

BOOK REVIEWS

TOWARDS LEGAL LITERACY: AN INTRODUCTION TO LAW IN INDIA.

Edited by Kamala Sankaran and Ujjwal Kumar Singh. Oxford University Press. New Delhi: 2007. Paperback. Pages v - 211. Rs. 195.

There are introductions and introductions. Some introductions seem to be purely descriptive, e.g. stating the manner in which one's work is organised. Some are used as disclaimers- "Mine is *only* an introduction!" Some aim at setting the tone for subsequent events. Whatever be the kind of introduction, they aim to familiarize the object of the introduction to the subjects. Drawing from the philosophical arguments on the impossibility of descriptive projects, it is unlikely that an introduction can, irrespective of its claims, be purely descriptive. A feature of introductions which may be both, a reason for defeating descriptive claims and increasing the importance of perspectives, is that introductions are in most cases in relation to things which are unfamiliar to the person being introduced and familiar to the person who introduces. The knowledge of a knowledgeable person (especially teachers) introducing, has the potential of forming lasting impressions unless one doubts the credibility of the introducer or was an expert in the field oneself. This feature calls for introductions to state their perspectives honestly and take other perspectives on board. A strategy such as this would help those being introduced, to critically evaluate other perspectives operating in the same fields of knowledge, the deduction of which may lie solely in the fact of their being new and unknown.

The book being reviewed is at least an honest introduction. At the very onset, it makes clear its perspective, claims and aims. It is an introduction to law in India and aims at furthering legal literacy. Turn the book around and it is clearly stated that it is a text for undergraduate students, which in no manner undermines its relevance for other citizens.

The book is a reader with papers primarily written by academicians, with the exception of the papers of Justice V.R. Krishna Iyer and Justice S. Muralidhar. The papers cover a wide range of subjects in the field of law which include areas fundamental to the understanding of law¹, developments which are contemporary² and matters which require

¹ The papers on 'Basic Structure of the Constitution', 'Law Relating to Criminal Justice Administration', 'Law of Contract', 'The Indian Judicial System', to name a few.

² The papers on 'Cyber Law', 'Consumer Law', 'Alternate Dispute Settlement Mechanisms'.

reflection on, and evaluation of, our laws, institutions and practices.³ A good way to review a book such as this, which stresses on evaluation, with giving description its due, would be to assess whether or not the perspective that it claims to introduce the subject from are sustained by the contents.

I. THE PERSPECTIVE

Doubts about the perspective from which the book seeks to introduce law in India are laid to rest by the Introduction by the editors. It states boldly that equality is a virtue, and that the seemingly content-independent virtues of the law, like solving coordination problems, can be achieved in a society of equals alone.⁴ This conclusion would have been rewardingly convincing to those targeted readers who search for logical connections, if the connection between equality as a necessary condition for efficiency in the context of law was stated. Being a text book however, one could presume that the fullest expression of ideas in such a text were to be elaborated by those who would initiate the discussions on the readings. The lack of such statement does not undermine the importance of the perspective that the book adopts by stating law to be an instrument for dismantling hierarchies and ensuring equality of opportunity and participation, with a view to reconstitute a moral society.⁵ The uncritical call for such a conception of law is better explained by Prof. Upendra Baxi's paper; a piece of writing which justifies the need for a 'wake up' call of such nature, but not without recognizing the existence of other perspectives .

Prof. Baxi's paper explores deep rooted problems about the general perception of the meaning of legal literacy and offers valuable understandings of it to persons and groups who take up its cause. The paper throws up the unpopular question of alternative legal traditions and links it to the problem of legal illiteracy. Illiteracy and innumeracy necessarily entail lack of knowledge about laws only in those traditions where the written word is given primacy over the spoken; where certain kinds of knowledge

³ Prominent in this category being the papers on 'Offences Against Women', atrocities against scheduled castes and tribes, 'Labour Laws and the World of Work', anti-terror laws and 'The Concept of Religious Personal Laws.'

⁴ See p. xi of the book.

