



Autocratic legalism in India: A roundtable

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Abstract

At a moment when democracy seems to be experiencing an unprecedented level of crisis worldwide, this roundtable focuses on one country, India, to ask what we can learn from its ongoing challenges. The participants take as their starting point Scheppele's idea of 'autocratic legalism', in which constitutional democracies are 'hijacked by ... legally clever autocrats' who turn democratic institutions and values against themselves. Does autocratic legalism capture developments in India, particularly since 2014? Does the concept help identify weaknesses or untapped potential in Indian democracy? Or does the crisis of India's democracy reflect different patterns from the autocratic legalism emerging in other parts of the world? Participants consider these and other questions during a conversation that bridges disciplines, geography, and the academy–legal profession divide.

Keywords Autocracy · Democratic decline · Constitutionalism · India · Crisis

1 Legalising crisis in contemporary India: An introduction by Deepa Das Acevedo

What is the relationship between 'law' and 'crisis' in contemporary India?

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It seems unarguable that there *is* such a relationship.¹ Here, as around the world, the crisis of democratic decline appears both marked and inescapable, and the law's role in that decline is coming under increasing scrutiny.² Statutory amendments to change campaign finance laws, informal constitutional amendments to weaken parliamentary democracy, and legislative drafting to avoid the inconveniences of bicameralism are just a few ways in which law has itself become the source of crisis.³

To be sure, the prospect of law being mobilised for illiberal or oppressive ends is not new. The concept of *lawfare*, the doing of things legally that ought to be done politically (or ought, in a less imperfect world, to not be done at all), has been with us for some time.⁴ More recently, regionally, and I think it is fair to say *regretfully*, scholars of Indian constitutional law have demonstrated how public interest litigation, once the judiciary's claim to progressive jurisprudential fame, has been co-opted by urban elites and unsympathetic judges.⁵

Nevertheless, there is some sense that *this* time things are different—that this time, the law's complicity and vulnerability may be especially significant because of how law, in its different iterations, *is itself* the cause and consequence of crisis. This roundtable conversation considers this possibility through the lens of 'autocratic legalism'—a phenomenon where 'electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda'.⁶ Hungary has been an 'archetypical case' of autocratic legalism, though it is far from alone—Russia, Turkey, Poland, Venezuela, and Ecuador surface regularly in these conversations about what happens when the law (as a product of electoral democracy) is used to undermine the law (as a product of constitutional democracy).⁷ Participants in the roundtable set themselves the task of exploring whether and to what extent recent events in India exemplify this phenomenon.

The roundtable held virtually on 23 October 2021 is part of an ongoing, international, and interdisciplinary research effort called the Project on Autocratic Legalism: Brazil, India, and South Africa (PAL/BISA). PAL/BISA grew out of the 2019 Law

¹ Oishik Sircar, *Violent Modernities: Cultural Lives of Law in the New India* (Oxford University Press 2021).

² Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) *Law and Ethics of Human Rights* 49.

³ Khaitan, 'Killing a Constitution with a Thousand Cuts' (n 2).

⁴ Jean Comaroff and John L Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006) 30.

⁵ Gautam Bhan, "'This Is No Longer the City I Once Knew": Evictions, the Urban Poor, and the Right to the City in Millennial Delhi' (2009) 21(1) *Environment and Urbanization* 127; Varun Gauri, 'Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?' (2010) 1(1) *Indian Journal of Law and Economics* 71; Shylashri Shankar, *Scaling Justice: India's Supreme Court, Anti-terrorism Laws, and Social Rights* (Oxford University Press 2009); Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2017); Deepa Das Acevedo, 'Sovereignty and Social Change in the Wake of India's Recent Sodomy Cases' (2017) 40(1) *Boston College International and Comparative Law Review* 1.

⁶ Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *University of Chicago Law Review* 545, 548.

⁷ *Ibid.* 549–556.

and Society Association (LSA) annual meeting, and has been supported by LSA, first as an International Research Collaborative (IRC) network and now as the first Global Collaboration Project. Besides the original IRC coordinators, Dee Smythe, Raquel Pimenta, Fabio de Sa e Silva, and Deepa Das Acevedo, PAL/BISA now includes country leaders for each of its three areas of geographic focus as well as an expert advisory committee of comparative constitutional law scholars.⁸ This conversation included two members of the PAL/BISA coordination team, Fabio de Sa e Silva and Deepa Das Acevedo, as well as the two India country leaders, Mayur Suresh and Mohsin Alam Bhat.⁹ They were joined by Kim Lane Scheppele, Arvind Narrain, Rebecca John, and Bachittar Singh.¹⁰

The October 2021 roundtable reflects PAL/BISA's goal of simultaneously undertaking in-depth country studies and cross-country comparisons. In addition to this roundtable conversation, there either are or in short order will be publications focusing on Brazil, and a collective work spanning not only the three primary countries but others as well. Similarly, the roundtable reflects PAL/BISA's rootedness in socio-legal scholarship: its participants brought disciplinary training in sociology, anthropology, and law, as well as deep contextual knowledge derived from years of litigation and activism. Lastly, the roundtable format acknowledged PAL/BISA's commitment to flexible, critical, and creative study that is informed by ground realities—rather than assuming the relevance of our central concept, we wanted to evaluate its applicability and analytic usefulness.

Over the course of roughly 1.5 hours, the conversation ranged widely, moving from the underlying characteristics of the Indian Constitution to the 2019 protests against the Citizenship (Amendment) Act 2019.¹¹ This introduction highlights five themes that emerged with particular clarity during the roundtable. Our hope is that, by sharing this discussion, we will encourage others to join the collaborative efforts of PAL/BISA and also reach beyond our particular focus in ways that are helpful for future explorations of the relationship between law and crisis in India.

First, it became increasingly apparent to us that although the law is central to any story of crisis or democratic decline in India, its role in that process may be unusually complex. Legal autocrats in the mould of Orbán and Putin are adept at using law to entrench their own power and transform the systems they lead. In India, by contrast, the law seems to play a licensing and formalising function as much as a mobilising one—a distinction that makes law reactive as well as generative with respect to

⁸ Dee Smythe, Professor of Public Law and Interim NRF Chair in Security and Justice in the Law Faculty, University of Cape Town; Raquel Pimenta, Professor of Law, FGV Sao Paulo; Fabio de Sa e Silva, Assistant Professor of International Studies and Wick Cary Professor of Brazilian Studies, University of Oklahoma; Deepa Das Acevedo, Associate Professor, University of Alabama School of Law.

⁹ Mayur Suresh, Senior Lecturer in Law, SOAS; Mohsin Alam Bhat, Professor and Executive-Director of the Centre for Public Interest Law, Jindal Global Law School.

¹⁰ Kim Lane Scheppele, Laurance S Rockefeller Professor of Sociology and International Affairs and the University Center for Human Values, Princeton University; Arvind Narrain, Visiting Faculty, Azim Premji University School of Policy and Governance, and Co-founder, Alternative Law Forum; Rebecca John, Senior Advocate, Supreme Court of India; Bachittar Singh, University of Alabama School of Law Class '24.

¹¹ Citizenship (Amendment) Act 2019, Act No. 47 of 2019.

illiberal change. Whether one considers ‘love jihad’ laws¹² restricting interfaith marriages or cow slaughter laws (held to be constitutional by the Supreme Court as early as 2005),¹³ legal language is being used to legitimise ongoing activity rather than only to authorise future activity.

Second, and following from this first point, the law’s role in the crisis of democratic decline may be different here than elsewhere because of the relative unimportance of individual autocrats. Undoubtedly, many of the institutional transformations that have occurred in India since 2014 were facilitated by the charismatic authority of Prime Minister Modi and his party collaborators, including Amit Shah and Yogi Adityanath—and these changes matter, inasmuch as they entrench specific actors and viewpoints past the point of electorally driven change. But we are not sure that any of these individuals drives illiberal legal change so much as he (and occasionally, she) embodies it. Autocrats, by definition, are singular and central, their politics are personal, and their uses of the law, we think, reflect this extreme centralisation of authority. Tellingly, the temple that was constructed in honour of Modi in August 2021 was closed within a matter of days on the instructions of senior party officials.¹⁴ Indeed, some of us have wondered in other writings whether totalitarianism, with its emphasis on all-encompassing ideology, is not a more helpful way to think about current events in India, while others during this roundtable suggested that fascism—again because of its attunement to ideas over individuals—could be appropriate as well.¹⁵

Third, and building off the theme of this special issue, several of the roundtable participants noted that illiberalism is baked into India’s constitutional and legal fabric such that it is somewhat difficult to name the current moment as a categorical break with the past.¹⁶ Most notably, Article 22(3), the ‘undemocratic heart of the Constitution’,¹⁷ authorises preventive detention and consequently problematises any suggestion that the Indian state *was* liberal in ways that it no longer *is*. Less spectacularly—but no less significantly—the Constituent Assembly decided not to incorporate a true due process clause after the manner of the US Constitution in Article 21, but instead to include the more forgiving stipulation that the entitlement to life and liberty was subject to ‘procedure established by law’.¹⁸ In other instances, the

¹² Samanwaya Rautray, ‘The UP Prohibition of Unlawful Conversion of Religion Ordinance, 2020, Explained’ (*Economic Times*, 14 December 2020). https://economictimes.indiatimes.com/news/et-explains/the-up-prohibition-of-unlawful-conversion-of-religion-ordinance-2020-explained/articleshow/79717402.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. Accessed 01 May 2022.

