



# Of Semiotics, the Marginalised and Laws During the Lockdown in India

Manwendra K. Tiwari<sup>1</sup> · Swati Singh Parmar<sup>1</sup>

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## Abstract

On 24th March 2020, the first nationwide complete lockdown was announced by the Prime Minister of India for 21 days which was later extended to 31st May 2020. Consequently, thousands of migrant workers placed in big cities had no other option but to go back to their native villages. Their journeys back to villages- thousands of kilometres on bicycles or foot due to the non-availability of public transport amidst the travel ban- were driven by the compulsions of food and shelter. In one of many heart-wrenching incidents, sixteen laborers were run over by a freight train (all passenger trains in the wake of lockdown had been halted) while they were resting on the railway tracks. The images of the *Roti* (Indian bread) on the railway track strewn across were beamed on the national news channels, as a telling commentary of the unimaginable hardships of these workers. Ironically, in the eyes of law, they were trespassers under the Indian Railways Act, 1989. The Indian Railway did not pay any compensation to the victims. Their act also violated the Indian Disaster Management Act, 2005 and Indian Penal Code, 1860- the law for the breach of lockdown guidelines and the law for disobedience of order by public servants respectively- for having decided to travel amidst a travel ban. The semiotics of law-making acts ‘criminal’ bereft of ‘moral culpability’ are seldom questioned on their supposed amoral foundations. Pandemic exhibited that social fissures not only condition the individual or community actions but also the actions of the State. Minorities especially Muslims were at the receiving end of State’s selective enforcement of lockdown laws in India. The various instances in the wake of the COVID-19 pandemic expose the hollow claims of equality before the law and the equal protection of laws as a constitutional promise to every citizen. This article aims to unravel the ostensible and the actual moral exhibition of such Indian laws through the lens of several incidents during the nationwide lockdown in India. This paper would argue that this constructed positivist amorality needs to be deconstructed to unearth the power imbalance that it seeks to hide.

**Keywords** Legal semiotics · Criminality · Pandemic policing · Constitution · Human dignity · Positive rights

## 1 Introduction

The novel coronavirus does not discriminate against who it infects but the socio-economic inequalities do. This biological reality hit the socio-economically disadvantaged at different scales in India, rendering the ramifications of the entire COVID-19 situation discriminatory. The virus may have severely robbed the rich and middle class of their economic and mental health and in some cases, given permanent scars by taking the lives of their loved ones, but it disproportionately impacted the socio-economically disadvantaged [1]. They were the hardest hit for various reasons ranging from starvation, suicides, accidents, police brutality, and denial of timely medical assistance [2]. The lockdown and corona curfews due to the onset of COVID-19 in India gave rise to glaring inequalities such as concerns for mere physical survival (including food and livelihood concerns) for the economically underprivileged. The alarmist rhetoric of lockdown order and travel restrictions offered a Kafkaesque metamorphosis to the migrant workers [3]. With just *two* legs, they had *thousands* of kilometres to walk.

Thousands of migrant workers, mostly without money and food, were forced to undertake arduous journeys back to their villages on foot<sup>1</sup> in the harsh Indian summer of May and June. They bore the heat and the wrath of laws and the cost of blindfolded statue of justice.<sup>2</sup> There are sign boards that do not exist for the illiterate as they are built on the comfortable assumption that only literates must know the directions in their lives and the uneducated may be left to a directionless state of life. For those who need the most assistance, our exclusionary roads and signboards leave them without any assistance. The roads and signboards blind and indifferent towards the social inequities can be aptly described by this adage from the Animal farm, “All animals are equal, but some animals are more equal than others” [5].

As methodology, the paper engages with the semiotics of the gulf that exists between normative promise of *equality* and *dignity to all* under the Constitution of India and how it played out during the period of COVID-19 lockdown in India. The social and political marginalisation conveniently enables the articulation of philanthropic and empathetic language to be used by the State organs, while consistently denying the presence of any enforceable right. Regardless of the socio-economic divide, the legal semiotics of the heightened constitutional normativity of equality and dignity, as a rhetoric distant from the reality is highlighted through illustrative events during this period. Despite the mandatory constitutional requirement of only legislators being the political executive in India, the paper reveals the convenience with which the political executive has been able to abandon the hardship caused by the straight jacketing of laws by donning the hat of the executive. The same political

<sup>1</sup> Sudden and unplanned announcement of lockdown forced the migrant workers to take journeys back to their home walking, cycling, hitching rides on lorries, water tankers and milk vans. Many had young children and pregnant wives who walked along. Women dragged their children on their strollers. For accounts of such exhaustion, see Pandey, Vikas. 2020. Coronavirus lockdown: The Indian migrants dying to get home. BBC News. <https://www.bbc.com/news/world-asia-india-52672764>. Accessed 20 July 2021.

<sup>2</sup> Jay [4] probing into the costs of denying images to the allegorical goddess of Justice, settles down for certain justifications on temporary inability to perceive the visible differences while applying law.

executive has managed to subsume its identity by merging their own with that of the legislators as a group, having made the laws that caused such hardship or having the powers to amend or repeal the laws causing hardship. Consequently, the semiotics of the endeavour of the political class to side along the moral compass, by forsaking its one constitutional avatar over other, has been spotlighted. The paper also underscores the selective policing of Muslims during lockdown in India and law as an enabler for this. The assistance accorded by the Criminal laws used during the pandemic period which take away the mental element in the determination of guilt by making *motive* and *intention* irrelevant is also highlighted. How this fundamental principle of Criminal laws works against those who suffered disproportionately more during the pandemic period has been outlined. Legal semiotics studies the legal sign systems.<sup>3</sup> Legal semiotics can be a significant tool to understand and establish the link between the legal argument of the lockdown orders and the causation. A semiotic analysis can provide the faultline in the legal system in this context.