⁵ The object of the book is best found in its reference to democratic spaces: "*This reader is an attempt at reinforcing this space through the creation of an alert citizenry, enhancing rights consciousness and making the law more accessible.*"

are a monopoly of the literate. The thread of this thought runs through the other ideas put forward in the paper. Prof. Baxi draws linkages between legal illiteracy, systems of production; and domination. He highlights the dependence of the production of illiteracy on the cooperation between state actors and civil society actors. He critiques the descriptive claims of positivist theories as being unable to guide action and displays the assumptions and interests behind different meanings ascribed to legal literacy.

The paper sets the tone of the book by defining illiteracy in terms of injustice and reveals to readers certain Indian perspectives of literacy and education as “*far in advance of all the contemporary and voguish human rights talk.*” The distinguishing feature of such perspectives from others like the liberal one, lies in their comprehension of literacy and education as necessarily involving (a) an understanding of sufferings of others and (b) building capabilities for action on the basis of literacy. Such an understanding converts ‘subjects’ to ‘citizens’ and makes them capable of evaluating laws and institutions. One becomes legally literate “*not to serve interests of the dominant but to resist injustices towards others*”.

The perspective set by the Introduction and Prof. Baxi’s paper call for an evaluative attitude of citizens towards their laws, legal institutions and actors. It also calls for literacy of legal and other political actors.⁶ All this, with a view towards ‘*reconstituting a moral society*’ where our rights and other’s sufferings are taken seriously. The idea of legal literacy has the above as integral features, and thus any attempt at furthering it would succeed only if it cultivates such evaluative attitudes in people.

In what follows I assess whether the papers in the book reflect and carry forward this project of legal literacy which I shall refer to as the ‘evaluative project’. The assessment of course fails entirely if I have failed to correctly comprehend the book’s perspective. I have made an attempt to bring out some central arguments of Prof Baxi’s paper which justify my belief that the book has been introduced with a particular approach to legal literacy, and is rooted in an understanding of suffering and injustice. Though the message he tries to convey is simple and clear towards the end of the

⁶ Such actors, *inter alia*, assume importance in a context where the Indian parliament has made the realization of compulsory education contingent upon the action of such actors. Prof Baxi finds the reasons for illiteracy rooted in the lack of a fundamental right to literacy and education in the Indian Constitution.

paper, it is doubtful that the finer but important nuances of the paper would get conveyed to undergraduate students without substantial assistance by teachers.

II. SUSTAINING THE PERSPECTIVE

The evaluative project finds many successful envoys in the papers that follow, in spite of a few letdowns. Justice Iyer's paper is one such envoy which describes certain features of the constitution like the Fundamental Rights and Directive Principles as basic. He evaluates the performance of our institutions, particularly the Indian Supreme Court, in interpreting and upholding these features and unhesitatingly criticizes the Court *inter alia* for adopting a conception of equality which "*defeats its quintessence*". The paper also identifies the judiciary and parliamentary democracy as basic features of the constitution and after a brief description of their nature highlights their failure to follow the constitutional mandate. "*Fair is the Preamble which impregnates the constitution with sublime values....Foul is the functional experience of the Constitution...*" The paper adopts a eulogizing tone towards the values in the constitution which portrays the same to the students as sacred and unquestionable. In my opinion however, the paper's critical attitude towards authorities which claim to be, and are portrayed as unquestionable, would cultivate a critical attitude in students which would not spare the constitution either.

Justice Iyer's paper is followed by one on the 'Indian Judicial System'. The paper is predominantly a summarization of the law on the hierarchy of courts, their powers and functions. The paper provides information that is otherwise found in the constitution and statutes, and precisely for this reason, the description could have meaningfully been a guidance to such specific materials. The evaluative project could have been better sustained by highlighting aspects of the judicial system which require thought and the reasons for such requirement. In the few opinions that it puts forth, the paper gives an unqualified credit to the judiciary for making the state administration accountable and sensitive to sufferings of citizens. The credit is due no doubt, but making it unqualified would place it at odds with the contents of Justice Iyer's paper. The paper concludes with reference to two unexplained concepts; a legal system, and a justice system, and advocates a move from the former to the latter. It seems to unintentionally suggest that law and justice are concepts necessarily at odds, a suggestion with grave consequences if left unexplained.

