).

Publishing in general, and academic publishing more specifically see the confluence of two stakeholders with different incentives coming together to produce the eventual outcome: academics, who rarely participate with the incentive of monetary benefits, and publishers who rarely participate without the incentive of monetary benefits. Therefore, a utilitarian matrix would recognize that exclusion rights need only be granted to the extent that it would continue to provide necessary financial incentives for publishers, but not the extent that it would restrict the spread of information goods more than is required – especially since the one half of the creators (i.e., the academics) do not require such financial incentives to continue creating new works.

It would follow that in order to minimise static inefficiencies, the rights granted to the copyright holders (publishers) can be limited to only what is necessary to keep their actual markets largely unaffected. To restate the reason for course packs being used so commonly across the country – it is largely impractical and usually prohibitively expensive for students to buy all these textbooks. In other words, students are not the market that is buying the textbooks to start with. Therefore, an exception or limitation to Copyright policy that allows the non-market audience to easily/freely access these textbooks ought to be allowed as it ensures more efficient usage of the information, while also not affecting dynamic efficiency. It is worth noting at this point that this particular judgment does not discuss full-text copying but only refers to reproduction of course packs. Some commenters have suggested that if the question of full-text copying comes up, a 'reasonable nexus' text could be used, wherein the question of infringement turns upon whether it is necessary for such copying to be done for the purpose of educational instruction (Basheer, 2016).

Additionally, while there is no doubt that publishers contribute value to the process, it must be kept in mind that even some of this value is gained not through capital investment but through unpaid peer-reviews. These peer-reviews are also not done due to financial incentives but through other non-monetary incentives. Thus, in calibrating the extent to which exclusion rights should be granted, this value too need not be captured, as it would otherwise be unnecessarily allowing publishers to capture more value than required. To appropriately calibrate this policy framework, analysts require (currently non-existent) data on the actual costs incurred by publishers, as well as data on their markets and margins. However, while direct data on academic publishing costs may not yet be available, there are several reports which show that the (larger) publishing industry has been growing, with large amounts of credit being given to increased literacy levels (Neilsen, 2015; Dasgupta, 2016). Given that course-packs have been in wide usage for the past few decades already, it seems a far-fetched argument that course-packs which had already been widely used in practice, would now suddenly harm academic publisher incentives due to the law pronouncing course-packs with legal legitimacy.

Further, access to education has a special significance in a in the 'network economy' due to the import that information has in today's knowledge ecology. As Manuel Castells describes it, "the action of knowledge upon knowledge itself is now the basis of increased productivity" (Castells, 2010, p.17). In such a scenario, a wide interpretation of an educational exception to copyright as non-infringement shows an understanding of the larger social benefits that flow from not allowing over-broad copyright laws, and this is exactly what the Delhi High Court has done in this decision.

Coming at a time where India's IP Policy is facing great scrutiny at the world stage (Barooah, 2015), and where developed nations are increasingly pressuring developing countries to treat IP rights as an end in themselves, (Barooah, 2014), this decision by the Delhi High Court shows a welcome contextualizing of IP policy with India's socio-economic realities, rather than the lobbyist drive industry concerns of the developed countries.

One can hope that with these developments and the discussions around them, all concerned stakeholders will seek to better understand as well as expand upon of the policy impacts of these information regulation mechanisms.

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The Evolution of Judicial Accountability in India

Bhairav Acharya*

The Judicial Standards Bill of 2010 was the culmination of many attempts to introduce accountability for judicial misbehaviour and indiscipline. There have been a growing number of reports of judicial misconduct – including, notably, an admission from a sitting Chief Justice in 2001 of many corrupt judges. But past attempts to discipline judges have been shot down on the ground that they interfere with judicial independence. One of the reasons for the lack of regulation is that Constituent Assembly simply did not consider judicial accountability in enough detail. The Assembly was primarily concerned with the mechanics of removing judges, not with measures to discipline them. The Judges Act of 1968 was first statute to regulate the impeachment process. It is very brief; it has only been invoked once, and it failed to achieve its objective when invoked. The judiciary has evolved an ad hoc internal mechanism to deal with that hiatus called the 'minor measures' approach. The main punishment handed out by the 'minor measures' approach is transfer. The only way to break through this logjam is for a statute to introduce scalable responses to judicial misconduct, mindful of the "hiatus," with firm warnings and punishments, a due process regime, and which does not interfere with judicial independence.

