॥ न्यायस्त्र प्रमाणं स्यात् ॥

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ANNUAL LECTURE SERIES IN CRIMINAL LAW

CRIME, PUNISHMENT AND JUSTICE IN INDIA: **THE TRAJECTORIES OF CRIMINAL LAW**

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TRAJECTORIES OF CRIMINAL LAW

First, congratulations to the Death Penalty Project on its re-christening!

This is meant to be a reflection on the trajectories of criminal law in India. It seems a vast topic. This address is expected to initiate a conversation on 'what we are criminalising' and 'how we are criminalising'. On trajectories of criminalisation and the rationale behind them in contexts not limited to law and poverty. There are concerns about criminal procedure and how it impacts the disadvantaged.

The big question is whether there has been sufficient normative development of criminal law within the framework of the Indian Constitution and if not, what has this meant for a constitutional democracy committed to the rule of law?

This is also a talk about stories. The criminal justice system abounds in them. Victims, witnesses, the police, lawyers, the judges, TV anchors, the public – everyone has a story, and each believes or at least hopes that their version is the true one.

Akira Kurosawa's classic 'Roshomon' is a reminder that there are several versions of the same story, each seeming right, depending on who is saying it, when it is said and from what standpoint.

But then only some stories can be recounted today. And possibly not from all standpoints. There are many that I do not propose to delve into for paucity of time.

For instance, despite more stringent penal provisions after 16th December 2012 why has the number of gang rapes reported shown an alarming increase? What encourages videos of such gang rapes to be uploaded on the net?[1] Why would police officers of a State invite the media to a live encounter?[2] Candlelight vigils for rape victims, yes. But protests for rape accused? That too by lawyers?[3] The police knocking at the door at the instance of someone who didn't like what he saw online; a funny stand-up comedy clip; a sarcastic remark against the government;[4] a Facebook post ridiculing a popular public figure.[5] It could be just about anything.

Now we know that at short notice a mob can assemble and it will want justice here and now. Society appears to be on a short fuse and at times lacking a sense of humour. The saner and sober voice of reason easily gets drowned out by high decibel rabble-rousers dressed as TV news anchors framing the issue in binaries and whataboueries. Then there are the troll armies that descend on an unwitting opinion holder in a cacophony of unreason. No sense. Just noise.

Shakespeare depicted this to us starkly. There is a scene in *Julius Caesar*, Act II, Scene III. Caesar has been assassinated. Marc Antony, in his impassioned speech infused with powerful rhetoric, tells the angry mob that the assassination was the work of a cabal of conspirators led by Brutus and which included Lucius Cornelius

Cinna. Someone in the mob points to a man who happens to be Gaius Helvius Cinna, a poet. His protests that he is Cinna the poet fall on deaf ears. "It's no matter," says one in the mob, "His name is Cinna! Tear him for his bad verses, tear him for his bad verses".[6]

All that for another day.

What I propose to do, however, is to reflect briefly on the origins of the criminal justice system, which we have continued with for well over three centuries, and reflect on the debates at the time of the making of the Constitution that firmly foregrounded the basic criminal law tenets. In examining the way our institutions have worked, I touch on the broader aspects of immunity and impunity. I also propose to briefly talk about the resilience of the non-formal legal system in our country that continues to impact the way criminal law works; about the changes we are witnessing in law and procedure and how our institutions are responding to them; and about the new challenges before us and how we could meet them.

II

The more things change, the more they remain the same

When we begin to talk of the present criminal justice system, we need to acknowledge that it is essentially, as noted by Professor M.P. Jain "what the British created, and hardly has any correlation, continuity or integral relationship with the pre-British institutions".[7] A study of the criminal justice system in Madras between 1686 and 1726 revealed "that the process of administering justice was very slow and tardy. Criminals as well as debtors were confined to prisons for long periods so much so that at times even their offences were forgotten".[8] In Bombay "the whole idea of criminal justice was preventive and deterrent and, with this end in view, even inhuman and barbarous punishments were not uncommon".[9]

The British formally tookover the criminal justice system in 1790.[10] However the scenario then appears to persist till date. Officers' salaries were meagre; they accepted bribes with impunity, and crime was promoted as criminals felt that money could save them from the law; proceedings in criminal courts were dilatory; prisons were overcrowded and insanitary. Thus, "major crimes were committed with impunity and lawlessness prevailed throughout Bengal, Bihar and Orissa".[11] In 1793, the "executive was not only separated from the judiciary, but was even placed under the courts for breaches of law".[12] This did not work out and was sought to be reversed in 1833 during William Bentinck's time by combining executive and magisterial functions.[13] However, there was no discernible improvement. The fundamental problem of delay in conduct of trials leading to prolonged incarceration of under-trials in overcrowded prisons persisted not only till the country became politically free but even thereafter.[14]

Radhika Singha, who studied the crime and justice system in pre-independent Bengal, observed that the object of the Indian Penal Code 1860 was to minimize discretion in the executive and the judiciary and provide Indians, in a limited way, legal redress against arbitrariness of official acts.[15] She points out that a prominent feature in the period between the late eighteenth century and the mid-nineteenth century was "a preference for administrative solutions to control agency rather than substantial reform in judicial procedure, or provision for judicial redress".[16]

Preventive detentions and preventive arrests were part of the criminal law milieu. The Criminal Law Amendment Act, 1908 and, the Defence of India Act, 1915 were frequently invoked. Expressions of political dissent attracted the indiscriminate and arbitrary deployment of criminal law.[17] Even dramatic performances were subject to pre-censorship.[18] Poverty was criminalized. The colonial law in the nineteenth century in Bengal empowered the police to apprehend not only dacoits and robbers but also "*Geedur mars*, *Malachees*, *Syrbejuahs* or other description of

vagrants lurking about without any ostensible means of subsistence".[19]

With the advent of the industrial revolution, persons found idling or presumably refusing to work were seen as social parasites and a threat to the socio-economic order.[20] This provided the justification for making both vagrancy and begging punishable offences.[21] In its application, the significance of this law was "in its quantitative impact and administrative usefulness."[22] As a "catch-all of criminal law,"[23] it was useful in banishing 'unwanted persons', 'cleaning up' cities, and abating nuisances.[24] The activities of the poor were criminalised. Beggary and vagrancy, juvenile delinquency, sex work[25], the wandering mentally ill[26], the *hijras*,[27] were all the subject matter of control by penal statutes.

When the draft Constitution was being prepared, the triumvirate of the Indian Penal Code 1860, the Indian Evidence Act 1872, and the Code of Criminal Procedure 1898 formed the statutory bulwark of the criminal justice system. They governed the functioning of the police, the criminal courts, and penal custodial institutions. They were central to the debates in the Constituent Assembly around the introduction of Articles 20, 21, and 22 in the Constitution of India.

The Constitution makers proceeded on certain major premises which have survived till date. One of these was that in the area of criminal law, procedure is sacrosanct. There was hardly any contestation over Article 21 guaranteeing, as a fundamental right, not to have the life and liberty taken away except in accordance with the procedure established by law. The debate, if any, was only whether we should adopt the due process clause found in the 14th Amendment to the United States Constitution. Presumably, on Justice Frankfurter's counsel, Sir B.N. Rao desisted from including it in the draft Indian Constitution.[28] The procedure that Article 21 talks of has to be just, fair and reasonable.[29]

The production of an arrested person before a criminal court within 24 hours; being informed of the grounds of his arrest; being informed of his right to be represented by a lawyer of his choice; judicial supervision of the detention of a suspected person, first in police custody and thereafter in judicial custody, were elements of criminal procedure written into Article 22 of the Indian Constitution.

The presumption of innocence and the right to silence formed the basis of Article 20 (3) and the right against *ex post facto* conviction is guaranteed under Article 20 (1) of the Constitution. The right against double jeopardy is found in Article 20 (2) of the Constitution.

Ours was also perhaps the only constitution which prescribed offences. Article 17 declared untouchability to be an offence. Article 23 declared the trafficking of human beings and *begar* as offences. The freedoms under Article 19 to speech, assembly, association, residence, and movement were subjected to reasonable

restrictions on the grounds of law and order, public morality, and state security. Early in 1951, a leading light of the Supreme Court, Justice Vivien Bose, reminded us that "it is the rights that are fundamental and not the limitations on freedom."[30]

The production of an accused person before a criminal court within 24 hours, being informed of the grounds of arrest and his right to be represented by a lawyer of his choice, and the judicial supervision of the detention of a suspected person first in police custody and thereafter in judicial custody are elements of criminal procedure which were written into Article 22 of the Constitution (Article 15A in the Draft Constitution). How this came about is interesting. Dr. Ambedkar explained Article 15A was being introduced in order to provide for "the substance of the law of 'due process".[31] Although Dr. Ambedkar conceded that "Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice,"[32] there were objections and suggestions even to the wording of these clauses.[33] In response to Pt. Thakur Dass Bhargava's suggestion that the draft Article 15A should include a clause providing for "right of consultation after arrest and before trial and the right of being defended by the counsel of his choice," Dr. Ambedkar relented and suggested that the following words be added in the last line of clause (1) of Article 15A: "(Nor shall he) be denied the right to consult or to be defended by a lawyer of his choice".[34] There was discussion on the denial of the right of representation to persons preventively detained. Mr. H.V. Kamath made particular reference to the "frequent cases of physical or mental ill-treatment to which detenues were subjected during the British regime, especially during the dark days of 1942 and immediately thereafter" and that "it is but fair that our Constitution should lay down specifically that no detenue will be subject to physical and mental ill-treatment".[35] Mr. K. Kamaraj of Madras posed a question to M. Ananthasayanam Ayyangar: "If the choice of a person for instance a communist of the day, is a Russian lawyer, would you allow it?"[36] The response: "Let us not be prejudiced against lawyers. As a matter of fact, but for lawyers, this Constitution would not have come into existence".[37] In his response, Dr. Ambedkar adverted to the suggestions made in regard to the right of an accused person to consult a legal practitioner. With a view to removing ambiguity, he said, "I am prepared to add after the words 'to consult' the words 'and be defended by a legal practitioner', so that there would be both the right to consult and also the right to be defended".[38]

It was in 1976, by the 42nd Amendment, that Article 39A (the moniker of the host for today's event) providing for free legal aid came to be inserted in the Indian Constitution. The Legal Services Authorities Act 1987[39] is a statutory affirmation of the right to free legal aid to every person in custody even if under preventive detention. It, therefore, makes up for what continues to be denied by Article 22.