On 24th March 2020, a nationwide lockdown was imposed by the Government of India under the Disaster Management Act, 2005 (*hereinafter* DMA). The provincial governments of India resorted to Epidemic Diseases Act, 1897 (*hereinafter* EDA) to invoke their lockdown order. Both these legislations authorise executive fiat to govern during the times of natural disaster with very little legislative oversight [6]. It is important to note that the lockdown order gave rise to several constitutional questions related to guaranteed fundamental rights which clearly appeared to have been forsaken in favour of the argument of stopping the spread of COVID-19. It is pertinent to note that the constitutionally guaranteed fundamental rights under the Constitution of India can only be suspended if there is a formal proclamation of emergency. The lockdown order suspended the otherwise guaranteed constitutional rights without a proclamation of emergency. The lockdown order as signifier was a physical sign which signified an emergency not contemplated by the Constitution of India and the signification was that the Government may start wielding power under a legislation in excess of what is permitted by the Constitution. The Indian Constitution has adopted the model of judicial constitutionalism, where every legislation must be consistent with the constitutionally guaranteed fundamental rights, otherwise if challenged, the constitutional courts in India, namely, the High Courts in the different provinces of India and the Supreme Court of India can declare these legislations to be unconstitutional.<sup>4</sup> The declaration of unconstitutionality by the courts automatically invalidates the legislation.<sup>5</sup> Interestingly, the constitutionality of the

<sup>3</sup> See also Tiefenbrun defining the purpose of legal semiotics as an “attempt to identify, classify, and describe in a systematic fashion, and in standard language, modes of signification present in legal discourse that give rise to interpretation.” Tiefenbrun [7], 96.

<sup>4</sup> For a discussion on the salient features of the Constitution of India, see [8].

<sup>5</sup> Article 13(1) of the Constitution of India reads “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void”. Article 13 (2) further says, “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void”.

lockdown orders was never tested by the constitutional courts of India on the yardstick of the constitutional principle of proportionality.<sup>6</sup>

Many laborers in Delhi walked on the roads where the *Gyarah murti*,<sup>7</sup> a glistening black sculpture displaying Mahatma Gandhi's historic salt *Satyagrah* (a non-violent movement as part of India's struggle for Independence) is erected. It displays ten people showcasing the cross-section of the Indian population. The portraiture reflects the anger and determination of the citizenry against colonialism. On the same roads that bear the iconic fragments of the Gandhian dream of an egalitarian Indian society, the laborers during the lockdown helplessly walked. The rhetoric of the glistening black sculpture engulfed the existence of the economically underprivileged walking on the roads, in its darkness. The *gyarah murti* is situated just 6 kms away from the Supreme Court of India, an institution that is 'the last resort of the oppressed and bewildered' [9] but has largely become inaccessible to them.<sup>8</sup>

Socio-economic rights meant to address these concerns which are already relegated to second-generation rights in the theorization of rights,<sup>9</sup> were further undermined during the lockdown period. In Law, the protected rights are mostly negative, imposing a negative obligation upon the State to not interfere.<sup>10</sup> The negative right is further backed by a right to remedial action in case of State's unlawful interference and resulting violation of right. However, the specific enforcement of these rights is not insisted by law, and therefore a legal assurance of remedial action is taken as a legal guarantee for the protection of rights.<sup>11</sup> Socio-economic rights are mainly positive rights giving rise to positive obligations for the State. Owing to this

<sup>6</sup> Article 13 (3) of the Constitution provides that the executive orders can also be challenged before the courts alleging it to be violative of fundamental rights and hence unconstitutional. It reads, (3) In this article, unless the context otherwise requires,—(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

<sup>7</sup> A massive sculpture in the heart of Delhi of ten Indians following Mahatma Gandhi depicting the historic 1931 Dandi March, a civil-disobedience protest, against British rule in India.

<sup>8</sup> Suresh [10] highlights the reorientation of the Supreme Court's priorities in case of Public Interest Litigation. This shift is demonstrated by the authors empirically by examining the win rates by various groups like advantaged social group and the marginalised group. Rajagopal [11] shows a bias against the poor by the Supreme Court in its activist rulings.

<sup>9</sup> Most of the socio-economic rights in India form part of Part IV of the Constitution of India under the head DPSP. According to Article 37 of the Constitution of India, DPSPs are fundamental in the governance of the country and the State owes a duty to apply these principles in making laws but DPSPs are not enforceable by any court.

<sup>10</sup> Negative Fundamental Rights under the Constitution of India are therefore 'Hohfeldian immunities' like the Bill of Rights in the United States of America. Immunity ensures that the right holder is immune from the powers of State and the State is therefore disabled to alter the legal situation of the right holder by exercising its power [12, p. 132]. Positive Fundamental Rights are 'Hohfeldian claims' imposing a positive duty upon the State to fulfil the content of the right. Therefore, the logical consistency in the normative jurisprudence of rights enabling the courts to read positive duties of State in the fundamental rights of people gives rise to a logical inconsistency in analytical jurisprudence of rights by altering rights as immunities into rights as claims [13].

<sup>11</sup> Article 32 of the Constitution of India guarantees recourse to the Supreme Court of India for the violation of fundamental rights enumerated in Part III of the Constitution. Article 32 is also a fundamental right, and this assurance of remedial action is taken as the constitutional guarantee for the protection of rights.

characteristic of socio-economic rights, the chance of protection available to the negative rights (mostly, civil and political rights) in terms of remedial actions is not available to socio-economic rights. Unfortunately, for the needy, their right to have access to basic human needs covered under the socio-economic rights becomes conditional, solely on State's intervention. This inequality is portrayed as a natural phenomenon<sup>12</sup> and hence the lack of State's intervention here is not considered a violation of the right to equality as a first generation right. The popular acceptance of this Nozickian notion of the inevitable inequality is built on the assumption that even when everyone is placed under the same conditions and with the same starting point, in due course of time, inequality will naturally breed between them. So, the egalitarian measures are articulated as philanthropic.

The first generation, enforceable, civil and political rights are placed in Part III of the Indian Constitution as Fundamental Rights. The unenforceable, socio-economic rights, are mostly enumerated in Part IV of the Constitution, forming the part of the Directive Principles of State Policy (*hereinafter* DPSP).<sup>13</sup> However, the Supreme Court of India has read these socio-economic rights as flowing from right to life and personal liberty enumerated under Article 21 which guarantees human dignity, forming part of Part III of the Constitution [17].

Significantly, affirmative action measures also find mention under Part III of the Constitution.<sup>14</sup> The Supreme Court has also held that the provisions in Part III enabling the State to take affirmative action measures are not exceptions to the constitutionally guaranteed right to equality [18]. However, Indian constitutional courts have frequently held that the affirmative action measures taken by the State under the Indian Constitution are policy measures and not a constitutional fundamental right of the beneficiaries of affirmative action measures [19–24]. The reason for this lack of empathy in constitutional rights could also stem from the fact that the Indian Supreme Court is still overwhelmingly Hindu, upper caste<sup>15</sup> and male [25] which are the dominant social groups in India. Ascribing ambiguity in this manner by the

<sup>12</sup> Friedman [14] notes the British House of Lords observation that poverty is merely a misfortune, and the law cannot take any responsibility for it.