Keywords: *Judicial accountability, Constituent Assembly.*

The Judicial Standards and Accountability Bill, 2010 (Judicial Standards Bill), which lapsed with the Fifteenth Lok Sabha, was the latest in several series of attempts to impose accountability on India's higher judiciary. The issue is often wrongly conflated with the question of judicial appointments, which is distinct. Judicial accountability concerns the quality of justice and conduct of judges after they have been appointed.

Judicial accountability is controversial because it strikes at the root of judicial independence. In past periods of conflict between the judiciary on the one hand and the executive and legislature on the other, discussions regarding judicial accountability have been deeply divisive. After Indira Gandhi ordered the supersession of Supreme Court judges during the Emergency, which precipitated the most acute judicial crisis in the history of independent India, the judiciary and the government have maintained an uneasy truce.

But the status quo could not last forever, particularly in light of the growing number of reports of judicial indiscipline. The current judicial accountability statute in force, the Judges (Inquiry) Act, 1968 (Judges Act), is a ramshackle law that inspired no confidence

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and failed the only time it was called upon. To replace it, Manmohan Singh's government introduced the Judges (Inquiry) Bill, 2006 (Judges Bill) in Parliament steered it through the benches and even past the Standing Committee on Law, but to no avail. It was not enacted.

The Judges Bill was preceded by significant efforts by the Law Commission of India to settle, once and for all, the nagging problem of judicial accountability and independence. In 2005, in a prefatory letter to the Union Law Minister that accompanied the 195th Report of the Law Commission (2005) that dealt with the subject, its Chairperson, Justice M. Jagannadha Rao, suggested no exaggeration when he stated that "no other earlier reference to the Law Commission in the last fifty years has been as important" (Law Commission of India, 2006, p.2). Yet, despite the importance of this issue, no seriously comprehensive legislative effort has been made to put in place a regulatory system to discipline judges over the last seventy odd years since independence.

Few views in the Constituent Assembly

On 29 July 1947, there was a surprising dearth of opinion when the Constituent Assembly debated provisions for the removal of judges of the superior judiciary. The Assembly was preoccupied with two competing views regarding the power to remove superior judges – should it be vested in Parliament or with the President? Alladi Krishnaswami Ayyar argued for parliamentary safeguards by warning against the erosion of judicial independence by making superior judges subject to executive removal. His views prevailed over those in favour of an efficient system of judicial accountability that empowered the President to remove judges.

The power to remove judges of the Supreme Court was to be exercised only by both Houses of Parliament acting on an impeachment address. Yet, all the members did seem to agree on one point; that it was unlikely that a judge of the superior judiciary would ever have to be removed for misconduct. N. Gopalswami Ayyangar summarised this belief:

> I wish only to point out that the contingency of removing a Judge of the Supreme Court from his office is perhaps one of the rarest that we can contemplate. … So whatever procedure you prescribe for the removal of Judges for proved misconduct or misbehaviour, that procedure is likely to be used only in the rarest of contingencies and very probably will not be used within my life time or even the life time of those who are much younger in this House than I am (CAD IV(12), July 29, 1947).

The manner and procedure of impeachment, including critical due process, was left to Parliament to statutorily provide under Article 124(5) of the Constitution of India. This, Parliament did not seem in a hurry to do. Indeed, in his Constituent Assembly days, Jawaharlal Nehru saw little of interest in the judiciary. Judicial misconduct was certainly far from his mind (Seervai, 2005).