Even 71 years after independence, we have persisted with some features of the criminal law as it stood at that time. The Criminal Law Amendment Act, 1908 has survived and is still being deployed to ban organisations.[40] The Defence of India Act 1915 has constituted the basic model for the post-Independence preventive detention statutes. Apart from the National Security Act 1980, the COFEPOSA 1974, Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act 1980, there are at least 17 other preventive detention statutes enacted by State assemblies that enable executive detention, without judicial supervision, for a minimum of three months and a maximum of a year without trial.[41] The Armed Forces Special Powers Act (AFSPA), 1958 a 60 year old law that permits takeover of civil administration by the armed forces, applies in parts of the North East and its counterpart enacted for Jammu & Kashmir to the whole of that state. AFSPA applies to the whole of Nagaland, Assam, Manipur and parts of Arunachal Pradesh. Then we have the Public Safety Act that applies in J&K since 1978. One of our eminent jurists Prof. Upendra Baxi has this to say on preventive detention:

> *"The Indian Constitution is the most unusual document, for among other reasons it has Article 21 which says everybody shall have the right to life and liberty, and Article 22 which authorises preventive detention .... One can understand this because it was a country born in holocaust and the constitutional assembly wrote in the middle of partition violence.... so one understands 22 it in its original setting. But then it becomes habit of the state to govern by preventive detention. It becomes a legislative habit, a judicial habit to say it is ok. That is what was not intended by the constitution makers. And it fosters what Kannabiran says "culture of impunity" because it is a very vast power and you can do with it what you like. The courts can only review so much of detention and so on. Although the courts have policed as it were, detention powers, they have not questioned them. They cannot because the Constitution authorises that. It is also a response of state panic, when political managers are not able to cope. This is a high handed instrument to cope with resistance, popular unrest and so on."*[42]

We have persisted with provisions for preventive arrests and the laws that criminalise poverty, and subject dramatic performances to pre-censorship. The disproportionate impact of criminal laws on the minorities and under-privileged, which was a recurrent theme of the pre-Independence times, continues till date. A majority of those incarcerated whether as undertrials or as convicts belong to the scheduled castes or minorities (See tables below). In some states like Madhya Pradesh and Chhattisgarh they are predominantly Scheduled Tribes.[43]

INCARCERATION OF MINORITIES[44]

Category	No. of under trials	No. of convicts	% of under trials
SC	61,139	28,033	21.6
ST	34,999	18,403	12.4
Muslim	59,053	21,220	20.9
Total	2,82,076	1,34,168	100

SCHEDULED TRIBES INCARCERATED IN CHHATTISGARH AND MADHYA PRADESH[45]

Convicts	Chhattisgarh	Madhya Pradesh
Total Backward Classes	7774	17058
Scheduled Tribes	2269	4101
Percentage of Scheduled Tribes	29.1%	24%
Undertrials	**Chhattisgarh**	**Madhya Pradesh**
Total Backward Classes	9870	21300
Scheduled Tribes	2919	4820
Percentage of Scheduled Tribes	29.5%	22.62%

There is a myth that has persisted as well, that better crime control involves more severe penal laws with harsher penalties. The earlier anti-terrorism laws like the Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA) and the Prevention of Terrorism Act, 2002 (POTA), have been morphed into the pre-existing Unlawful Activities (Prevention) Act 1967 (UAPA) by way of amendments. Then we have the law to deal with organised crime i.e. the Maharashtra Control of Organised Crime Act, 1999 (MCOCA). There are questions being raised whether these statutes could be seen as incorporating a predictable template of provisions that stand at odds with the constitutional provisions concerning criminal procedure that we noticed earlier. Longer periods of police custody,[46] extending the time for filing of charge

sheets from 90 to 180 days,[47] and making the obtaining of bail prior to the filing of a chargesheet extremely difficult.[48] The NDPS Act 1985 which is enacted to deal with the drug menace has provisions for presumption of a culpable mental state,[49] apart from provisions that make the grant of bail extremely difficult. For it is not as if these laws have helped reduce the incidence of these crimes. The conviction rates under TADA and POTA remained abysmally low as long as they survived on the statute book. While the conviction rates under the UAPA and the NDPS Acts are better, the long pendency of trials and increased incidence of the crimes themselves point to a failure of the statute to be an effective means of controlling the menace (see table below). As it invariably happens in the criminal trials in our country, the process is itself a punishment.[50]

Conviction and Pendency Rates under UAPA and NDPS[51]

Year	UAPA			NDPS		
	Total Cases	Conviction Rate%	Pendency %	Total Cases	Conviction Rate %	Pendency %
2013	n/a	n/a	n/a	1,50,740	64.7	87.1
2014	1250	27.3	97.4	1,57,375	74.3	86
2015	1330	14.5	94.2	1,81,601	77.2	80.6
2016	1488	33.3	97.8	1,99,412	72.4	81.4

The legislature nevertheless continues with the same pattern. It has introduced it in the statutes dealing with economic offences. The recent examples are the Finance Acts,[52] the Prevention of Money Laundering Act 2002[53] and the Companies Act, 2013. Apart from defining new offences,[55] they grant public servants working in the executive government police powers of arrest, search and seizure.[56] Since these public servants are not 'police officers' as understood under the Cr PC,[57] the statements recorded of the suspect by such public servants during investigation are admissible in evidence.[58] While there is confusion whether these offences are cognisable or non-cognisable, there is no FIR registered, therefore there is no requirement to maintain a case diary or ensure that the necessary steps taken and supervised by a criminal court.[59] The bail provisions in some economic offences statutes are as harsh as in an anti-terrorism statute.[60] The latest in this genre is the Fugitive Economic Offenders Act 2018.[61] It provides for seizing of the assets of the fugitive offender. One rationale offered is that economic offences are no different

from terrorist crimes. Further, the refrain is that 'something has to be done about the repeated instances of economic fraud.'

In the last two decades the Magistrates' courts in India have been swamped with cheque bouncing cases. We are talking here of literally lakhs of cases. What would be considered as pure and simple civil cases, are being dressed up as cases of cheating under Section 420 IPC which is a cognisable and non-bailable offence.[62] Builders, floaters of Ponzi schemes, fly-by-night operators, frequently appear in the criminal courts. Then we have the whole range of corruption cases involving the scams – 2G[63], coal scam[64] and others, which bring in companies that are accused of bribing public servants for favours, attracting the Prevention of Corruption Act 1988.

Pendency of Section 138 Negotiable Instruments Act cases

As on	No. of Pending Cases
31st December 2017	2,28,745
1st September 2018	2,38,670

Statistics on Cheating Cases (S.420 IPC) in India

Year	Cases sent for trial	Total cases for trial	Disposed of	Conviction Rate	Cases Pending at the end of the year
2014	48,180	3,01,990	23,706	22.2%	2,74,858
2015	53,188	3,27,846	23,413	34.6%	3,00,823
2016	55,738	3,56,493	26,457	20.0%	3,30,036

What this has also meant is that the more frequent presence in the criminal courts is the corporate litigant, the businessman. More white collared crimes being prosecuted means more company executives being arrested and arraigned. The profile of the criminal bar and criminal law practice has undergone change.

The other frequent visitor to the Courts and the Juvenile Justice Boards is the young adult, either as a victim, witness or accused. One of the reasons of such visits is the enactment of the Protection of Children from Sexual Offences Act 2012[65], a penal statute to deal with child sexual abuse. The other development is

that despite the rape law being made more stringent after the horrific gang rape in Delhi on 16th December 2012, there has been no palpable effect on the growing instances of rape around the country.[66] Just in one year, 2016, a total of 38947 rapes were committed out of which 2167 were gang rapes!!

Rape Statistics 2010-2016[67]

Crimes In India Reports	2010	2011	2012	2013	2014	2015	2016
Number of rape incidents in India	22,172	24,206	24,923	33,707	36,735	34,651	38,947
Number of rape incidents in Delhi	N/A	N/A	N/A	1,441	1,813	1,893	2,155
Number of gang rapes in India	N/A	N/A	N/A	N/A	2,436	2,113	2,167
Number of gang rapes in Delhi	N/A	N/A	N/A	N/A	N/A	N/A	85
Rape incidents where victims are SC/STs	1,349	1,557	1,576	2,073	N/A	N/A	2,541

Incidents of Rape in India

Year	Incidents of Rape
1971	2487
1980	5023
1990	10068
2000	16496
2010	22172
2016	38947

POCSO Statistics 2014-2016[69]

Year	Cases for Trial	Conviction Rate (%)	Pendency Rate (%)
2014	8379	24.6	95.1
2015	20935	41.9	90.2
2016	101326	29.6	89

The tasks of the policeman[70] and the criminal courts have increased manifold in the past decade. Newer and harsher criminal laws are enacted without accounting for the impact that they have on the functioning of the law enforcement apparatus and the judiciary.[71]

III Punishment does not work

"Injustice is one of the greatest factors in perpetuating crime in the country and moulding the habitual criminal." [Erle Stanley Gardner][72]

Erle Stanley Gardner, a California attorney more famous for his fictional character Perry Mason, in his perceptive tome 'The Court of Last Resort',[73] spoke of politicians having to respond to the crying need of the public to do something about the increase in instances of crime. The quick fix solution was to enact a very severe penal law that would somehow assuage the raging public that 'something is being done'. Gardner was critical of continuing with harsher punishments for drug related offences which were on the rise in the early 1950s in the U.S.A. According to him: "That remedy has been in effect for hundreds of years and all it has done is to increase the number of criminals to a point where our prisons are bulging."[74] He warned that "We can't let the criminal determine the extent of our law enforcement."[75]

Another scholar Charles Silberman in "Criminal Violence, Criminal Justice'[76] offered a similar critique of the system prevalent in the late 1970s in the USA. According to him "behaviour that emanates from respect for law is different from the behaviour that reflects a fear of punishment; to ignore the distinction is to confuse authority with coercion...Acceptance of the legitimacy of law is a far more effective instrument of social control than is fear of punishment."[77] He further pointed out that "Recent research on deterrence suggests that increasing the certainty of punishment has considerably more impact on crime than does increasing its severity."[78]

Offering a Marxian perspective William Chambliss says: "Criminal behaviour is the product of the economic and political system".[79] According to him, in capitalist societies "criminal acts are widely distributed throughout the social classes. The rich, the ruling, the poor, the powerless and the working classes all engage in criminal activities on a regular basis. It is in the enforcement of law that the lower classes are subject to the effects of the ruling class domination over the legal system, and which results in the appearance of a concentration of criminal acts among the lower classes in the official records. In actual practice however class differences in the rate of criminal activity are probably negligible. What difference there is would be a difference in the type of criminal act, not in the prevalence of criminality."[80]

IV

Situational Engineering replaces Social engineering

"The emotional temperature of policy making has shifted from cool to hot."
[David Garland][81]

This explains to some extent the general trajectory of crime and criminal law in the last two decades. But the more recent changes, particularly beginning in the 21st century, require a different understanding. And that is compellingly provided by David Garland's seminal work: 'The Culture of Control'. Although written in 2001, it offers the best possible explanation for what we now see around us.

What Garland found happening in the 1970s in the U.K. and the U.S.A is happening here now. We too are witnessing the fading of the correctionalist and welfarist rationales for criminal justice intervention and a decline in the rehabilitative ideal. Rehabilitation as a goal of crime control policy, based on the earlier understanding of criminality as a symptom of poorly adapted individuals and families, is giving way to retribution, incapacitation and management of risk. Those, like you and me, are seen as equally prone to crime and, therefore, needing to be 'controlled'. The focus is shifting from the criminality and the criminal individual to the criminal event.[82] 'What' is being punished is relevant. Not 'who' or 'why'.

The last three decades of the 20th century, says Garland, witnessed the "remarkable return of the victim to centre stage in criminal justice policy."[83] The earlier focus on the need to reintegrate the felon as an imperative of the public interest in treating no one, even the 'useless criminal', as dispensable has given way to the interest and feelings of victims – actual victims, victims' families, potential victims – which are now routinely invoked to support measures of punitive segregation. There is an emergence of fear of crime as a prominent cultural theme. The next victim could be you. It could be your mother, partner, son or daughter. The image of the delinquent as a misdirected person in need of attention has made way for legislation to stereotype the depictions of 'unruly youth, dangerous predators and incorrigible career criminals.'[84] The background effect of policy is more frequently a collective anger and a righteous demand for retribution rather than a commitment to a just, socially engineered solution.[85]

Garland explains how in a market economy, the policy making process has become profoundly political and populist. Protecting the public has become the dominant theme of penal policy. Crime and delinquency are viewed not as problems of deprivation, but of inadequate 'control'.[86] The State and the media trade on the images of the amoral behaviour of dangerous offenders and remind us that 'our' security depends on 'their control'. Garland describes the 'criminologies

of everyday life' as envisaging three broad types of controls.[87]

First we have 'social controls' whereby the state will dictate how we behave as 'good citizens, by infantilising whole populations with homilies of dos and don'ts (announcements over the sound system at railway stations). This also compels giving up to the State our personal data – fingerprints, iris scans, face scans, DNA. The State will maintain a register of sex offenders and put in place the CCTNS; banks will ask to update the KYC data; your having to report to the State every now and again with some information about yourself or your family or getting police clearance before engaging a domestic help or letting your premises to a tenant. The billboard below is an example.[88]

Then we have the 'situational controls'. CCTVs everywhere, inside and outside the houses, on streets, corridors in public buildings, metal detectors, baggage and body scanners, electric fences, gated communities.[89] This along with private security guards and body guards, outsourcing of security services by the state to *'Salwa Judum'*.[90] Village and Mohalla Defence committees. What Garland calls 'responsibilisation.'[91]

Being watched on line and, as Snowden informed us, your private electronic communications made available for data mining by your state maybe but definitely by the country of the service provider.[92] Crowd photographs scanned with banked data to zero in accurately on suspects.[93] Drone warfare that eliminates boots on the ground.[94] The Orwellian dystopia of big brother watching your every move and even trying to read your thoughts.[95]

A third variant is 'self-control'. You snoop on your neighbour. You report to the police on someone suspicious. You train in martial arts. You be 'sensible'. What this

results is in the informal ghettoisation of populations segregated on communal, caste lines and eating habits. The following poster advertising for an exclusive Brahmin housing colony in Mysuru illustrates this perfectly.

