



Criminal Law Reform in the Postcolony: Nikita Sonavane in Conversation with Prabha Kotiswaran and Tarunabh Khaitan (transcript)

[Note: This event was recorded on 24 September 2020 and does not consider additional concerns surrounding subsequent changes to the mandate and composition of the Committee for Reforms in Criminal Laws.]

Arushi Garg:

Hi, everyone. My name is Arushi Garg. And on behalf of the Centre for Criminological Research at the University of Sheffield, I'd like to welcome you to this event. Today, we're going to focus on the ongoing criminal justice reform process in India. And before I hand over to our excellent panellists, I just want to take a moment to introduce this topic for our viewers.

I believe that this topic is highly relevant, not just for India, but also for several other postcolonial legal systems that have been engaged in the process of modifying, amending, and indigenising colonial codes for the past century or so. The reform process at hand involves a five-member committee that is based in Delhi, that has been established by the Indian Ministry of Home Affairs, in order to propose a rewriting of the three main criminal codes of the country. The exact mandate of this committee is not in the public domain and is not known, but it appears from its website that the members of the committee are acutely aware of the colonial origins of these codes. So the chairperson's message on the website, for example, talks about how the Victorian morality and colonial imperatives embedded within these codes are no longer fit for purpose in postcolonial India. The three codes in question are the Indian Penal Code, or the IPC, the Code of Criminal Procedure, or the CRPC, and the Indian Evidence Act. The IPC is our main piece of substantive legislation, and it defines all of the major crimes that are prosecutable in India. So this includes rape, murder, theft, rioting, sedition, and several others. The CRPC specifies the processes that must be followed in order to investigate, prosecute and adjudicate crime. Crucially, the CRPC also contains safeguards for what criminal justice authorities like the police can or cannot do legitimately. And finally, the Evidence Act determines how a crime will be proved or disproved in court. So the Evidence Act tells us what sort of evidence can be adduced before the court, and how the court will go about the process of weighing up such evidence. Taken together, a comprehensive reform to all three codes will have huge ramifications for the administration of criminal justice in India, and on the liberties of those who are subjected to the Indian criminal justice system.

Many concerns have been raised about the composition methods and mandate of the committee. But once again, I leave it to the panellists to explore these in a little bit more detail. But for now, I just want to observe that these concerns and anxieties about what to do with colonial codes will likely have resonance in many different parts of the world. In fact, the very three codes that the committee is currently in the process of evaluating have also, through a process of legal transplantation, influenced law reform and law development in many different parts of the world.

So describing the IPC, Dema Lahm and Stanley Yeo state, "With nearly 160 years of history, the IPC is the longest surviving penal code in the world. And it has been highly useful to several other countries besides India. Notably Malaysia, Sri Lanka, and Singapore." And if I could add to these examples, the IPC was extended to Zanzibar in 1867, to Burma, current day Myanmar, in 1886, to the erstwhile East Africa Protectorate, roughly modern day Kenya, in 1897, to Uganda in 1902, and to Tanganyika in 1920. Though in many of these countries, other colonial codes were also subsequently drafted. The IPC has also exerted an indirect influence on the development of law



in many countries. So in 1959 and 1960, the northern region of Nigeria introduced a penal code that was modelled on the Sudanese Penal Code, which in turn was modelled on the IPC. And the migration story of the two other codes is no less impressive. In fact, we might be quite familiar with international media reports about Section 144 orders being imposed in Myanmar, in response to the anti-Muslim violence in the Rakhine State, and in other parts of the country. This refers to Section 144 of the CRPC in Myanmar, which is often used by the executive in order to ban gatherings of five or more people, and to impose what Melissa Crouch has referred to as a state of everyday emergency. Indian lawyers will immediately recognize the similarities with Section 144 of the Indian CRPC, on which the Myanmar provision is modelled. And the Indian provision has, of course, also been dogged by stories of state abuse and opacity over the past several years. All of this to say that an ambitious reform of these criminal codes is a highly relevant exercise, not just for India, but also for a range of legal systems that are now grappling with the legacy of the British Empire. And indeed, other colonial regimes.

And so I'm confident that this conversation that we engage in today, will support all of these legal systems in thinking through some of these issues. And so with that, I will hand over now to our moderator, Nikita Sonavane. Nikita graduated with a BA in Political Science from St. Xavier's College in Mumbai, and an LLB from Government Law College, also in Mumbai. She holds an LLM in Law and Development from Azim Premji University, Bangalore. She has worked as a legal researcher and an advocate for three years. She is the co-founder of the Criminal Justice and Police Accountability Project, a Bhopal-based litigation and research intervention, focused on building accountability against the criminalisation of marginalised communities by the police and the criminal justice system, and pressing for decarceration. She has previously worked as a research associate with the Centre for Social Justice, Ahmedabad, on issues of local governance, forest rights and gender in the Adivasi region of Dang, in Gujarat. Thank you so much for joining us, Nikita, and the floor is all yours.

Nikita Sonavane:

Thank you so much, Arushi. Thank you so much for the introduction and thank you, to you and the Centre, for organizing this much needed discussion. I'm delighted to be having this important and timely conversation with all of you, and particularly with Dr. Prabha Kotiswaran and Dr. Tarunabh Khaitan, who are two leading voices from the legal academy.

Let me just begin by briefly introducing our panellists for today. Dr. Prabha Kotiswaran is a Professor of Law and Social Justice at King's College London. She's the author of *Dangerous Sex, Invisible Labour: Sex Work and the Law in India*, published by Princeton University in 2011. She has worked extensively on the regulation of trafficking and forced labour, having edited *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, published by Cambridge University Press, and has written extensively about the rape law reforms in India in *Governance Feminism: An Introduction*, and *Governance Feminism: Notes from the Field*, both published by the University of Minnesota Press. I must add here that her writings on governance feminism are a personal favourite.

Also, our next panellist is Dr. Tarunabh Khaitan, who is a Professor in Public Law and Legal Theory at Oxford, a Professor of Law and Future Fellow at Melbourne University, and a general editor of the *Indian Law Review*. He has authored the book titled *A Theory of Discrimination Law*. He has also played a pivotal role in drafting the Indian Anti-discrimination and Equality Bill, in 2017. His research on discrimination law has been courted and relied upon by the Supreme Court of India.



With this, without any further ado, let's begin this discussion. So Prabha and Tarunabh, in the last six months, we've seen a lot of course, the world has been battling this pandemic. And in India in particular, we saw that one of the harshest lockdowns in the world was imposed to deal with this pandemic. While we're grappling and continue to grapple with this massive public health crisis, we see that this Committee on Reforms in Criminal Laws was set up by the Ministry of Home Affairs on the 4th of May, 2020, so right at the height of the lockdown in the country. And so we see that this is a national committee that has been set up to undertake a review of criminal laws. And it seems to recommend these overarching reforms to criminal law. And the lifespan, of course, of the committee is six months. So I want to begin the conversation, Prabha, by asking you if you find this entire process of the constitution of the committee objectionable? And if yes, why is that the case?

Prabha Kotiswaran:

Thank you. Thank you so much, Arushi, for initiating this very important conversation. And to Nikita, for your moderating of this session. So I would say that almost everything about the constitution of this committee is objectionable, except for perhaps the mandate that the committee sets out on its own website, which is to recommend reforms, it says, "In a principled, effective and efficient manner, which ensures the safety and security of the individual, the community and the nation. And which prioritises the constitutional values of justice, dignity, and inherent work of the individual."