The Judges (Inquiry) Act, 1968

In 1964, a Bill to institute a procedural mechanism to remove judges for proven misbehaviour or incapacity was tabled in Parliament. It was enacted under powers given by Article 124(5) of the Constitution in 1968 and went into force one year later. The Judges Act, with only seven sections, did not provide a comprehensive mechanism to remove errant judges. The Judges Act affirmed the impeachment procedure after a joint committee of both Houses of Parliament attempted to purge the Bill of executive influence by vesting investigative powers with a judicial council.

Despite the joint committee's protective concerns regarding judicial independence, Parliament retained a role in the impeachment process through the power to vote on the judicial council's recommendations. The Judges Act was invoked only once to attempt an impeachment of Justice V. Ramaswami between 1989 and 1993. The experience thoroughly exposed its limitations as also the risks of political manipulation. Despite being indicted by the judicial council, Parliament failed to deliver its final vote to remove Justice Ramaswami after the Congress Party decided to abstain from voting. In a notable speech, Kapil Sibal delivered the impeachment motion its deathblow.

"Hiatus between bad behaviour and impeachable behaviour"

The failure of the Judges Act to impeach an indicted judge highlighted an interesting problem of judicial misconduct. What is to be done when a judge is guilty of misconduct that is not, in the opinion of Parliament, sufficient to impeach him? Sibal's eloquent defence of Justice Ramaswami before the Lok Sabha was premised on an insufficient degree of admitted judicial misconduct. In September 1995, in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee,* the Supreme Court speaking through Justice Ramaswamy underscored the need for an internal judicial mechanism to discipline errant judges while recognising the "hiatus between bad behaviour and impeachable behaviour" (*C. Ravichandran Iyer v. Justice A.M. Bhattacharjee,* 1995).

In 2002, the National Commission to Review the Working of the Constitution of India (NCRWC) chaired by Justice M. N. Venkatachaliah reiterated the distinction between misbehaviour warranting removal and deviant behaviour attracting disciplinary measures short of removal. The latter primarily consists of judicial transfers. The NCRWC contended that such transfers should be made only by an independent 'National Judicial Commission' with mixed judicial-executive membership to ensure both accountability and independence. In January 2006, the Law Commission of India made a strong pitch in favour of "minor measures" to discipline judges without impeaching them outright.

The "minor measures" approach

The "minor measures" approach was first tested in Justice Ramaswami's case in 1990. Faced with the mounting controversy Chief Justice Sabyasachi Mukharji requested Justice Ramaswami to go on leave and constituted a committee of three Supreme Court judges to suggest action. But the committee found no reason to deny judicial work to Justice Ramaswami and he was allowed to resume work. The entire episode failed to enthuse public confidence in the judiciary's ability to discipline itself.

In the last two decades, there have been a series of judicial controversies that have been inconsistently met by the internal "minor measures" method. In Karnataka, three judges accused of scandalous sexual impropriety were absolved of all guilt after an internal judicial inquiry, its report was never published. In Punjab, the entire high court struck work for the first time in judicial history to protest the Chief Justice's direction against receiving gifts from litigants. Astonishingly, the Chief Justice was transferred. In Rajasthan, an internal committee recommended the removal of a sitting judge accused of soliciting sexual favours.

Transferring judges: from national integration to punishment

Since the adoption of the Constitution, judicial independence has preoccupied both the judiciary and the executive for different reasons. The Constituent Assembly in 1947–1949, the joint committee of 1966, the NCRWC in 2002, and the Law Commission in 2006, amongst many others, have steadfastly underlined the importance of judicial independence. The Supreme Court has repeatedly held that judicial independence is a part of the "basic structure" of the Constitution. However, the frequent transfer of judges by the executive has undermined judicial independence.

Both the Report of Justice Fazal Ali's States Reorganisation Commission in 1955 and the 14th Report of the Law Commission saw the transfer power as a desirable means of consolidating 'national integration' by maintaining in all High Courts a certain proportion of 'outsider' judges. This policy turned on consent. Indira Gandhi used the transfer power to notorious effect during the Emergency of 1975–1977 to effect punitive transfers of judges who were critical of her government or who ruled against arbitrary detentions. However, even after the Emergency obliterated the consent rule, the principle of transfers without consent has been kept alive in varying measures.