The lengthy descriptions in the paper on the judicial system raise questions with bearings on the evaluative project. Is it possible that in a book which seeks to introduce law, topics with vast materials could be introduced in a manner which cultivates an evaluative attitude? Would not description dominate, given the constraints of space? The answer seems to be an emphatic no, reflected in a number of papers aiming at the same project. Though the papers on contracts and consumer laws follow the trend of summarizing the law, the papers on criminal justice administration, labour law, offences against women, environmental law, religious personal laws and anti terror laws further the evaluative project. The paper on 'Law Relating to Criminal Justice Administration' seems to be the one covering the widest field, if not the paper on Labour Laws. The paper deals with the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. In spite of the length of these statutes, the paper introduces important features of the law in an interesting manner by providing analogous examples and raising conceptual questions. The writing never gives the reader the impression of being imparted a lesson in criminal law. Rather, it uses examples which connect provisions of law with each other and with events in everyday life along with a taste of interesting conceptual issues. A method such as this operates as an auxiliary reason for adopting evaluative attitudes. The realization that bodies of knowledge, walled by claims of being technical, specialized and thus the monopoly of a few, being relatable to reasons that pervade ideas and concepts used in everyday life, fosters confidence in one to engage with such bodies. Such confidence would turn recipients into evaluators and subjects to citizens. It may be argued against my assessment that criminal law is an interesting subject in comparison to other areas of law and thus, the appeal of the paper. This argument however, would not deny any credit to the manner of writing and method adopted by the paper, similarities with which are found in other papers, which further the evaluative project.

It may be due to the nature of the subject matter again, but most of the papers dealing with issues relating to particular groups and categories of persons, seem to advance the evaluative project. The paper on labour laws is a significant weapon in the armoury of the project. For a paper on a subject, interest in which seems to be diminishing in students of law, there could not be a better start than to demonstrate the number of people affected by such laws. The paper is a savoury blend of legal information, their relationship with social issues; and evaluative opinions on the law and legal institutions. Instead of summarizing different legislations, a few important ones are elaborated upon and the others covering the field are referred to

by way of a table. Central issues regarding rights of workers are discussed along with the interpretation of the law by adjudicative bodies. In its choice of issues to be highlighted, it does not fail to draw attention to those issues which are peculiar to women workers, and which should otherwise be of equal concern to men.

The evaluative project marches ahead with the paper on offences against women, which apart from highlighting important issues, uses examples of everyday situations and suggests how they could be dealt with. The paper draws attention to interesting interpretations of the law by courts, which pose anomalous situations, and which in turn reflect the deep rooted social attitudes that our legal actors have towards women. It introduces the perspective of law as an instrument towards certain goals, but definitely not an adequate one by itself. The piece on atrocities against scheduled castes and tribes (SCs and STs) too evaluates the role of laws and the courts in addressing the problem at hand. However, the paper while introducing the subject to the students does make sweeping statements regarding the problem. It would have been fair, if differences in the social status of SCs and STs were qualified especially with regard to the tribes in the North-Eastern periphery. In the alternative, the paper could specifically have been on atrocities against Dalits. Some problematisation of issues involved by tackling arguments against presumptions in criminal statutes, the tensions between freedom of speech and prohibition of hate speech; and addressing concerns of abuse, would have strengthened the position advocated for.

In tune with the evaluative project are the papers on the concept of Religious Personal Laws (RPLs), access to criminal justice, environmental law and anti terror laws. The paper on RPLs invites attention to tensions between equality and aspects of the rights to freedom of religion. The paper starts with an account of the historical development of RPLs and moves on to provide information regarding the present status of such laws. Uncomfortable issues nevertheless assume prominence, asking questions about convenient understandings of the oft-celebrated concept of unity in diversity. The relevance of the problem posed transcends RPLs as they are pertinent to questions regarding rights of minorities in multicultural societies, more so in the context of rights of individuals and groups within the minorities. True to the project, the author both evaluates and then advocates for a position rooted in fidelity to equality.

The paper on access to criminal justice too provides interesting insights into the concept of legal aid and problematises conventional understandings prevalent not only amongst lay persons, but also amongst practitioners. While advocating a holistic understanding of legal aid which encompasses a range of services, the paper also addresses arguments against the idea of free legal aid. The piece is largely drawn from a commendable scholarly work by the author and thus presupposes the understanding of certain legal concepts by its readers. This however does not impair the evaluative project. The paper highlights invaluable linkages between law and poverty. It indicates the shift in the judiciary's focus from the poor in custodial institutions to the legitimacy of judicial institutions in the eyes of the victim and its shortcomings in moving from the formal declaration of rights to their effective realization. These are valuable insights that encourage an evaluative attitude towards institutional authorities, more so since they come from an institutional actor.