Now, these lofty claims of the committee are not evidenced at all, by the way in which it is functioning. To begin with, and many commentators have written about this in the Indian media, if you look at the composition of the committee, it's appalling. There's not a single woman on the committee. All the representation is from the north of the country. And also, in terms of the legal community, it's not adequately represented in terms of having, say, practitioners from the trial court level, or even have a member from civil society. So it's actually a really elitist committee, and it has been very hard to actually track the terms of reference of the committee. There's a complete lack of transparency in the way that the committee is carrying out its deliberations. We're expected to engage with the committee only through online questionnaires. Which is again, highly problematic in a country like India, given that all the questionnaires are in English.

Now, I'll actually also come to the substantive aspects of the questionnaires in due course. But as you rightly pointed out, Nikita, I think the context of the pandemic makes us really worry about this process of law reform, because obviously, it emphasises a major reorganization of the relationship between the citizen and the state. And now would be the worst possible time to actually undertake something so important and crucial to the population of a country. Of course, there's been a lot of talk about the feasibility of the work of the committee. It's utterly unfeasible. Clearly, the codes themselves took decades to draft and be passed into law. And as all of us academics know, you could spend years working on a very small area of the criminal law. And for the committee to simply imagine that it can undertake this mammoth task within a period of six months, it's just wishful thinking. I mean, I would say that in fact, it would take an army of research assistants to simply compile a literature review of the literature on criminal law in six months. I mean, we would be lucky if we got even a literature review in six months, let alone trying to rework the laws.

And I just want to highlight here, in contrast, and I appreciate the irony of citing to our ex-colonisers here. But if you look at the Commission, the Law Commission in England and Wales, it's currently working through its 13th programme of law reform, which was invited by the Commission in June, 2016. And it's noteworthy that actually, the Commission had a range of meetings with several stakeholders to actually identify, what are the key issues



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that the Law Commission should even consider? And that process itself took about 18 months. And out of that process, that consultative process, there were 14 topics that were selected. And I have been following one topic in particular, which is in relation to its surrogacy laws. It's quite interesting that they began working on reforming surrogacy law in 2017. And if you look at the website of the Surrogacy Law Reform Commission, we find that a Bill on surrogacy would be proposed only in 2022. So in fact, there's been a whole range of consultations between 2017 and now, there's been a pre-consultation period, another consultation phase, and now the Commission is in its policy development phase. So it's taken five years, or it will take five years to work on a fairly discrete area of the law.

And I think, last but not the least, what I want to say is that this initiative on the part of the committee is not in line with our very rich ethos in India, of undertaking law reforms. So we have various processes that have developed in India. You have independent expert committees or bodies, such as the National Commission for Women, the NHRC and the NCPRC. There are inter-ministerial committees. There are committees that particular ministry is set up with NGO stakeholders and experts. There's of course, a Law Commission of India. There are court-appointed committees. There are directions that courts issue within public interest lawsuits. There's the National Advisory Council, which is another example through which a range of social welfare legislations and consultation with social movements were passed.

So actually, some of this may seem quite chaotic in some ways, but it has ensured the wide participation of a range of stakeholders. And of course, we are no stranger to paddling community-based reform initiatives, such as People's Tribunals, *jan sunwahis*, so there's a rich diversity of social movements' engagement with law and policy. And literally, every area of law that I have engaged with in the recent past has taken decades to stratify. So for example, the rape law reform, it took 35 years actually for the Criminal Law Amendment Act to be passed, although it had been discussed for several decades in between. If you look at the Motor Vehicles Act, again, passed in 1988, after a range of law reform, Law Commission reports on the Motor Vehicles Act was only amended in 2019. Again, took 35 years. If you look at just surrogacy law reform, which is currently being considered by parliament, it's taken 15 years. So expecting something as major as the revisiting of three major criminal codes within a period of six months, to me, suggests that it is not an effort in good faith.

Nikita Sonavane:

Thank you. Thank you, Prabha, I mean, these are some really crucial points and I want to get to some of them also, as we proceed with the discussion. Tarunabh, I want to come to you now. I mean, your engagement has been vastly with the field of constitutional law. And so I want to understand, what do you imagine might be the constitutional implications of undertaking a process of reform such as this one?

Tarunabh Khaitan:

Well, first, a huge thank you to Nikita and Arushi for inviting me to this really important conversation. So I want to say two broad things about the constitutional implications of this reform process. The first is something that Prabha already hinted at, which is the dissembling nature of this reform. So a new government, a democratically elected government is of course entitled to seek reform of laws in a democracy. It's also absolutely true, as Prabha has again, already hinted, that a lot of our criminal justice system is indeed a colonial heritage in deeply problematic ways. That the existing criminal justice system does include extremely authoritarian colonial



systems, which are problematic and do need to be reformed in a democratic system. So I want to put those two caveats to my comments, before I say anything further.

So why is this problematic? There are two reasons why a government undertakes comprehensive law reform. One is ideological or political, which is a party fights an election amongst other issues, on an issue of comprehensive law reform in a particular area of law. It's usually a manifesto promise. And the people in part, elect that party to invite it to form government, based on that political promise. That kind of law reform is very different from a second reason for reforming the law, which is law reform based on largely managerial, technocratic, effectiveness-based reasons, which is modernisation. The law needs to be improved, brought in consonance with the times. The problem with this process is that it is actually the first route pretending to be the second. And both routes have particular constitutional implications for how they should go ahead.

So I looked at the BJP's 2019 election manifest, [inaudible] comprehensive reform law. There are three mentions of crimes. They speak of updating cybercrimes. They speak of updating crimes against women. And they speak of updating economic crimes, to deal with black money and untaxed money that's sent outside the country. But there's no mention of a comprehensive law reform process. This is just preparing the case that Prabha has already mentioned, the dissembling nature of, what is the stated agenda and what is the real agenda? So there is ostensibly no political ideological case, where the case presented is one of bringing criminal law up to our times, to make it effective, to make it modern. And that is why you have to go through the process of an expert-based committee, which would also have to undergo all the consultative processes. But anyway, so the attempt here is to go through the motion of making it look like democratic reform.

But what is in fact, and we only have hints of the process and these hints come from the kinds of questions the committee is asking, which is, should sedition law be expanded? There is no space for sedition law in a democracy. Let alone talk of its expansion. If this committee was interested in rolling back the colonial legacy, it will be asking for doing away with sedition law. Or should confessions to a police officer be admissible? Even the colonial state did not trust its police to make confessions to a police officer admissible. A wholesale admissibility of confessions, which we all know in practice, how the Indian police functions with routine torture as a modus operandi. I mean, the BJP has itself raised issues of police torture. We should not forget Pragma Thakur, I think she was a representative candidate of the BJP in elections.

Nikita Sonavane:

Current MP, actually.

Tarunabh Khaitan:

Exactly.