¹³ ‘The States Where Cow Slaughter Is Legal in India’ (*Indian Express*, 08 October 2015). <https://indianexpress.com/article/explained/explained-no-beef-nation/>. Accessed 01 May 2022.

¹⁴ Ajay Jadhav, ‘BJP Worker Removes PM Modi Bust from Temple after Criticism, NCP “Disappointed”’ (*Indian Express*, 20 August 2021). <https://indianexpress.com/article/cities/pune/pune-modi-temple-bjp-worker-7461226/>. Accessed 25 May 2022.

¹⁵ Mayur Suresh, Deepa Das Acevedo, and Mohsin Alam Bhat, ‘Authoritarianism in Indian State, Law, and Society’ (work-in-progress).

¹⁶ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966).

¹⁷ P Padmanabhan, ‘Undemocratic Heart of the Indian Constitution’ in AR Desai (ed), *Violation of Democratic Rights in India* (Popular Prakashan 1986) vol 1.

¹⁸ Abhinav Chandrachud, ‘Due Process’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016); Austin, *The Indian Constitution* (n 16).

Constitution exemplifies non-liberal (rather than illiberal) impulses, as when it subordinates the religious freedom rights granted by Article 25 to ‘public order, morality and health’ and to powerful state-led reform.¹⁹ Departures from liberal politics are, as several of us noted, baked into India’s constitutional cake,²⁰ and so, it requires considerable nuance to differentiate recent trends from intentional features.

These three observations may suggest that events in India do not quite follow the script of autocratic legalism, but other developments indicate exactly the opposite. Consequently, a fourth theme to emerge during the roundtable conversation was the many ways in which the key characteristics of autocratic legalism—democratically elected leaders and legally weakened accountability mechanisms—are amply present in the Indian case. Since 2014, the balance of power has been quite intentionally destabilised along vertical (citizen-state), horizontal (cross-branch), and diagonal (civil society) axes.²¹ Without question, these changes have had the effect of shielding the current administration from efforts to constrain or remove it. More frighteningly still, the socio-political transformations occurring in India right now suggest that few such efforts will be forthcoming in the near future.

Fifth, and finally—and reassuringly—the participants in this conversation noted that even if law has created the enabling conditions for illiberalism to thrive *and* even if law has been used by political actors to subvert constitutional democracy, law is also very likely to be a source of light in these dark times.²² The same Constitution that reflects embedded illiberal and non-liberal impulses provided inspiration and unity during the 2019–2020 protests against the CAA.²³ The same judicial system that, at its apex, has chosen to subordinate itself to a blatantly oppressive regime *also* continues, in its least powerful magistrates’ courts, to lead the charge against that regime. In this context, law is *in* crisis, *enabling* crisis, and, hopefully, it is an avenue *out* of crisis as well.

2 The roundtable

Deepa Das Acevedo (Deepa): Welcome, everyone. This is a roundtable on autocratic legalism in India. It is an event being conducted in conjunction with PAL/BISA, which is the Project on Automatic Legalism in Brazil, India, and South Africa. PAL/BISA is both a collaborative research network and a global collaboration project under the Law and Society Association. It is an effort that began after the 2019 Law and Society presidential address on constitutional assassinations, when a group of

¹⁹ Deepa Das Acevedo, ‘Temples, Courts, and Dynamic Equilibrium in the Indian Constitution’ (2016) 64(3) *American Journal of Comparative Law* 555.

²⁰ Mayur Suresh, ‘The Slow Erosion of Fundamental Rights: How *Romila Thapar v. Union of India* Highlights What Is Wrong with the UAPA’ (2019) 3(2) *Indian Law Review* 3(2) 212.

²¹ Khaitan, ‘Killing a Constitution with a Thousand Cuts’ (n 2).

²² Mayur Suresh, *Terror Trials: Life and Law in Delhi’s Courts* (Fordham University Press 2022).

²³ Seema Mustafa (ed), *Shaheen Bagh and the Idea of India: Writings on a Movement for Justice, Liberty and Equality* (Speaking Tiger Books 2020); Ziya Us Salman, *Shaheen Bagh: From a Protest to a Movement* (Bloomsbury Publishing 2020).

scholars, largely based in the Global South, began discussing possible collaborative efforts on the uses of law by autocrats to consolidate power, and the resistance to those kinds of moves. Within PAL/BISA, we have three separate country teams. The India team, which is represented in its entirety here, consists of myself, Mayur Suresh, and Mohsin Alam Bhat.

The goal of this particular discussion is to facilitate a loosely structured conversation about recent and not-so-recent developments in India that are relevant to autocratic legalism.

I'll invite everyone to introduce themselves. My name is Deepa Das Acevedo, I am a legal anthropologist on the faculty at the University of Alabama School of Law. I am calling from Tuscaloosa, Alabama. I *was* in the midst of transitioning to a new series of projects that are very relevant to PAL/BISA, inasmuch as they focus on constitutional morality and everyday conceptions of constitutionality in India ... until the world came to a screeching halt!

Mohsin Alam Bhat (Mohsin):

Thanks Deepa! I am Mohsin Alam Bhat, I teach at Jindal Global Law School where I run the Center for Public Interest Law. Over the last three years I have offered clinical courses on hate crime and more recently on citizenship, which are areas on which I continue to do research. I have worked on Muslim and low-caste social movements, and their relationship with constitutional meaning inside and outside courts. These engagements with questions of minorities, citizenship, and hate crime are the reason why I am particularly keen on PAL/BISA's work. I am in London, for the time being.

Mayur Suresh (Mayur): Hi, everyone. I am glad I know most people on this call. Previously, I used to work in Delhi and Bangalore. And I have worked with both Arvind (Narain) and Rebecca (John). Both those experiences have been very insightful for me. I teach at SOAS in London, and broadly in the field of legal anthropology. My work is on terrorism trials in Delhi and my book will be coming out soon. I'm joining from London.

Kim Scheppele (Kim): Hi! I am Kim Scheppele, I am calling in from Hopewell, New Jersey, which is a little town outside of Princeton. And I am really eager to hear about what is happening in India. One of the effects of COVID was that we locked down right before my first trip to India was scheduled ... so I have not ever been to India, I'm afraid. But I look forward to being able to travel there when we all get to travel again.

Autocratic legalism is something that I think we have seen creeping around in many parts of the world. My own focus is on Eastern Europe. I moved to Eastern Europe after the Berlin Wall came down: I lived and worked in Hungary for four years at the Hungarian Constitutional Court, moved to Russia, worked at the Russian Constitutional Court, and have been involved in constitutional drafting processes in Poland and elsewhere in the region. Many of the countries in Eastern Europe are now in the grips of autocratic, charismatic leaders who want to destroy constitutional government by law. And what is so striking to me about the region is that almost all the leaders themselves are lawyers. You win an election, and then you change the law. And that looks to the outside like normal democratic procedure until you study further the content of those changes. And so that is what I have been enmeshed in trying to do.

I have been watching India with a lot of concern, and I have a number of former students who teach in India. Some of whom (I have been surprised!) have gone over to the ‘Oh, it’s not so bad’ camp. So, I was slow to pick up on India because some of my very own students who are there, I am worried, are participating in the destruction of the constitutional government in India. I hope I do not just generate anti-constitutionalism in my teaching, but it is amazing where these things come from. And that is one of the things I am interested in figuring out. I am really eager to hear what all of you have to say.

Rebecca John (Rebecca): I am a lawyer; I practise criminal law. I have been doing that for the past 34 years, both in the trial courts as well as in appellate courts. So, you could say that I am in the middle of all the action in India. I live in New Delhi. And that is the seat of my practice as well. The rest, I think, will follow as we speak.

Arvind Narrain (Arvind): Hi, my name is Arvind Narrain. I am based in Bangalore, and I am a lawyer as well. But a little more in the research and the writing part and activism part as compared to being in court. When Mayur and Deepa asked me to be a part of this roundtable, it made sense to me because of my experience with the Alternative Law Forum and with the People’s Union for Civil Liberties (PUCL). The PUCL has come up with a language, which is more widely shared as well, of looking at the contemporary moment as one of an *undeclared emergency*. I am curious to see whether either undeclared emergency or autocratic legalism are adequate terms for understanding what is going on in India.²⁴ As Rebecca said, more can follow later.

