

## EDITORIAL

## Public narrative on “instant justice”: A slippery slope

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*“... it should be clear how central the role of public reasoning is for the understanding of justice. This recognition takes us to a connection between the idea of justice and the practice of democracy ... that democracy is best seen as ‘government by discussion’ has gained widespread support.” (Amartya Sen, *The idea of justice*: p 324)(1)*

**Background**

The brutal gang rape and murder of a young veterinarian (now known as the ‘Disha’ case) on Nov 27, 2019 in Hyderabad (2), was followed by the encounter deaths of the four suspects at the hands of the Hyderabad police, on Dec 6, 2019 (2). The rape-murder, the police killings, and the public jubilation after the killings are all not only extremely disturbing, but very intriguing. The Disha case is a sombre reminder of the 2012 Nirbhaya case. These and other violent sexual crimes shake our conscience as citizens. However, this particular case stands out due to the police encounter followed by the public celebrations. These events raised two sets of key questions in my mind: (a) What shapes public opinion on important aspects of human life, like women’s safety, and the emerging trend of shortcuts to criminal justice delivery, or ‘instant justice’ in a democracy like India?; and (b) Do survivors of gender-based violence and their families perceive the ‘death penalty’ as the only appropriate redress and do they feel justified in supporting the extra-judicial path of ‘instant justice’ in the face of persistent delays in criminal justice delivery?

The police action does not seem to be a one-off event when seen against the backdrop of contemporary India witnessing increasing tolerance for lynching, for mobs ‘taking the law into their own hands’ (3,4). This raises concerns.

**Serious concerns**

The increasing instances of “encounters” and lynching, and the support they find amongst the people should worry us all. They raise concerns about the peoples’ perception of the justice delivery system and legal frameworks in India; about the responsibilities of various arms of the government and the judicial system, of how these bodies should operate; and the limits to their mandate. The increasing instances of “instant justice” delivery is not only extra-judicial but also ethically compromising for any society, both in the short and the long term. In a mature democracy like India, any accused persons ought to have the chance to defend themselves via well-established legal procedures. Public sentiments and outcry aroused by brutal rape cases cannot and ought not to be the driving force to determine who is guilty, or what punishment the person should be subjected to. Neither should the government respond to such events with hurried legislative reforms to placate the public, without addressing systemic issues and root causes. For example, government promulgated the Criminal Law (Amendment) Ordinance, 2018 (5) in response to the public outcry over the Kathua and Unnao rape cases (6, 7). The Ordinance raised the punishment for rape from seven to ten years, and for child rape, to 20 years extendable to life imprisonment or death. Further, by adopting the route of issuing an ordinance, government has circumvented parliamentary deliberations and public engagement which form the foundation of democracy and legislative reforms. This close connection between public reasoning, the idea of justice and the practice of democracy is astutely captured by Sen (1) as reflected in the opening quote.

Therefore, this phenomenon of the public narrative supporting the elimination of convicts via the death penalty as a legal measure, or of accused persons via extra-judicial measures as the ultimate justice to survivors warrants attention and deliberation. It is noteworthy that these measures do not translate into any commitment to responding to the harms gender-based violence causes to survivors and their families. The questions mentioned at the outset are complex, given the fact that the aforesaid perspective, although it appears to be a dominant one, is not the only one. It, therefore, is a “tight-rope walk” to respect diversity in public narratives, foundational to any mature democracy, and to ensure that secular and equitable legislative frameworks for justice delivery are not subverted.

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Answers to these questions seem to lie, only partially, in the often discussed colossal systemic failure. However, to me, a fuller explanation could be found in the “restorative and recognitive frameworks of justice” articulated by the feminist discourse, and that of public sphere and counter-publics which shape public opinions. I briefly discuss these below to get initial insights into this phenomenon.

### Systemic failures

The failure of systems in implementing policies is a long-standing concern world-wide and across sectors, which is also the case in India. There is a substantial body of work on policy implementation gaps in the post-Nirbhaya reforms (8, 9, 10), as also exposing the government’s failure to make the system work. This includes the well-known low conviction rates, and the unbearably slow pace of disposal of sexual violence cases within the criminal justice delivery system in India.