Nikita Sonavane:

Current member of parliament

Tarunabh Khaitan:

Yeah, made serious credible allegations of torture by the police. This is not a partisan issue. That is a colonial legacy. And that is the colonial police system that we are seeking to empower, to extract confessions from,



which will be admissible as evidence against you in the system. Questions about bail, questions about... This is an attempt to widen criminal law, to make it more statist, to make it more oppressive, all the things that you would expect a decolonising process to do the opposite. Which is why the argument about dissembling, that this is something as pretending to be something. Wolf in sheep's clothing. But that sticks. And that's the first constitutional implication, is that the government is not being straight with its citizens. It's not being upfront, and it's not being honest about why it is doing it. And that explains the opacity of the process. The fact that we don't have the terms of reference, we don't know, apart from a few homilies, that nobody can disagree with. We all want our criminal justice system to be decolonised. But apart from homilies, the process is completely opaque. That is a namesake consultation, which is largely about box-ticking exercise.

There is no timeframe where this could reasonably be done. A reform of an entire criminal justice system, for over a sixth of humanity, in six months, by a committee of five men is impossible. On its face, it's unreasonable, unless you know what you want to do before you have begun. This is not a process of finding out where you want to get or where we should get. This is a process of post-facto legitimisation of things that are already set in advance. So constitutional implications, if there is a more straightforward case for a breach of the reasonableness requirement that the Indian Constitution imposes on the state, I don't know of it, than this. But this is a clear breach. This is unreasonable. This is arbitrary. This is cheating the citizens on an issue that is going to affect the state-citizen relations in a way that is deeper than anything else that has happened in independent India [inaudible] since the law is the most state uses against its citizens, apart from giving the vote to the citizens in 1950, 51, but this is the next biggest dramatic and pro-colonial move in state-citizen relations we have ever seen. Right? So that's the first point I want to make about constitutionality of this fight, that this is patently on its face, arbitrary and unreasonable, and therefore breaches the constitution guarantee contained in Article 14. My second point, which is that constitutional norms are not the same as legal norms, right?

So that was a legal, constitutional argument, but there are also things like constitutional values, which are deeply implicated in this process, which whether or not a court can uphold is a separate matter, but there are deep constitutional implications. The Indian constitution is fundamentally committed to three key values of democracy, of liberalism and of a commitment to the rule of law in this process and its likely output deeply contravene all of these three ideas. Why democracy? I've already mentioned that this is going to recalibrate citizen-state relationships fundamentally in favour of the state in ways that will leave very little recourse in the hands of the citizen and therefore this is fundamentally anti-democratic substantively, but also procedurally because you're changing this enormous power of the state without any meaningful consultations but asking the citizens what they want. So it's anti-democratic. It's illiberal in a deeply winding manner because we have already talked about sedition laws, about defamation laws.

If presumption of innocence is on the table, right? The committee has asked whether strict liability criminal offenses, whether you intend to commit the crime or not, it's irrelevant, right? If that is on the table, then the implications for the liberal foundations, which have always been aspirational, we are a defective liberal state, but at least we have aspired to get there, that will be deeply recalibrated. And finally, the rule of law, which requires that law is reliable, law is predictable, the law is stable and none of those things are happening here. We are going to change laws very quickly without consultation in ways that will make them even more obscure and much more difficult for citizens to figure out when they cross the line between legality and illegality. So I think this is a very deeply fundamental threat, not just to criminal law, but to our entire fundamental constitutional structure.



Nikita Sonavane:

Thank you so much Tarun for laying out the broad ramifications that this process would have for a constitutional democracy like ours. And I think it's important to add here that while we're in the middle of the pandemic we've seen and the Indian state's response to this pandemic has largely been through the realm of criminal law. And you look through these wide ranging instances of police brutality that we saw emerging in the public domain; arrests of street vendors, vegetable vendors, even doctors and healthcare service providers. We've seen time and again, the problems with utilising criminal law to address questions of deeply structured social inequality and to even expand the range of criminal law and giving unchecked power to the police and this pandemic has of course exacerbated these fault lines.

This brings me to my next question Prabha because various academics and theorists have said that criminal justice issue at their heart are of course issues of social justice, right? And I mean, different scholars have argued several times over that criminal law has had the effect of reproducing existing marginalities and NCRB data over the years tells us that whether it's the under-trial population in the country or in various ways, we see marginalised communities being overrepresented within the realm of criminal law. So I just want to understand, can you unpack this idea of this relationship between criminal justice issues and social issues? And do you think this idea is reflected in the process that this committee has sought to undertake? Are they dealing with it at all?

Prabha Kotiswaran:

Thank you, Nikita. And I just want echo, I think to the extent that both of you, both Tarun and you have just highlighted how the process in which the committee's working is actually not democratic, is deeply illiberal and against the rule of law. I think that itself goes to the question of, this cannot possibly produce just outcomes. And I think so, I just wonder underline that to begin with, you're right, criminal justice issues are essentially social justice issues because criminal law draws the line between citizen and the state and much criminal scholarship certainly of the kind that we teach our students is based on the liberal notion of equality of citizens. And we know that in India, despite having some semblance of formal equality, actually citizens are not rights bearing in any real sense and are absolutely unable to actually enforce their rights and are routinely at the mercy of the state and its most brutal arm, which is the the police.

So I think at every point of the criminal law system and actually I hate to call it the criminal justice system because actually I don't see any justice in it. So I'd much rather just call it a criminal law system, is that members from the most marginalised communities are disproportionately represented at every stage of the criminal law system. Whether it's a question of the undertrials who are languishing and have for decades now, it's what we studied as law students. And this happens to still be the case, whether as prisoners or whether at those who are subject to the death penalty. So these discriminatory effects of an under-resourced criminal law system that over-includes the dispossessed while also inadequately punishing those who are guilty, but who are otherwise privileged I think has been well-documented on numerous occasions in relation to a range of substantive areas within Indian criminal law.

And also the other thing that I want to say is that this is an opportunity for the committee to rethink how we theorise criminalisation. I think this is really the need of the hour that we need a new vocabulary for thinking about the criminal law in the Indian context. And indeed for all postcolonial legal systems. Unlike Western legal systems where you can accept, anticipate some semblance of the state working, although that's really not evident day in and day out, when you look at reports from the U.S certainly in relation to black men and women,



what we find. Something different about the Indian scenario is the vast level of informality I think in the functioning of our legal systems whether that's the civil system or the criminal system. And so we cannot forget the enormous threat that the state has issues vis-a-vis its citizens. So it's not that you actually have to come into contact with the legal system, it's just the threat of coming into contact with the legal system that's highly disempowering. I think there have been groups of citizens who have been at the receiving end of harsh criminal laws for decades. And I happen to have worked with one particular community for a very long time, which is Indian sex workers. But over time I realised of course that there are several other communities, whether it's the LGBTI community, the denotified tribes, and vast swathes of the population for whom any aspect of their life might actually be illegal, although may not be criminal, maybe illegal. It could be the tenancy arrangement under which they're living, by virtue of living in a slum or their working conditions, because of certain areas of occupations are considered to be illegal. The main modality of engagement between the citizen and the state has been through rent seeking practices of the Indian state, that's the primary site at which we engage with the state.

So I think we need to rethink criminal law root and branch and criminal law theory. We need to reinvent it for the Indian context. So I think the association of criminal law for the Indian citizen with the figure of the violent, corrupt policemen, rather than as a defender of their safety and security means that social justice must always be at the heart of any kind of criminal law reform. Now, unfortunately, the Criminal Law Committee is completely oblivious it seems to any of the social justice concerns and that's absolutely evident in the way that it's the composition of the committee, the conduct of its proceedings so far. I mean, it recreates the worst forms of exclusion from the lack of transparency to its elite composition, to its hurried consultation process with experts through online questionnaires and its lack of willingness to consult meaningfully with the common woman on the street and these numerous marginalised groups. So I think in a certain sense that they really wanted to rethink criminal law root and branch, they would start with these communities and there are many, many of these communities who are highly articulate and have mobilised against the criminal law on many occasions in the recent past. And I think that's where the Criminal Law Reform Committee should start its work rather than with these online questionnaires directed at experts.