<sup>13</sup> For example, Article 41 of the Constitution of India provides for the right to work and education; Article 42 provides for humane conditions of work and maternity relief; Article 43 provides for living wage for workers; Article 45 provides for early childhood care and education for children up to 14 years of age; Article 46 provides for the promotion of educational and economic interest of Scheduled Castes, Scheduled Tribes and other weaker sections and their protection from social injustice and exploitation; Article 47 provides for the duty of State to raise the level of nutrition and public health. Some of the DPSPs are controversial too. For example, Article 44, which states that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India [15]. Likewise, Article 47 states that State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Another controversial provision is Article 48, which reads that the State shall take steps for prohibiting the slaughter of cows and calves and other milch and draught cattle. These provisions have been argued as constitutional consensus building techniques, whereby the ideological dissenters can be brought on board to sign up to a largely liberal Constitution giving them a hope of future political victories. See [16]

<sup>14</sup> Article 16(4) and 15(3) of the Constitution enabling the State to take affirmative action measures, forms part of Part III i.e., Fundamental Rights, of the Constitution of India.

<sup>15</sup> Caste is a social division of class among Hindus in India.

constitutional court to the causes associated with the upliftment of the marginalised are symptomatic of how constitutional courts in India act as polyvocal courts.<sup>16</sup> The polyvocal constitutional courts in India ensure that claims of equality of the economically marginalised are seen through the prism of philanthropy and right-centric discourses on equality remain on the margins.

This is one of the reasons that despite the devastating effects of the orders of lockdown on the lives of the marginalised, it had hardly been taken as a case of violation of the right to equality guaranteed under the Indian Constitution. It is noteworthy that under the Indian Constitution, the right to equality can only be suspended if there is a formal declaration of proclamation of emergency [26]. COVID-19 lockdown is unique in this sense. It impacted the daily wage earners disproportionately by extinguishing their right to earn their livelihood and consequently their right to dignity. The right to human dignity is also a fundamental right recognized under Article 21 of the Constitution of India [17]. But both these constitutionally guaranteed rights were practically suspended without the formal declaration of emergency under the Constitution of India. Significantly, Article 21 cannot be suspended under any pretext under the Constitution of India [27]. The constitutional emergency has been replaced by the corona emergency and the claimed pervasiveness of this emergency has given legitimacy to all the executive actions ignoring the constitutional questions.

## 2 Pandemic and the Dignity of the Economically Underprivileged

The pandemic and the subsequent lockdown created a theatre for several constitutional rights questions, not all of them could reach the courts for adjudication. The ones which had the threshold to reach the court created abysmal spaces for the marginalized and in few instances, it was a complete disenchantment.<sup>17</sup> The

<sup>16</sup> In India, constitutional courts, namely the Supreme Court of India and the High Courts in the different provinces, hear a case by sitting in benches of one or more than one judges. Therefore, on a single issue a court may have contrary views.

<sup>17</sup> The marginalised cannot actually present their case before the court despite some of their concerns being heard by the court through the means of public interest litigation which enables any public-spirited persons/organisations to espouse such causes on behalf of the marginalised. This reflects that the lived experiences of such people do not come to the court directly. In one of the issues which the Delhi High Court referred to as the case of “Digital Apartheid” in the wake of economically underprivileged students studying in private schools in Delhi being denied access to classroom education. Due to lockdown, the private schools shifted to online classes leaving the economically underprivileged students studying there under the legislation (The Right to (Free and Compulsory) Education Act, 2009, which enables such students to study in schools, without access to school education. These students cannot afford computers or android smartphones connected to the internet to attend their class. The Delhi High Court ordered that under the given law and since right to primary education is a fundamental right under Article 21A of the Constitution, the State must undertake the financial burden to provide these students with requisite gadgets equipped with reasonable internet speed to access their classes. See [28] The provincial government of Delhi went in appeal before the Supreme Court of India against this order and the Supreme Court ordered a stay on the orders of the Delhi High Court without assigning any reasons. See [29]. In general, Public interest litigation has been hailed as an extraordinary judicial innovation by the Indian judiciary [30, 31].

announcement of complete lockdown by the Prime Minister was silent about the food and shelter requirements of the migrant workers. On March 31, 2021, the Solicitor General of India in his submission before the Supreme Court of India in a Public Interest Litigation filed to ameliorate the plight of a walking exodus of thousands of migrant workers going home amidst the nationwide lockdown, stated that at 11 AM today there is no person walking on roads to reach their homes.<sup>18</sup> The Solicitor General of India, like a deranged artist, chose white paint to whitewash a besmirched canvas to make sure that the onlookers are beguiled. This blatant refusal to acknowledge the real plight of the migrant workers reaffirmed their triviality in the social hierarchy for Indian society. The concerns of the migrant workers when defying all the odds reached the otherwise inaccessible Supreme Court, the way the case was dealt with assured future deterrence for such matters to reach the Supreme Court. The court as a guardian of the Constitution was to be considered, as Austin noted, the most tangible evidence of India's independence [32]. This tangible evidence had reduced itself as a tangible building and made itself distant from the unbearable difficulties that the migrants faced. However, the endeavor of law to construct justice by empowering the State with the sole authority to deliver it to the populace is complete and Ihering's idea of law as 'a means to an end' is belied [33].

On 8 May 2021, 16 migrant laborers (8 belonged to the *Gond* tribe) trying to return on foot to their homes in *Umaria* and *Shahdol* districts<sup>19</sup> of the State of Madhya Pradesh (more than 1000 km away), were crushed to death by a freight train that ran over them at 5:15 AM [34] while they had fallen asleep on the railway tracks due to exhaustion. They started walking at 7 PM the previous evening and after an exhaustive walk for 36 kms, they had decided to rest on the accident spot [34]. The deceased migrant laborer's last month's wages were not paid to them; owing to extreme economic hardship and on frequent request by their family members, they had decided to walk to the nearest place from where they can get a train to reach home. They were walking on the railway track to avoid being caught by the Police for violating the lockdown norms. This irresistible desperation to travel resembles the desperation of the *Speluncean Explorers* as depicted by Professor Fuller [35]. In the *Speluncean explorers'* case, the gravity of desperation was so high that it led to the killing of one of the fellow explorers. Justice Foster noted that the explorers were cut off from the world regulated by the state and were placed in a state of nature.<sup>20</sup> While the desperation triggered by the lockdown was not only within the confines of the State but also created by the State. Violating the lockdown norms by the migrants for their survival measures and killing a fellow explorer for survival, exhibit varying degrees of desperation. The legal complexity of this peculiar situation of the migrant workers deserved a sincere intervention by the Indian judges.