Also, the government’s inclination to widen the scope of crimes<sup>1</sup> for awarding the death penalty seem to be motivated by the aim of diverting public attention from the systemic failure to deliver timely justice to sexual violence survivors or victims. The same might be true of the increasing number of death penalty pronouncements in the country, including those for sexual offences. The National Crime Records Bureau report for 2018 (11) documents a 53% rise in death penalty awards between 2017 and 2018, from 121 to 186 respectively; and according to the Death Penalty in India Annual Statistics Report (12), 41.35% of those sentenced to death by the trial courts in 2018, and 52.94% of those in 2019, were convicted for murder involving sexual offences. This trend disregards various observation in the Law Commission of India Report 2015) (13) making a case for abolition of the death penalty in India, except for terrorism-related crimes. It also contravenes the global movement of more and more countries towards either restricting the scope of crimes for death penalty awards, or its abolition.

Overall, government arms resorting to extra-judicial means appears like a short cut to justice delivery and a cover up for sustained systemic failure to comply with the post-Nirbhaya reforms, which were informed by a longstanding engagement of the women’s movement with gender-based violence. I, therefore, explore this further.

### Post-Nirbhaya reforms: Restorative and recognitive justice beyond retribution

While retribution is integral to the criminal justice delivery framework in India, the post-Nirbhaya reforms centre-stage restorative justice to survivors. For example, a government scheme such as *Manodhairya* (self-confidence) (14) enables the provision of financial assistance to survivors and their dependents, shelter, medical and legal aid, and counseling services.

These reforms are also founded on a deeper understanding and explicit acknowledgement of the causes of gender-based violence rooted in gendered social structures; and the dominance of patriarchal forces in the public and private spheres. Fraser (1990) (15) best captures these aspects as “recognitive justice”. She argues that women suffering from the range of gender-based violence and “exclusion or marginalization in public spheres and deliberative bodies” comprise ... injustices of misrecognition ... they cannot be remedied by redistribution alone but require additional independent remedies of recognition.” (15: p 2). According to her, a “recognitive justice” approach helps to move away from blaming individuals alone to social relations and social structures which underlie the misrecognition of some individuals or groups. This understanding of justice moves away from an exclusive and misplaced focus on retribution. The post-Nirbhaya reforms, informed by this conception of justice, therefore emphasised the need for recognition of the androcentrism that causes gender-based violence at every stage of the process in justice delivery that the survivor has to navigate through. Accordingly, it has a number of facets, such as, widened scope of the constituents of sexual violence and rape, permitting the filing of ‘zero first information report (Z-FIR)<sup>2</sup>, the essentiality of respecting the survivor’s testimony, delinking of the survivor’s past sexual history with the specific incident of sexual violence, and making the use of the “two-finger test” completely irrelevant to evidence collection at healthcare facilities, and inadmissible in court.

However, in the Indian context, it is well-established that survivors and their kin have to struggle to file first information reports (FIRs), and bear with adverse and disrespectful remarks, disbelief, and insensitivity during their engagement with most wings of the government apparatus in the tortuous process of seeking justice. Employing the “recognitive justice” approach emphasises the need for ‘recognition with dignity’ of the survivors’ suffering by all justice delivery personnel as well as the public at large. Moral injury occurs as a result of denial of the recognition of physical harm and various forms of disrespect, humiliation, and lack of concern. The approach centre-stages the survivors’ perception of justice during the process of justice delivery from filing the FIR to the conclusion of the trial. It widens the scope of justice beyond punishing the perpetrator alone, to reforming the system and changing the perspectives, attitudes, and practices of the key players in the justice delivery processes – police machinery, healthcare providers, the judiciary, families, and community-society at large. As such, it lends a collective dimension to the response to injustices, and helps to focus on effecting broader social change (16).