In the last two decades, there has been a revival of the policy of transferring controversial judges for punitive reasons, usually to courts in north eastern India that suffer as a result. However, shuttling judges around the country has not and cannot be an effective substitute for judicial accountability. Punitive transfers have sometimes been forced by, and met with, protests to create messy situations. This lynch culture precludes due process and thwarts meaningful accountability.

Protesting for accountability

The judiciary is concerned that independent speech and public protests for accountability threatens judicial independence. No doubt protesting outside courtrooms and boycotting specific judges indulges a lumpen righteousness. But it cannot be seen as an attack on the judiciary's independence. The reconciliation of judicial independence with the principle of accountability is eminently possible. The Law Commission's 195th Report made a detailed examination of judicial independence in the context of removing judges.

However, in 1995, the Supreme Court appeared to present a different view when it came down on public expression for accountability in the matter of a Bombay judge accused of corruption. Independence is more important than accountability, the

Court suggested in Justice Bhattacharjee's case. The Court claimed that judicial independence was threatened by public protests:

> Independent judiciary is, therefore, most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived) undisturbed by the clamour of the multitude (sic) (*C. Ravichandran Iyer v. Justice A.M. Bhattacharjee,* 1995).

The Court went further. It ruled that, except in an impeachment proceeding in Parliament:

> … no other forum or fora or platform is available for discussion of the conduct of a Judge in the discharge of his duties as a Judge of the Supreme Court or the High Court, much less a Bar Council or group of practicing advocates. They are prohibited to discuss the conduct of a Judge in the discharge of his duties or to pass any resolution in that behalf (*C. Ravichandran Iyer v. Justice A.M. Bhattacharjee,* 1995).

India's attempts at judicial accountability have been intermittent and ineffective. After the failures of the past, there is now a growing consensus on the need for an institutional mechanism to discipline judges and ensure their accountability. Whereas previous measures to discipline judges were based on an all-or-nothing position – parliamentary impeachment or uninterrupted immunity – there is today an understanding of the need to bridge that gap with appropriate measures (Shah, 2011).

The impeachment mechanism in the Constitution

The Constitution creates an impeachment process to remove judges of the superior judiciary and allows Parliament to enact laws to regulate the procedure of any removal including an appropriate due process regime. A judge of the Supreme Court may be removed from office after a parliamentary address to that effect is accepted by the President under Article 124(4) of the Constitution. Parliament can enact law to regulate the manner of investigating a judge for misbehaviour. A judge of a high court may be removed in a similar manner.

Since there are no further provisions for removal, judges of the superior judiciary can only be removed after the President accepts an address by Parliament where both Houses have adopted resolutions to that effect by a special majority. Therefore, the initiation of a judicial impeachment lies solely with Parliament and not with the executive. No provision was made to create a complaints mechanism to enable citizens or authorities other than Parliament to register actionable complaints of judicial misconduct or other grievances.

Impeachment in the Constituent Assembly

An examination of the early debates of the Constituent Assembly reveals that, far from instituting a complaints mechanism to make the superior judiciary accountable to every citizen, the Assembly was loath to include even substantive measures for a regular removal mechanism. In fact, members of the Assembly did not believe that

a mechanism to remove judges would even be necessary. The Report of the Union Constitution Committee indicates little discussion of the judiciary, much less a mechanism to remove its judges. Ayyar spoke of the removal power:

> It does not mean that the power will normally be invoked. The best testimony to such power is that it has never been exercised. It is a wholesome provision intended to be a salutary check on misbehaviour, not intended to be used frequently, and I have no doubt that future legislatures of India which are invested with this power will act with that wisdom and that sobriety which have characterised the great Houses of Parliament in other jurisdictions (CAD IV(12), July 29, 1947).