<sup>18</sup> Available at [https://images.assettype.com/barandbench/2020-03/b0e29c64-806d-4880-99e8-5611e51bb53d/Alakh\\_Alok\\_Srivastava\\_vs\\_Union\\_of\\_India\\_\\_SC\\_Order\\_\\_March\\_31\\_\\_2020.pdf](https://images.assettype.com/barandbench/2020-03/b0e29c64-806d-4880-99e8-5611e51bb53d/Alakh_Alok_Srivastava_vs_Union_of_India__SC_Order__March_31__2020.pdf). Accessed 25 May 2021.

<sup>19</sup> Districts in India are administrative units within provinces like counties.

<sup>20</sup> Justice Foster analyses that the explorers (the defendants) were "not in a 'state of civil society' but in a 'state of nature'. This has the consequence that the law applicable to them is not the enacted and established law..., but the law derived from those principles that were appropriate to their condition." [36, p. 621].

It is also intriguing to examine whether the desperation of migrant workers can qualify them to be eligible for the defense of necessity under Criminal law. Returning migrant's desperation can be equated with that of the Dudley and Stephens in the infamous *Dudley and Stephens* [36] case. In this case, after being shipwrecked at sea for 18 days and without food and water for 7 and 5 days respectively, the defendants had killed and partially consumed an ailing cabin boy. The Queen's bench division convicted the defendants for murder and sentenced them to death. The sentence was later commuted to 6 months imprisonment without hard labour. Writing the judgment, Lord Coleridge rejects the temptation to be an excuse. He expresses compassion for the accused in terms of morality yet condemns the defendants not for their lack of human standard of conduct but for the lack of heroism [36]. The condemnation of the defendants at the hands of law is also owing to the lack of utilitarian justification of securing the larger social good [36]. To admit the defense would be akin to opening the door for a cannibal's charter [37, p. 204]. The moral condemnation for the lack of heroism to starve or the indignity to stand in the queue for food is applicable to the returning migrants. The utilitarian premise of their return being prejudicial to public health is also present. The moral and utilitarian justifications cancel the defense of necessity.

While rejecting a petition filed before it to address the plight of migrant workers, the Supreme Court of India orally observed that "It is impossible for this court to monitor who is walking and not walking" [38]. The Petitioner lawyer referred to the unfortunate incident of 16 migrant laborers being run over by the train. To this, the court asked, "How can anyone stop this when they sleep on railway tracks." The Solicitor General in his reply said "If someone doesn't want to wait for his turn" referring to people still walking back to their homes as the Government has decided to ferry people back home. The sheer reluctance and absolute lack of empathy of a class of individuals who had the affordability of food, masks, and physical distancing towards the strenuous situation of the migrant workers looked unabashedly brazen in a court of law. The Supreme Court shrugged off the concerns of the migrant workers conveniently while showcasing the workers as the ones responsible for their own plight. Distant from the lived experiences of the workers, the Solicitor General and the Supreme Court, comfortably chose to overlook how the workers were robbed of their choice 'to be or not to be' [39]. The sign type or the *sémiologie juridique* involved in this legal activity exhibits the gulf between the normative principles of equality and dignity under the Indian Constitution and its realisation. It also shows that the legal system can withstand this non-realisation of the constitutional principle, reducing constitutional principles to Kelsenian norms whose realisation potential carries no bearing on the recognition of norm as legal. It demonstrates the irrelevance of marginalised people to the positivist recognition of the legal system.

The oral observations of the court during judicial hearings are not to be taken as the official version of the court, but when the live streaming of court proceedings is anticipated,<sup>21</sup> the indifference to these observations reaching the public,

<sup>21</sup> The Supreme Court of India in [40] this judgment agreed that in principle the courts in India, being open and transparent courts, live streaming of proceedings of the court must be done. The Court even framed guidelines for the broadcast of the proceedings of the Supreme Court and asked all the High Courts of India to frame live streaming rules for itself and for the courts subordinate to them. This judgment was passed on 26th September 2018; however, the Supreme Court is yet to begin the live broadcast of its proceedings.



speaks volumes about the court's inhibition in implementing its own decision of live streaming of court proceedings. This ostensible disdain for the dead migrant laborers by the Apex Court of the country along with the State through its Solicitor was different from how the incident played out otherwise. Prime Minister Narendra Modi stated that he is extremely anguished by this incident. The Prime Minister's office also sanctioned the payment of two hundred thousand Indian rupees (around 2300 Euros) each to the next of kin of the persons deceased [41]. The Maharashtra Government, the provincial government where the incident happened also announced payment of five hundred thousand Indian rupees (around 5700 Euros) compensation [42] along with the Madhya Pradesh Government (the provincial government whose natives were killed) which also announced five hundred thousand Indian rupees compensation [43].

The difference in the approach of how constitutional courts and the political executive viewed this incident can be understood in terms of the semiotic portrayal of the incident. For courts and the State as a party in the court, it is the black letter law that took precedence over empathy for the dead. Ironically, it even took precedence over the fundamental right to dignity and equality as articulated by the Supreme Court itself to be flowing from the constitutionally mandated fundamental right to life and personal liberty under Article 21 of the Constitution of India. If the right to human dignity is a fundamental right, then in the absence of means to earn, relying on free meals even if the free meals provided under the lockdown were enough, walking back home to have a dignified meal at home should not be a criminal act. The indignity of standing in the queue for one free meal even for a day cannot be insisted on by force. Therefore, evading that indignity cannot be criminal. This forcing of indignity is symptomatic of how makers and adjudicators of law are oblivious to the respect for the human person of the economically underprivileged.



Image Credit – Reuters Photo. Available at <https://www.hindustantimes.com/india-news/wages-halted-victims-began-to-walk/story-epx5KoPhk9qrYI21GE5zVI.html>. Accessed 28 May 2021

The public spectacle emanating from the portrayal of the aforesaid incident by the media would need assuaging of people's emotion by the political executive, being the representative of people. This is reflected in the executive's swiftness to express anguish and offer compensation. In India, there is a fusion of the political executive and the legislature. Only a legislator can be part of the political executive and the political executive must have the majority support of the legislators. For enacting or repealing laws, majority support of legislators is required. In law, the 16 dead migrant workers were trespassers of railway property, that is why the Indian Railway (a government of India enterprise) did not pay any compensation in this case [44]. But the political executive can award compensation for the same violation of the law. How easily the political executive, despite being the top legislative leaders, can disown their legislative hat and embrace the role of an anguished executive, is extraordinary. The Executive representing the concerned State pushed the inconvenient legislature into oblivion. The erasure of their legislative identity by the political executive is remarkable, for it was not even discussed as something amiss in the political scheme of things. Participating in a discourse is passing on the signs and symbols and their intended meaning from one individual to the other—that's what is called culture [45]. This meaning creation and the consequent creation of culture excludes the participation of marginalized, ignorant, and indifferent. A lone dissenter may not be able to deconstruct this culture but underlining that this culture is also a conscious creation and not a natural reality is an important sign, which also needs individuals for passing on this meaning.