Fabio Costa Morais de Sa e Silva (Fabio): My name is Fabio de Sa e Silva. I am speaking from Norman, Oklahoma, where I am based. I teach here at the University of Oklahoma. I also direct the Center for Brazil Studies here. I am originally from Brazil and have worked there for a number of years before relocating to the US to take up this position.

I am also shifting my attention to issues of law and democracy, and that was largely due to two factors. First was the election of Jair Bolsonaro in Brazil, which really changed things and put this topic on the table. And the second was Kim’s speech, which Deepa was alluding to, in the 2019 Law and Society meeting, where she called our attention to how the law could be *part of*, instead of just an *obstacle to* these autocrats. And so, with Deepa and colleagues from Brazil and South Africa, we are organising this project to study this more deeply, in comparison between the three countries and possibly beyond. I am glad to be here and am looking forward to learning from you about India—which looks tragically fascinating.

Bachittar Singh (Bachittar): Hi! I am Bachittar Singh. I’m currently a law student at the University of Alabama in Tuscaloosa, Alabama. My background is in human rights, specifically crimes against humanity in Punjab; and I’ve been doing this work with Ensaaf, a non-profit organisation, for about ten years before deciding to come back and pursue a law degree. I’m still working with the organisation in addition to assisting Professor Das Acevedo.

²⁴ Arvind Narrain, *India’s Undeclared Emergency: Constitutionalism and the Politics of Resistance* (Context 2022).

Deepa: Let's open with a relatively general question. I would love to hear from any of you, from your experiences and your research: how do you see autocracy emerging through law in India? These could be specific legislative developments, legal cases, institutional transformations, or anything else that you care to identify. I think the key point in this question is the *legal* avenues through which autocracy is being developed.

Arvind: When you say autocracy in the Indian context, one place to trace it, of course, is the colonial era, but the second place to trace it would be really the Constitution of India itself. We have in place Article 22(3), which allows for preventive detention under certain circumstances.²⁵ And if you look at the Constituent Assembly Debates (CAD) at that moment in time, it's quite fascinating. There was one strong strand of opinion, especially of people who were at the receiving end of preventive detention laws by the British, who argued quite strongly that preventive detention shouldn't be a part of the Constitution.²⁶

There's a long story to this debate about Article 21 and the idea of whether it should be 'procedure established by law' or should it be the American 'due process of law'.²⁷ The response to that debate was to introduce draft Article 15(A) (now Article 22), which includes within it, supposedly, protections against the excesses which the state can carry out. But if you look at the CAD itself, a large number of members who spoke felt very strongly that 15(A) was not a proper response, that it was even worse than the problem itself, because it was recognising preventive detention in the legal framework.²⁸ So that's one starting point—when you say autocracy, it's there in the constitutional text itself.

The second point, I think, would be the entire question of the Emergency, 1975 to 1977. In particular, the preventive detention provisions were used to detain the opponents of the regime, as well as to crack down on the broader issue of freedoms including the right to association and the right to speech. If you look at Tarunabh [Khaitan]'s article,²⁹ he says that two moments which crystallise the destruction of constitutional values are the Emergency and the current moment. The Emergency was carried out through constitutional amendments to change the legal framework, whereas this current moment is marked by the capture of institutions. So, these are two starting points.

Mohsin: I would like to add to Arvind's really important point that thinking about authoritarianism or autocracy in India has to reckon with the existing internal illiberalism of India's constitutional tradition. That's a complicated question, and hopefully we'll talk about that in greater detail. But to add to Arvind's list, I think what strikes me as being quite dramatically 'new'—now, we do have to think about *how* new it

²⁵ Constitution of India art 22(3), 'Nothing in clauses (1) and (2) shall apply—(a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.'

²⁶ Choudhry et al., *The Oxford Handbook of the Indian Constitution* (n 18) Chap. 42 ('Life and Personal Liberty'), Chap. 43 ('Due Process'), Chap. 44 ('Criminal Law and the Constitution').

²⁷ *Ibid.* Chapter 43 ('Due Process').

²⁸ *Ibid.*

²⁹ Khaitan, 'Killing a Constitution with a Thousand Cuts' (n 2).

is—is the political discrediting of the opposition. The kind of tools that are used by the regime to do this are not always legal, but it seems to me that the law plays a central role in how it is done. So, the law, or even ordinary legal policy, seems to be a provocation *and* a site where the opposition is politically, culturally, and historically discredited. Not only is law central to that process, but I think the demolition of the opposition and of the accountability system and the larger social project of the regime is quite relevant there as well. I just want to add the *fate* or the *state* of the opposition into the mix as something that hopefully we'll talk about.

Rebecca: Coming to the present (which seems to have consumed all of us), look at the kind of amendments that have been made in the law. Recently, we had this law called the Unlawful Activities (Prevention) Act 1967 (UAPA), and in 2019, an amendment was made whereby an individual could be notified as a terrorist under the law without trial. Thus far, it was only organisations, but now an *individual* can be notified as a terrorist—and once you get that label, the procedure in the law is so complicated that it's almost impossible to prove that you are not a terrorist. There is absolutely no process *before* you're notified as a terrorist whereby a person can contest that label.³⁰

Likewise, you have laws which have become so normal in India—for instance, the one called the 'love jihad law', which actually seeks to criminalise interfaith unions and marriages. There have been several challenges to this law, both in the Allahabad High Court as well as in Madhya Pradesh. Thus far, the courts have not really come out with an affirmative ruling, which I find very surprising because something as basic as a voluntary union is now criminalised, and courts are sitting on the challenges. You also have the 'anti-cow slaughter' laws, which you know, takes you to another age altogether. You don't even have to *invoke* the law: even *before* that you have noticed so many lynchings in India for which there is little or no prosecution. And if there *is* prosecution, the prosecuting agency is so complicit that nothing comes out of it.³¹

Parallely, the law is used as we have seen in the case of the 2020 Delhi riots cases, where hundreds and hundreds of activists and poor Muslims have been detained now for over a year, some under the very stringent provisions of the UAPA where bail is what we are fighting for.³² In the 35 years that I've practised law, I have *never* seen chargesheets of the kind that I've seen in the Delhi riots cases where it is *openly* communal (prejudiced against Muslims). Investigating agencies write all manner of drivel in their chargesheets, and one is used to reading that. But I have *never* seen chargesheets that are as unabashedly communal as the ones that have been filed in the Delhi riots cases. The fact that these are filed before courts and courts have taken *cognisance* of these chargesheets—you're moving forward, and you're pleading for bail,

³⁰ Mayur Suresh, 'The "Paper Case": Evidence and Narrative of a Terrorism Trial in Delhi' (2019) 53(1) *Law and Society Review* 173.

³¹ Anubhav Vashishtha, 'Mob Lynching: A Crime That Exonerates the Offenders in India?' (*Outlook India*, 05 August 2020). <https://www.outlookindia.com/website/story/opinion-mob-lynching-a-crime-that-exonerates-the-offenders-in-india/358031>. Accessed 01 May 2022.

³² The Unlawful Activities (Prevention) Act 1967 s 43D(2) (extends the time for filing of chargesheet); s 43D(5) (rendering it almost impossible for persons chargesheeted under UAPA to get bail); ss 15, 16, 17, and 18 (substantive offences).

and you're asking for copies of these documents, and *every other process without* a murmur from courts saying 'how are you even placing this before us?'—is extremely disturbing. We are in the midst of fighting some 755 chargesheets with thousands of accused persons, largely from the Muslim community; many of them are, of course, activists who had participated in the anti-CAA protests in 2019, which spilled over into 2020. I think the Delhi riots cases are really a defining moment because something has shifted and shifted in a way that *we can't turn back*. Just today, I appeared for one of the accused persons, who has been charged under the UAPA, for his bail. He has been in custody for over a year.

There is also the increased use of the sedition law—again, a relic from the past, part of our colonial legacy.³³ I would like to speak a little bit on sedition and its usage in India and how creatively it is being used in various cases across the country.

So, this is the *present* landscape. Arvind and Mohsin have spoken about what is really our constitutional legacy and how preventive detention has been brought in through Article 22 (something which the Supreme Court has upheld as being constitutionally valid—to imagine that somebody can be kept in custody *preventively*, in this age and time, is really quite unbelievable). But we have moved from there: they don't really need to invoke preventive detention laws alone, they have enough and more to invoke now, sometimes for very minor things, but which will keep you in custody forever.