Nikita Sonavane:

Yeah. Thank you so much Prabha, you've made some really important points about us having to even rethink how we understand criminalisation and even whether... Because it almost seems like relying on criminal law has become some sort of an intuitive response of the society at large. This pandemic is of course a public health crisis, but a response to this pandemic has largely been through the lens of criminal law. I think a process that seeks to reform criminal law has to ultimately challenge this punitive impulse of a society that has been cultivated. And a great way to start is of course to reach out to those who have constantly been on the receiving end of this, over-zealousness of using criminal law. I think it's really important that to highlight this connection and that brings me to my next question. Tarun, we have constitutional courts, we spent so long the Constituent Assembly in particular, working on this Constitution, thinking through some really fundamental democratic values.

But we see, when this committee was constituted with all of its numerous problems, we've seen that any sort of resistance to this committee has happened outside of the realm of the constitutional courts, right? So we've seen numerous statements being written by lawyers, academics, including former judges to the committee. We've seen students that have mobilized, putting together a website that's called [Disband the Committee](#) and



several such forms of resistance that have been outside of the judicial setup. And what do you think might be the reason for relying on these forms of resistance?

Tarunabh Khaitan:

I haven't been particularly deeply involved in the resistance to this particular Committee and therefore I cannot tell you what the organisers thought, what their strategic decisions were. What I can tell you is why I think it's a good idea not to go to court. So at least not to go to courts right now. The Indian Constitution is at a deeply troubled junction and I have a separate paper on how the government has been killing the constitution with a thousand cuts. The time when constitutional courts could have saved the Constitution, we have passed the time. Even if the courts were willing as the least dangerous branch of the state, their ability to deal with fundamental challenges to the system, even in the best of systems is limited. The power of the court is the power of the written word, which has to be accepted by other constitutional actors. In a context of complete constitutional shamelessness when key actors do not care about the norms written or unwritten, the ability of even the most willing judiciary is already compromised. In the Indian context, the willingness of particular judges to uphold the constitution itself is under question, right? I don't think institutionally it is true of the court, but some judges do take the Constitution seriously, but many don't. It will be a gamble for the resistance against the committee to go to court at this instance in part, because they're very likely to lose. I'm not saying that is the only possible solution, they may win, but constitutional loss in the courts are very likely, and that would delegitimise the political movement as well. But there's a broader point here, which is that constitution cannot be left to be defended solely by courts alone, right?

A constitution that is not defended by its citizens cannot last. Constitutions have to be defended on the streets. And the irony of course is that protest itself has been criminalised to such a great extent and we've seen this in the context of Citizenship Amendment Act from the protests that took place in Delhi and the extreme use of criminal law to organisers of legitimate protests to protect the constitution should leave no one in any doubt about the motivations behind this. So I understand that it's extremely difficult now for citizens to take to the streets and we'll have to come up with increasingly innovative ways to seek to defend the constitution. But we can't, let alone court courts, we can't even rely on other state institutions to stand up for the Constitution. Of course, wherever those pockets exist, we have to solicit their support. But every institution, every organization, every civil society space that still has the capacity and the courage frankly to stand up must stand up. But that is sadly the only hope that is left. But what really needs to be appreciated by the people at large is that this is a fundamental recalibration of the relationship between the state and the citizen and that nobody is safe.

I don't know if we are desperate for silver linings in our times, right? One of the silver linings, if you can call it that, of the recent type of criminalisation that we've seen in India in the last five, six years has been that class is no longer insurance against criminality, that the only insurance against criminality that exists today is complete and utter loyalty to the party state. That is the shield that will protect you from everything else. But without that shield, your class, your gender, your caste, nothing will protect you. It's a mixed blessing, obviously, because until recently it was always the marginalised, the poor, who faced the rod of the criminal justice system. And in part it's easier for middle-class people and frankly upper-class people to sympathise and empathise with people like them, right? And a lot of people like us today have been present for a very long time, that is new in India. I don't know, but I think that parties and loyalties will change and pallet holders will change and state governments will deploy it for different loyalty groups and against different groups. So everybody is under threat



and let nobody feel that they will not be affected by this reform. That message has to go through and has to go through to the people. This can only be stopped on the streets, not in the courts.

Nikita Sonavane:

Tarun you said that the Constitution, the work of defending the Constitution has to happen on the streets. And like you said, rightly pointed out, we saw this during the NRC protests, and we saw during these protests, whether it was Shaheen Bagh or in different parts of the country. We saw that people from various marginal locations were out on the street trying to defend their constitutional rights, trying to assert their rights. And I mean, now with this committee that came soon after when the pandemic happened and this committee was constituted, we see that the process that this committee seeks to undertake and the stakeholders that it seeks to consult, it leaves out precisely these voices from that process. And so that brings me to Prabha about what do you think is happening differently here in terms of, you said earlier that the previous committees have undertaken *jan sunwahis*, there was the National Advisory Council, NGOs were consulted. What do you think is happening differently with this particular process that this committee has undertaken? Of course time span has been a major concern and like the Verma Committee, which dealt solely with the question of criminal law had a shorter time span. But then again, we had the Malimath Committee, which was the last time that a committee like this was constituted to deal with, or to propose broad reforms in criminal law. We saw that that committee was constituted for almost two and a half years. What do we see happening differently in this exercise?

Prabha Kotiswaran:

So I think the work of this committee, I think it marks a new low in the criminal law reform process. I think certainly the Verma Committee process worked at breakneck speed, but it was exceptional, it was an exceptional moment in Indian politics. And so it was an exceptional response to an exceptional situation. And what is interesting from the Verma Committee process, I think is that despite its robust defence of women's rights against sexual violence, actually the haste with which the committee proceeded resulted in mistakes. For example, it conflated sex work with trafficking because, I think it goes to the role of civil society in feeding into these processes. And this has been the argument of my book *Governance Feminism* which is to say that certain elite members of the feminist community could have a say in terms of how the rape law reforms were done, but not in terms of the sex workers whose very livelihood was at stake here in terms of how the Verma Committee defined trafficking and criminalised their lives in one stroke.

And there were many other changes that the Vermont committee made, for example to the definition of a trafficking offence, which were not in line with international law obligations. But I think what was interesting about the Verma Committee report was that actually they were open to some extent. The Indian women's movement, many feminists could actually insist on a meeting with the Verma Committee. Also, when sex workers went to the Verma Committee and said, "Roll back your definition of trafficking because you're criminalising everything that we do," the Verma Committee actually accepted that and issued a clarification, which then meant that a corrected version of section 370 was in fact passed into law. So I think what is worrisome about the work of this particular committee is the government's excessive reliance in the past few years on criminal law.