The dominant visual semiotics of the images of the *Roti* (Indian bread) on the railway track strewn across were beamed on the news channels and newspapers conveying the harsh reality of the COVID-19 lockdown inequitably impacting the daily wage earners, even taking their lives. The unnoticed visual semiotic of the pictures however were noticed by the Indian Railways, for whom sleeping on the tracks was a punishable offense. While for most of us the visual imagery of *Roti* lying scattered in the background of railway tracks was good enough to warrant penning an elegy [46], for Indian Railways, the railway track was the thing to be noticed to deny payment of any compensation. An allegorical irony indeed.

Ironically, the law is the product of politics but the moment this product comes into existence, the politics behind its making, is eclipsed and the product acquires the character of amorality. The questioning of this constructed amorality to denounce its acceptance is prohibited by the force of law itself. But its makers, the political class, are aware of the (im)moral character of it and therefore, may conduct itself morally by distancing itself from the crafted amorality of law hiding its immorality. Grant of compensation for perishing in the process of committing an offense aptly describes this.<sup>22</sup>

<sup>22</sup> The unsettling complexity between farmer's suicide due to the agrarian stress in India [47] and ethicality of the 'crime' of attempt to suicide [48] also captures this. Under Sect. 309 of the IPC, attempt to commit suicide is a punishable offense with a prescribed imprisonment for a term which may extend to one year.

### 3 Criminal Laws in Action During the Pandemic

The need for hiding the legal reality emanates from the insulation of moral questions behind the commission of the act deemed criminal by the penal laws, the exclusion of motive and at times even *mens rea* to determine the culpability of the person accused. The muddled logic of separating *mens rea* from motive is also a project which needs revisiting in the aftermath of such incidents.

On 24th March 2020, the DMA was enacted by the Indian Parliament due to the Tsunami in the year 2000, was invoked for the first time by the Government of India declaring the COVID-19 pandemic to be a disaster under the law. The law empowers both the Union government and the provincial governments in India to enforce the lockdown. This law makes it an offense to refuse to comply with the orders of the Government resulting in loss of life or imminent danger thereof, and it is punishable by imprisonment up to two years [49]. Ironically, this measure of lockdown under the law meant to safeguard people's life from a pandemic came from the Ministry of Home Affairs of the Government of India and not the Ministry of Health. The Ministry of Home Affairs is primarily responsible for internal security whereas the Ministry of Health is supposed to look after the issues of public health. So, a migrant laborer walking on the road back to her home during the lockdown commits this offense. Her justification of not getting work and therefore not even having food to eat is irrelevant since her actions fulfil the definition of the offense. This reminds us of what Fuller suggested that a law must not require the impossible [50, p. 70]. The brutal pointlessness of the law is in letting the subjects know that there is nothing that may not be demanded of him and that he should be ready to jump in any direction [50, p 71]. The government official tasked with the enforcement of such laws faces the alternative of doing serious injustice or diluting the respect for the law by himself winking at the departure from his demands [50, p 71]. Forsaking civil liberties and freedom, persuasion from the State has taken the form of imposition which has become the norm and the democratic State has transformed into a police State to save its citizens from themselves [51]. The pandemic panopticon truly imprisoned these people in social and political paralysis [51].

The lockdown was implemented in India using a combination of laws; namely—section 188,<sup>23</sup> 269,<sup>24</sup> 270<sup>25</sup> and 271<sup>26</sup> of the Indian Penal Code of 1860 (*hereinafter*, IPC), section 144 of the Code of Criminal Procedure 1973 (*hereinafter*, CrPC), DMA and EDA. IPC is a comprehensive code defining multiple substantive offenses and their punishments. The CrPC is a comprehensive code providing procedural rules of criminal justice. Section 144 of CrPC empowers a public servant (executive magistrate) for immediate prevention and speedy remedy to pass an order directing persons of a place or area to abstain from certain acts securing human life and health. EDA was enacted in the year 1897 to control the deadly bubonic plague in Bombay. This law was a stringent measure that Queen Victoria wanted her colonial government in India to prevent the outbreak of the disease [52]. The Act empowers the provincial governments to take measures to prevent epidemic diseases or prescribe temporary regulations. Disobedience of the orders prescribed under the Act is punishable under Section 188 of IPC. It is worth noting that in all these penal offenses, ‘intention to harm’ is not the requirement but the knowledge that the act is prohibited and that doing so may spread the disease. The sweep of the definition of these offenses is such that the migrants going back to their homes either on foot or bicycle are committing an offense under the aforesaid laws. The same will be the case for street hawkers who depend for their livelihood on the proceeds of their make-shift shops on the pavements of the road. Their excuse of being forced to do

<sup>23</sup> 188. Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. Illustration—An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

<sup>24</sup> 269. Negligent act likely to spread infection of disease dangerous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

<sup>25</sup> 270. Malignant act likely to spread infection of disease dangerous to life.—Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

<sup>26</sup> 271. Disobedience to quarantine rule.—Whoever knowingly disobeys any rule made and promulgated [by the Government for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

so for denial of work and consequently the daily or monthly wages on which their livelihood depends is irrelevant in the determination of their culpability. This also reflects the ramifications of the continuance of colonial laws in post-colonial India meant to control and punish the native population ignoring the intention to harm and substituting it with knowledge.

The semiotics of Criminal Law's indifference towards the deontological concerns of human dignity in favour of the utilitarian cause of the general protection of the Indian populace from the infection is worth noticing. The Supreme Court of India has generally been accommodative of the laws ostensibly meant to protect the public interest over individual liberty. The declaration of the anti-terror laws as consistent with the constitutional fundamental rights by the Supreme Court is worth noting.<sup>27</sup> Criminal Law is Public Law, meant to protect the public interest and therefore, irrespective of the absence of the guilty mind, if the accused's act harms public interest even if committed due to compulsions of life and dignity—law shall side with the argument endorsing public interest. The semiotics of the meta constitutional norms with deontological foundations was actually limited to physical signifiers signifying empty rhetoric.