Deepa: One of the things that has struck me over the past year or so is that when we talk about autocratic legalism, or the rise of autocracy and authoritarianism in India, there's a dual, simultaneous, and seemingly *contradictory* response. On the one hand, I think many of us want to say this is nothing new: institutionally, infra-structurally—it's baked into the cake, right? It is laid within the constitutional fabric against which everything else has to be measured. But there's also a kind of inescapable sense in which new things *are* happening. And I think Tarunabh's³⁴ article is an effort to kind of grapple with that sense of newness despite the background of baked-in authoritarianism or autocracy. I'm trying to get a handle on how to simultaneously say, 'this is *not* new' and 'it *is* new'. And I wonder if we can think about that a little bit more because that's already something that's emerged from what Arvind and Mohsin said and what Rebecca has also reminded us of—that it is not simply background constitutional stuff that we're talking about here.

Mayur: The other thing I would add is that it is also the way we speak about the problem, where we locate autocracy. So Tarunabh's article, and what Mohsin was speaking about, is about the centralisation of power. There is a way in which the Modi regime, whether it is through constitutional amendments, or riding roughshod over Parliament, or delegitimising the opposition—there's a certain centralisation of authority within the figure of Modi, or Amit Shah, or two of them, and that really fits within the autocratic model, I think.

But what Rebecca pointed to is something a lot more diverse and not controlled. There is obviously pressure put on the police from the top to deal with all of these

³³ Indian Penal Code s 124A; Siddharth Narrain, "'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India' (2011) 46(8) *Economic and Political Weekly* 33.

³⁴ Khaitan, 'Killing a Constitution with a Thousand Cuts' (n 2).

riots and cases that Rebecca was speaking about. But my sense is that across the country, it is *local* actors also speaking in the language of authoritarianism. It's not as if Modi-Shah are saying to every police officer, 'go and arrest these people.' But it's as if, as Rebecca was saying, the *language* has seeped in everywhere—the language of authoritarianism. You have a kind of a centring of power in Modi-Shah, but at the same time, it's as if you have a *centrifugal* force kind of pushing everything out as well. It is conceptualising that, I think, which also I'm having difficulty with: in addition to 'is it new / is it old'—also, *where* is it? Is it in the middle? Is it everywhere?

Deepa: This is one of the points in our draft report for PAL/BISA that we're trying to get at. Would we be better able to name the phenomenon if we thought of it as *totalitarianism* instead of *autocracy* or *authoritarianism*?

Kim: This has been very helpful to hear. One thing that I've encountered, especially in Hungary, is that sometimes what governments do when they're doing this is that they engage in what you were just describing. That is what happened in the US with Trump. He just mobilised all these bullies who have just been looking to be freed from the constraints of civilisation as we knew it. And that by itself is a serious problem for constitutional democracy: if you have people taking force into their own hands—there's that kind of empowering, which is in some ways the denial of legality. What it does is to say the state no longer has a monopoly on violence, that everybody can enforce the laws on their own, and the state will encourage you to do this. This is what was happening in the Philippines with Duterte. And I think that is worrying, and it's a distinct phenomenon that is terrible.

But I think that what's happening on the autocratic legalism side is that very often—again, this is Hungary, this is Poland, this is Russia (actually before them)—leaders do something very dramatic that they know will cause the political opposition to run over to some corner and protest. So, in Hungary, it was putting up statues to raving anti-Semites from the 1930s, you know, and the entire political opposition would go over to the part of the city where the statues were being put up. And in the meantime, a 500-page law would go to the Parliament in which 30 pages were just collapsing the independence of some institution or another. Which is to say, some of it was a distraction, and some of it was a concentration of power done under the cover of the distractions.

I've been focused mostly on this concentration of power stuff because I want to know, if, when the time comes for the public to get fed up with the leaders in charge, *can* they get rid of them? That is, to me, the simple question of whether you still have a democracy. These new leaders are often very charismatic and very popular. The question isn't whether they *now* have support—the question is whether, if people want to get rid of them, can they still do so? There were all kinds of different signals for me coming out of India, both the illiberal intolerance and the violence. It's like 'Gujarat' applied to the whole country now, tolerating all this kind of private violence. But the thing that makes Modi look like Orbán to me is all of this capture of state institutions. Because the question is: can India can ever get out of this?

I do think that this stuff about locking in power so that it can't rotate is a different kind of threat than some of these others. This is where I would love to hear your thoughts: you know, the Congress Party dominated for so many years—was that a lock-in, or was that, you know, democracy working mostly in a party and not in the

general public? Is this different from that? Or is this just what India had gotten used to under the Congress for so many years? Those are the things where I would love to know what you all think, because I don't know enough to be able to understand what the differences are between the lock-in by the Congress and the lock-in by the Bharatiya Janata Party (BJP).

Mohsin: If I may come in just to respond to Kim's first point, which was in conversation with Mayur's point about the nature of politics itself: I was wondering whether we could take some time to step back and interrogate the very category of 'autocratic legalism'?

My impression is that what Mayur was saying—the category I'll use is 'mob'—and what I think is happening since 2014 and 2015 is the restructuring of India's political landscape, where the *mob* has become a form of political engagement. This is not just 'illegality', so it's not just the state saying, 'we will not enforce.' It is, over a period of time, the state using legal cover *for* the mob, providing legal legitimacy *to* the mob. So, when Rebecca was talking about the cow slaughter laws or love jihad legislation—these are laws not only to discipline social behaviour but also to give a legal language to mob politics. And in my experience working in many of these cases in a very different capacity (from human rights organisations), most of the people who are involved in these kinds of violent behaviours are very rational political actors, and they have found out that mob violence is a way to do it. And I think this is deeply connected to autocratic legalism in two ways, potentially.

One is that law *is* being used to give them legal cover. The second is, it is a project of *social transformation*. So 'locking in'—what Kim called 'making sure you're not removed from power'—can happen both by formally changing institutions but also by changing society in a way that social actors, electors, and constituents will never even think about changing these people. And if *that* is the case, then I think India might potentially be a distinctive case in which autocratic legalism is also bringing in politics, changing the social landscape. And that's why Deepa, Mayur, and I thought that 'totalitarianism' could be a good way to think about the nature of autocratic legalism in India.

Arvind: I agree with what both Mohsin and Deepa put forward. I feel that the framework of autocratic legalism doesn't work, or it's too limited—I would go further than Mohsin and say that that's *not* the framework within which we should think about what is going on in India. I'll give a reason for this. Look at the comparison of the Emergency regime and the current regime. Consider Gyan Prakash's work: he makes a very interesting point about the fact that the Emergency regime at *best* elicited a sullen acceptance among the people—at *best*.³⁵ But the current regime, and this links back to what Mohsin said, is *popular*, and we can't deny that. There is a base it has in a larger grouping of people, and a base it has in a certain ideological framework, and that's the root of its popularity.

So that's why the language of totalitarianism or the language of fascism is very important. Fascism is not a top-down phenomenon: it's a phenomenon that has a deep rooting in a popular upsurge. And that's what we're seeing in India today. Just

³⁵ Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (Princeton University Press 2019).

the other day, the Chief Minister of Karnataka gave a statement justifying this entire phenomenon of what we call ‘communal policing’ or ‘moral policing’: where boys and girls from different religious communities having a cup of tea or a cup of coffee at a cafe in Mangalore are liable to get attacked because they’re socialising across lines of religion.³⁶

This is a project of *social* transformation. And that’s why it goes beyond, in my understanding, what Indira Gandhi’s regime sought to achieve. The Indira Gandhi regime was interested in power for its own sake. If you look at Christophe Jaffrelot and Pratinav Anil’s work,³⁷ the point they’re making is that the socialist rooting of Indira Gandhi’s regime was quite superficial. You can’t argue that about the current regime: its rooting ideology is very clear. It’s very strong. They have a programme of not just state capture but—Mohsin’s very important point—*societal* transformation as well. And societal transformation will be done through the use of the mob, will be done through the use of the law—the cow slaughter laws, the love jihad laws, the CAA, and a range of these other legal frameworks. These laws enable the rise of a dispersed sovereignty.

And I also completely agree with Mayur, I don’t think Modi and Shah are directing the way the guy at the local police station is to function. Just the other day the police in Karnataka were all dressed in saffron to celebrate Vijayadasami.³⁸ What does that say about the police? It’s not autocratic legalism. The state is taken over by an ideological framework and that’s the larger problem. That goes in the direction of totalitarianism in terms of the idea of *total control*. You want to control who’s talking to whom, you want to control who’s marrying whom, you want to control what you’re eating, you want to control whom you’re going out with. These are frameworks which are obviously deeply disturbing. I think the right analogy we have to think in terms of is *totalitarianism*. We have to think in terms of the Nuremberg laws.³⁹ We have to think in terms of what the Nazis did. That’s the direction we’ve got to think of.