And I think Tarun has already talked about hyper criminalisation as a response. In the past, I would say even a decade, I think there has been a tendency to use the criminal law to deal with social reform or to address chronic



socio-economic inequalities. And so of course they are relying on the symbolic power of the criminal law, not only to address high profile cases of sexual violence, such as say work through amendments to the general criminal law, but they've gone beyond. And I think this is again, that's something that Tarun has talked about and it's actually quite interesting. So you can see quite unrelated areas of the law, that year on year the government has increased the levels of punishment. I've been working for example the law relating to assisted reproductive technologies and surrogacy. And these are considered to be laws or practices where the medical profession is very closely involved. So our traditional way of dealing with any sort of complaints in this arena would be some form of self-regulation where doctors themselves, given their medical expertise would sit in judgment over other doctors and what the clinics had done. But that's not the case anymore. If you look at the ART bills which have been evolving with the past 15 years, you see that the most recent version of it, which was submitted introducing in the Lok Sabha in this past session, there are high levels of punishment, 10 years of punishment for doctors themselves. And I think something similar has happened with corporate law. I think Tarun is absolutely right that actually no one is safe from the tentacles of the criminal law. But I just want to go back to this question of sexual violence and I've written about this elsewhere that there's been a flurry of activity around violence against women and just a plethora of laws in the past five, six years. And it's actually fascinating. So if you just zoom in into one particular area, say of sexual violence, you find that all of these laws are deeply interconnected. And when you don't think about their interactions deeply enough, which the Verma Committee did not either, what then happens is that you find that there are mistakes, and that judges and courts struggle to actually interpret these laws. So for example, all of these laws, even in the past five, six years that have been passed, their internal logics clash with each other, in terms of how their offenses have been defined, how they are prosecuted, how they are punished. Often they will have conflicting goals, some speak about welfare, some speak about retribution. And then that launches multiple lawsuits, which are then pending in all the high courts. Some are trying to push the spirit of the reform to its logical conclusion.

Say, in the case of marital rape, there are other actors, and a lot of these being quite small NGOs, which are again, not necessarily good, they're not social movement organisations, but they're entrepreneurs and norm entrepreneurs that resort to the courts. And then they tried to close loopholes because the laws themselves are in disjuncture with each other. So for example, if you look at the Criminal Law Amendment Act of 2013, although it was set to raise the age of consent to 18, because of POCSO, which was passed a couple of years earlier, the exemption for marital rape had a different age limit, which then led to a decision by the Supreme Court in the *Independent Thought* case. Which then held that sex with a wife under the age of 18, would constitute rape. And so then you also have litigation pending to bring the provision of the Child Marriage Act in line with POCSO, to hold that child marriage would be void, and then to equalise the age of marriage for both men and women. And then of course you have litigation to criminalise adult marital rape as well. Especially in light of the privacy jurisprudence in *Puttaswamy*. So, I think rushing headlong to pass these laws without really understanding how they interact with each other is quite problematic. And it leads to basic mistakes. So, if you look at the increase in minimum mandatory punishment for rape *simpliciter* has wiped up the distinction between rape and aggravated rape. And this is a distinction that the criminal law had held sacrosanct for centuries. Similarly, if you look at the POCSO Amendment Act of 2019, the minimum mandatory punishment for aggravated penetrative sexual assault is now 20 years, which may extend to life and death. But, under the Criminal Amendment Act of 2013, it's a different level of punishment. So, there're discrepancies between these two laws.

And so this just shows that there's a lot of discrepancies because these laws are being passed too quickly. But, also that the level of punishment is being increased year on year. You can see within the space of just one year,



how these punishments are increasing. And then, of course, there's a lot of empirical work to show that in fact, increased punishment is not realising in increased conviction rate. So, I just want to say that trying to take this model of, this carceral mindset of the state in relation to sexual violence. And then simply expand it to other areas of the law, which the question has alluded to, and which all of you've already mentioned, I think it's a recipe for disaster. But, this is definitely part of a new phase of how the Indian state is thinking about the criminal law compared to previous decades where in fact the reform was much more gradual, maybe a bit too slow for some of us, but it involved a range of bodies that could think through these various dimensions of where the outcomes of criminal law enforcement would actually fall. And often, also seeking out empirical evidence to see how criminal law would in fact be implemented.

Nikita Sonavane:

Thank you. Thank you so much, Prabha. And I mean, you were saying, in your work you've said this over several times over about how particularly when it comes to rape law reforms, there are certain feminists from certain caste class locations who spearheaded this process of pushing for rape law forms. Which we saw, particularly in the aftermath of the 2012 gang rape in Delhi. And so, Tarunabh, I'm trying to understand, through your work, if you've seen how have other jurisdictions and other countries tried to address this question? And what are the pre-legislative approaches that they have relied on in terms of reaching out to various stakeholders and ensuring that more diverse voices were heard during the process? And how do you think that compares differently to what this committee is doing?

Tarunabh Khaitan:

All right. So, one of the difficulties in the Indian context has been a really poor approach to thinking about legislative procedure. Even when our system works as the laws and the existing norms require, it is not a particularly consultative system. We saw last year how the government managed to introduce and have passed within the day fundamental amendments to the Constitution, changing the status of Kashmir. So, those things are possible in our system only because the procedural safeguards are not robust.

There's also been a strong tendency, thankfully, being questioned now by younger scholars in the Indian progressive spaces, of seeing procedure as an impediment, as an obstacle to justify substantively good outcomes. Right. So, there's been a scholarly as well as a political, under-appreciation of the importance of formality and the importance of procedure in good institutional outcomes. But, so with that preamble, to answer your question more substantively democracies deal with legislation in a huge range of ways. India is perhaps at one extreme and of requiring very little by way of procedure, even where the bills go to a committee stage for a second reading is often discretionary, right, on part of the government of the day.

[inaudible] ... called standard process, you would expect law reform processes to be initiated by a ministry. And I'm not talking about the scale of law reform. I just don't think that the scale of law reform should ever be undertaken in a democracy in one go at any rate. This is a decade long agenda for a country of India's size. So, you take a chunk that you can deal with in a reasonable parliamentary timeframe. Start with a ministry, which will start with a consultation paper and put out clearly its agenda for the reform, right. Articulate what it sees as the problem, at least at a broad, vague level, but not as vague as we want to make our laws more effective and decolonise them, something more concrete than that. Invite extremely broad inputs from a wide range of social actors.



And the level of consultation will depend on the nature of the reform in question. The broader the scale, deeper has to be the consultation. The more statist the proposed reforms are the more you have to consult. And criminal law by far must satisfy the most stringent of consultative mechanisms because it is the most brutal way in which the state. Imagine yourself in the position of a family whose sole breadwinner is going to be locked up perhaps for three years, even before charges are brought against them. It destroys families, not just individuals, sometimes it destroys communities. That is the power we are entrusting to the state, right. So, people who are likely to be affected, people who have studied this, you have to have a role for evidence-led policymaking. If they have to have a criminal law committee, people like Prabha and Arushi should be on it, who have studied the outcomes in particular domains. People like Nikita, you should be on it who have worked with marginalised communities and seeing how these laws affect them.

So, that's the consultation phase on a broad outline, then you'll move to framing the final policy. You go through another round of consultation. Then it becomes a draft bill that is put out to the public again through consultation. And then, this is all pre-legislative and it hasn't even reached parliament yet. And you must go through these three phases, depending on the nature of reform in question. There's an awful word often used called stakeholders, I hate it because of its managerial business-like ickiness, around it. But, the point is that every interest affected must have a voice in shaping the law in question. If you're going to be affected you know what is at stake, right. Once that is done, then it must go through a proper parliamentary process where a draft bill is first put out. There are committees now in other parliaments which look at draft bills, bills before they are introduced to parliament, to check it.