According to Garland, the crime control policy in a market economy state, entails reducing opportunities for crime. Anyone could be a terrorist. So don't give anyone a chance, increase situational controls and change everyday routines. No longer will people grumble when *route lag jaati hai*[96] or when they are pulled aside for checks or frisked or the boot and bonnet of their vehicles opened. People are likely to steal cash, so replace it with plastic money, better still wireless transfers. Have electronic identification systems, tracking devices, IoTs, wrist bands fit bits that talk seamlessly to other computers; algorithms that will mine the collected big data and do background checks on prospective employees, tenants, spouses. Imposing curfews on movements, controlling access to the internet (who said the net was free?) Insurance companies (life and general) constantly advertising fear.[97]

In Garland's analysis, in the criminology of control two new currents have emerged. The three broad types of 'controls' that we just noticed, are termed by him as **late modern** in character. These he says are more attuned to our way of life, more aware of the limits of government schemes, more modest in its ambitions for human improvement. The other current is that which is intrinsically **anti modern**. It "re-dramatizes crime – depicting it in melodramatic terms, viewing it as a catastrophe, framing it in the language of warfare or social defence."[98] Being intrinsically wicked or evil, some offenders are not like us, they do not fit in and so they must be forcibly expelled. "Criminal actions" according to this view, "are voluntary and bad choices of wicked individuals."[99] It allows us to forget what penal welfarism took for granted: that offenders are citizens too and their liberty interests are our liberty interests. Both new criminologies, Garland says, differ in profound ways but reinforce each other and "entrench the culture of control that has taken hold in the public discourse on social and crime issues."[100]

We can see the effects of such an approach in the debates in our country that led to lowering the age beyond which the juvenile is tried as an adult to 16 years[101] and prescribing the death penalty for rape of children below 12 years.[102] Moreover, the knee jerk reaction in asking for newer laws for a range of crimes like lynchings, honour killings is suggestive of an impatient society desperate for quick fixes. The re-criminalising and decriminalising of social behaviour that the dominant section of society does not approve of is reflective of the tension created by the "late modern" and "anti-modern" approaches to crime control.

Tied up with the return of retribution as a pivot around which criminal law administration is configured, is the promotion of a general culture of violence, of immunity and impunity when the entities and individuals protected by the State, or the State itself, kills; whether in fake encounters[103] or by way of custodial torture and extra judicial killings. Sharp shooter policemen are valorised.[105] It even percolates to vigilante mobs.

The return of retribution in sentencing is evident. We have some judges, who are called upon to make the choice of penalties for homicidal crimes between life imprisonment and the death sentence, saying how we cannot be seen to be soft state, how our 'sympathies' should not be 'misplaced' and how humane considerations have no place in sentencing.[106] When they affirm the award of the death sentence these judges often say that they are answering the 'collective conscience'.[107] Justice Radha Binod Pal, the lone dissenter in the Tokyo Tribunal set up to try the World War II war crimes in Japan, had a different perspective:

> *"It is indeed a common experience that, in times of trial and stress like those the international world is now passing through, it is easy enough to mislead the people's mind by pointing to false causes as the fountains of all ills and thus persuading it to attribute all the ills to such causes. For those who want thus to control the popular mind, these are the opportune times; no other moment is more propitious for whispering into the popular ear the means of revenge while giving it the outward shape of the only solution demanded by the nature of evils. A judicial tribunal, at any rate, should not contribute to such a delusion."* [108]

NLUD's Death Penalty Project shows us that there are judges working to push the law in the other direction which emphasises rehabilitation of the criminal and restitution of the victim as not two opposing demands but as a continuum.[109] In seeking to strike a balance our Supreme Court seeks to substitute the death penalty with mandatory minimum sentences.[110] It is a dynamic process in which the bench mirrors the plurality of the beliefs held in a multi-cultural society.

V

Law and Poverty

"To be impoverished is to be an internal alien, to grow up in a culture that is radically different from the one that dominates the society."[111]

The discussion of the increase in crime rate in urban locations is invariably linked to the geographies of inequalities and inequities. According to Silberman: "The fabric and texture of life in urban slums and ghettos provide an environment in which opportunities for criminal activity are manifold, and in which the rewards for engaging in crime appear to be high - higher than the penalties for crime, and higher than the rewards for avoiding it."[112] Barbara Harriss-White points to the endemic criminalisation of the lives of the poor that pushes them into the vortex of the criminal law spiral, escaping which seems near impossible. She states that, "The occupations of practically destitute people are also criminalized—not simply sex-work, or the couriering or peddling of drugs but even itinerant trading and squatter trading. Children in need of care and protection, children in conflict with the law, and child labour all fall under the jurisdiction of the judiciary and police. The enforcement of these laws involves the removal and incarceration of such people. Targets of preventive detention set for the police require the regular rounding up of homeless and destitute people."[113]

Delhi is the only State where recently in August 2018 the High Court struck down the anti-begging statute.[114] Its counterpart continues in over 20 other states in India. The statutes that enable taking into custody the wandering mentally ill,[115] the sex worker found in a brothel,[116] the juvenile in conflict with the law,[117] all these punish the poor for who they are and not necessarily what they do. Municipal laws punish the poor in different ways, for what they do to survive. The pavement dweller,[118] the stealer of electricity and water in slums have to live in a state of permanent fear of the policeman's *lathi*. They are easy pickings in times of crisis. The courts where such cases are tried are literally the poor courts, where there are poor lawyers. It isn't justice for the poor. It is poor justice. Here I think the LSAs can play a significant role.[119]

Over the years, these have been the areas for judicial intervention through PILs.[120] The task has been to visibilise the penal custodial institutions, reach the inmates and to liberate them for inhuman conditions of existence. Still, there is much to be done. The Agra Protective Home of 1985[121] is replicated in more horrifying degrees in Muzzafarpur and Deori.[122] We have had remarkably sensitive responses from the Supreme Court to the issues concerning manual scavengers[123] and sewer cleaners.[124] But as in many other things, there are no easy solutions. The implementation of Court orders is another challenge.[125] It is a work in progress. The Court does step in to correct.[126] Sometimes late, but still better than never.

VI

Despair and Hope

Let us now look at the Non-Formal Legal Systems (NFLS) that continue to be robust and seemingly stand firm against the rising waves of change. *Khap* and *katta* panchayats can still sentence *sagotra* couples to death;[127] a girl can be sentenced to gang rape because she decided to marry someone from outside her village;[128] women can be declared witches,[129] be hunted down, lynched and burnt; alleged child lifters,[130] cow smugglers,[131] even young thieves[132] can be lynched. Bodies can be mutilated,[133] acid thrown,[134] faces blackened,[135] women stripped and paraded.[136] Those who kill for honour will be glorified.[137]

But it is not as bleak as it seems. People stand up to it. The *Naari Adalats* in Gujarat,[138] the Muslim Women's *Jamaat* in Tamil Nadu[139] and the 'Gulabi Gang' in Uttar Pradesh[140] are inspiring stories of brave women who want to control their destinies. Another inspiring moment was when women manual scavengers in the recent past in several states literally threw away their baskets and brooms to liberate themselves from the dehumanising activity they have had to undertake generation after generation.[141] This solemn act of self-emancipation had no state support and little societal support.

In the *habeas corpus* jurisdiction our high courts are routinely visited by couples who have had the courage to defy the unjust societal norms, risk their lives to run away and seek protection. Some succeed, others don't. But, they try. Some mind sets are able to be changed and some are not. Young women like Hadiya are prepared to stand and fight for their choices.[142] They are today shaping the law and guiding the Courts to developing it in the vision of Ambedkar who wondered if we would survive as a republic if we did not make equality and fraternity our constitutional creed.[143]

Defying the troll armies, people are prepared to speak up, do a stand-up comedy show and mock power-exhibiting authorities by refusing to mistake the government for the State. These people believe that they have the constitutional right to voice their opinions. Once again, aided in no small measure by the judiciary, the Khushboos,[144] the Perumal Murugans,[145] the Hareeshs,[146] the Anand Patwardhans[147] are making the difference and reminding us that democracy in our country is a work in progress. Its engines need the dissenting voice for fuel.

VII

Lessons from our Failures

How have our institutions responded to the most difficult challenges? Much has been written about the failures to deliver justice to victims of mass crimes - in 1984[148] in 1992-93,[149] in 2002[150] and in Kandhamal in August 2008.[151] One continuing prominent example of this is the failure to promptly investigate and bring the perpetrators of egregious crimes against the scheduled castes to justice. These should not be merely looked at as failures of institutions but collective failures of the rest of society to acknowledge and respond to the injustice and reach out to the victims. It points to the need to actively work towards a more inclusive and trusting society that resolutely resists being divided on caste and communal lines. These instances also point to the failure of the FLS to dialogue with the NFLS. We are unable to meaningfully comprehend the factors that lead to the societal resistance to social change through the instrument of law. The failure to punish the constitutional crimes of untouchability,[152] of *begar*, to implement the laws that prohibit the giving and taking of dowry,[153] prohibit child marriage, prohibit bonded and child labour, prohibit manual scavenging and sewer cleaning.[156] It is these failures that require sustained attention across all disciplines.

There is a familiar pattern in the collapse of trials in these cases. The stark feature is the absence of an effective victim and witness protection programme about which again much has been written and talked about.[157] There are working models all over the world for us to implement, if we care to do something about it.[158]

These instances also tell us of the two big challenges that the criminal justice system is called upon to meet every now and then i.e. immunity and impunity. The failures or the delay in granting sanction for prosecution of public servants involved in crimes hampers the progress of investigation. At times, the failures to even acknowledge or register crimes committed by people who are actively abetted by those in power have resulted in grave miscarriage of justice. Not just inability but also the unwillingness of the State to prosecute.

It also brings into sharp focus the issue of crime and politics. Whether or not to prosecute, whether or not to execute, and as we saw recently in Tamil Nadu, whether or not to commute, can become highly charged political questions.[159] The increasing trend of politicians with a criminal background being elected to legislatures is disconcerting.