However, the creation of legal wrongs making lack of moral blameworthiness irrelevant in case of migrant workers returning home could not sustain for very long and on April 29, 2020, the Government of India allowed the movement of migrant laborers and facilitated their return by running special trains. On June 8, 2020, the Supreme Court of India also in a *suo motu* initiated judicial hearing ordered all the provincial governments within India to consider the withdrawal of prosecutions of migrant laborers under Section 51 of the DMA and other lockdown related offenses during the enforcement of lockdown [55]. Despite this, the unfortunate killing of 16 migrant workers by a freight train on May 8, 2020, tells us that the arrangements made for their return were inadequate forcing them to take the arduous journey back home on foot. The response of the Government of India as voiced in the Supreme Court by the Solicitor General of India was that they did not wait for their turn to be sent back home by the special trains started by the Government.

The conundrum to comprehend who stands for what could not have been starker. The Government of India in the Supreme Court says that the deceased laborers did not wait for their turn. The Prime Minister of India as the head of the Indian State expresses anguish and pays compensation to the bereaved families. In his tweet, he mentions that he has spoken to the Railway Minister regarding all possible assistance, but the Indian Railways finds that the deceased were trespassers over the railway's property, hence refuses to pay compensation. The Supreme Court of India which declared human dignity to be a fundamental right under the Constitution of India says that we cannot monitor who is walking and who is not walking on the road.

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<sup>27</sup> The Supreme Court of India in [53] declared the Prevention of Terrorism Act, 2002 as constitutional. Further, in [46], the Supreme Court of India declared the Terrorists and Disruptive Activities (Prevention) Act, 1985 as constitutional. See also [54].

#### 4 Disproportionate Impact of Pandemic Policing on Muslims

Systematic bias against the socio-economically marginalized also translates into law and order enforcement in India [51, p. 36]. Under the garb of maintaining law and order, police systematically target persons belonging to socially underprivileged like persons from Scheduled Caste,<sup>28</sup> Scheduled Tribe<sup>29</sup> and religious minorities especially the Muslims [57, p. 36]. The already existent dual policies of social inclusion and ideological exclusion for muslims [58] was silently placed enmass in the Indian psyche.

Social cleavage on the lines of religion, caste, and gender is not new in India [56, p. 2]. This fragmentation came to the center during the COVID-19 pandemic [59, p. 2]. Suddenly, it felt that the COVID-19 virus does not target communities but the people belonging to lower-income groups, underprivileged castes, and religious minorities because of their unequal treatment by levelling them as super spreaders [59, p. 2]. This prejudice has been equated at par with the one highlighted by the critical race theory scholars [59, p. 2]. In India, Muslims, a community of 200 million people were made the scapegoat for the spread of coronavirus.<sup>30</sup> This desire of false pinning of blame reflected one of the oldest and ugliest human impulses of blaming a calamity upon those who are different [61]. “Scapegoating during pandemics has a long history. Jews were blamed for the outbreak of the Black Death in medieval Europe. Irish immigrants were accused of spreading cholera in the 19th-century United States. Haitians were stigmatized during the AIDS epidemic” [61].

In India, all this started when a *Markaz* (congregation) was organized by *Tablighi Jamaat* (Society of preachers to spread the Muslim faith) in March 2020 at New Delhi in which around 4500 persons gathered from across the world. Within days of the announcement of the first lockdown by the Indian Prime Minister on March 24, 2020, when some positive COVID-19 cases started coming linked to *Tablighi's Markaz*, the news about 30% of the total cases coming from one source, i.e., *Tablighi* congregation started making rounds on news channels [62]. A new parallel to the “Chinese” or “Wuhan” virus was found by news channels that called it “*Tablighi Virus*” while referring to the positive cases linked to the *Markaz*. “*Corona Jihad*” hashtag, a new term insinuating Muslims as deliberate super-spreaders, filled the Indian social media space, simultaneously depicting Muslims as the virus carrying suicide-bombers in some of the cartoons [63]. Such hate generating and attention seeking often turns out to be an effective enterprise [64].

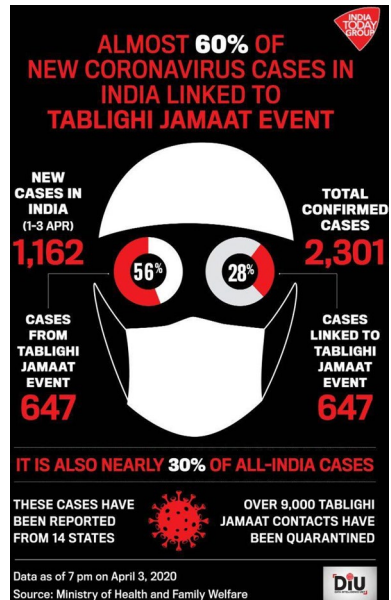
Despite having its guidelines against the stigmatization of communities or areas [65], the Government of India in its daily media briefings started giving separate figures for COVID-19 positive cases linked to *Tablighi Markaz* and comparing it with the total number of nationwide cases [66]. This was also contrary to the guidelines

<sup>28</sup> Consists of the most socio-economically backward and socially ostracised cluster of castes in India. See, Article 341 of the Constitution of India.

<sup>29</sup> Cluster of tribes inhabiting India. See, Article 342 of the Constitution of India.

<sup>30</sup> The narratives to create the imagery of the Muslim other has not been new. See [60] for the narratives created by the media and experts about Islam.

Pic credit: Tweet by Rahul Kanwal @rahulkanwal, News Director Aajtak & India Today (Two national news channels of India in Hindi and English respectively), 4 April 2020. Accessed 26 July 2021



issued by the World Health Organisation (WHO) [67]. In addition to the portrayal of the role of *Tablighis* and a conscious extension of the portrayal to include the role of Muslims in spreading coronavirus in India, “it suddenly felt that COVID-19 had a religion” [62]. Police and the Government emboldened by this media narrative swung into action and started criminal proceedings against the members both Indian and foreigners who participated in the *Tablighi Markaz*. Eleven Provincial Governments within India filed 205 criminal cases against 2,765 *Tablighi Jamaat* members [68]. However, not even a single conviction could be secured by the prosecution [69]. The extent of abuse of the police powers is evident from the fact that in one of the cases in the Province of Uttar Pradesh which is led by a Hindu monk as its Chief Minister (Chief Executive), the police officer after investigation submitted the charge-sheet against the alleged attendee under sections 269, 270 of the IPC. However, it was withdrawn, and a senior Police Officer added the charge of an attempt to murder against the alleged *Markaz* attendee. The person accused challenged this charge before the High Court and the High Court in its written order stated this to be a prima facie reflection of the abuse of the power of law [69].