This reticence is ironic considering the initiation of removal proceedings, almost exactly one year later, of Justice Shiv Prasad Sinha of the Allahabad High Court. In July 1948, acting on the request of the United Provinces government, the federal Governor-General referred a complaint against Justice Sinha to the Federal Court. Five charges were framed against the judge, including charges related to corruption, and the Federal Court began its inquiry. The Federal Court maintained due process: it heard both the judge and the government and even allowed a cross-examination. After upholding a single charge based on circumstantial evidence, the Federal Court recommended Justice Sinha's removal. The Governor-General accepted the recommendation and the judge was removed under section 220(2) of the Government of India Act, 1935.

Two removal mechanisms

What engaged the Constituent Assembly on 29 July 1947 was a short discussion on the merits of two opposing models for removing judges of the superior judiciary. Ayyar proposed a 'parliamentary' model of removal whereby:

> A judge of the Supreme Court of India shall not be removed from his office except by the President on an address from both the Houses of Parliament of the Union in the same session for such removal on the ground of proved misbehaviour or incapacity (CAD IV(12), July 29, 1947).

Ayyar's model was accepted by K. Santhanam but not by M. Ananthasayanam Ayyangar who proposed an 'executive' model of two variations. The first of these was:

> A judge may be removed from office on the ground of misbehaviour or of infirmity of mind or body by an address presented in this behalf by both the Houses of the, Legislature to the President, provided that a committee consisting of not less than 7 High Court Chief Justices chosen by the President, investigates and reports that the judge on any such ground be removed (Ayyangar, CAD IV(12), July 29, 1947).

The second variation of the executive model that was proposed was:

> A Judge of the Supreme Court may be removed from office by the President on the ground of misbehaviour or of infirmity of mind or body, if on reference being made to it (Supreme Court) by the President, a

special tribunal appointed by him for the purpose, from amongst judges or ex-judges of the High Courts or the Supreme Court. report that the judge ought on any such grounds to be removed (Ayyangar, CAD IV(12), July 29, 1947).

Hence, whereas Ananthasayanam Ayyangar's first suggestion proposed a tribunal of sitting judges appointed by the President on Parliament's recommendation, his second suggestion reduced the tribunal to a panel left to the President's discretion. Ananthasayanam Ayyangar's motives in proposing the executive models were clearly his desire to put in place an efficient system of judicial accountability, unencumbered by further statutory due process.

The executive model for removals was first proposed by Tej Bahadur Sapru in 1945 but it did not find Ayyar's favour. He feared that it would subordinate the chief justice to the executive, reducing the office-holder to the President's mercy. Ayyangar saw, in the two competing models presented before the Constituent Assembly, a need to "think furiously" as he was at odds with the parliamentary idea of judges being "removed by popular vote" thereby subjecting them to a "principle which you are not prepared to accept even in the case of ordinary public servants"; and, equally dissatisfied with the executive proposal of "placing a Judge who is accused of misbehaviour in the dock before a Tribunal some of the members of which might have held positions subordinate to him in the judicial hierarchy of the country" (Ayyangar, CAD IV(12), July 29, 1947).

In the end, Ayyar's parliamentary model won the Constituent Assembly and the Constitution enacted the impeachment model in Article 124(4) leaving the due process of the removal up to Parliament to enact in Article 124(5). Not all were pleased with Parliament's power to politically interfere with a removal through their due process empowerment, seeing the power as a threat to judicial independence (CAD IV(12), July 29, 1947).

No serious thoughts about the removal power

In 1964, the Judges (Inquiry) Bill was introduced in Parliament to exercise the power under Article 124(5) of the Constitution to enact a due process mechanism for removing judges. In the intervening years between the adoption of the Constitution in 1950 and the introduction of the Bill in 1964, not very much was done to generate a consensus on removing judges. The 14th Report of the Law Commission of India in 1958 contained detailed suggestions to reform judicial administration but made no mention of the procedures to extract judicial accountability. Indeed, the power to remove judges was treated most summarily, the most substantive comment offered was:

> Realizing the importance of safeguarding the independence of the judiciary, the Constitution has provided that a Judge of the Supreme Court… holds office till he attains the age of 65 years and is irremovable except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity. Thus the Constitution endeavoured to put Judges of the Supreme Court above executive control (Law Commission of India, 1958, p.33).