But again it is not as hopeless as it seems. The Supreme Court and High Courts can and at times do entrust the investigation of crimes to the CBI[160] or some other independent investigation authority where the state police is found unwilling or

unable to get to the bottom of it.[161] The Supreme Court sets up SITs.[162] It mandates trials by special courts constituted by it. It tries to make politicians sitting in the Legislature more transparent and accountable.[163] Some of these orders may seem extraordinary. All of this may not work but it certainly gives hope to those wanting fair justice.[164]

The Supreme Court has in the recent past laid guidelines to investigate encounter killings,[165] intervened to have the CBI prosecute those responsible for fake encounters,[166] overseen the work of JJB and CWCs under the JJ Act, issued directions to improve prison conditions.[167] In the recent past, the Courts have, in their constitutional dispensation, not only awarded compensation to the victims of custodial violence and malicious prosecution but have also emphasised the need to effectively prosecute police excesses.[168] In an overworked and underprovided system, instead of wringing their hands in despair some in all the institutions are putting their shoulder to the wheel. Much needs to be done; but, it is undeniable that there is a will to do it.

VIII

A better court, a better procedure, a greater hope

The criminal courts in the country are where the poor first meet the judges. How well do such courts function at that level will be the barometer by which we measure the efficiency and effectiveness of these courts. The Magistrate's Court, the Beggar's Courts, the Railway Magistrate's Court,[169] the *Mahila Court*, the JJB; all of these institutions constitute the first point of contact to the victim and the accused entering the criminal justice system. The orders passed in these Courts profoundly affect the liberties of the litigant. The Constitution and the laws do not get reduced to a mere formality. In that sense these Courts do perform a constitutional function.

While what is generally spoken of in the public discourse on the performance of the judiciary as a whole is about the work remaining to be done, not much attention is paid to the work actually being done. As difficult as it is for the police and other institutions in meeting the challenge of law enforcement in an inherently unequal society, where a culture of belief in the rule of law is still evolving, on the other hand the work of the judiciary as a whole, and the subordinate courts in particular is daunting. In 2014 and 2015 around 14,000 subordinate courts between themselves disposed of nearly 50 lakh or 5 million cases in each year.

Statistics on Criminal Trials (Pendency and Disposal) all India[170]

Year	Cases sent for trial	Total cases for trial	Disposed of	Cases Pending at the end of the year
2014	62,71,795	1,94,26,573	49,90,811	1,42,80,475
2015	63,09,386	2,05,77,075	48,81,619	1,55,12,982
2016	37,99,053	1,83,58,914	25,61,618	1,56,52,276

Institution and Disposal of Cases in Subordinate Courts of Delhi

	Institution	Disposal
Criminal Courts	7,01,644	5,99,223
Family Courts	9,596	8,965
Total	7,11,240	6,08,188

What cannot be missed is that by managing to dispose of as many cases as it receives every year, the judiciary is running hard to stay at the same place. Every new law means an added load to an already overworked judiciary. This is where the need to undertake a judicial impact assessment before introducing a new legislation is an imperative.[171]

Now, I turn to the recent changes in criminal law and procedure. Let me share some of the positive developments initiated in the Delhi judiciary for a more meaningful and fair justice.

The vulnerable witness court rooms in each district complex in Delhi have ushered in a healthy change in the way we treat our most important visitor to the court: the child.[172] These easily match the best practices in the world in the area. That does not mean that the rates of conviction in cases involving child sexual abuse will see any drastic improvement. That will require concerted efforts. There are problems of language, of translation, at which the Delhi Courts are working too.[173]

The Delhi Judicial Authority (DJA) is also working to provide orientation to our judges in criminal courts in constitutional rights and protections and to instil in each of them that in passing every remand order they are performing a constitutional function. They are in that sense human rights courts. The enforcement and protection of human rights is not the task of only the constitutional courts. They stand as an important shield between an oppressive state and every person in their domain, and not just the citizen. There is need for more lawyers imbued in constitutional values and human rights to remind our courts of their duty.

How has the criminal bar shaped the development of criminal law? It is a mystery that the criminal bar as a whole has not been in the forefront of the human rights movement in the country. What is even stranger is the response of bar associations in the form of resolutions to ban their members from appearing for the accused in some cases;[174] attacking other lawyers who are HR defenders; [175] attacking the suspects when they are produced in Court; storming court proceedings and not letting the hearing proceed etc. Subsequently, these very lawyers will come together to contribute liberally for flood and disaster relief or participate in blood donation camps.[176] What should we make of it?

A positive example of a human rights defender who firmly believed in constitutional values and to defend the right even of those who did not believe in the Constitution is K.G. Kannabiran, a Senior Advocate who practised in the High Court at Hyderabad. He narrates an exchange he had with the Judges on the Bench who were hearing a petition on behalf of those termed by the State as naxalites:

> *(the Judges asked me) Mr. Kannabiran, these Naxalites who want to go overthrow the government, overthrow the Constitution and all that, why should they seek protection under the Constitution?*
>
> *Then I told them Sir, when such values come before this Court, it is not their values which are on trial but your values. Your values are on trial, your constitution is on trial. You write in the Constitution saying people who do not believe in the Constitution are not entitled to protection, that's the end of it. So long as you say that notwithstanding their views they are entitled to rights and protection under the Constitution, it is your values, your Constitution which is always on trial."*[177]

When Harish Salve, a top senior corporate lawyer appeared for a victim of the 2002 Gujarat riots, Bilkis Bano, the outcome was positive with the trial being shifted to Maharashtra, expedited and ending in convictions of the accused in good time.[178] There are other positive developments too. A new breed of young lawyers fired with idealism is stepping up to provide *pro bono* legal assistance to victims of crime. They are working hard to bring the underprivileged classes into law schools and continue supporting them through their law course and thereafter.[179] They are prepared to give up lucrative positions in corporate law firms to work in the courts. They are an enthusiastic lot eager to joining the Legal Service Authorities (LSAs) wherever they practise.

Turning to the work of the LSAs in Delhi, duty solicitors are available in every criminal court. Legal representation is provided to every criminal defendant and victim. The DSLSA pays reasonably well and works to ensure delivery of quality legal aid.[180]

FEE SCHEDULE OF DSLSA & DHC LEGAL SERVICES COMMITTEE

DSLSA FEE SCHEDULE 2017[181]		
S No.	Description of Work	Maximum Fees (Per Case)
1.	Criminal case punishable with death, life or imprisonment of more than 10 years	Rs. 30,000/-
2.	Bail	Rs. 1200/- per bail application
3.	Appeals	Rs. 10,800
4.	Trial	Rs. 18,000/-
DELHI HIGH COURT LEGAL SERVICES COMMITTEE[182]		
1.	All criminal cases before Single Judge	Rs. 6,000 on admission and 9,000/- on disposal of case
2.	All criminal cases before Division Bench	Rs. 8,000 on admission and Rs. 14,000/- on disposal of case
3.	Criminal Appeal (Drafting)	Rs. 5,000
4.	Bail Application	Rs. 1,500

But this is just one of the tasks. In my current roster, the criminal bench in the Delhi High Court, I have been watching young enthusiastic lawyers do their very best in legal aid cases in a spirit of true professional service. I am sure they are able to experience a sense of satisfaction irrespective of the result in the case. As judges, we are encouraged that the next generation of lawyers is willing to put its best foot forward and ensure that the cause of justice is well served. Their counterparts in the district courts would do well to heed the advice that Chief Justice Charles Evan Hughes gave many years ago:

> *"Here is work for lawyers. The Supreme Court of United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of our republic will be found in the treatment of the poor and the ignorant, in indifference to their misery and helplessness stands disaster.*[183]"

The potential of our LSAs can play an important part in forming the bridge between the police and the courts, the prisons and courts and people and the institutions. If an LSA could be the first point of call for a person in need of justice the object of the Legal Services Authority Act could have been achieved.

We are listening, better than before, to victims.[184] But we need to do more. Monetary compensation is a balm but not the answer to the uninvited injustice suffered. We have begun to acknowledge that the victim of the crime is not just the one who has suffered at the hands of the perpetrator but more often than not also the family of such perpetrator. If ultimately found wrongly accused, it includes the wrongly prosecuted too. The 277th report of the Law Commission of India titled 'Wrongful Prosecution (Miscarriage of Justice): Legal remedies',[185] makes a much needed beginning of the much needed dialogue on this issue and proposes significant changes to the statutory law. The first step has been taken.

What we still need to work on, is in understanding prison populations. This will require a multi-disciplinary approach involving other disciplines like psychiatry and sociology. We are yet to reach other penal custodial institutions in a meaningful way. Here I am talking of observations homes, *nari niketans*[186] and mental health institutions.[187] These continue to be invisible to the courts unless actively reached out to. The task of law and institutional reform is a continuous one and has to be prepared to respond to the changing needs and demands.

The work for the Article 39A Project is cut out. I would urge that the law and poverty focus is never given up. Collaboration with the NALSA in your Death Penalty Project produced a landmark report, the true value of which is still to be realised. Our institutions need to open up to law researchers, to those who can hold a mirror to us without fearing the sword of contempt. We need a critical appraisal

of our functioning so that we are constantly reminded of our primary task of delivering justice to the people.

Will that also take us towards an Innocence Project for India? The increasing dependence of our investigating agencies on confessions as the main source of evidence, with little corroboration by scientific evidence, results not infrequently in miscarriages of justice and wrongful convictions which challenge the legitimacy of our legal system.[188] We now have several personal accounts of those who are wrongfully incarcerated.[189] These are the subaltern narratives that should help us rethink our ways of prosecuting those whom we suspect of serious crimes. We haven't yet thought about creating a police archive which would provide access to lawyers and law researchers who may want to re-examine the materials gathered during investigation and demand a re-trial.[190]

The experience of seven decades informs us that continuing with the constitutional basics in the realm of criminal law is imperative. The right to silence, the presumption of innocence, the right against self-incrimination,[191] effective representation at all stages of the criminal case and above all a just,[192] fair and reasonable procedure that respects rights and individual dignity of an individual are non-negotiable.[193] Dismantling the carefully preserved edifice of basic constitutional rights that scaffolds our criminal law procedures is fraught with grave consequences for the freedoms and liberties of each of us. The transition has, at every stage, to be towards greater freedom and not less, towards more open and accountable institutions that govern our criminal justice system.

In the words of the Supreme Court:[194]

> *"In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."*

Above all else, as Kannabiran puts it "we must be equally uncompromising in administering the value system that we believe in, even to those who do not believe in it and who doubt it can survive their onslaughts.[195]" If we can frame the issue not in binaries of rights of accused versus rights of the victims but in the understanding that protection and enforcement of human rights is important for everyone, we would have moved in the right direction.

IX

The challenges of today and of tomorrow

What are the newer challenges? We are already in a world where the virtual predominates the real. Cyber-crime is as routine as petty crime; only its dimensions are more complex and consequences severe.[196] The changes in technology are rapid and the criminal is two steps ahead of the law. We are already seeing remote controlled crimes and drone warfare which is just the beginning.[197] We are looking at crimes without human criminals. A robot as the principal accused? An algorithm as the main weapon of offence?[198] Yes, maybe even in the near future? Don't be surprised. The challenge before the investigators and the courts is formidable but I can assure you that the judicial academies are constantly working to orient the judges to meet it.

The push to digitise the working of courts has come from the Courts themselves.[199] The National Judicial Data Grid (NJDG)[200] is the brainchild of a committed band of judges who just happen to be tech savvy. It is a true game changer. It helps you to drill down to every case in every court in the country. It is a boon to the law researcher. Paperless courts, e-filing are again judicially driven initiatives. Again, it is the judges who have taken upon themselves the task of figuring out how we receive, store, retrieve and ultimately prove electronic evidence.[201] This is bound to be critical to the efficient functioning of the criminal justice system and a large number of cases, both serious and less serious, have electronic evidence forming the main basis of the case of either party.