Deepa: Rebecca raised a point earlier—and I think it has been repeated in different ways over the course of the conversation—that we can’t go *back*. This whole conversation is disheartening, so I suppose slightly more disheartening moments within it are not remarkable. But I want to think about that for a second, particularly in light of what we’ve been saying. Suppose this is about more than entrenchment through legal change and the locking-in of institutional power in the way that Kim was describing. In that case, if it’s about giving a licence for dispersed actors to behave in ways that

³⁶ ‘Karnataka CM’s Apparent Endorsement of Moral Policing Triggers Controversy’ (*Indian Express*, 14 October 2021). <https://indianexpress.com/article/cities/bangalore/karnataka-basavaraj-bommai-moral-policing-comments-controversy-7571141/>. Accessed 01 May 2022.

³⁷ Christophe Jaffrelot and Pratinav Anil, *India’s First Dictatorship: The Emergency, 1975–1977* (Hurst Publishers 2020).

³⁸ Saumya Kalasa, ‘Karnataka Police Dressing Up in Saffron on Dussehra Sparks Controversy; Siddaramaiah Questions Bommai’ (*News 18.com*, 18 October 2021). <https://www.news18.com/news/india/karnataka-police-dressing-up-in-saffron-on-dussehra-sparks-controversy-siddaramaiah-questions-bommai-4336457.html>. Accessed 01 May 2022.

³⁹ Arundhati Roy, ‘India: Intimations of an Ending’ (*Nation*, 22 November 2019). <https://www.thenation.com/article/world/arundhati-roy-assam-modi/>. Accessed 30 March 2022.

they might otherwise not feel empowered to do, a kind of social transformation that is not centralised, that is not legal in nature—then it seems to me that it *is* harder to name, to locate, and to counter. Which would make it harder to ‘go back’, as Rebecca was saying. Does that seem accurate? And if that’s the case, there’s a kind of nihilism that is built into this assessment, right? Are we just saying we have to ride it out? And if we’re *not* saying that, then what is the alternative?

Fabio: Just a follow-up question: what would be the role of law in building the alternative? Can law be a means of resistance—especially since the law is being used to build this whole thing?

Deepa: Rebecca and Arvind, I’d be especially interested to hear from you, given that you’re in the trenches in a way that the rest of us aren’t.

Rebecca: I don’t know how to look forward to a new imagined India at the moment. I can’t see that happening in the near future. I don’t know whether it will happen and whether some things will change at all.

If you look at the way some of our institutions are functioning in the midst of all of this—look at the Supreme Court of India and its distrust of anything that sounds like protest. They hate protesters, they hate protesters who sit on the streets, they’re constantly looking to disperse them.⁴⁰ Much of the court’s time has been taken to rule that protests must not disrupt normal life or cause inconvenience to traffic on the streets. However, till date, challenges to the constitutionality of some of the most contentious laws in India’s history, including the farm laws (now withdrawn by the government), the CAA/NRC, or Article 370 in the context of the state of Jammu & Kashmir, have yet to be heard by the Supreme Court.

The Supreme Court of India is great when it talks in the abstract. So, if you ask them to write a judgment on privacy, they would probably write a very, very beautiful judgment running into 900 pages. And I don’t even have to go very far—Pegasus and surveillance was a big thing a couple of weeks ago. It’s before the Chief Justice’s bench, he appears to be serious, and has clearly gone beyond what the previous Chief Justice did during his tenure.⁴¹ But we haven’t moved forward. So, we have courts, and particularly constitutional courts, presiding over all of this and not saying a word.

In fact, in India, if there is somebody who’s pushing back, it is the lower courts, it is the magistracy. During the height of the anti-CAA protests in Delhi, for example,

⁴⁰ Rangin Pallav Tripathy, ‘Why the Supreme Court’s Assault on the Right to Protest Is Fundamentally Undemocratic’ (*Scroll.in*, 07 October 2021). <https://scroll.in/article/1007102/why-the-supreme-courts-assault-on-the-right-to-protest-is-fundamentally-undemocratic>. Accessed 01 May 2022. See also Naomi Barton, ‘What Happens When You Try to Protest against the Supreme Court?’ (*Wire*, 07 May 2019). <https://thewire.in/women/cji-ranjan-gogoi-sexual-harassment-protest>. Accessed 01 May 2022.

⁴¹ See, generally, Harish Khare, ‘The Ramana Effect: The 48th CJI Has Restored Judicial Spirit and Spark’ (*Wire*, 17 September 2021). <https://m.thewire.in/article/law/ramana-effect-supreme-court-judicial-spirit-spark/amp>. Accessed 01 May 2022; Ashish Tripathi, ‘CJI Ramana: A Determined, Courageous Reformer’ (*Deccan Herald*, 22 August 2021). <https://www.deccanherald.com/amp/national/cji-ramana-a-determined-courageous-reformer-1022289.html>. Accessed 01 May 2022; Manu Sebastian, ‘Chief Justice NV Ramana’s Six Months in Office — New Rays of Hope in Judiciary’ (*Live Law.in*, 30 October 2021). <https://www.livelaw.in/amp/columns/chief-justice-of-india-cji-nv-ramana-six-months-office-supreme-court-judicial-independence-184703>. Accessed 01 May 2022; Srishti Ojha, ‘“I Don’t Want Any Sealed Covers, Keep It with You”’: Chief Justice of India Ramana’ (*Livelaw.in*, 15 March 2022). <https://www.livelaw.in/amp/top-stories/i-dont-want-any-sealed-covers-keep-it-with-you-chief-justice-of-india-ramana-194219>. Accessed 01 May 2022.

young metropolitan magistrates would wake up at midnight and issue directions to the police that no juvenile would be taken into custody—something that a high court or the Supreme Court would never do. And it was—and it continues to be—the magistracy which is somewhat troubled by what is happening. As you go higher, you see no leadership, no intervention from any of the superior courts. Even in the Delhi riots cases, the large volume of pro-citizen judgments has come from young subordinate court officials who have actually shamed higher courts into occasionally passing the right order.⁴² They've taken on the police—some of them have got transferred and paid a price for it.⁴³ But I would say that the subordinate judiciary, particularly in places like Delhi, where I practise, has actually shown how it should be done. And the superior courts have just caved in and not done anything about anything.

There's another incident, what happened in Hathras, where a young woman was gang-raped and cremated by the police without handing over her body to her grieving parents, who begged and pleaded with them in the middle of the night. This is how brazen it gets. There is no accountability. Sure, there's a CBI case and some kind of trial is going on, which I believe is so contradictory that it will not stand any kind of scrutiny—but notwithstanding that, this is the brazenness with which things are happening in India. And I agree with Arvind and Mohsin that this is not something which is centrally controlled. There may have been some instruction at some point in time, but you have foot soldiers who are doing this randomly without anyone questioning.

We had this incident a couple of days ago where a jeep was driven into farmers who were just walking down the street.⁴⁴ Everybody kind of says the Supreme Court has passed these beautiful comments, has taken on the government, is saying all the right things—but it's been three weeks since the incident and there has not been one tangible order fixing accountability.

So, I think a lot of this is just hogwash, you know. I think the present Chief Justice wants to show that he's different from the previous one. I don't think we could get someone worse than the previous one—maybe we will (I'll live to see that also!)—but the present one is smarter and pretends to have a heart. The joke in my family is a lot of them make these magical statements when they address law students, and they show that they're extremely liberal, but that distance between the India International Centre in New Delhi and the Supreme Court is sufficient for them to change from being ultra-liberal to being completely conformist.

⁴² Naomi Barton, 'Juvenile Victims of Police Violence in Delhi Speak of Paying the Price for CAA Protest' (*Wire*, 22 December 2019). <https://m.thewire.in/article/communalism/chandra-shekhar-aazad-police-jama-masjid-daryaganj-protest/amp>. Accessed 01 May 2022; Sagar, 'How Detainees Were Denied Legal Counsel, Medical Help at the Daryaganj Police Station' (*Caravan*, 25 December 2019). <https://caravanmagazine.in/amp/politics/detainees-denied-legal-medical-help-daryaganj>. Accessed 01 May 2022.

⁴³ Nupur Thapliyal, "'Inefficient', 'Poor Standard', 'Lackadaisical': Critical Observations Made by Now Transferred ASJ Vinod Yadav against Delhi Police Probe in Riots Cases' (*Livew.in*, 10 July 2021). <https://www.livew.in/amp/news-updates/asj-vinod-yadav-critical-observations-delhi-police-probe-delhi-riots-cases-183309>. Accessed 01 May 2022; 'ASJ Vinod Yadav Transferred: 12 Instances Where the Judge Took On Delhi Police in Riots Probe' (*Wire*, 07 October 2021). <https://m.thewire.in/article/law/asj-judge-vinod-yadav-transferred/amp>. Accessed 01 May 2022.