The Law Commission's 58th Report was no less helpful (Law Commission of India, 1974).

Making sense of judicial accountability

It would appear that while the Constitution provided for the removal of judges, it made no provision whatsoever for judicial misdemeanours. When the crisis surrounding Justice Ramaswami occurred in 1995, the Supreme Court more or less resolved that it would deal with the matter informally even as it silenced any discussions on judicial misconduct. This informal approach came to be tested in many instances of judges' misbehaviour that followed. The informal approach, whether by minor measures or transfers, does not formally sanction illegal conduct or unethical behaviour; so it must be rejected as a viable answer to bring the higher judiciary to account. A more robust approach based on statutory change is needed.

Statutory change cannot interfere with the principle of judicial independence which is fundamental to the Constitution. Judges must be insulated from the executive and provided with immunity in respect of their work. But independence cannot forestall accountability, a point which has been repeatedly reiterated including by the UN Basic Principles on the Independence of the Judiciary, 1985 and the Bangalore Principles on Judicial Conduct, 2002. Judicial accountability must be enforced through a clear, transparent, and predictable system of warnings, reprimands, and punishments; but it cannot be achieved by transferring judges around the country.

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Book Review

Rule by Numbers Governmentality in Colonial India
by U. Kalpagam

Orient Black Swan, New Delhi;
2014; pp. 339, / 850.

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The book is a timely intervention for academicians interested in understanding the Foucauldian approach to modern State formation. Research on colonial state-society relations from Marxist, liberal, post-colonial and feminist perspectives have thrown light on various aspects of colonial State. Resolutely Foucauldian in approach the book provides valuable introduction to the subject of governmentality and biopolitics in colonial state formation in India. The main focus of the book is on the production of statistical knowledge as a part of colonial governance in India using Foucault's idea of governmentality.

The traditional understanding of State formation in Western political thought is based on the sovereignty-model that argues power is concentrated in the hands of sovereign ruler. Foucault challenged this model by calling for 'cutting off the king's head' and replacing it with new way of looking at the modern State. Modern State is the effect of power relations diffused in the society. Governmentality or political rationalities are complex strategies of power used for directing the 'conduct' of individuals, groups, communities etc. towards certain goals.

The book focuses on the 'enumerative rationalities' and strategies 'used in the State building activity'. The author highlights how colonial conquest in India and elsewhere was based on 'epistemological conquest', i.e., a power-knowledge system that displaced, replaced or juxtaposed the existing system. Kalpagam documents this epistemological conquest in the domains of history, economy, society (castes, tribes, religion and race), public health, and the public sphere. The colonial State building became possible in India due to the introduction of Western categories of time, space, reason and causality. None of the regimes in the pre-British era used quantificatory system. However, the West was already using Baconian inductive and experimental knowledge to study social processes in their own society. It merely sought to export it to the colonies. Statistical knowledge became new mode of intervention in the Indian subcontinent. Yet, the method introduced in India

differed considerably from the Victorian administrative State. The book examines how enumerative technologies of rule led to the proliferation of measurements and classifications of things that earlier were unquantified.

Kalpagam gives an overview of how the abstract concept of modern State sovereignty was deciphered during British colonial rule. Sovereignty in theory is coherent but in practice it is fragmented and discontinuous. This was seen in case of East India Company that was a political monster of dual nature; it was subject of the British state and political master of India. As company rule consolidated by 1830s there were fierce debates in Britain regarding governmental practices suitable to the Indian society. The civilizing mission using liberal governmentality was always a mix of coercive, disciplinary and violent strategies. This necessitated total control of people. Therefore, the institutions set-up in India used bureaucratic surveillance to create massive imperial archives about the population of India so as to bring various aspects of social life under the colonial gaze. Yet, the scientific rationality of archival practices was subjective as it involved selecting some slices of social facts and ignoring the rest. The practices of annual reports of parliament, royal commissions, and experts' opinions prevalent in England were exported to India to extract knowledge of the colony. For instance, the colonial office in London demanded all colonies to produced annual statistical reports known as Blue book.