The new jurisprudence on privacy has alerted the Courts to alter their ways of working. Anonymising the names of litigants in matrimonial and custody cases, in cases of sexual violence, is just a beginning. Recognising that gender is a matter of self-choice has meant that we re-think what constitutes a gender-based crime. Recently a litigant who chose to be female approached our Court complaining that the police would not register a case under Section 354 IPC against those who outraged 'her' modesty in a male hostel.[202] Does de-criminalising consensual same-sex among adults in private[203] require rape laws to be made gender neutral? The constitutional underpinnings of the jurisprudence of the rights of these newer and emerging identities will necessarily require re-working the definitions of crime and criminality.

X Conclusion

Are our courts doing enough? I would not know standing here in one corner of the country. But I do know that the expectations from it are higher than ever before. I know we can do better. But speaking at a personal level, I welcome being watched closer than before by young and informed minds unafraid to speak the truth. Sunlight indeed is the best disinfectant. No, we do not by any means have a perfect system, far from it. But we need to keep at the daunting task of making it work and work well. For the weakest. All of us need all of us to work together for that to happen.

I would like to conclude with a quote of Dr. Ambedkar[204]

> *"Let us leave aside slogans. Let us leave aside words which frighten people. Let us even make concession to the prejudices of our opponents, bring them in, so that they may willingly join with us on marching upon that road which as I said, if we walk long enough, must necessarily lead us to unity. This is too big a question to be reduced to a position of mere legality.... It is not a legal fight. I say leave aside all these considerations and make some attempt whereby those who are not prepared to count, will count. Let us make possible for them to count....."*

XI Citations

[1]This is the printed version of the talk delivered at the Nehru Memorial and Museum on 28 September 2018. I thank my Law Researchers Pranav Gopalakrishnan, Harsh Dhankar and Bharat Makkar for their help with the background research and preparation of tables.

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[2]Aligarh 'Encounter': Cops Trying to 'Implicate' Deceased in Kasganj, Muzaffarnagar Riots, 23 September 2018, https://www.newsclick.in/aligarh-encounter-cops-trying-prove-implicate-deceasedkasganj- muzaffarnagar-riots; Last visited September 30, 2018

[3]Lawyers Protest Not Just About Kathua Rape Case but also for deportation of Rohingyas, 16 April 2018, https://www.livelaw.in/lawyers-protest-not-just-kathua-rape-case-also-deportation-rohingyas-jk-hcbar-association/; Last visited September 30, 2018

[4]**What Happens To The People Arrested For Insulting Modi?**, 24 April 2018, https://www.huffingtonpost.in/2018/04/23/what-happens-to-the-people-arrested-for-insultingmodi_ a_23417412/; Last visited September 30, 2018

[5]**Arrest over a Facebook status: 7 times people landed in jail for posts against politicians,** 24 March 2017, https://www.hindustantimes.com/india-news/arrested-over-a-facebook-status-7-timespeople- landed-in-jail-for-posts-against-politicians/story-ON1jukoStfV6T8aYcJEVGJ.html; Last visited September 30, 2018

[6]Julius Caesar by William Shakespeare, Act II Scene III, Available at https://www.playshakespeare.com/julius-caesar/scenes/361-act-ii-scene-3, Last visited 9 October 2018

[7]M.P. Jain, **Outlines of Indian Legal History**, Wadhwa & Co., (5th edn. 1990: 2000 Reprint) pp.1-2. (It was first published in 1952) For a historian's perspective, of the legal system in colonial times in Bengal see, Radhika Singha, **A Despotism of Law: Crime and Justice in Early Colonial India**, Oxford, 1998. Other works include Ramesh Chander Srivastava, **Development of the Judicial System in India under the East India Co.** (1833-1858), Lucknow Publishing House, (1971); B.S.Jain, **Administration of Justice in 17th Century India**, Metropolitan Book Co. (P) Ltd., (1970);Tapas Kumar Banerjee, **Background to Indian Criminal Law**, Orient Longmans (1963); S.M. Edwards, Crime in India, Oxford (1924) and Orby Mootham, **The East India Company's Sadar Courts 1801-1834**, Indian Law Institute, (1982).

[8]Id. at 20. He notes (at 33) that in Bengal too "the administration of justice was in a very poor shape at the time of advent of the British."

[9]Id. at 29. "much of the crime committed in India...results from the inability of the mass of a caste-ridden people to comprehend the meaning of the terms 'State' and 'society' and therefore their own position and duty towards the latter."

[10]This was considered the most significant reform that Lord Cornwallis, the Viceroy, ushered in after getting the response of several magistrates to a questionnaire on the prevailing criminal justice system. Jain notes (id. at 134): "He (Cornwallis) framed a new scheme which the Government promulgated on December 3, 1790. Its most important features were – abolition of the last vestiges of the shadowy authority of the Nawab...and transferring administration of criminal justice from Muslim law officers to the Company's English servants." The scheme brought in a three-tier system of adjudication – magistrates at the lowest rung, court of circuits in between and the Sadar Nizamat Adalat at the top.

[11]Supra note 7. "There are, indeed few countries in the world in which organised crime could develop so

quickly as in India, where most provinces contain large tribes of professional and hereditary criminals and freebooters, large masses of illiterate peasants living on the margin of poverty, and an upper stratum of well-to-do people, among whose virtues and good qualities, physical courage is not always strikingly conspicuous."

[12]Supra note 7 at 139. It was expected that "by this change in the system, oppression and tyranny committed by executive officers towards Indians would be prevented and the officers would be made to follow the Regulations." But the inadequacy of criminal courts, the pressure of work on the magistrates, the absence of Indian judges, the reluctance of people plagued by the prospect of an uncertain and delayed justice to prosecute offenders contributed to the failure of the scheme.

[13]Id. at 200. Although mooted in 1821 by Hastings, it was not extensively used till Bentinck took over.

[14]Even in 1833, it was found that the criminal justice reforms had "failed to achieve the twin objects of a court, viz., cheap and quick decision of cases." (id. at 196) The Mughals, sought to tackle the problem of overcrowding of prisons by avoiding the use of imprisonment as a punishment "as far as possible to avoid an unnecessary expenditure to the state. The first offences were treated leniently on the plea that the individual had not become a hardened criminal or incorrigible": B.S. Jain.

[15]Radhika Singha, supra note 7 at 304.

[16]Ibid.

[17]See generally A.G. Noorani, **Indian Political Trials 1775-1947**, Oxford Paperbacks (1976)

[18]The Dramatic Performances Act 1876 enacted to "prohibit certain dramatic performances, which are scandalous, defamatory, seditious, obscene, or otherwise prejudicial to the public interest." It survives till date with many States enacting modified versions.

[19]Radhika Singha, supra note 7 at 44. Emphasising the perception of vagrancy as a status offence in 18th century Bengal, Singha points out that "arrest and indefinite detention could follow from the assessment of community affiliation and certain 'disposition', rather than from a specific offence."

[20]Leon Radzinowicz, A History of English Criminal Law, Vol.4 (1968) 17: "Idleness, 'a reluctancy of the people to be employed in any kind of work' was regarded as the basis of both vagrancy, mendacity and a high offence against public economy as well as against good order." See also Scott L.J.'s summing up of the purpose of the vagrancy law in Ledwith v. Robert (1937) 1 KB 323: "Those laws were framed exclusively in relation to that particular class of the community and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were (a) settlement of able bodied in their own parish and provision of work for them there; (b) relief for aged and infirm, that is, those who could not work; and (c) punishment of those able bodied who would not work." The petition was by two window cleaners arrested by the Liverpool police under the Vagrancy Act 1824 and the Municipal Corporations Act 1582.

[21]William Chambliss, "The Law of Vagrancy", Crime and the Legal Process, McGraw Hill Book Co., (1969) 51 at 61: "The vagrancy laws were subjected to considerable alteration through a shift in focal concern of those statutes. Whereas in their inception the laws focused on the 'idle' and those 'refusing to labour', after the turn of the sixteenth century the emphasis came to be upon "rogues" and "vagabonds" and others who were suspected of being engaged in criminal activities." The difference between the two concepts was functional – vagrancy did not require any positive act but being in a condition whereas beggary involved an act of seeking alms in a public space: B.B.Pande, "Vagrants, Beggars and Status Offenders" in Upendra Baxi (ed.), Law and Poverty: Critical Essays, Tripathi (1988), 248 at 254.

[22]Caleb Foote, "Vagrancy-type Law and its Administration", in William Chambliss, Crime and the Legal Process, Id. This was a culmination of Foote's painstaking research which included observing the courts of magistrates in Philadelphia for three continuous years from June 1951 to March 1954.

[23]Id. at 314: "When a magistrate talked about 'cleaning up his district', he was referring to the role of

vagrancy-type enforcement as the garbage pail of the criminal law."

[24]Id. at 304: "To the extent that the police actually are hampered by the restrictions of the ordinary law of arrest, by the illegality of arrests on mere suspicion alone, and by the defects and loopholes of substantive criminal law, vagrancy-type statutes facilitate the apprehension, investigation or harassment of suspected criminals. When suspects can be arrested for nothing else, it is often possible to 'go and vag them'."

[25]Immoral Traffic (Prevention) Act, 1956

[26]Mental Healthcare Act, 2017

[27]The Telengana Eunuchs Act, 1919

[28]T.R. Andhyarujina, 'The Evolution of Due Process of Law by the Supreme Court' in Supreme but not **Infallible: Essays in Honour of the Supreme Court of India**, B.N. Kirpal et al (Eds.) Oxford (2000)

[29]***Maneka Gandhi v. Union of India*** AIR 1978 SC 597.

[30]Explaining the opinion of Vivien Bose, J. in ***S. Krishnan v. State of Madras*** AIR 1951 SC 301, K.G. Kannabiran in **The Wages of Impunity: Power, Justice and Human Rights**, Orient Longman (2003) (p.38) says: "Bose alone understood that words were mere symbols and indeed a gloss and that the prolonged struggle for independence should form the key to understanding the Constitution and laws affecting freedom. Therefore, he declared, it is rights that are fundamental and not the limitations on freedom."

[31]Constituent Assembly Debates, Volume IX, (1999: 3rd reprint), Lok Sabha Secretariat, 1499. The text of Article 15A, which later became Article 22 of the Constitution in its draft form read as under: "15A. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice."

[32] Ibid. He explained that the essential purpose of introducing the safeguards contained in the Cr.PC 1898 into the Constitution was "to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions."

[33]A strong objector to the introduction of the provision was Mahavir Tyagi who said: "It is all safe as long as the House is sitting and the Members are sitting on these benches. But then let us not make provisions which will be applied against us very soon. There might come a time when these very clauses which we are now considering will be used freely by a Government against its political opponents." [Constituent Assembly Debates [1946-49], Vol. IX (1999, 3rd reprint) Lok Sabha Secretariat, Pg. 1549]

[34]Id. at 1502.

[35]Id. at 1519. This amendment does not seem to have been accepted.

[36] Id. at 1546.

[37]Id. at 1547.

[38]Id. at 1559.

[39]The Legal Services Authorities Act 1987 came into force on 9.11.1995, vide S.O.893 (E) dated 9.11.1995. Section 12(d) guarantees free legal aid to every person with disability.

[40]***Abdul Wadud v. State of Jharkhand*** 2018 SCC Online Jhar 1170: Also see 'Jharkhand HC Quashes Ban on Popular Front of India (PFI)'available at: https://www.livelaw.in/jharkhand-hc-quashes-ban-onpopular- front-of-india-pfi-read-judgment/, last visited 8 October 2018

[41]A sample: Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forestoffenders, Goondas, Immoral Traffic Offenders, Sand-offenders, Sexual Offenders, Slum-grabbers and Video Pirates Act, 1982

[42]Excerpt from the Documentary 'The Advocate' by Deepa Dhanraj, available at https://www.youtube.

com/watch?v=haGd9lCmD8w (24:20 min to 25:55min)

[43]NCRB, Crimes in India Statistics 2016; Table 5.1

[44] Prison Statistics India 2015

[45]NCRB Crimes in India, 2016 Report. The total percentage of Scheduled Tribe prisoners (convict + under-trial) in these states is: Chhattisgarh- 29.4%; Madhya Pradesh- 23.26%.