III. THE PERSPECTIVE SUSTAINED

A substantial part of the book sustains the project, which the editors introduced and Prof. Baxi justified. The belief of the editors that the book would be useful to citizens other than students is a justified one. The papers in the book would be of immense value to persons seeking an introduction to the subjects dealt with. Apart from providing much needed information in simple language, they also provide valuable analysis predominantly from a rights perspective. The book is positioned to occupy a strategic place in tackling, in Prof Baxi's terms, the '*illiteracy of the literate*'. Books of this genre hold immense potential to educate institutional actors and provide them with a perspective with which to deal with laws. The commonly held 'legalistic' notion of the law by such actors, which is associated with a non-evaluative attitude towards laws, is interrogated and discouraged by the evaluative project.

The choice of subjects by the book sustains the assertion of the editors that law impacts everyday life of citizens. However, a paper on intellectual property rights, its effects on a wide range of people and the global nature of interests involved may have satisfied the requirement of addressing contemporary subjects in a more fulfilling manner. Though cyber laws are a contemporary subject, the degree of technical knowledge required and the class of people it effects may water down its candidacy for the

prized space in the book in the light of legal literacy's connections with injustice and suffering.

The book overall provides informative descriptions, evaluative analysis and often, a qualified advocacy of issues and positions. However, papers like the one on Public Interest Litigation, could have interrogated the criticisms of the exercise of PIL jurisdiction and troublesome trends in the same more adequately. Though the judiciary's role provides us reasons to celebrate, recent trends have thrown up questions of judicial governance and judicial activism which require more than a passing mention.

Irrespective of the criticisms that I have often indulged in, the book is a significant step towards legal literacy which is a fundamental prerequisite for a rule of law society, in the written tradition, which we have opted to become.

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HUMAN RIGHTS AND BASIC NEEDS: THEORY AND PRACTICE.

Editors: Mahendra P. Singh, Helmut Goerlich and Michael von Hauff. Universal Law Publishing Co., Delhi, 2008. Hard Cover, Pages xxviii - 339. Rs. 425.

The moral and conceptual underpinnings of human rights have been the subject of study starting from the time the idea of universal rights, natural or human, were put forward. The extents to which such underpinnings are present in countries with differing religious, cultural and social traditions have been a matter of debate. In recent years we have seen strong opposition concerning the universalism of human rights from those who defend the cultural relativism of rights and who deny the moral right to enforce such universal human rights. A related question has also been whether the ideological basis of human rights discourse is specific to the Judeo-Christian tradition and whether it could be adequately justified in other traditions.¹

The location of the individual in each tradition, the conceptualisation of the state, the nature of the legal system, and the religious, historical, social and economic development of a country are important constituents in constructing this tradition. The Westphalian state as it emerged in Europe was deemed all-powerful in the temporal sphere. The rise of individual rights against such a powerful state is the narrative of the development of modern human rights. The discourse around human rights has had to examine whether this narrative of the emergence of the state and its relationship vis-à-vis individualism and their liberties is a meta-narrative for the course of development of all countries in the world. The book under review seeks to locate the roots of human rights thinking in indigenous, country-specific traditions. Using India, Britain and Germany as representative of diverse traditions, the book uses a comparative approach to understand whether the notion of rights has been central to the legal and moral traditions of these countries. The book is a result of a series of conversations that began at a meeting at the Institute of Advanced Studies, Berlin in 2003.

In a thought-provoking, opening chapter that sets the tone for much of the book, Professor Mahendra P. Singh points to the divergences between the Judeo-Christian tradition and the Indian one. Whereas in the former, God and man are seen as distinct entities, the latter sees the human as a manifestation and even a part of God. The implications of this view as developed by him are that there is no 'other' in the Indian tradition and consequently no demonization of the 'other'. Rather, there is acceptance and accommodation of alternate traditions paving the way for mutual respect and hence for the acceptance of the universality of rights. Another idea taken up in the essay and that has been the site for much debate, is the notion of a single Indian tradition, as a secular idea, free of all religious overtones. Professor Singh is conscious of the implications of locating a tradition solely in terms of its religious pedigree and the distinct possibility of creating