⁴⁴ 'Congress Shares Video Showing Vehicle Running Over Farmers in Lakhimpur Kheri' (*India Today*, 05 October 2021). <https://www.indiatoday.in/india/story/uttar-pradesh-up-lakhimpur-kheri-congress-viral-video-jeep-runs-over-protesting-farmers-1860775-2021-10-05>. Accessed 01 May 2022.

This is the institutional framework under which we are all working. Will this change, and how will it change? I wish I had an answer. I really don't. Because I don't think I've felt this bad in 35 years of my practice; there are times when I truly find it difficult to sleep at night because of what is happening, and how quickly things are changing, and how law is being used. When someone as privileged as Bollywood's most famous actor's son, who did not have a gram of narcotic substance on him—when he continues to be in custody ...⁴⁵

So, it is the use of the law, and that's something which this regime has done very well. They use the law to misuse it. I don't think previous governments—the Congress, for all their faults—could ever imagine that they could do something like this! (I'm sure that if they imagined it, they would have done it themselves.) But this is another beast altogether, and unless we recognise it, I don't think we can imagine a life different from what we are facing. It's truly tragic. And there's a lot of despair.

Mayur: I just want to ask Rebecca: our good friend and lawyer Jawahar Raja says that the higher you go in the hierarchy of courts, the worse it is—but why is that? Why is the magistracy passing these legal orders, whereas you think the higher courts aren't?

Rebecca: I have a very practical answer to it. I think the higher you go, especially by the time you reach Chief Justice Ramana's stage, you are already thinking of what you will do after you're 65 and what kind of post-retirement benefits you will get (and all of them do get). We had a sexual harasser Chief Justice who has just become a Member of Parliament through the Upper House route. So, I think they are very concerned about what will happen to them after retirement because that's looming large, whereas these younger judicial officers, maybe because they're young, or maybe because it resonates more with them and they have a long way to go before they reach anywhere near these positions, are less constrained.

The way they sometimes speak in court—I fear for them, because, you know, if someone were to record it. They are very critical. So, while I salute what they're doing, I also feel some of them can be in a fair degree of danger. But I think it's largely because as you grow older, you become greedier, and you are thinking of that lovely house in Lutyens' Delhi with the chauffeur-driven car and some kind of assignment which will keep you occupied till the day you die. That's what motivates the higher judiciary, in part, from not doing their job—and that's not something which the subordinate judiciary is immediately concerned with. That may be an oversimplified answer, but that's something that I just thought of.

Kim: I had a similar question. In the regimes I'm calling autocratically legalistic, you have a leader positioning allies in institutions. And what I'm hearing today is something really quite different, which is that it sounds like a combination of Modi taking the lid off things and if people know there are no legal consequences, the rule of the mob strikes. That seems like really a quite different thing. I think those of us living in the US feel like that's a lot of what Trump did here. And the fact that we

⁴⁵ 'Aryan Khan Granted Bail after 25 Days in Custody, to Walk Out of Mumbai's Arthur Road Jail Soon' (*Economic Times*, 29 October 2021). <https://economictimes.indiatimes.com/magazines/panache/aryan-khan-granted-bail-after-25-days-since-arrest-to-walk-out-of-mumbais-arthur-road-jail/article-show/87336973.cms>. Accessed 01 May 2022.

didn't have more outbreaks was a result of the fact that some states were not under his control, he didn't capture everything, and so on. But India seems like a different set of tactics, and I think, really worth documenting.

So, one of the things that saved the US from Trumpism was, partly, federalism. And I'm wondering if you see a lot of regional variation in this? I know with the courts it's quite different—because there isn't a unitary court system, there aren't separate courts in the states in India as there are in the US. Do you think the court system has a particular vulnerability here? You know, because of what you suggest and that it's not so much Modi parachuting with his allies into the courts (which is what we see in Hungary and Poland and so on). It's creating uncertainty around things like public pensions—taking the lid off, removing guarantees, removing certainty rather than imposing a different certainty. Does that sound like the kind of dynamic that you're seeing there?

Mohsin: On Kim's question, I'll partly answer it and leave the judiciary bit for Rebecca and others. On the federalism point, I don't know what our political assessment is, but Modi wants to have simultaneous central and federal elections. If that happens, it will require a constitutional change, perhaps. And that will really undermine regional political parties, which have been a major source of political opposition, and they also, by and large, tend to dominate the upper house of Parliament. The upper house, or Rajya Sabha, has been quite an important oppositional force, quite unprecedentedly in Indian history. Right now, he's using politics to do it. But if he wants to change the Constitution, which he's sort of testing, that would be very interesting and harmful, but something which will fit autocratic legalism.

I just wanted to mention three other spaces, because the Indian case teaches us a bit more about what different sites can be used by autocratic legalists. First, the Modi regime's main area of mobilising is a different constitutional legal common sense. When the citizenship law was enacted in 2019 and introduced an explicit religious test,⁴⁶ I was more or less convinced that there would be complete consensus that it's unconstitutional. Within six months, you had some of the most prominent lawyers coming out—or even younger lawyers who had a lot of social media presence—and I believe, now, the CAA has moved from an easy case to a hard case: it has become contestable. It is possible that the Supreme Court tomorrow says it's constitutional and now I won't be surprised. I'll disagree with it, but I think they have mobilised legal common sense and the role of legal professionals, and I think that is connected to the social question.

Second: Modi has captured the BJP, which might be very similar to what Indira Gandhi did in 1970. So Arvind mentioned Jaffrelot and Anil's book, for example, and I think of political parties as institutions that can be captured, through which the state can be captured, and this might be a thing which Modi has done. And this also has federal implications because intra-party federal contestations were another way of ensuring accountability and preventing state capture.

And third, which again is a theme coming out everywhere—Rebecca also talked about the judges—I think they have mobilised inherent, systemic weaknesses in the

⁴⁶ Citizenship (Amendment) Act 2019 s 2, inserting proviso to Clause 2(1)(b). <https://egazette.nic.in/WriteReadData/2019/214646.pdf>. Accessed 01 May 2022.

Indian legal system to a politically, ideologically, astute end. And that is what the ‘judges question’ is. Judicial appointments were always a problem, but they have not decided to change anything; what they made sure is that judges know that they will use it strategically. And, it seems, everybody knows that. So, they are much more instrumental about the systemic weaknesses than before. They are not bringing formal changes; they are using weaknesses that already existed.

Fabio: Yes, which is similar to what is happening in the United States—right Kim?—where the Republican Party is capturing the judiciary through judicial appointments, and using rules out there. It’s just penetrating the legal profession and the judicial system, and strategically using them.

Kim: Exactly. We also have all these cases that used to look easy suddenly become hard. I mean, it’s law professors, the legal bar, and who the judges are. And so, I think that’s just such a good description of a real serious issue.

Deepa: I’m going to make a very quick observation, and then I think Bachittar has a question he’d like to ask. One of the things that strike me is that, as Kim mentioned at the outset, in the Eastern European context that she is primarily familiar with, a lot of the people, a lot of the leaders who are at the forefront of these changes and manipulations of law are, themselves, lawyers. This is a trend that she has documented. And I think, at least until this point, there has been a tendency within South Asia to think of lawyers in a largely positive sense. The idea that the legal profession is a bulwark against pernicious political and legal transformations floats in the scholarly conversation quite persistently among South Asianists.

I think it’s worth noting, or considering, to what extent the legal profession is or isn’t involved in the changes we’re talking about in the Indian context. Because on the one hand, we have Rebecca saying that, you know, the superior courts do nothing, say nothing, and if they say or do anything, it’s not helpful—but that the magistracy is kind of where some of the positive potential action is at, if there is any. And we have Kim noting that even some of her former students who are now academics or lawyers (or both) in India are experiencing a change of heart or perspective. And we have some conversations about the role of judicial appointments, not necessarily transformations but more strategic use of existing potential. So, I think there’s something to think about with respect to the role of lawyers in these kinds of legal and social transformations, and whether anything about the current moment is worth noting or is different.

Bachittar: My question touches on three things that yourself, Rebecca, and Kim mentioned. It’s the idea of regionalism. For example, the current DGP (Director General of Police) of Punjab Police is Dinkar Gupta, who is reported to have been involved in the ‘disappearances’ and the unlawful killings of at least four individuals in Punjab, as per the data that Ensaaf has collected over the past decade.⁴⁷ His

⁴⁷ Ensaaf, ‘Crimes Against Humanity in Punjab: Dinkar Gupta’. <https://data.ensaaf.org/official/S0009/>. Accessed 01 May 2022. Note that the speaker adds: In 2021, Dinkar Gupta was made the Chairman of Punjab Police Housing Corporation and Iqbal Preet Singh Sahota replaced him as the DGP of the Punjab Police.

predecessor, Suresh Arora, is also reported to have disappeared and extrajudicially executed multiple Sikh men in Punjab between the late 1980s and the early 1990s.⁴⁸

You see this abuse of power in the Punjab judiciary as well. We filed a case in the Punjab and Haryana High Court about a former Punjab police officer who provided testimony against his co-workers from the 1990s after he witnessed them killing 16 people, including a 14-year-old whom they beheaded and then they cut open his body and threw him into the Hari ke Pattan (which is a canal in Punjab). The Haryana High Court actually fined him for libel against the police officers.⁴⁹

I think that's something that we have to address as well: the fact that this 'demon' that's coming forward now on the Indian political stage—the most that's happening is that now it's more widespread, whereas before I think it was more regional. You saw this in the Northeast⁵⁰ you saw this in Punjab⁵¹ and Kashmir⁵² and parts of Gujarat during 2002,⁵³ whereas now it's definitely more widespread.