The episodes of “instant justice” and over-emphasis on the death penalty for the crime of rape disregard these facets of justice to survivors or victims of sexual violence and their families. The persistent lack of recognition of survivors’ own suffering — physical,

emotional, and mental — in the current criminal justice delivery system suggests that more needs to be done for meaningful justice to survivors and to redress harms caused. Except anecdotal and experiential knowledge, little systematic empirical work which has employed this framework with survivors, exists in India. Such works, as demonstrated by McGlynn and Westmarland (17), will help us understand whether survivors value these dimensions of justice over “instant justice” or the death penalty.

One of the questions ineffective realisation of recognitive justice raises is if there has been sufficient engagement with all the concerned constituencies to impact public opinion and practice, in response to this counterpublic.

### Counterpublics, and public opinion

The concept of “counterpublics”, has been central to the feminist critique of mainstream public sphere theory (15, 18). The counterpublic is conceived as a possible avenue and opportunity for historically marginalised groups to come together and challenge dominant public discourses which shape the public sphere<sup>3</sup>. The concept of counterpublic reflects an acknowledgement of the differentiated and hierarchical nature of societies across the world with the existence of varieties of marginalised underprivileged communities. I consider that the long-standing work of the women’s groups oriented by woman-centered thinking as the counterpublic discourse succeeded in shaping the post-Nirbhaya reforms; but remained ineffective in impacting practices on the ground as referred to earlier. Singh and Kumar (19) demonstrate by employing the discourse on counterpublics, that it has not been able to translate into practice as reflected in, for example, the police machinery’s indifference to survivors while filing FIRs. It, therefore, appears that ineffective realization of these facets of justice might be because the post-Nirbhaya reforms processes did not offer or create sufficient spaces and opportunities to involve those who shape the dominant public sphere which also comprises the government apparatuses.

In the current context of India and its polity, the notion of “government by discussion”, closely linked to the idea of justice and democracy, is losing its substantive core. It seems, the public opinion has been deeply affected by propaganda and fake news. This may explain ever-increasing intolerance to alternative or different perspectives and complete disregard for deliberations and diversity. Currently, the dominant public sphere is geared to undermine the inclusive and progressive spirit that is integral to public reasoning and deliberation in a mature democracy like India and the counterpublics.

### Going forward

Empirical and experiential knowledge demonstrate that the systemic failures of post-Nirbhaya reforms could partially explain the public narrative in favour of “instance justice” as a short cut to justice delivery for survivors of gender-based violence. Appreciating it more comprehensively warrants a deeper look into the implementation gaps of the post-Nirbhaya reforms, employing the “recognitive justice” framework which enables an understanding of the status injury survivors confront at every stage of justice delivery. Given the wide spread use of social media, and entrenched influence of the current polity in India, we witness the increasing dominance of non-inclusive public sphere. As a result, we are losing the gains the counterpublic discourse fetched us.

Going forward, this area warrants in-depth attention drawing upon multiple strands of scholarship primarily to appreciate the newer era of easily accessible social media, the politics of fake news and newer trends in propaganda generation shaping the dominant public sphere. This would enable a clearer understanding, and alter the current public narrative which regards such short cuts to justice delivery and over emphasis on the death penalty as a panacea for a range of inadequacies in justice delivery to survivors.

### Notes

- <sup>1</sup> Soon after the Disha case, the Andhra Pradesh legislative assembly passed the Disha Bill 2019. It mandates the completion of investigation in 7 working days and completion of the trial in 14 working days. Furthermore, the Bill, ensures the death penalty for rapists by amending section 376 (which deals with punishment for rape) of the Indian Penal Code (IPC).
- <sup>2</sup> Zero FIR facilitates the reporting of crimes of sexual violence at any police station by survivors irrespective of where the crime occurred. This helps in faster filing of FIR and in averting further trauma to a survivor even for filing the FIR.
- <sup>3</sup> The concept of ‘public sphere’, originating from Jürgen Habermas’ writing, conveys a group of persons gathered to discuss issues of public concern or common interest. These public spheres worked alongside state’s instruments/authority enabling a free flow of opinions and demands to be exchanged between the state and the common people, thus, establishing a strong public opinion for the benefit of the citizens. Over time, the concept evolved to integrate influences of entities such as private players with their own commercial interest, and the media

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