[46]While S.167 (1) Cr PC authorises a maximum of 15 days' police custody, most of these statutes like UAPA, MCOCA extend it to 30 days.

[47]Section 43(D)(2) Unlawful Activities Prevention Act, 1967, Section 21(2)(b) of Maharashtra Control of Organised Crime Act, 1999, Section 36(4) of Narcotic Drugs & Psychotropic Substances Act, 1985

[48]Section 43(D)(5) Unlawful Activities Prevention Act, 1967, Section 21(4) of Maharashtra Control of Organised Crime Act, 1999, Section 37 of Narcotic Drugs & Psychotropic Substances Act, 1985.

[49]Section 35 of Narcotic Drugs & Psychotropic Substances Act, 1985.

[50]**Justice delayed: India's top courts take 10-15 years to decided on a case, says Law ministry study, 22 June 2016**, https://www.indiatvnews.com/news/india-india-s-top-courts-take-10-15-years-todecided- on-a-case-says-law-ministry-study-335789 last visited 1 October 2018

[51]NCRB Crimes in India Statistics 2013-16

[52]The decision of the Delhi High Court in ***Makemytrip India Pvt. Ltd. v. Union of India*** (2016) 233 DLT 484(DB) dealt with an instance of abuse of the powers of arrest vested under the Finance Act 1994 in officers of the Department of Revenue. The appeal against the judgment is pending in the Supreme Court.

[53]Rajbhushan Omprakash Dixit 2018 (168) DRJ 292 inter alia dealt with the issues arising from the powers of arrest vested in officers of the Department of Revenue Intelligence under Section 19 PMLA. The writ petition has been transferred by the Supreme Court to itself and is pending.

[54]***Neeraj Singal v. Union of India*** 252 (2018) DLT 151 (DB) dealt with the issue of grant of bail to an individual arrested on suspected commission of the offence of 'serious fraud' and the powers of arrest vested in the officers of the Serious Fraud Investigation Office (SFIO) functioning under the Department of Company Affairs, Government of India. In SFIO v. Neeraj Singal (2018) 10 SCALE 671 the Supreme Court, while not interfering with the grant of interim bail by the Delhi High Court has stayed the remaining part of its order. The writ petition has been transferred by the Supreme Court to itself and is pending.

[55]Section 2(p) and Section 3 of the Prevention of Money Laundering Act, 2002 define 'money laundering'; Section 2(83) & Section 211-212 of Companies Act, 2013 define 'serious fraud'.

[56]Section 19 of the Prevention of Money Laundering Act, 2002; Section 212 & 301 of Companies Act, 2013

[57]***Poolpandi v. Superintendent Central Excise*** (1992) 3 SCC 259

[58]Id., See for example Section 212(11) of Companies Act, 2013.

[59]This is the stand of the DRI as noted in Rajbhushan Omprakash Dixit, Supra note 53

[60]268th Law Commission Report of India on 'Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail', May 2017

[61]Bill to help government bring back fugitive economic offenders gets Parliament's nod, https://www.livemint.com/Companies/8aCSuw8KM0grxRcaHJeKoN/Parliament-passes-Fugitive- Economic-Offenders-Bill-2018.html, Last visited 30 September 2018

[62]***Amrapali Group case, Bikram Chatterji v. Union of India*** WP (Civil) 947/17; ***Unitech Group; Sanjay Chandra v. State Govt of NCT Delhi*** 2017 SCC Online 1260

[63]*Centre for PIL v. Union of India* (2012) 3 SCC 1; *Subramaniam Swamy v. A. Raja* (2012) 9 SCC 257

[64]*Manohar Lal Sharma v. Union of India* (2014) 2 SCC 706

[65]Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) punishes the offence of penetrative sexual assault with a minor with imprisonment for not be less than seven years but which may extend to imprisonment for life, and fine. For the offence of aggravated penetrative sexual assault. Section 6 prescribes punishment with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

[66]The two terms of reference of the Verma Committee were (i) to make more stringent laws on sexual offences and (ii) recommend measures for speedier justice in cases of sexual assault. The report did not address the second term of reference viz., speedier justice.

[67]NCRB Crimes in India Statistics 2010-2016.

[68]First ever reported number of rapes by NCRB in its Crimes in India Reports

[69]NCRB Crimes in India Statistics, 2014-2016

[70]For e.g., criminal complaints of domestic violence and harassment for dowry are first referred to a Crime Against Women (CAW) Cell where police personnel act as mediators helping the disputants to 'settle'. If this fails, the criminal case is formally registered.

[71]This despite the report of the Committee chaired by Justice M. Jagannadha Rao, a former Judge of the Supreme Court of India, submitting a Report on Judicial Impact Assessment on 15 June 2008, available at http://doj.gov.in/sites/default/files/judicialimpactassessmentreportvol1%20%201_0.pdf, last visited 12 October 2018

[72]The Court of Last Resort, Pocket Books Inc.(1954), 311

[73]This was perhaps the earliest precursor to the Innocence Project. Set up by Erle Stanley Gardner to investigate the cases of men unjustly convicted of murder, it comprised special detectives, medical and forensic experts. They published their findings, generated public opinion and succeeded in obtaining reprieves, pardons and even acquittals in re-trials for some wrongly convicted and later proved innocent.

[74]Ibid. at 318

[75]Ibid. at 328

[76]Charles E Silberman, Criminal Violence, Criminal Justice, Vintage Books (1978).

[77]Ibid. at 266

[78]Ibid. at 258

[79]William Chambliss, **Towards a Political Economy of Crime (1975) Theory and Society Vol. 2 No. 2 (149-170)**

[80]Id.

[81]David Garland, **The Culture of Control: Crime and Social Order in Contemporary Society**, The University of Chicago Press (2001), 11.

[82]Ibid. at 16

[83]Ibid. at 11

[84]Ibid. at 10. Says Garland (at 133): "Frequently appearing in the wake of sensational high-profile crimes (which is to say, highly unusual cases that are made to appear all-too-typical this is a criminology that trades in images, archetypes, and anxieties, rather than in careful analyses and research findings."

[85]Ibid at 11

[86]Ibid. at 182

[87]Ibid. at 16

[88]A billboard of Delhi Police reminding people to have their domestic help verified. The word "crime" in blood red letters is depicted as running through a set of service providers thus reinforcing the prejudice against them in enforcement of the criminal law. (Photo Courtesy: Dr. Usha Ramanathan).

[89]Supra note 81 at 129:"Criminogenic situations, 'hot products', 'hot spots' – these are the new objects of control. The assumption is that 'opportunity creates the thief rather than the other way around."

[90]The challenge to the recruitment of over 3000 Special Police Officers (SPOs) also known as 'Koya Commandos' (which included children below 18) for the private force called Salwa Judum under Section 9 of the Chhattisgarh Police Act, 2007 was successfully challenged in the Supreme Court in Nandini Sundar v. State of Chhattisgarh (2011) 7 SCC 547. However, a new wing of the CRPF in Chhattisgarh called the Bastariya Battalion is now operational. See Dipankar Ghose, 'Is the Salwa Judum Back?' available at https://indianexpress.com/article/explained/is-the-salwa-judum-back-bastariya-battalion-crpfchhattisgarh- 5190001/ (last visited 13 October 2018).

[91]Supra note 82 at 124.

[92]'Citizen Four' a HBO Documentary available at https://www.youtube.com/watch?v=EDhB-A23lUk; also 'Snowden' the movie at https://www.snowdenfilm.com/, last visited 7 October 2018

[93]Charlie Savage, '**Facial Scanning is making gains in Surveillance**' at https://www.nytimes.com/2013/08/21/us/facial-scanning-is-making-gains-in-surveillance.html last visited 14 October 2018

[94]Thomas Macaulay and Tamlin Magee, '**The future of technology in warfare: From drone swarms to VR torture**', 18 April 2018, at https://www.techworld.com/security/future-of-technology-in-warfare-3652885/ last visited 14 October 2018.

[95]The scenario depicted in Steven Spielberg's 2002 film The Minority Report in which three psychics known as 'precogs' with their foreknowledge help the specialized police department nab criminals even before the crime is committed, is not in the realm of fiction any longer. We are entering a phase where crime can possibly be defined as mens rea without actus reus.

[96]The colloquial expression in Delhi to explain the blocking of roads to facilitate the passage of a convoy of security vehicles protecting an important government functionary.

[97]Supra note 81, Garland calls this (at 129) 'supply side criminology which entails "shifting risks, redistributing costs, and creating disincentives.....Rather than rely upon the uncertain threat of deterrent sentences, or the dubious ability of the police to catch villains, it sets in place a more mundane set of reforms, designed not to change people but redesign things and reshape situations."

[98]Ibid at 184.

[99]Id.

[100]Ibid. at 185

[101]Rajya Sabha passes Juvenile Justice Bill: 16-year-olds can now be tried as adults for rape and murder, 23 December 2015, https://www.firstpost.com/india/juvenile-justice-bill-after-heated-debatepublic- outcry-new-law-passed-in-rajya-sabha-2555978.html, last visited 7 October 2018

[102]**Union Cabinet Approves Ordinance Prescribing Death Penalty For Rape Of Girls Under 12 Years, 21st April 2018**, https://www.livelaw.in/union-cabinet-approves-ordinance-prescribing-death-penalty-rapegirls- 12-years/, last visited 7 October 2018

[103]**Lights, Camera, 'Encounter': What Happened to Naushad, Mustaqeem Before Aligarh Shootout?,** 1 October 2018, Available at https://www.newsclick.in/lights-camera-encounter-

whathappened- naushad-mustaqeem-aligarh-shootout, last visited 7 October 2018

[104]In Extra Judicial Victim Families Association v. Union of India (2016) 4 SCC (Cri) 508 the Supreme Court entrusted to the CBI the investigation into around 95 cases of 'encounter' killings of or excessive use of retaliatory force against citizens in Manipur by the members of the armed forces.

[105]A Hindi film Ab Tak Chhappan (56 So Far) made in 2004 was based on the (notorious) official life of a sharp shooter Mumbai policeman Daya Nayak who claimed to have killed that many 'criminals' in encounters. A sequel was made in 2015.

[106]In ***Vinod v. State of MP*** 2018 SCC Online MP 466

[107]***Mukesh v. State (NCT of Delhi)***(2017) 6 SCC 1

[108]International Military Tribunal for the Far East, Judgment Available at http://werle.rewi.huberlin.de/tokio.pdf

[109]NLU Delhi's Death Penalty in India Report, Vol. 2, Pg 72

[110]See ***Swami Shraddhananda v. State of Karnataka (***2008) 13 SCC 767 upheld by the Constitution Bench by a majority of 3:2 in ***Union of India v. Sriharan*** (2016) 7 SCC 1

[111]Harrington, **The Other America,** 1962 cited in Harold W Solomon, **'This New Fetish for Indigency: Justice and Poverty in an Affluent Society',** (1966) Vol. 66, Columbia Law Review, pp 248, 251

[112]Charles E. Silberman, **Criminal Violence, Criminal Justice,** supra note 77 at 121.

[113]Barbara Harriss White, A note on Destitution, Pg. 5; Available at https://www.qeh.ox.ac.uk/sites/www.odid.ox.ac.uk/files/www3_docs/qehwps86.pdf, last visited 8 October 2018

[114]Harsh Mander v. Union of India 2018 (171) DRJ 263.

[115]The Mental Healthcare Act 2017.

[116]The Immoral Traffic (Prevention) Act, 1956.

[117]Juvenile Justice (Care and Protection of Children) Act, 2015.