And these have to be cross-partisan committees, right. So, politicians have a hugely important role to play here, right. We cannot deal with these issues entirely through technocracy, you're talking about democratic law-making. Then it's introduced in parliament. Then it goes to the committee stage where the committee invites expert evidence and stakeholders' evidence. And then it goes to final reading. And this is just for a small piece of reform in particularly important issues you can have, there are instances of even more demanding and rigorous. As you mentioned, *jan sunwahis*, *jan adalats*, public hearings, citizens assemblies. When the issue at stake is really serious, you have to go through an even more rigorous and robust process of law-making. But, we are very far from that process. There are courts like South Africa where laws are struck down as unconstitutional if they do not go to a sufficiently rigorous parliamentary process. Right.

So, if the South African assembly, which is the equivalent of our parliament, does not look at a law sufficiently rigorously, the court strikes it down, because that tells the assembly you have not paid sufficient attention to this law, right. In our context, the bill can be [inaudible] debated and passed [inaudible], that will not be legal in many other democracies. Getting that enshrined in the law in our context will be a good beginning. We have a long way to catch up, but in terms of good practice, there is a whole world out there. And maybe we need a legal reform process on procedural laws, which must follow the procedural niceties, to figure out how it is that we should be making laws. Because we have a lot to learn from the world in that context.

Nikita Sonavane:

Yeah. I mean, I think we have, our law-making process, also just like any other law-making process, is constantly borrowing from other jurisdictions. So, I think it might be important to see what we can learn from what other countries have done, when it comes to this law-making exercise. But, like you said, with criminal law, because of its potential to impact people and communities, the way that it does and the ways in which it has. One might



argue, which people have, is that it's so incredibly technical how evidence is recorded. Especially when you see the police, you look at a case diary, for any case, you see the way in which seizures are done, the *panchnama* is made, everything is done in such fine technical details.

And especially when it comes to cases of sexual violence, we see courts have also always constantly relied on expert evidence. So, we have medico-legal experts who constantly testify in courts. And so the courts and the executive alike have constantly told us in various ways, "Let's leave this to the experts," right. Because this is ultimately something that belongs in the expert domain. And how would you respond to those people Prabha? What do you think might be the drawbacks of leaving everything to the experts alone? Let's say, this would be a diverse range of experts, even if the committee had someone like you, me, or Arushi, we would still be experts, and do you think there would be drawbacks to even having a wide range of experts?

Prabha Kotiswaran:

Yeah, I think, actually the committee, the questionnaires put out by the committee are the best testament to the fact that actually, we shouldn't leave these questions to the experts. Because I think even in the very technocratic domain that you set out, these are laws and we need to understand the nuances, how they're interpreted. I think that there are good lawyers and then there are not very good lawyers. And I think this, unfortunately, the questionnaires, and I just want to go a little bit in-depth in looking at these questions. Because this actually suggests, I would say, the incompetence of the committee. For example, so first of all, there are 500 offenses in the IPC, on what basis has the committee chosen to use 87 questions to deal with these 500 offenses? It's not really clear. And if I come across a questionnaire randomly without knowing what the purpose of the questionnaires were. Well, I would have thought it's a criminal law paper, a badly drafted question paper for students. The kind of questions, for example, on strict liability. So, I mean, the incompetence really spans different dimensions. So, one is where the question is extremely broadly phrased. So, for the question on strict liability offenses, which principles regarding the objective nature of the crime should guide the introduction of strict liability offenses with the IPC? Which strict liability offenses should be included within the IPC? What are the principles of sentencing? I mean, these are the kinds of questions that students would offer canned responses to, from reading the criminal law textbooks. I think for academics each one of these questions is worthy of a book in itself. And it also shows how naive the committee actually is.

The reality of it is, that in fact, we have sprinkled liberally in several new criminal laws, absolute liability offences, forget about strict liability. You have absolute liability offenses. And in statutes like POCSO where, if you're prosecuted for a certain offense, you presumably have committed it. I mean, why aren't we asking questions around that? Similarly, another question on punishment. So, one of the questions in the questionnaire is, are there any offences in the IPC for which a quantum of punishment and fines imposed should be revised? I mean, this is impossible to answer even for the most erudite criminal academics, even textbook writers for that matter. Because obviously, the IPC has been around for more than a hundred years. So, amendments to the IPC have come in at different times, and at different points in time there's a certain context of culture for punishment. Certain levels of punishment are considered to be appropriate at that particular point. And so to ask, even experts, to answer a question that's so broad-ranging, it just shows that they haven't done their homework at all. Instead, what you would expect them to do, as Tarun rightly said, it's just such a very detailed paper which marshals the literature, the academic literature in the area, the case law in the area. And often, I think, given the huge disparity in the way that appellate courts interpret statutes in India, it's very hard to know



exactly what the law in any particular area is. So, to really bring together, and given the level of legal research that we have in Indian law schools, I think this is no small task and it's actually a lot to ask of legal academics.

And, I think, then at the other extreme the committee has listed certain questions that are extremely narrowly worded. I mean, for example, on sexual offences, I've just set out how many new laws have been passed in the past few years. I mean, so the mandate of the committee would have been to actually see how they have been implemented. We've had almost seven years now since the Criminal Amendment Act of 2013 was passed. And how does it relate with other laws, around say, institutions such as Muzaffarpur, children's homes, what is happening there? How are all these laws actually being related? So, if anything, we should stop this process. And just looking at sexual offenses would, I think, take a very long time.

And then there are some really misplaced questions. So, for example, on general defences. There's so much that could be said about general defences, just about the core aspects of general defences in very sophisticated theoretical terms. Instead, the committee is asking whether particular conditions leading to the need for a general defence would factor into the sentencing process? I mean, they're going off at a tangent. And of course, the questions around offenses against the state are highly biased, there is a presumption that criminalisation is good. So, let me just say that I'm deeply suspicious even of criminal academics who are experts in doctrine, if this is what they're coming up with. And forget about in the context of India, how these laws are actually being implemented. Because a lot of academics don't necessarily do empirical work.

And so we actually have no pulse on how prosecutorial decisions are being made. How the police are actually implementing certain laws and how are judges interpreting them? And how are they interpreting them in courts in the north, in the south? I, mean, there's just so many variations. So, I think, it would be very dangerous to leave this exercise to academics alone. And for that matter, even to elite spokespersons, such as, say feminists or members of certain civil society organizations. Instead, I think one would really have to go to the population at large, particularly women, children, *bahujan* communities, tribal communities and sexual minorities.

Arushi Garg:

Actually, Nikita has requested me to pull the questions from one of the regional consultations. And this will actually drive home the point that Prabha was making. So, I'm just reading out the entire questionnaire. The questionnaire that was circulated through the GNLU regional consultation. And the reason I can read out the whole thing is because it's only four questions long and only the first question is mandatory. And the first question is, do you think the Indian criminal law system requires reforms? And the two options are yes and no. And after that, we have three open-ended questions, if yes, in your opinion, what are the different criminal laws, which requires reforms? What are the different sections of different legislations, which requires amendment? Kindly specify the reasons for suggesting amendments to the above-mentioned sections, in few words? And that's the end of the questionnaire.