The other thing was about lawyers—at one point, the Punjab Government had to pass a bill which forbade the police from torturing and killing Punjab lawyers because, in the 1990s, a lot of human rights attorneys were being picked up, detained, and tortured, and eventually 'disappeared' by the Punjab police for questioning their methodologies.⁵⁴ So, the government actually had to step in and say, 'you cannot detain lawyers,' after there were massive protests in Chandigarh, Ropar, and these regional areas. This was after five to ten prominent human rights attorneys were 'disappeared' and killed by the state.⁵⁵

⁴⁸ Ensaaaf, 'Crimes Against Humanity in Punjab: Suresh Arora'. <https://data.ensaaaf.org/official/S0003/>. Accessed 01 May 2022.

⁴⁹ Ensaaaf, 'The Last Killing: A Film by Ensaaaf'. <https://ensaaaf.org/satwant-singh-manak/>. Accessed 09 May 2022; Ensaaaf, 'The Last Killing' (film). <https://www.youtube.com/watch?v=bKmxqqhIPD0>. Accessed 09 May 2022.

⁵⁰ 'India: Repeal Armed Forces Special Powers Act' (*Human Rights Watch*, 18 August 2008). [https://www.hrw.org/news/2008/08/18/india-repeal-armed-forces-special-powers-act#%20\(Includes%20a%20report](https://www.hrw.org/news/2008/08/18/india-repeal-armed-forces-special-powers-act#%20(Includes%20a%20report). Accessed 09 May 2022. This article includes a link to a report published by Human Rights Watch discussing the draconian laws enacted by the Indian legislature by labelling specific areas as 'disturbed areas', therefore creating a legal exception by neglecting to hold accountable military personnel who violate human rights of the local population.

⁵¹ Jaskaran Kaur, 'A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India' (2002) 15 *Harvard Human Rights Journal* 269; Ram Narayan Kumar et al., *Reduced to Ashes: The Insurgency and Human Rights in Punjab* (Final Report 1, South Asia Forum for Human Rights May 2003) 53–62, 104–121.

⁵² Rifat Fareed, 'India Arrests Prominent Kashmir Rights Activist under Terror Law' (*Al Jazeera*, 23 November 2021). <https://www.aljazeera.com/news/2021/11/23/india-kashmir-khurram-parvez-arrest-human-rights-uapa-terror-law>. Accessed 09 May 2022; Intifada P Basheer, 'When It Comes to UAPA Arrests, Kashmir Leads the Way' (*Outlook*, 06 August 2021). <https://www.outlookindia.com/website/story/india-news-when-it-comes-to-uapa-arrests-kashmir-leads-the-way/362961>. Accessed 26 May 2022..

⁵³ Human Rights Watch, "WE HAVE NO ORDERS TO SAVE YOU": *State Participation and Complicity in Communal Violence in Gujarat*, Report 14(3C) (April 2002) 4.

⁵⁴ Kaur, 'A Judicial Blackout' (n 51) 291.

⁵⁵ Ensaaaf, 'The Disappearance of Human Rights Attorney Sukhwinder Singh Bhatti'. <https://ensaaaf.org/sukhwinder-singh-bhatti/>. Accessed 09 May 2022; Ensaaaf, 'The Murder of Human Rights Defender Jaswant Singh Khalra'. <https://ensaaaf.org/jaswant-singh-khalra/>. Accessed 09 May 2022; Kumar et al., *Reduced to Ashes* (n 51) 16–21, 24–31, 73–74, 85–88.

So, to touch back to the beginning of this conversation, I think that what we are currently seeing now in India is a wider application of what various regions and states in India experienced under various governments. It's just become more widespread now, more public. And it's very concerning. Before, it was just a regional issue, at most, a regional abuse of power with a Central touch. But now we're seeing that it is the Central Government that's leading this new attack on those that it deems to be anti-national.

Mayur: Deepa had that question of what's new about the present moment, right? It may be this, what Bachittar is speaking about, and what Pratap Bhanu Mehta also calls the 'Kashmirisation' of the rest of India,⁵⁶ where everything is becoming like the human rights abuses that were faced in Kashmir, in Punjab, in the Northeast, in parts of Telangana. That is kind of the regime that we're in right now. So maybe that's the newness of it?

Mohsin: I had a question for Arvind and Rebecca, but others as well. When I reread Kim's work on autocratic legalism,⁵⁷ there's this underlying idea that legal form is used as a cover, and it's also used as a form of legitimation. And my suspicion is that there's a lot of that over the last five to six years in India. So, the defence of citizenship reform, agricultural reform—it's done in quite legal and instrumental ways. And Mayur, Deepa, and I also had that conversation about law, the role of law, and the promise of the law. I was wondering: what is your assessment, Arvind and Rebecca, about the legalisation of India's politics, legalisation of the public sphere itself, and how law is used by ordinary people to sort of defend the regime and say, 'of course, they're completely within their legal rights to do it'?—particularly when it came to the NRC (National Register of Citizens). Does that tell us the limits of the law itself in dealing with this issue, and how optimistic should we be about the law? Or will we have to reimagine it or resituate the promise of the law?

Arvind: I think from the point of view of, say, grassroots groups around the country: where does one vest one's hope? Where does one begin one's struggles? What are the normative frameworks around which the struggle against the regime is hinged? It is the Constitution. It's the idea that the Constitution promises these rights—again, at a normative level. It may not be so in practice, but your struggle is hinged on the Constitution. In my understanding, that's really the promise of the law. That's a very important part because I feel that we're struggling to preserve the constitutional legal framework. We're saying that this framework matters. It's relevant. It's what anchors all of us as far as the struggle going forward is concerned.

What is the Modi regime's response or understanding of the Constitution? Is it that, at best, they give a hypocritical kind of obeisance to the Constitution? Do they want to, in some sense, challenge, remove, and nullify the promise of the Constitution? Is the CAA a way of nullifying the promise of the Constitution? If that is so, then the way forward—I mean, if you saw the CAA protests, the protests hinged on the Preamble. What people are taking to is the language of the Constitution, the

⁵⁶ Achyut Mishra and Fiza Jha, 'Pratap Bhanu Mehta on "Kashmirisation of India"', Gen Hooda on Challenges Post 370' (*Print*, 06 August 2019). <https://theprint.in/thought-shot/pratap-bhanu-mehta-on-kashmirisation-of-india-gen-hooda-on-challenges-post-article-370/273028/>. Accessed 09 May 2022.

⁵⁷ Scheppele, 'Autocratic Legalism' (n 6) 548.

language of the struggle which brought the Constitution into being. The Constitution is not just a document. It's a document which is the product of a struggle. And what people were going back to in protests around the country during the anti-CAA movement, are Gandhi's words, Ambedkar's words, and the promise of composite citizenship—that's what people are really going back to.

So, I think you have to look at this in a concrete sense and ask, what are you going to hinge your struggle on that can draw people together? And today, that language really is the language of the Constitution. We can't give up on that. I think the promise of the law is the promise of the Constitution, regardless of what we said about Article 22 earlier. Of course, that is there, but we have to look at the promise of the Constitution and see how we can take that forward in our struggles.

Rebecca: I agree with Arvind completely. And actually, in the midst of all of this gloom, if I can just flag something quite inspirational in many ways, was the period between December of 2019 and February of 2020 where these protests organically came up across India against the CAA-NRC process. So, for example, in the city I live in, you saw uncles and aunties on the streets, you know, and they were not particularly aligned to any political dispensation. You wouldn't think that they were interested in anything beyond their paycheck at the end of the month, but they were there, and they were protesting. You saw students and professors and everyone else coming out to join them. Everyone from my office went down to read the Preamble. There was something there. And so, you know, before we give up completely, I think we need to look at those moments and kind of clutch and hold on to them and say that, perhaps, this is our failing: we've just assumed that this whole space is this horrible, violent communal space. It probably is. But there is still room for hope.