A renewed trend has taken roots in the Indian Criminal Justice System where the definition of the substantive offense has a little bearing on the imposition of charges to showcase its application to ‘Muslims’ to attract harsher criminal process as punishment and to support and reinforce the rhetorical narrative of them being marauders in the public knowledge.<sup>31</sup> Therefore, conviction is not at all a real possibility.

<sup>31</sup> There is an ongoing political narrative reinforced in India of Muslim ruler who ruled during the medieval period in the undivided India where Muslim invaders who destructed the Hindu culture and civilizational heritage of India. These Muslim foreign invaders are also referred to as the people responsible for converting Hindus to Islam. A noted Historian in India Romila Thapar [70] has written that this has also

The fact that imposition of criminal charges will put the accused person in trouble by way of pre-trial imprisonment as an undertrial, unless she gets a release order from the court, the criminal process itself is the punishment. This attempt to make the criminal process as punishment is bolstered by the slow pace of the criminal process [73–77]. Special criminal laws, making it difficult for an undertrial to be released on bail also add immensely to the urge of using the process as punishment against the ideological dissenters [78–80]. The fact that none of the *Tablighis* were convicted even for the charges associated with the spreading COVID-19, clearly reflects how casually cases were filed against Muslim men including even the foreign Muslims. The foreigners among the *Tablighis* were also charged for violating visa conditions by accusing them of the charge of the propagation of religion in India. This charge also could not be proven against any of them.

A study of pandemic policing conducted in the province of Madhya Pradesh (5th largest province of India in terms of population) by the Criminal Justice & Police Accountability Project based in Madhya Pradesh, which works against the targeting of certain communities by the Police and the Criminal Justice System, revealed startling facts about the targeted policing. Muslims constitute only 6.57% of the population but during the lockdown, 24.45% of all arrested persons in the State of Madhya Pradesh were Muslims [57]. The report laments that the “Hateful media campaigns and public prejudice are likely to have exacerbated such institutional bias.”

The state’s discretion to arrest and prosecute is seldom questioned to fix accountability and therefore this discretion is frequently misused against religious minorities. In fact, this discretion is portrayed as important for maintaining law and order. The Muslim men arrested by the Police may have violated the lockdown orders but this high percentage of the arrest of Muslim men clearly shows selective policing. While there is no right to equality in the technical legal sense that is applicable here, as the argument of why other violators are not arrested is not available to these men, it certainly raises important moral questions about the equality principle. It also shows how conveniently, the law enables the State to escape the moral rigor of equality principle and helps build the narrative of culpability against religious minorities exacerbating the already existing social cleavage.

It is also important to note that this over-policing of a community is not only from among the *prima facie* violators of lockdown orders, be it pedestrians, street vendors or people sitting together playing cards. Targeted policing of minorities even includes framing of those who have not violated lockdown orders or contributed to the spread of COVID-19. The policing of social media presents instances of such a targeted approach. In the province of Madhya Pradesh, a criminal case was lodged by police against a Muslim man for his WhatsApp display picture which stated that “I/We are with *Markaz Nizamuddin*” [49]. *Nizamuddin Markaz* was the place where

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Footnote 31 (continued)

been helped by the Historians such as Mill and Mueller who labelled the history of India into Golden Hindu period followed by its destruction at the hands of Muslim “foreign invaders” who used forced conversion “by the sword” to bring Islam to the sub-continent. In truth, Islamic practices entered India because of trade with the Arab world before the Delhi Sultanate and Mughal Empire [71, 72].



*Tablighi Jamaat's* congregation had taken place. The First Information Report (FIR) lodged to initiate the criminal case by the Police noted that “the *Tablighi Jamaat* has been responsible for the spread of COVID-19, which has led to a general dissatisfaction against a community and yet the accused has put such a status supporting the *Jamaat*” [57]. The extent of desire to frame Muslims for being responsible for the spread of COVID-19 could not have been starker. The alleged neutrality of these police actions thankfully had been exposed by the courts, but the fact that except for a rebuke from the court, nothing else could be done to account for such deeds of the Police, highlights the role of law in enabling legally sanctioned violence.

It is important to note that if not from his attire, a Muslim man is easily identifiable by his name. In the province of Uttar Pradesh, an 18-year-old Muslim vegetable vendor, Faisal Husain died in police custody after he was picked up by the Police for violation of lockdown orders [81]. Another vegetable vendor who saw Faisal being beaten by the Police said, “I am not sure why the policemen singled him out as others were present at their shops as well” [81]. Due to lockdown Faisal’s family was struggling and being the only breadwinner in the family of 6, Faisal was forced to sell vegetables. It is important to note that adhering to the lockdown timings for economically underprivileged sellers of perishable products like vegetables is not easy, as the next day the vegetables may not be good enough to be sold. Therefore, applying the same yardstick of lockdown timings on everyone, irrespective of the nature of the product sold by the street vendors, itself, is arbitrary and exclusionary. Further, this kind of brutality at the hands of the State in the name of law enforcement exhibits how hapless may be treated at the hands of the State. The deeply entrenched Islamophobia<sup>32</sup> in the society, guards against the outbreak of public outrage which could make the State take long-term measures to curb this kind of practice.

The semiotics of the targeted policing of Muslims reflects equality as an unfulfilled constitutional promise. It also reflects how justice is a struggle for religious minorities in a country which, as set out in its preamble to the Constitution, claims itself to be a secular republic. Secularism has been identified by the Supreme Court of India as the basic feature of the Indian Constitution.<sup>33</sup> Justice is often categorised in two ways—procedural justice (proper application of procedures and fairness in the application of procedures) and substantive justice (relates to seeking the correct outcomes or results, even at the expense of procedural justice) [89, p. 200]. The role of police is mainly covered under procedural justice, and it is evident that the procedural justice was denied to a religious minority by the police during the lockdown. Here also, Police as a genre is clearly promoting a pre-modern ideal of law, [89, p. 202] one that prioritizes the existing social prejudices over rationality.

<sup>32</sup> The identity of the Other Muslim has been socio-historically created [82–84], sometimes on the logic of race [85] and sometimes out of the fear of multiculturalism [86]. In Post 9/11 America, Naber [87, p. 236] argues that the “Arab-Middle Eastern-Muslim” Other has been constituted by a dual process of cultural racism and the racialization of national origin”.