So, I think Prabha, when Nikita suggested that I intervene to relay the contents of this questionnaire. I thought this is a very helpful illustration of how, even entrusting, the exercise to experts is no guarantee really that they're going to ask the right questions. And, of course, it can be counterproductive in all the other ways that you and her have been talking about, in terms of excluding perspectives that really need to be factored into the law reform process. So, I'm going to hand over to Nikita now, with that brief interruption.



Nikita Sonavane:

Yeah. No, thank you so much for reading that out, Arushi. I think, I mean, Prabha, you would know this, *jan sunwahis*, et cetera. The way they're conducted, these are extremely robust and democratic processes that involve various voices and lots of lived experiences are at the centre of these conversations. And, of course, from our experiences with our diverse communities, in particular, we know that these are communities that have had their own customs and have carried out their own modes of governance without any legal training and that mainstream education and that technocratic background that we all swear by right now. And these are structures, of course, that have their problems but have functioned efficiently for over the years. And, I mean, now we have a questionnaire like this that an expert committee is circulating. Market survey researchers are more robust than this perhaps, but yeah, so I think it's important.

And, I think, you've done a great job of really encapsulating the problems with this expert approach. And now, of course, what you and Tarun, throughout this discussion have highlighted numerous problems that exist with the committee and the processes that they've undertaken. And I want to ask you Tarun, do you think, I mean, if you could suggest some changes that you would see being implemented in the way that this committee is functioning? And if you did, I mean, it's obviously a speculative exercise, if you think you had the power to implement three changes in the way that this committee is functioning, what do you think those would be?

Tarunabh Khaitan:

Thanks for the question, Nikita. Before I answer that, I want to say something about the expertise question that you just posed, to add to that.

Nikita Sonavane:

Yeah.

Tarunabh Khaitan:

So, I firmly believe that experts have a role in the law reform process. And this is not anything, I don't think Prabha would deny at all. There are two types of problems with this committee. First is, and with due respect, everything we have seen that has come out of this committee makes it quite clear that they lack the expertise to do the job, as in whether they could be a committee, whether it's possible to have a committee that would have the necessary expertise to deal with all of Indian criminal law, substantive law, procedural law and evidential law is itself a question, but this committee is particularly incompetent and that is just evident in the type of questions that Arushi just read out the examples that Prabha had given.

The second problem is this. At least to the academic members of this committee, this is what I would say. That as an academic, the first academic virtue is a fidelity to truth, is a fidelity to truth above all else, right? And a fidelity to truth is impossible without an intellectual humility of accepting your own fallibility. You cannot be a genuine scholar unless you accept that I could be wrong. Any scholar who is so sure of their correctness of their views is not really a scholar. They're an advocate, they're an activist, they're a politician, right? But you always have to be open to the possibility that you might be wrong. And I think it is frankly, non-scholarly, unintellectual of the academic members of this committee to accept the invitation, to undertake this mammoth task, because it's frankly completely impossible as an academic, for a five member committee to do this task while remaining



committed to the virtue of truth-telling, which is the first commitment of our profession, of what we do as academics.

I just wanted to highlight that as a problem of competence. You need expertise, but you need good expertise with humility. People who've actually seen how the laws work. But even with good expertise, and your initial question was, "What if we had a committee with the three of you on it?" But amongst others, obviously. Even with good expertise, the problem is that it's impossible to be an expert in everything, and it's impossible to see all sides, all different perspectives to a problem. I'll just give one quick example, if you'll bear with me. When I was working on the anti-discrimination draft bill, right? This was a project that I undertook over a period of three to four years. [inaudible] started with comparative analysis of discrimination law in five other jurisdictions over seven years. So I studied that for seven years, then started with a workshop in India where I spoke to stakeholders, people who are affected by discrimination, explained to them what other countries do with the law. And they immediately, you're talking about technicalities, right? You have to explain to people what these things mean in the law. And they were so quick to tell me what works in their context, what foreign ideas are translatable and will be helpful and where are the gaps. They told me that there is no point of a discrimination law in India which does not engage with the problem of boycott, which does not engage with the problem of families telling couples they can't marry across casts and religion. Foreign laws don't deal with that because they... So I think expertise also has limitations and without... So proper law reform has to combine participatory democratic voices of affected interests with expertise in order to come out with the right framework.

What are the three things I would do if I had any influence or power in this context? I think the first would be to disband this committee. I don't think this is a problem that can be fixed. This is problem that has to be eliminated. We have to start with a fresh start with a sincere effort to decolonising our criminal law system as Prabha rightly calls it and not the criminal justice system. But even the law part there is debatable because a lot of what is happening is not law. And the first effort must be to assure the people of India that they will be criminalised in accordance with the law. To make it a criminal law system, which would mean a serious consultative effort to completely overhaul the way we police and the way we prosecute and to remove all the extraneous pressures on the CBI, on state policing, on prosecutors, which are political, which are corporate, which are all the monied and political and social power. Influence has to be removed from these two wielders of direct and course of state power. So that people can be assured that the only thing that matters to their criminalisation is the law and nothing else. Not your party loyalty, not whether you're pro-state or pro-government or anti-government. Nothing else, right.

That is where we start. And then let's talk about evidence. Unless I trust the system, whatever you write in, I will always have the legitimate worry, as Prabha said, the fear that you're going to use it for extraneous motives and not for your stated motives. That where we need to start if we are serious about the process of decolonising the criminal administrative system in India.

Nikita Sonavane:

We're saying, and of course I am in complete agreement that this is a committee that needs to be done away with given its numerous problems. But I mean, there might be some who might argue that after all, this is a body that only has the power to make recommendations, right? The final ball is in the court of the parliament. And we have elected members who are a part of the parliament and supposedly electoral processes take into account all of these different questions of plurality and voices of those. And that their representatives are in the



parliament and if the parliament has the ultimate authority to make laws then should we even worry about what this committee is doing or not doing? And Prabha how would you respond to that?

Prabha Kotiswaran:

I think anyone who's watched the proceedings of the two houses in the monsoon session, I think will know that parliament can not necessarily save us from bad laws. But I think like Tarun, I've been working quite intensively on a bunch of laws relating to women's rights, particularly the trafficking bit. And what I've learned from the process really has been that... And it was interesting to hear the South African experience, or the experience of other countries that actually drafts of bills are released ahead of time so that both parliamentarians and the public can review it. That's not the case in the Indian context.

So I just want to say something about expertise. I think while we are all focused on the committee, let us not forget that there could actually be another group of experts who are actually drafting the criminal law reforms that will, in fact, go to parliament and this has happened with the trafficking bill. There was a draft put out by the Ministry for Women and Child Development in 2016. Consultations were invited, they were made public. Everything was on the website of the ministry. And then of course it disappeared. And then two, three years later there was talk of a trafficking bill which looked completely different from what had been released in 2016. So this, I think the process currently is a red herring in fact. I think we will get dumped with a criminal law that looks very different from what we think we are engaging with in due course. And I think what was interesting yesterday, there was an interview that Dr. Madhavan gave from Parliamentary Research Service with NDTV and he spoke about how... This is a reality, I think, of those who try to assist MPs. And he was talking about the labour codes. 350 pages of them being dumped on the MPs on Saturday morning and a lot of it not incorporating the comments of the Standing Committee on the three codes. And he said it took a team of five of them to actually review the labour codes full-time and it was passed by the Lok Sabha on Tuesday and by the Rajya Sabha on Wednesday. Now, if you look at MPs, obviously, they don't have access to drafts of these bills earlier on, their aides cannot help them. And a lot of the aides that come through PRS are... A majority of them are not lawyers. I've often seen LAMPs as they're called, labouring or trying to understand basic principles of the law in all-nighters in MPs offices.