¹ See ARVIND SHARMA, ARE HUMAN RIGHTS WESTERN? A CONTRIBUTION TO THE DIALOGUE OF CIVILIZATIONS (2006).

division across the social fabric. How one could steer such an articulation of a pan-Indian tradition, without the consequent political and social agenda of homogenisation and marginalisation of all other pluralities from the discourse remains problematic and a matter of concern. While this aspect is not addressed explicitly in this essay, Professor Singh is justifiably cautious in holding, “it is unsafe and inadvisable to base the idea of human rights in religion” (p. 6). The manner in which the idea of an Indian tradition has been used by the BJP through the conception of *dharma rajya* in recent years has been addressed by Dr. Michael Schied in a later chapter to argue that such an ideology has lowered the position of the individual and only served to strengthen the executive arm of the state (p. 140-4).

Developing his theme further Professor Singh argues that the caste system as it emerged in India is a deviance from its ethos of acceptance and accommodation, and hence inequality based upon the caste system cannot be used to deny the deep roots of a human rights strand within the Indian tradition. This idea itself is strongly questioned in a later chapter in the book by Professor BB Pande, who asserts that, “A society that holds divine destiny or the past *Karma* responsible for the existential plight of the poor and needy sections would feel neither morally nor socially bound to meet the needs or the basic necessities of the fellow beings.” (p. 159).

Some like Professor Singh, have presented the idea of *dharma*, the *sadharana dharma* (as a counter point to high culture, perhaps?) with its focus upon the obligation or duty incumbent upon every individual, as laying part of the foundation for human rights in India. It could be argued that this duty-centric idea of a correct conduct, one that is focused upon the self and not centred on being judgmental vis-à-vis others, forms the basis for nourishing India’s diversity. Yet how much of the laws as described in the ancient texts were the basis for day-to-day life historically is difficult to surmise. As Robert Lingat has commented, “It would be presumptuous and vain to attempt to draw from it any picture of the law actually in force at any given period.”² If the texts are ‘ideal-type’ situations and the reality drifts away from the normative text, could the fact of hostility and non-respect for those not part of one’s caste or religion be explained away as only a historical distortion and one that the *Bhakti* movement sought to reverse? Many would argue that the caste system is not a distortion but a manifestation of the inherently hierarchical reading of the act of creation, the *Purusha Sukta* of the Rig Veda; and that not merely inequality, but graded inequality, as Dr. Ambedkar described it, is a component part of the caste system. The intersection of caste, religion, gender and region in the enjoyment of human rights and realisation of basic needs is however not built upon later in the book

The essays in the book provide an interesting set of perspectives about which branch of the State is the critical branch for the realisation of human rights, in particular the ones relating to basic needs. This analysis is interesting

² ROBERT LINGAT, *THE CLASSICAL LAW OF INDIA*, 259 (1998).

because it is often assumed that the judiciary has a larger role to play in the enforcement of socio-economic rights since they are often-times not claim-rights in a Hohfeldian sense. The essays also bring out the contrasting constitutional styles and ideas of statehood. The chapter by Professor Mahendra P. Singh makes an important contribution towards developing further the theory of statehood within the Indian tradition. The nature of the state as conceived in Indian political thought, is not conceived as illimitable in its powers (it is certainly not an Austinian state) but circumscribed at all times by its duties towards humans, other living creatures and god. This notion of the State in Indian political thought sees the idea of *dharma* as placing the present day contours of 'limited government' and constitutionalism upon kingship in the classical Indian tradition. The absence of an absolute ruler, he notes, was the reason why the trajectory of growth of individual rights seen in Europe was not to be found in India. This theory of statehood, he argues, was instrumental in India taking the decision to become a democratic republic in the twentieth century with an agenda for social and economic transformation. What remains problematic in this outline however is the linear, non-conflictual presentation of the Indian tradition as also the assertion that historically, including in British times, "society in general, mostly rural, did not come much in touch with the state." (p. 34).