I'll give you another example. I was going to a district court—this was December 2019, close to our Christmas vacations. I was going for a regular corporate bail application. I was called by these young lawyers, most of whose names I did not even know, and I was asked whether I would appear for the first set of arrestees, popularly known as the 'Daryaganj arrestees'—they were people who were protesting against CAA-NRC, they had been thrown into a bus, there were some 15 of them—whether I could appear for them in their bail hearing and opposition of their remand. When I reached that court (and these arguments went on till eight at night), there were not less than 4,000 people. A large majority of them were young lawyers outside court waiting to see because that was the first test case of its kind. It was truly magical. I must also recognise this counter-current that we also saw during that period. We can't just throw that away and say that it does not matter.

I don't know where they are at the moment, but they're somewhere around and we need to identify them and bring them back. As you know, last year, they arrested this young person, an environmental activist from Bangalore: she was brought to Delhi, she was all of 22, and then that resulted in several other young activists (this was during the farmers' protests) being called in by the special cell.⁵⁸ It has a ripple effect because then parents tell their children 'shut up, keep quiet, stay at home, don't

⁵⁸ Hannah Ellis-Petersen, 'Disha Ravi: The Climate Activist Who Became the Face of India's Crackdown on Dissent' (*Guardian*, 17 February 2021). <https://www.theguardian.com/world/2021/feb/18/disha-ravi-the-climate-activist-who-became-the-face-of-indias-crackdown-on-dissent>. Accessed 09 May 2022.

be visible.’ And perhaps they still feel the way they felt in 2019—I don’t know—but all that we seem to hear and seem to see is this overwhelming hate that’s defined by Twitter, that’s defined by Facebook, that’s defined by everything else that is happening around us. Maybe there are people who ... am I being overly optimistic here? I don’t know.

Arvind: No, no, no. You are on target. You are completely on target.

Rebecca: Or maybe I’m just trying to grab something so that we can get past the next few days, you know—you need something to hold on to!

Arvind: I think it’s important. Also, I think the context matters—where one speaks from matters. Rebecca saying this sitting in Delhi is very different from people saying it in the West. And so, we need to derive a sense of courage and optimism from the fact that she’s here and doing the work that she does. And that’s very important. But you can’t be saying ‘we give up,’ you know, ‘we are frustrated’—that can’t be the message you take away! You should read Rebecca differently. You have to read her as somebody in the trenches, doing her remarkable work, and she is an inspiration to all of us by her life. That’s the way we have to think.

To go back to what Mayur has spoken about: think of Arendt’s [*Men in Dark Times*⁵⁹]. She survived the Nazi Holocaust and she is talking about the lives of 10 or 12 people, and she’s telling you the stories of their lives. And what she’s saying is that sometimes when the area around us is incredibly dark, the light which emerges can only be the light emitted from the lives of individual people. Whether that’s the light of the candlelight or the light of the sun, the future will tell us. But that light is very important. And in that sense, what we see here is a bit of light, right? You should be able to take the light from that and not see it in terms of, like, spreading gloom, but rather the fact that this work is going on, day in and day out, in difficult circumstances, and the fact that hope is kept alive: that’s the important part.

One more point: the day before yesterday, we had a protest in Bangalore. It’s a BJP administration in Karnataka, and the Chief Minister had made this particular statement saying what I’d referred to earlier: that when boys and girls having coffee together, tea together, getting married, running away, etc. are attacked, then then they must have done something wrong.⁶⁰ And of course, it’s a shocking statement, because you’re basically saying the rule of law doesn’t matter, you can do what you want, and the state is behind you. That’s what he said.

And we had a protest on that. And the language, going back to Kim’s statement, the language we used was the language of the Constitution. What was the statement of the protesters? The statement of the protestors was that the Preamble which we fought for has written within it the language of fraternity. ‘Fraternity’ is there in the

⁵⁹ ‘That even in the darkest of times we have the right to expect some illumination, and that such illumination may well come less from theories and concepts than from the uncertain, flickering, and often weak light that some men and women, in their lives and their works, will kindle under almost all circumstances and shed over the time span that was given them on earth—this conviction is the inarticulate background against which these profiles were drawn. Eyes so used to darkness as ours will hardly be able to tell whether their light was the light of a candle or that of a blazing sun.’ Hannah Arendt, *Men in Dark Times* (Harcourt, Brace and World 1968) ix.

⁶⁰ See generally ‘Karnataka CM’s Apparent Endorsement of Moral Policing Triggers Controversy’ (n 36).

Indian Constitution because Ambedkar wanted it to be there.⁶¹ And what fraternity means is that you cut across lines of religion and caste and interact: you're talking about democracy as a form of conjoined associative living. Again, Ambedkar's idea of democracy is not merely electoral democracy—no. Democracy is really a project where people come together across lines of religion and caste, and that's the ideal you're defending. So, the point the protesters were making is that if two people fall in love and run away, what they're doing is they're embodying Ambedkar's idea of fraternity. So, we go back to the language of the Constitution to defend these rights at the individual level.

And again, these are not protests happening in elite English-speaking circles, right? It's people speaking in Kannada, people quoting Ambedkar, people saying that these are the values we are seeking to uphold. And you look at young people doing that and say, 'do we have a right to be hopeless?' Going back to Rebecca's point, what I thought was a remarkable moment for all of us was the release of the three young people who were arrested for the CAA protests: Asif, Devangana, and Natasha.⁶² What spirit they had! It was incredible, utterly incredible spirit. That gave a sense of optimism to everybody around them. You're looking at these people in jail coming out with that spirit, and Rebecca's here doing this work with this kind of spirit. And so that's what should spread. Possibilities of hope are very important. You shouldn't give up.

Deepa: That seems like a very good point to end on! I know we have another five minutes, but I almost don't want to say anything because I'm feeling good, which I did not expect to at the end of this conversation. Mayur, did you want to say something?

Mayur: In what Arvind said, that there seem to be two languages. There's the language of authority, and hierarchy, and power—which is the language the Modi regime speaks in—but there's also the language of fraternity, love, togetherness, and community. And there's something very inspiring—I remember this image of Asaduddin Owaisi leading the mass chanting of the Preamble, of *Hum bharat ke log* (We are the citizens of Bharat).⁶³ There was something so moving about that moment.

So maybe the problem is that the darkness among us is through the everydayness of the law. Modi amended Article 370,⁶⁴ he passed the CAA-NRC, but there's also

⁶¹ Rajmohan Gandhi, 'Inclusion of the Word Fraternity in Preamble Is of Historic Importance and Contemporary Relevance' (*Indian Express*, 22 October 2020). <https://indianexpress.com/article/opinion/columns/india-constitution-preamble-fraternity-fundamental-rights-6824790/>. Accessed 09 May 2022; Rowena Robinson, 'In Search of Fraternity: Constitutional Law and the Context of Housing Discrimination in India' (2015) 50(26–27) *Economic and Political Weekly* 54.

⁶² Jignasa Sinha, "'Thought We Would Never Get Out ... Faced Social Trial': Natasha, Devangana, Asif Walk Out of Jail' (*Indian Express*, 17 June 2021). <https://indianexpress.com/article/cities/delhi/thought-we-would-never-get-out-faced-social-trial-natasha-devangana-asif-walk-out-of-jail-7363804/>. Accessed 09 May 2022.

⁶³ Aditi Ghosh, 'Asaduddin Owaisi Reads Out Preamble to the Constitution at Mumbai Rally' (*NDTV*, 29 January 2020). <https://www.ndtv.com/india-news/aimim-chief-asaduddin-owaisi-reads-out-preamble-to-the-constitution-in-mumbai-2171254>. Accessed 09 May 2022.

⁶⁴ Apoorva Mandhani and Debayan Roy, 'Explained: This Is What Modi Govt Has Done to Scrap Article 370, 35A in Jammu and Kashmir' (*Print*, 05 August 2019). <https://theprint.in/india/governance/explained-this-is-what-modi-govt-has-done-to-scrap-article-370-35a-in-jammu-kashmir/272369/>. Accessed 09 May 2022.

this undercurrent of hopefulness, of the promise of law, that the anti-CAA protests harnessed, that no one saw coming because—as Rebecca said—everyone just said, ‘okay, this is just going to be a miserable time.’ But that promise of what it meant to have the rule of law, the promise of Ambedkar, the promise of fraternity—it’s not so much the details of legality; but maybe the promise of legality, the promise of the rule of law, is something that animates us and is where tomorrow will come from.

Deepa: I think I’m going to end it on that note. It’s not often that I think about these issues and come away feeling better than when I started, so I’d like to hold on to that bit of positivity. Thank you all so much for taking this time to talk. I think that the ability to talk across contexts, but also deep within one, and draw on practical experience and insights, as well as theoretical ones, is one that we still don’t have all that often. I know that one of the goals of PAL/BISA is to try and create more of those opportunities, but it’s still rare and valuable when we encounter them. So, I really appreciate all of you taking the time to do this.

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