So now these are the people who are preparing briefs for MPs on the laws. So MPs are completely under-resourced in this respect. Only a few of them have LAMPs. And even then, I think when in fact they have something to say about a law, they have very little time in parliament. You would have seen that they have to rush through it in two or three minutes of their critique of a particular legislation.

And of course, we also know the statistics in terms of which of these laws are being referred to committees. I think 60 or 70%. in previous years now, it's a third probably if one is lucky and then on very short turnaround time. So before the next session of parliament meets, so this gives actually MPs very little time to deliberate with constituencies that might be affected by certain law.

And then of course we know the politics of the voice vote and so on. I don't need to go into that. So I think that parliament would likely be our last line of defence against a law that comes from the committee, but I'm not confident that they themselves will be the able to apply their mind or have the sort of political wherewithal to push back against deeply problematic provisions that will come from this process.



Nikita Sonavane:

And I think, as Tarun also suggested earlier, I think at this point we don't know whether the committee's toeing the Parliament's line or if it's the other way around. So we don't know whether these recommendations are already in place and the committee is merely legitimising them, or the parliament is going to simply uphold the legitimacy of all the recommendations that the committee makes. But regardless, these are both processes that individually have their own problems. And I think we need to be cognisant of them. Which brings me to, Tarun, anybody who is interested in the question of reforms of law, I think generally, as the courts call them, public-spirited citizens. What would you like to tell them about this process, especially those who are listening to this conversation. You're on mute Tarun.

Tarunabh Khaitan:

That's an extremely difficult question to answer Nikita because we are living in very troubled times and there was a quote I read on the internet that you don't fight fascism because you'll win, you fight fascism because it's fascism. And I think we are in similar territory and I think that citizens today require us to do a few things. The first is to learn what is at stake. So there's a duty to be an informed citizen, and this is not easy, especially if you lack legal and constitutional expertise. Who do you trust? There's so many dissembling voices. But that is the first duty of the citizen today, to find out what it is that is happening to our country and the constitution.

The second is to educate others once you have a good sense of what's going on. And the third is to document because as the recently deceased American Supreme Court judge Ruth Bader Ginsburg said, "I write my dissents for the future." Right? We need to document what's going on because, because the tide will turn and if you don't win today, someday the story needs to be told. So it finally put us right and see what can be done. I'm not particularly optimistic in the short term about the prospects of Indian democracy, but I'm also not pessimistic in the medium to long-term. I do think that the vivacity... that democracy has taken, howsoever defective, Indian democracy has taken deep enough roots, that it cannot be done away with. We will pay a price for restoring it, and the price may be quite a high one.

So I think, and this may sound very cynical. I don't mean to be cynical. I want to end on a hopeful note that there is hope. Just don't hope for immediate victories and let's not become cynical for that, but let's also learn the important lessons of this particular process, which is that formalities matter, processes matter, institutions matter. All the things that we have just assumed to be boring, the state of legal expertise and scholarly expertise on criminal law in India is appalling, right. And I say this in the presence of, perhaps, two of the best scholars in the country. But their respective age demonstrates how new this phenomenon itself is, that we have a huge scholarly duty to understand our country. So the academy has failed our democracy as well, not just our politicians. So yeah, learning, teaching, documenting, and making sure that posterity will remember and we can tell that we can tell our grandchildren that we were on the right side of history.

Nikita Sonavane:

Yeah. And I think if we're going to be silent spectators to this, I think posterity will remember that as well. And we will see just the way that things have been happening in the last few months, I think this sort of culture of silence that we've all been responsible for in various ways is something that we will have to pay a huge price for. And with that, I just want to ask both of you if you have any final thoughts before we close the conversation for today? Prabha, would you like to start?



Prabha Kotiswaran:

Yeah, I think I just want to echo everything that Tarunabh said, notwithstanding his comments on the state of criminal law scholarship in comparison, say to constitutional law scholarship, which is going through some happy times, and I'm happy for you all and the excellent work that you do. I think what we should do is probably do the work of the committee for itself. If they want to decolonise criminal law, I think we should help them do it. I think we should invert the terms of reference of the committee. I think we should. I think there are just so many... I mean, one of the unfortunate aspects, I think of a lot of social movements and groups is that also we have begun to work in silos. We become experts. The child's rights groups work on a certain thing. The trans groups work in a certain area, but I think they have come together on occasion often to fight draconian laws, especially when they turn out to be criminal laws.

I think we need to mount a coalition for decriminalisation. Actually, we don't need more criminal law. I think less is more. I think that if we want to decolonise criminal law, we should push back criminal law. It has a role in our society for sure, but I think we need to limit what the role of criminal law is and to decriminalise the lives of millions of Indians, whether it's the work that they do, whether it's begging, whether it's adultery, whether it's abortion, whether it's sodomy. All of this – sex work, or consumption of certain drugs. I think we need to mount a campaign for decriminalisation and that would be a way of channelling the repository of knowledge there is within all of these social movements who have for so long borne the brunt of the criminal law in a country like ours. And maybe the police will join us. Maybe the true subaltern officers of the police force will actually join us in rethinking and reimagining what criminal law should do in a country like ours.

Tarunabh Khaitan:

Yeah. I want to echo Prabha's suggestion. And in fact, I should have added to my list of learn, educate, document and protest is to show the possibility that a different way of doing things in different ways is possible, right? Not letting that imagination ever disappear and one of the best ways in this context is to have a citizens' committee perhaps on decolonisation of criminal law. And to show, to expand the limited imagination of the official discourse, to show what the possibilities are. And what does it genuinely mean for the state to have a self-conception that it is the servant of the people and not the other way around. That the people are the sovereign, and their interests count and their interests matter, that lives are not to be played around with for political goals. So I wholeheartedly welcome that suggestion. And I think a parallel citizens' participatory consultative criminal law reform process with the decolonisation agenda would be of a powerful statement to make. And who knows, someday it might even be legislated upon.

Nikita Sonavane:

Yeah. Thank you so much both of you. I mean, I think it's just... Just want to sum up with something that Dr. Ambedkar said, a clarion call that he issued to the *dalits*, where he said that we need to educate, agitate and organise. And I think now is a good time to pay heed to that advice. And for all of us who see ourselves as individuals who care about the state of our democracy in various capacities. I think for us to do that and to marshal our resources and come together is, I think, important to do that now. And the time to do that now is more urgent than any other. So thank you so much. This was a wonderful conversation. I'm sure our listeners will take away a lot from it just like I did. Yes. So thank you so much.



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Arushi Garg:

Thank you so much Nikita, Prabha and Tarun. That was truly fascinating. I know people always say it at end of the event, but I genuinely found it to be a very interesting and very insightful conversation. And there's just so much to soak in. What does it mean to have democratically legislative processes? What does it mean to carry out criminal law reform, not just during a pandemic, but during this time also of hyper-criminalisation, hyper-nationalism, and also extreme fragmentation of criminal law? So thank you so much for all of those various threads and thank you to the Centre for supporting this event and like Nikita, I'm also confident that our viewers will really appreciate that you took out the time to have this conversation.