The counter-example to the idea of statehood discussed above is presented in the chapter by Ralf Brinktrine on the British example. He traces the residual character of civil rights in UK constitutional law. The tension between the individual and the State and the struggle to impose duties upon another, including the State, has resulted in the weak position of human rights within the constitutional discourse there. He argues that despite the broadening of judicial interpretation, "it could not change the status of liberties into becoming positive or material rights." (p. 52). Despite the growth of international instruments and Charters which impose obligations upon the state in international law, they do not confer enforceable rights upon individuals within a state that is signatory to such instruments. He thus argues that in the absence of human rights readily flowing from such instruments, there is a need to secure basic needs through domestic legislation. This remains the case even after the Human Rights Act, 1998 came into force since it does not extend to basic human needs and focuses instead upon classical civil rights.

In contrast to the British position, the German experience is instructive. Professor Helmuth Schulze Fielitz points out how the German Basic Law confers positive rights upon an individual to enforce his or her rights. He traces the basis of the right to enforceability as a reaction to the ineffectiveness of human rights under the Nazi regime. He also notes the differences between what he terms the Second and Third Dimensions (Generations) of human rights. He subscribes to the view that civil and political rights require State restraint and no overt action. We must note however, that this view of the first generation rights being 'costless' has been challenged by several human right theorists in recent times to argue that the chasm between the different human rights dimensions need not be seen as acute. Fielitz argues that different human rights need not be pitted one against the

other. But he is of the view that the appropriate arena for enforcing human rights pertaining to economic and social rights needs to be the political one since it is here that questions of policy on allocation of scarce resources are handled.

This theme is further elaborated in the chapter by Professor Helmut Goerlich who links the enjoyment of human rights to the system of governance and posits the need to recognise the right to democratic governance as a human right. He draws attention to the inherent conflict between liberty and equality. He argues that the judiciary is not necessarily the appropriate branch of the State to actualise basic needs since these require budgetary allocations and implementation. In a Dworkin-like sense, he could be said to hold that actualisation of socio-economic rights and basic needs is a matter of ‘matter of policy’ rather than principle. He states that it is the legislative and executive branches that need to initiate legislation for the actualisation of these rights. The contrast of this perspective from the Indian experience is certainly one that is of interest to the comparative scholar. Rolf Künnemann elaborates this approach in concrete terms when he puts forward the need to not merely have a legislative framework but a framework law to operationalise the right to food in India.

The latter part of the book surveys the human rights track record in India and the crying need to deliver basic needs for the vast majority of people. A hard-hitting chapter by Dr. Michael Schied traces the emergence of the concept of fundamental rights during the Indian independence movement. In an analysis of the constitutional text and practice, he demonstrates how the imposing of ‘reasonable restrictions’ in the freedom rights nullified these essential rights. He points out that the Indian constitution did not rule out preventive detention and martial law, and had in fact codified emergency provisions. The political and constitutional development resulted in “the recognition of exceptional law as standard law” (p. 136) and the high rates of preventive detention, emergency powers and security legislation demonstrate that to characterise India as a soft state would be inaccurate. The unfolding of political and constitutional developments has resulted in the “an extension of executive powers and not by a balanced growth of all governmental branches” (p. 135).

The important role played by the judiciary in helping the citizen acquire a modicum of basic needs is brought out in several chapters in the volume. Professor BB Pande details the “ambivalent” judicial journey to create a proto-right to food in India. Professor Parmanand Singh in his essay on public interest litigation perceptively points out that “a judge may talk of right to life as including right to food, education, health, shelter and a horde of social rights without exactly determining who has the duty and how such a duty to provide positive social rights can be enforced.” (p. 322). Both the authors are cautious about the extent that one could expect the judiciary to deliver access to basic needs. Charu Sharma tracks the important contribution made by the Supreme Court in strengthening the right to environment in India and the varieties of remedies it have been imaginatively able to fashion. Chapters by Professors Amitabh Kundu and Michael von Hauff in the book describe the position with respect to basic amenities and informal

employment respectively. These essays are rich in economic analysis and the extent to which deprivation of basic needs impacts the poor.

The volume as a whole is an important contribution to the theorisation of human rights and the need to situate it in Indian political thought, both historical and contemporary, and will hopefully trigger broader debate on the human rights and “Indian values”. It also addresses the contemporary debate on the extent to which socio-economic rights can be enforced. Dealing with deprivation and the need to access human rights, the essays in the book offer a wealth of perspectives that would be welcomed by policy makers, political activists, lawyers, scholars and all those concerned with the future course of developments in India.

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