Production of modern spaces was an important component of political rationalities. The colonial State made use of surveys, maps, diagrams, etc. for demarcation of spaces. Carto-statistical techniques were used to map physical borders and population of India. Earlier cartographic exercises of James Rennell (*Bengal Atlas (1781) and Map of Hindoostan* (1788) helped in setting functional sites like barracks, factories, prisons, schools, etc. Land was an important source of revenue for the company. As early as 1792, the Company appointed Alexander Read as a revenue officer of Baramahal and Salem to conduct detailed 'political survey' of every district. The survey was comprehensive and covered subjects like inhabitants, occupation, calendar and division of time, weights and measure, coinage and exchange rates, production and crop cycles with appropriate diagrams, agricultural prices, land rents, tenures and rates and modes of taxation, histories of the districts and their institutions, settlement records, mode of revenue management etc.. In the latter half of the nineteenth century cartographic archives were used for medical policing as health became an element of colonial governmentality.

Alongside spatial practices the colonial government also introduced new temporalities in the subcontinent. When company rule was established in the Indian subcontinent British power had to reckon with thirteen types of calendrical system. Post-Enlightenment brought new understanding of time. Time became linear and progressive and advancement of civilisation was henceforth to be measured on the new time scale. The British considered indigenous understanding of time as static and cyclical. Hence, they wanted to replace it with secular idea of time and used it to map the history and progress

of Indian civilisation. Consequently, the British government began to impose uniform time scale to run the administration. Practices like allocation of work in factories, prisoners in jails, running of railways were premised on secular progressive time scale. However, the homogeneous time scale introduced by the colonial government often clashed with the heterogeneous time practices of the governed. This was especially witnessed in the writings of colonial history. While some colonial historians considered the then existing social system of Hindu society as decayed and sunken that had to be civilised by the British rule, certain sections of the Indian intelligentsia challenged such moves by invoking glorious Vedic past. Another argument put forth was that though India might have remained 'backward' in matters of material achievements it remained par excellence in the realm of spiritual greatness. This resistance to the 'secular progressive' time scale resulted in some taking refuge in the timeless, eternal and spiritual past. If the early Hindu nationalist criticised the empty homogeneous time of modernity by counterposing the spiritual realm, the anti-caste movement that arose in the mid-nineteenth century used the secular progressive temporality to attack the hegemony of the Brahmins by seeking emancipatory potential in the secular progressive time.

Classificatory techniques that originated in Europe in the 17th century helped in conceiving society at a macro level. Population became subject of study only after the development of statistical knowledge. Census tools were deployed to capture, what appeared to the colonial authorities as, chaotic social realities of Indian society. Caste was an important social marker that needed enumeration. The fuzzy caste relations had to be transformed into measurable entities by capturing its features like endogamy, commensability, occupation, ritual practices etc. Kalpagam argues that classificatory techniques were not unique to India as it was the result of statistical practices that became embedded in the governmental rationality of Western states. These techniques helped in assessing the capacities of individuals, groups, communities and state resources. This was necessary to integrate people into political economy and administrative rationalities of the state. Often postcolonial writers criticised census techniques for freezing caste system that, they claimed, was fluid before the arrival of the British. However, it must be understood governmental rationalities didn't exist in vacuum; they always partake the social realities of the society. Even in Europe disciplinary techniques and surveillance practices were used against working class, vagabonds and criminals. The discourse of race and crime got mixed with evolutionary science and this led to the emergence of governmentality that began to understand caste system as based on racism.