[118]Please refer to Section 303 of Delhi Municipal Corporation Act, 1957 which prohibits traffic or construction on public streets; Section 5 and 6 of Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

[119]On the broad range of suggestions for the agenda of the LSAs, see S. Muralidhar, **Law Poverty and Legal Aid: Access to Criminal Justice Lexis Nexis Butterworths (2004), 393-396.**

[120]***Rakesh Chandra Narayan v. State of Bihar*** 1989 Supp (1) SCC 644 was a PIL dealing with the functioning of the Ranchi Mansik Aarogyashala and ***BR Kapur v. Union of India*** (1989) 3 SCC 387 was another PIL concerning the functioning of the mental health facility at Shahdara, Delhi.

[121]The Supreme Court was approached by Dr Upendra Baxi and Dr Lotika Sarkar, both law professors of the Delhi University to intervene to ameliorate the pitiable conditions in the Agra Protective Home. A series of orders and constant monitoring of their implementation were required culminating in the first stage in 1986 with the order reported as ***Dr. Upendra Baxi v. State of UP*** (1983) 2 SCC 308. The second phase culminated in 1998 in the order reported as (1998) 9 SCC 388. The NHRC was asked to take over the task thereafter. See S. Muralidhar, 'The Case of the Agra Protective Home' in Amita Dhanda and Archana Parashar (Eds.) **Engendering Law: Essays in Honour of Lotika Sarkar Eastern Book Co. (1998) 291-320.**

[122]**Muzaffarpur like incident at Deoria shelter home: Yogi orders strict action, 6 August 2018,** http://www.uniindia.com/muzaffarpur-like-incident-at-deoria-shelter-home-yogi-orders-strictaction/states/news/1310993.html last visited 7 October 2018

[123]***Safai Karamchari Andolan v. Union of India*** (2014) 11 SCC 224

[124]*Delhi Jal Board v. National Campaign for Dignity and Right of Sewerage and Allied Workers* (2011) 8 SCC 568.

[125]*DK Basu v. State of West Bengal* (1997) 6 SCC 642 was the main judgment giving detailed directions on the procedure to be followed in the arrest of persons. The Supreme Court, however, continued to monitor the implementation of its directions in the States as is evident from the orders reported in (1998) 9 SCC 437, (1998) 6 SCC 380, (2002) 10 SCC 741, (2003) 11 SCC 723, (2003) 11 SCC 725, (2003) 12 SCC 174, (2015) 8 SCC 744.

[126]In Re-Inhuman Conditions in 1382 prisons (2017) 10 SCC 658.

[127]Arumugam Servai vs. State of Tamil Nadu (2011) 6 SCC 405.

[128]In Re: Gang-Rape Ordered by Village Kangaroo Court in West Bengal (2014) 2 SCC 751.

[129]For a recent criminal case concerning the branding of women as 'witches' and lynching them see: ***State of West Bengal v. Kali Singh*** 2018 SCC Online Cal 7237. This judgment refers to the broad guidelines laid down by the Calcutta High Court for control and prevention of witch hunting in ***Smt. Moyna Murmu v. Sri Nanda Murmu*** (2017) 1 WBLR (Cal) 611

[130]**5 'child lifters' lynched in Maharashtra's Dhule: 14 killed in mob-lynchings based on social media rumours since 20 May, 2 July 2018,** https://www.firstpost.com/india/5-lynched-in-maharashtrasdhule- for-being-child-lifters-14-killed-in-mob-lynchings-based-on-social-media-rumours-since-20-may- 4643591.html, last visited 10 October 2018

[131]https://www.huffingtonpost.in/2018/07/31/alwar-lynching-give-cow-smugglers-a-couple-of-slaps-tiethem- to-tree-before-calling-cops-says-bjp-mla-gyan-dev-ahuja_a_23492729/, last visited 11 October 2018

[132]**Alwar Lynching: Give Cow Smugglers A Couple Of Slaps, Tie Them To Tree Before Calling Cops,** Says BJP MLA Gyan Dev Ahuja, 31st July 2018, https://thewire.in/rights/man-lynched-twoinjured- on-suspicion-of-being-thieves, last visited 11 October 2018

[133]**West Bengal panchayat election: Wife of slain presiding officer Rajkumar Roy calls his death cold-blooded murder, 17 May 2018,** https://www.indiatoday.in/india/story/west-bengal-panchayatelection- mutilated-body-of-kidnapped-presiding-officer-found-1235130-2018-05-17, last visited 12 October 2018

[134]**Hizbul threatens to pour acid in eyes of those who contest Kashmir panchayat elections, 9 January 2018,** https://www.hindustantimes.com/india-news/participation-in-kashmir-panchayat-pollswill- invite-acid-attacks-hizbul-threatens-in-video/story-FluKBzRsHn7RVmmXSdNUmL.html, last visited 12 October 2018

[135]**Dalit girl tonsured, face blackened, paraded in Bihar, 12th March 2014**, https://www.hindustantimes.com/india/dalit-girl-tonsured-face-blackened-paraded-in-bihar/story-CcHYQRsMsZdnRPwtOzC4dO.html, last visited 12 October 2018

[136]**45-year-old woman stripped and paraded naked on a donkey in Jaipur village, 11 November 2014,** https://www.firstpost.com/fwire/45-year-old-woman-stripped-and-paraded-naked-on-a-donkey-injaipur- village-1795613.html, last visited 12 October 2018

[137]Bibi Jagir Kaur, a former Chief of the Sikh Gurudwara Prabhandak Committee, who was jailed for five years for her role in the abduction of her daughter (who was subsequently killed) was carried by her supporters in a procession on release from jail: See I.P. Singh, 'Bibi comes out of jail in victory procession'https://timesofindia.indiatimes.com/india/Bibi-comes-out-of-jail-in-victoryprocession/articleshow/17070138.cms last visited 14 October 2018

[138]**Nari Adalat: A social experiment!, 8 July 2010,** https://www.legallyindia.com/views/entry/nari-adalata- social-experiment-html#liprefbox last visited 26 Setpember 2018

[139]**Invoking Justice: Tamil Nadu Muslim Women's Jamaat, 29 March 2013,** http://theaerogram.

com/invoking-justice-tamil-nadu-muslim-womens-jamaat/ last visited 26 Setpember 2018

[140]***Gulabi Gang: India's women warriors, 4 March 2014,*** https://www.aljazeera.com/indepth/features/2014/02/gulabi-gang-indias-women-warrriors- 20142261032061238 2.html last visited 26 Setpember 2018

[141]**Breaking Free: Rehabilitating Manual Scavengers,** http://in.one.un.org/page/breaking-freerehabilitating- manual-scavengers/, last visited 11 October 2018

[142]*Shafin Jahan v. Asokan K.M.* AIR 2018 SC 1933 in which the Supreme Court set aside the judgment of Kerala High Court which had annulled the marriage of 24 year old Hadiya to the Petitioner (after her voluntary conversion to Islam) and had given her custody to her father.

[143]Speaking at the Constituent Assembly on 26 November 1949 while tabling the Final draft of the Constitution, Dr Ambedkar said: "There is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality by which we have a society in which there are some who have immense wealth as against many who live in abject poverty...How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.... The second thing we are wanting in is recognition of the principle of fraternity."

[144]*S Khushboo v. Kanniammal* (2010) 5 SCC 600 in which the Supreme Court quashed 23 criminal complaints filed against a popular Tamil actor for her public comment on pre-marital sex and live-in relationships in Tamil Nadu. The Supreme Court asked "When two adults want to live together, what is the offence?"

[145]*S. Tamilselvan v. Govt. of Tamil Nadu* (2016) 4 CTC 561 in which the Madras High Court set aside the ban on the book Madhorubagan authored by Perumal Murugan as a result of an 'agreement' brought about by a government official to tackle the bandh called by certain groups to protest against the book which they alleged hurt religious sentiments. The Court observed that the author "should not be under fear. He should be able to write and advance the canvass of his writings. His writings would be a literary contribution, even if there were others who may differ with the material and style of his expression."

[146]*N. Radhakrishnan v. Union of India 2018* (10) SCALE 717 was in a PIL that sought a ban on the Malayalam novel Meesha authored by Hareesh on the ground that it depicted temple going women in bad light. The Supreme Court dismissed the PIL observing that the writer had the right "to exercise his liberty to the fullest" unless it fell foul of any valid law "because freedom of expression is extremely dear to a civilized society."

[147]Documentary film maker Anand Patwardhan succeeded in getting the Bombay High Court to set aside the decision of the Prasar Bharti Board not to screen his documentary film 'Father, son and Holy War'. The further appeal by Doordarshan was dismissed by the Supreme Court in ***Director General, Directorate General of Doordarshan v. Anand Patwardhan*** AIR 2006 SC 3346. The Supreme Court observed that the film no doubt dealt with the communal violence but the attempt of the film maker was to portray the miseries of innocent victims of communal riots. When viewed as a whole, and not in bits, "there cannot be any apprehension that it is likely to affect public order or it is likely to incite commission of an offence."

[148]On 31 October 1984 Prime Minister Indira Gandhi was assassinated by her Sikh bodyguards. The next four days witnessed the brutal massacre of thousands of Sikhs in the capital city of Delhi by unruly mobs aided by an indifferent police force. The few trials arising therefrom ended in acquittals. 21 years later, on 24 October 2005, the Government of India entrusted the investigation of the cases to the CBI on the recommendation of the Justice Nanavati Commission. The challenge by one of the accused to an order framing charges was negatived by the Supreme Court in ***Sajjan Kumar v. CBI*** (2010) 9 SCC 368

[149]In the wake of the demolition of the Babri Masjid in Ayodhya on 6 December 1992, communal riots erupted all over India and in Mumbai. One backlash was in the form of a series of 12 bomb explosions

on 12 March 1993 that ripped through the city. The Justice Srikrishna Commission of Inquiry, instituted in 1993 to enquire into the riots submitted a report in February 1998. When the recommendations in the report were not implemented, an 'Action Committee for the Implementation of the Srikrishna Report' petitioned the Supreme Court. Even as late as 1 August 2007, the Supreme Court was seeking the Maharashtra government's response to expedite the trials. See Lyla Bavadam, 'Wake up Call' at https://www.frontline.in/static/html/fl2417/stories/20070907502804100.htm. As for trials of the bomb blast cases, they meandered for nearly two decades culminating in the Supreme Court judgments in March 2013: ***Yakub Abdul Razak Memon v. State of Maharashtra*** (2013) 13 SCC 1.

[150]Following the incident of burning on 27 February 2002 at the Godhra station of a railway coach carrying pilgrims, communal riots on a large scale commenced all over Gujarat leaving about 1050 people dead and more than 2500 injured. The Supreme Court at the instance of the NHRC had to intervene to shift some of the trials outside Gujarat to ensure a fair trial. Many of the cases are yet to see a closure. For the latest status of the cases see https://www.thehindu.com/news/national/the-2002-gujarat-riotscases- and-their-statuses-so-far/article23617950.ece, last visited 26 September 2018

[151]The Kandhamal riots left 39 Christians dead, over 395 churches vandalised, 600 villages ransacked; over 5,600 houses looted and over 54,000 people homeless. For the present status of the cases see- 'They don't feel sorry': Revisiting Kandhamal 10 years after the violence against Christians, 26 August 2018**,** https://scroll.in/article/891587/they-dont-feel-sorry-revisiting-kandhamal-10-years-after-theviolence- against-christians, last visited 26 September 2018

[152]The rates of conviction under the two relevant statutes i.e. Protection of Civil Rights Act, 1955; the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 are abysmally low.