<sup>33</sup> Recognition of a constitutional feature as the basic feature of the Constitution of India by the Supreme Court means that the feature is the irreplaceable constituent in the making of the identity of the Indian Constitution and hence cannot be taken away, even by an amendment to the Constitution. [88]

## 5 Conclusion

COVID-19 has shown the world the pervasiveness of inequality in the world we inhabit. The privilege of being able to work from home cannot become the humankind's answer to confronting the challenges posed by the pandemic and consequent lockdowns. The fact that the makers of human regulations during the pandemic made those while working from home reminds us of the reasons for the rules not adequately accounting for those who never had the luxury to work from home. The Police being law enforcers may have worked in the field during the pandemic, but they too never had the experience of living the reality of the people policed during the pandemic. Being Government employees, they had the sovereign assurance of payment of their monthly salaries. The people were out in the open despite the genuine fear of infection because this exposure can only enable them to get their wages. Being policed and levelled as criminals for earning their livelihood by those having assured wages raises pertinent moral questions about equality as a meta-narrative of the liberal world. As a democracy, India cannot shy away from engaging with this moral question taking refuge in the exigency argument of the pandemic. Law being an enabler to the State to practice this inequality with impunity exhibits the gulf that exists between law and justice.

The Indian State must recognize the lopsided dynamics of power which the application of Criminal Law unleashes upon the marginalized communities. Taking shield in the crafted veil of the amorality of Criminal Law certainly needs to be denied to the State and its various actors. Legal semiotics must problematize the notions of unity of law which claims that—law, its written expression, the legal structure of a particular State, and the ideological manifestation of the concept, all belong to a single system, the legal system [90]. This presupposition promotes the predominant positivists' paradigm within legal studies [90]. The unity of the criminal justice system also needs to be problematized by the analysis of different sign types involved in the application of Criminal Laws. The function itself of an object is also the content of its signification [91]. The ostensible and actual functions of criminal law are therefore important contents of its signification. The pandemic period in India has revealed that the actual function and therefore the actual significations of the enforced Criminal Laws considerably outweigh its ostensible signification as an object in the hands of the State.

The enduring hardship of the socio-economically disadvantaged cannot be allowed to be treated with the strong hands of Criminal Law in this fashion. The Indian State cannot ignore the entrenched inequality, visible in the very application of these laws. It is time, therefore, to also introspect about the use of Criminal Law and the power of the State to enforce strict adherence norms in the name of necessity. The issue of overcriminalization in India is well known to public imagination as the public outrage against ghastly crimes hogging the newspaper headlines has always been assuaged by the political class using criminalization and enhancement of punishment as the 'go to' tools.<sup>34</sup> Pandemic presents us with the occasion to bring

<sup>34</sup> In December 2012, a young female student of physiotherapy was gang raped and killed by a group of men in the heart of New Delhi. This incident led to the extraordinary organic galvanization of people on the streets of New Delhi and other Indian cities demanding justice for the victim and better Criminal Laws against sexual assaults on women. Under pressure, the Indian Government hurriedly enacted the

overcriminalization to the centre stage of public debate. A person forced by the circumstances attributable to nature and the State to do the act cannot be held to have committed a criminal act. The use of Criminal Law by the State needs to be replaced by compassion and empathy at the behest of the State.

Indian masses' indifference to India's political structure under the Constitution of India enables the political class to conveniently escape the public scrutiny of its muddled functioning. The decentralization of the powers of the State must not enable the top political executive to disown the inconvenient and morally indefensible acts of the other constituents of the executive. The Prime Minister of India enjoys majority support of the legislators in the lower house of the Parliament and therefore, inconvenient laws cannot be blamed upon the legislature.<sup>35</sup> Indian Railway as an arm of the executive cannot term the dead migrants as trespassers hiding the issue in the garb of the amorality of law while the Prime Minister as the head of the same executive would offer to pay the compensation. In the name of guarding the amorality of law, the collective moral responsibility of the executive cannot be fragmented in this fashion. The hiding of the inconvenient stand of the Indian Railways reminds us of the extent to which attributed amorality of laws has given rise to the inconvenient moral questions. If immorality of law is so pervasive, it is better to acknowledge and introspect, than to hide behind the posited amorality of it and hoping for a muted media coverage of the legal position. The fact that such inconvenience is deemed episodic, reminds us about the lack of political capital the issues concerning the marginalized in India can engender.

The targeting of religious minorities by the Police owing to the already existing social structures of Indian Society brings to fore the fact that the State's instrumentalities are also not beyond social prejudices. The pervasiveness of social fissures must not be permitted as a leeway for the State to guard against social prejudices infiltrating its ranks. It also highlights how policing in India is still in the need of a therapeutic outlook. Repeated arguments about police reforms in India are far from being implemented.<sup>36</sup> Pandemic policing has revealed the ugly side of partisan policing in India, and it is time that the issue is addressed.

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Footnote 34 (continued)

Criminal Law (Amendment) Act, 2013. New forms of stricter punishments like imprisonment for life for the remainder of the natural life of the convict were introduced for rape. Other sexual offences were also made more stringent, and punishments were enhanced. A study published had demonstrated that after the Amendment, in the period between 2013 and 2018, the conviction rate in rape cases in Delhi has in fact gone down after the Amendment. In the cases decided during this period under the old law, the conviction rate was 16.11%, whereas, in the cases decided under the amended law in this period, the conviction rate was 5.72%. See [92].

<sup>35</sup> Having majority support of the legislators in the lower house of the Parliament is a constitutional requirement for forming the Union executive government in India. The present Narendra Modi government enjoys a majority of the legislators in the upper house of the Parliament also. For passing and repealing Union laws, majority support of legislators in both houses of Parliament is a constitutional requirement.

<sup>36</sup> The Supreme Court of India in [93], had given detailed guidelines for the police reforms with a view to ensure insulation of police from political/executive influence. However, these guidelines are yet to be implemented.

The legal semiotics of several events that happened during the pandemic in India is a reminder to the Indian State about the gulf between the normative assurances of the Constitution and the ground realities. It also reiterates the need to establish in essence the authority of the Constitution of India as truly a supreme legal document. This is equally applicable to the judiciary which under the scheme of the Constitution has to ensure State's adherence to the constitutional principles. The argument of Corona emergency from the State was allowed a far greater leverage by the judiciary. The wielding of State's power must find sanction from the Constitution under any emergency. The power of the Indian State to tackle the unforeseen emergencies must not be derived from legislations like the DMA and EDA permitting continuous and everchanging executive decrees without legislative or judicial scrutiny, ostensibly being portrayed as the only panacea available to tackle the eventuality like the outbreak of COVID-19.

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## Authors and Affiliations

**Manwendra K. Tiwari<sup>1</sup>**  · **Swati Singh Parmar<sup>1</sup>**

✉ Manwendra K. Tiwari  
manavbhu@gmail.com

<sup>1</sup> Dharmashastra National Law University, Jabalpur, India