The colonial State could not penetrate the depths of the society unless it was able to manage the conduct of the population in the direction of colonial liberal practices like participation in the new economy, accepting new social identities, developing respect for colonial value-system. Newspapers were yet another important mode of public sphere that developed in colonial India. Colonial State had to keep the Indian public informed about government policies and stimulate

favourable responses. The English newspapers published for the resident British and English educated Indians created public sphere for deliberations and debate though its spread was limited. The vernacular newspapers broadened the horizons of public sphere in India as the non-English educated masses (limited in numbers) could participate in the public deliberations. The colonial State also raised, especially after the 1857 mutiny, legal barrier to prevent the production of hostile public opinion. The nascent nationalism emerging in India made use of vernacular press to raise national consciousness of the masses. Similarly, some social reformers used newspaper to create favourable opinion about the benign role of the colonial power in catalyzing social change in the society.

The liberal freedom that was introduced by the colonial governmentality was always fortified by the security requirement of the colonial state. Yet this liberal governmentality germinated the ideas of equality and justice although in fragmented manners that got reflected in a more coherent manner in the framing of the Indian constitution. The postcolonial implications of colonial governmentality are also examined in the book with respect to both planning techniques for attainment of justice and the role of information in the constitution of neoliberal subjects.

Rule by Numbers offers original perspectives on the construction of the colonial State and colonial power within the framework of governmentality. It does a commendable work in drawing implications for the postcolonial nation-State in the contemporary period. It provides a wealth of information for students of surveillance studies. However, the main drawback of the book is that it is very dense. Readers not familiar with Foucault's theory of power will find it difficult to understand the book. Another major limitation of the book is the lack of references to political and social resistance coming from various segments of the society to the practices of colonial governmentality.

Journal of Public Affairs and Change

Call for Papers

For second issue of *Journal of Public Affairs and Change* focussing on **'End of the Welfare State?'**

Asa Briggs, in a classic essay on welfare state, identified three principal elements. These were:

- A guarantee of minimum standards, including a minimum income;
- Social protection in the event of insecurity; and
- The provision of services at the best level possible.

Its proponents consider welfare state as central to democracy as it will ensure equity, freedom and humane society.

Those left and right of politics have critiqued the concept of welfare state. The left argued that welfare state by offering few crumbs blunts the revolutionary fervour of the working class and coopts them. The welfare state despite its veneer merely promotes the interest of the bourgeoisie. The right, argue that welfare state by offering citizens a cradle-to-grave system of unconditional government support, creates intrusive governments, stifle personal responsibility and individual freedom. Of late there is also concern over the rise of competitive populism where contesting parties promise to give voters not just education or health care but anything from cable TV to laptop; politicians have a major interest in the ballooning welfare state. There are some who view the Government's record on welfare is disappointing and point out to the innumerable institutional failures it suffers from.

Yet, there is concern over states withdrawing and leaving the marginalized at the mercy of vagaries of the market. So, the issue is has welfare state outlived its utility? If so what kind of state should replace it? What are expectations of the citizens? The Summer 2017 issue of *JPAC* seeks to address these issues.

We would like to focus on issues such as

- Theoretical exploration of welfare
- Role of different welfare actors- State, Market, Civil Society.
- Neo-liberalism and welfare schemes.
- Welfare policy or electoral populism
- Role of public private partnership,

- Social sector wise impact of welfare policy and alternatives
- Institutional framework and welfare.

The list is only illustrative and we are open to submissions that come within the theme for the next issue.

Deadline for submissions is **June 1, 2017.**

Submissions must include a cover letter that provides:

- Manuscript title

- Names, positions, and institutional affiliations of each author. Corresponding with author's telephone number, postal and e-mail address.

Manuscripts must conform to the current edition of the **American Psychological Association Manual (APA).**

Papers should be no more than 6000 words, including references or commentaries on a current issue not more than 2000 word. Book Reviews should be about 1500 words.

Manuscripts must include an abstract of approximately 150 words. Tables/figures should be submitted as separate documents. Title and author information should be on a separate page. There should be no mention of the author in the inside pages of the submission. Manuscripts must be submitted electronically in a format compatible with Microsoft Office. Submission emails must be addressed to editors.jpac@gmail.com with the subject line "Submission to JPAC".

For a full version of the Guidelines: http://www.jpac.in/documents/Editorial_Policy.pdf