[153]The Dowry Prohibition Act, 1961

[154]The Prohibition of Child Marriage Act, 2006

[155]The Bonded Labour System (Abolition) Act, 1976

[156]The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013

[157]In the trials arising from the incident in Mirchpur, a village in Haryana, in which over 30 houses of Balmikis were burnt by the members of the dominant caste, the victims who left the village and were given protection supported the prosecution whereas those who stayed back did not. See Kulwinder v State Govt of NCT Delhi 252 (2018) DLT (DB) 1.

[158]See the 198th Report of Law Commission of India on Witness Identity Protection and Witness Protection Programmes, August 2006

[159]There has been disagreement between the Government of Tamil Nadu and the Government of India on the question of granting remission of the life sentences awarded to the convicts in the Rajiv Gandhi Assassination case, who have served 27 years in prison thus far. For the latest developments see- Despite Tamil Nadu cabinet push, Rajiv case convicts face uncertainty, 11 September 2018, https://timesofindia.indiatimes.com/india/release-of-rajiv-gandhis-murder-convicts-governors-optionsrange-from-traditional-to-adventurous/articleshow/65763419.cms, last visited 12 October 2018

[160]For an order of the Supreme Court of India referring to the CBI the cases of 'mass cremation' in Punjab see ***Paramjit Kaur v. State of Punjab*** (1996) 7 SCC 20

[161]The Supreme Court appointed a Special Investigation team (SIT) to probe nine post-Godhra related riot cases. For an update on the work of the SIT, see- SC allows Raghavan request to bow out of Godhra SIT, 13 April 2017, https://www.thehindu.com/news/national/2002-gujarat-riots-probe-screlieves- sit-chief-rkraghavan/article17979666.ece, last visited 14 October 2018.

[162]**Justice S N Dhingra To Head New SIT To Probe 186 Anti-Sikh Riot Cases, 11 January 2018,** Available at https://www.livelaw.in/justice-s-n-dhingra-head-new-sit-probe-186-anti-sikh-riot-cases/, last visited 6 October 2018

[163]See generally ***Manoj Narula v. Union of India*** (2014) 9 SCC 1; ***Union of India v. Association for***

Democratic Reforms (2002) 5 SCC 294.

[164]Recently, the Supreme Court has ruled on the need for the criminal antecedents of a politician to be disclosed. See Public Interest Foundation v. Union of India 2018 SCC Online SC 1617.

[165]PUCL v. State of Maharashtra (2014) 10 SCC 635.

[166]Extra Judicial Execution Victims Families Association v. Union of India (2016) 14 SCC 377. (A Full Bench of the Andhra Pradesh High Court in) Andhra Pradesh Civil Liberties Committee v. The Government of AP 2008 Cri LJ 402 held illegal the practice of the police not registering FIRs in cases of 'encounter killings' but registering a case against the person killed under Section 307 IPC and then closing it since the offender has died. The Supreme Court has in the appeal by the State stayed the said judgment. The appeal is pending.

[167]*Re-Inhuman Conditions in 1382 prisons* (2017) 10 SCC 658.

[168]In *S. Nambi Narayanan v. Siby Mathews* [decision dated 14 September 2018 in Civil Appeal Nos. 6637-6638 of 2018].

[169]*The State/ Railway Protection Force v. Raju;* 2014 iii AD (Delhi) 453; A young Railway Magistrate after a stint during which he found the same young offenders, steeped in poverty, brought before him with fair regularity was moved to pen the following poem (Excerpts from **Confessions of a young Judge** by Bharat Chugh): "He was accused of selling 'tea', without licence, in a train;
He was a migrant from a drought ridden village; his sheer pain;

His father had hung himself on a tree;
from the mounting debts on seeds-he wanted to break free.

With that torn shirt; as if modesty was just for the rich;
Law or justice; I couldn't, at first, pick which;

The law required me to punish him,
It's blindfold diktat and arbitrary whim;

This was something hard to speak on,
At the same time, impossible to be silent about;

If I went by the strict letter of the law and did fine,
I wouldn't be able to sleep with already vexed conscience of mine.

For - Legal authority was there; but moral authority I had none,
my nation's law had failed, and poverty had won !"

[170]NCRB Crime in India Statistics 2014-2017.

[171]See Report on **Judicial Impact Assessment** supra note 71.

[172]The Guidelines for Recording Evidence of Vulnerable Witnesses in Criminal Matters in Delhi is available at http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf, last visited 6 October 2018

[173]In *Harish v. The State Govt. of NCT of Delhi* 249 (2018) DLT 257, the victim stated: "I know if a boy kisses a girl it is called **galat kaam."** "Ques: I put it to you that if the boy does anything forcibly against the girl, touches and catches hold of the girl, is it called rape? [On request of the witness, question has been again put.] Ques: When the boy lies over the girl, kisses and holds her, is it called rape? Ans. Yes. Court question: The witness has been asked what does she mean by the term "rape"? Ans. I do not know."

[174]*AS Mohammed Rafi v. State of Tamil Nadu* (2011) 1 SCC 688.

[175]**Rewari gangrape case: Haryana maha panchayat forbids lawyers from defending accused, 18 September, 2018,** https://www.newsx.com/national/rewari-gangrape-case-haryana-mahapanchayatforbids-

lawyers-from-defending-accused, last visited 29 September 2018 Also see, Justice Abducted: Jagdalpur Legal Aid Group's latest tryst with injustice, 25 May 2017, https://barandbench.com/justice-**abducted**-jagdalpur-legal-aid-group/, last visited 5 October 2018

[176]Delhi HC Contributes Half a Crore for Kerala Flood Relief, 9 September 2018, See https://www.livelaw.in/delhi-hc-contributes-half-a-crore-for-kerala-flood-relief/, last visited 12 October 2018

[177]Supra note 42 (23:35 Mins -24:16 Mins)

[178]The case ***Bilkis Yakub Rasool v CBI*** (2010) 15 SCC 421 was transferred to Bombay as the fairness of trial was in doubt. The Bombay High Court upheld the conviction of the accused by Special Court in. Jaswantbhai Chaturbhai Nai v. State of Gujarat 2017 (3) Bom CR (Cri) 322. However, in contrast with the other cases of victims of the 2002 Gujarat riots have had a longer and uncertain course, with no closure yet like In ***Zakia Ahsan Jafri v. Special Investigation Team(SIT);*** 2018 (1) RCR (Criminal) 154

[179]One such initiative is Increasing Diversity by Increasing Awareness (IDIA) begun in law schools by Prof. Shamnad Basheer and involves assisting high school students belonging to socially and economically weaker sections enter law schools through competitive exams and further helping them navigate the five year course. Other efforts include the NLUD Death Penalty Project and I Pro Bono - an organisation which provides legal representation to child victims of sexual abuse.

[180]For the complete schedule see http://dslsa.org/wp-content/uploads/2017/07/FEE-SCHEDULE- 2017. pdf, last visited 4 October 2018

[181]DSLSA Fee Schedule, For the complete schedule see http://dslsa.org/wpcontent/ uploads/2017/07/ FEE-SCHEDULE-2017.pdf, last visited 6 October 2018

[182]Schedule Of Honorarium Payable To The Advocates On The Panel Of Delhi High Court Legal Services Committee Available at, http://www.dhclsc.org/DataFiles/upload/Fee%20Schedule%2001.06.2017.pdf, Last visited 6 October 2018

[183]Given in **The President's Address,** 42 N.Y.S.B.A. REP. 224, 240 (1919).

[184]The Supreme Copurt ordered enhancement of compensation to victims of acid attacks in ***Nipun Saxena v. Union of India 2017*** (4) RCR (Cri) 532.

[185]Law Commission of India, 277th Report on **Wrongful Prosecution (Miscarriage of Justice): Legal Remedies,** August 2018

[186]For the case involving the Agra Protective Home see ***Dr Upendra Baxi v. State of UP*** (1986) 4 SCC 106. For a detailed discussion see S. Muralidhar, **Law Poverty and Legal Aid** supra note 119 at 285-298 and S. Muralidhar, 'The Case of the Agra Protective Home' supra note in Amita Dhanda and Archana Parashar (Eds.) **Engendering Law: Essays in Honour of Lotika Sarkar** supra note 120 at 291-320.

[187]See ***Ravinder v. State 2018*** (171) DRJ 346 in which a series of directions have been issued for auditing the operations of mental health institutions in Delhi.

[188]***Adambhai Sulemenbhai Ajmeri v. State of Gujarat (the Akshardham Temple case)*** (2014) 7 SCC 716

[189]"There Must Be a Price to Pay for Wrongful Convictions", Sumanta Banerjee, 30 August 2016. Available at: https://thewire.in/law/cops-judges-andterrorists. (Last Accessed: 30 September 2018) which refers to two books namely; (i) **Framed, Damned, Acquitted: Dossiers of a 'Very' Special Cell,** *a report by Jamia Teachers' Solidarity Association which documents 16 cases where young Muslims were arrested on the charge of being terrorists, between early 1990s and mid 2000s. It also takes into account the story of Syed Maqbool Shah who was accused by the police in the 1996 Lajpat Nagar blast case in Delhi and after having spent 14 years of his precious youth in Tihar Jail, was acquitted by the Delhi high Court in 2012 and (ii)* **Prisoner No. 100: An Account of My Nights and Days in an Indian Prison,** by Anjum Zamarud Habib, a young Kashmiri woman, a political activist, who was arrested in Delhi in 2003.

[190]The mistrials and wrongful conviction of innocent persons in United Kingdom of the Guildford Four *(1974), the Birmingham Six (1975) and the Maguire Seven (1976) cases ultimately led to the constitution of the Criminal Cases Review Commission in March 1997. The 1993 film In the* **Name of the Father** in which Daniel Day Lewis starred as main protagonist Gerry Conlon depicted how the Guildford Four case ended in a re-trial and ultimate release of Conlon and his family after 15 years of incarceration thanks to the efforts of a legal aid counsel zwho accessed the police records.

[191]*Selvi v. State of Karnataka* (2010) 7 SCC 263.

[192]*Mohd. Ajmal Amir Kasab v. State of Maharashtra* (2012) 9 SCC 234

[193]*Sidhartha Vashisht v. State (NCT of Delhi)*(2010) 6 SCC 1.

[194]*Manu Sharma v State of NCT Delhi*; (2010) 6 SCC 1

[195]Supra note 30 at 105

[196]Ryan Calo, **Artificial Intelligence Policy: A Primer and Roadmap,** 51 U.C.D. L. Rev. 399 (2017)

[197]Dr. Sarah Jane Fox, **The Rise of Drones: Framework and Governance- Why Risk it?,** 82 J. Air L. & Com. 683 (2017)

[198]Matthew U. Scherer, **Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies**, 29 Harv. J. L. & Tech. 353 (2016)

[199]Dr. Justice G.C. Bharuka, **Technology & Timely Justice,** Common Cause Vol. XXXV No. 1, January-March 2016

[200]NJDG works as a tool to identify, manage and reduce the pendency of cases. The NJDG website is an interactive source available to everyone, to check the pendency of cases or disposal of cases in any court

all over India) Available at https://njdg.ecourts.gov.in/njdg_public/index.php?msg=Invalid%20Captcha, last visited 6 October 2018

[201]A Joint Committee comprising of Judges of Delhi High Court & Punjab & Haryana High Courts has been constituted on 28 July 2016 to formulate Draft Rules for the Reception, Retrieval and Preservation of Electronic Records by the courts.

[202]See *Anamika v State* [order dated 31.08.2018 in W. P. (Crl) No.2537 of 2018]

[203]*Navtej Johar v. Union of India* 2018 (10) SCALE 386.

[204]Dr. BR Ambedkar's Speech, Indian Constituent Assembly, 17 December 1947 as cited in the film: **All Rise for Your Honour** (2012) by Sumit Khanna

PROJECT 39A
EQUAL JUSTICE
EQUAL OPPORTUNITY