



## Foggy thinking

Delhi's firecracker ban may not work any better than Punjab's stubble-burning ban did

For the second time since November 2016, the Supreme Court has temporarily banned the sale of firecrackers in the National Capital Region. The idea is to test whether it cuts the deadly pollution levels seen in Delhi during and after Deepavali. In other words, to see whether they can be collapsed from the astronomical 1,000-plus micrograms per cubic metre of fine particulate matter seen in 2016 to merely life-threatening levels of a few hundred micrograms/cu.m that Delhi usually sees in winter. But that is a big if. Given that it came just about 10 days before the festival, it will be tough to impose the ban on an industry that has already produced stocks to order. Nor will it be easy to rein in revellers unconvinced by the court order. More importantly, despite delivering a big blow to the industry and incurring the displeasure of many, it offers too piecemeal a solution, akin to the even-odd licence number scheme of the Delhi government in 2015. North India needs a more holistic solution to the toxic air that residents breathe at the onset of winter. The major sources of pollution in the NCR have been clear enough to drive policy changes. While their relative contributions are still indeterminate, these include construction dust, vehicular pollution, waste burning, generators and crop residue burning in the Indo-Gangetic plains.

To tackle each of these will take decisive and persistent policy actions, not panic-driven and ill-considered bans. Take the 2015 ban on crop-residue burning in Punjab and Haryana for example. Two years later, farmers continue to violate it, because the State governments have still not taken the steps required to solve the underlying problem – the high cost of cleaning the paddy stubble instead of burning it to prepare the field to sow wheat. Though the government has offered subsidies on a machine called Happy Seeder, which doesn't require a stubble-free field to plant wheat, farmers haven't taken to it as burning remains cheaper. Another option is biomass-energy plants that buy paddy straw from farmers for use in generating power. Yet, government incentives for biomass-energy plants haven't been enough to galvanise industry. This, in turn, leaves farmers wary. The only answer is for the Punjab and Haryana governments to move purposefully on the solutions they know will work – just as the only option for the Delhi government is to raise awareness on the impact of firecrackers, while also tackling vehicular pollution, construction dust and other pollution sources. In the absence of these less dramatic, but more feasible solutions, it is unlikely a firecracker sale ban will avert the kind of health emergency that struck Delhi last year.

## Well-deserved 'nudge'

Richard Thaler has been crucial in putting the human at the heart of economics

Economics as a discipline is not infrequently accused of being fairly removed from reality. The activities of societies, countries, corporations and the global macroeconomy itself are meant to fit certain models, at the heart of which are rational agents maximising their utility or welfare. However, economic models are, to varying degrees, abstractions of the real world in which economic agents are all too often not rational. For decades, American economist Richard H. Thaler has studied how decision-making deviates from rational behaviour in the real world and how this can actually be incorporated into economic modelling. His analysis married economics to human psychology and his work has formed the core of the field of behavioural economics. It is for his pioneering contributions to this field that Prof. Thaler was awarded the Economics Nobel on Monday. The Royal Swedish Academy of Sciences cited his analysis of how decision-makers deviate systematically from rational behaviour as conceived in traditional economic theory. For instance, individuals experience bounded rationality due to cognitive limitations. Two, they have social preferences such as caring for others. And three, they sometimes lack self-control. These are situations that every individual can relate to. In explaining the relevance of Prof. Thaler's work and their decision to award him the prize, the committee highlighted its everyday relevance. Consider, for instance, the existence of social preferences. It would be rational for a shop to increase the price of umbrellas on a rainy day but customers would probably think of this as an unfair or exploitative policy if they were aware of the regular price. Their preference for fairness is thus a factor that keeps the shop from increasing the price of umbrellas according to the weather, when rational behaviour in traditional economic theory would warrant an increase. It is through such applications that behavioural economics has made economics as a whole more accessible and familiar. Richard Thaler had, as the Nobel committee put it, made economics more human.

Behavioural economics, like any other, is not free of criticism – in this case, of being a patchwork of cognitive psychology and mathematics, with so many individual exceptions that it neither has the rigour of mathematics nor is free enough of modelling to be pure psychology. There are several psychologists and economists with whom Prof. Thaler has collaborated, including Amos Tversky and the 2002 Economics Nobel winner Daniel Kahneman. In a 2008 book *Nudge*, Prof. Thaler and Cass Sunstein show how behavioural economics can be used in policy-making to influence behaviours. It is here that they introduce the concept of libertarian paternalism, where "choice architects" influence the behaviour of individuals to make their lives "longer, healthier and better" but in a way that gives individuals the freedom to not participate in arrangements that are not to their taste. And with governments slowly incorporating it into policy, behavioural economics has not been restricted to campuses.

# Measuring judicial merit

In making collegium decisions public, the Supreme Court must also reason out its measurement of 'merit'



SHAMNAD BASHEER

Indian judges wield power like no others. For, which other judiciary can boast a free hand in crafting policy on an almost daily basis, setting up booze free zones, mandating theatrical standing for the national anthem and even controlling a circus called cricket. However, what truly sets apart India's higher judiciary is the enviable freedom to select its very own: through that cosy cabal of a clique that we call the "collegium".

This is a freedom ferreted out from a rather tortuous reading of the Constitution some decades ago when the Supreme Court decided that the collegium would predominate over judicial appointments, to the near exclusion of all other stakeholders. Since then the judiciary has zealously guarded this self-anointed power, and even struck down a parliamentary enactment (National Judicial Appointments Commission Act) that sought to substitute the collegium with a structure that might have tilted the balance in favour of the executive.

### A controversial collegium

Little wonder then that the collegium continues to court one controversy after another – the latest being the unfortunate transfer of Justice Jayant Patel, just as he was on the verge of taking over as the Chief Justice of the Karnataka High Court. Some attribute this "punishment" transfer to his role in the Ishrat Jahan case, where he ordered a CBI inquiry into an alleged "encounter" killing.

All of this forces us to ask that eternally enigmatic question: how do we judge our judges? For this, we must have some measurable metric of merit, and a transparent

one at that. One that is well reasoned and turns (in turn) on how well the judge in question "reasons". In the Justice Patel case, one of the key demands by a local bar association which protested this seemingly arbitrary transfer was: pray, what are the "reasons"? Indeed, "reasoning" constitutes the chief raison d'être for the public legitimacy of the judiciary. As a famous U.S. judge once noted, "The political branches of government claim legitimacy by election, judges by reason."

I was therefore struck when a recently appointed judge at the Delhi High Court publicly pronounced at a conference that judges need not give "reasons" for issuing intellectual property (IP) injunctions, since they know best and decide with "conviction". This was a bit ironic, since just a few months prior to this conference, a former judge of the Rajasthan High Court had gone on record with his strong "conviction" that peacocks propagate their progeny not through sex, but through tears.

Clearly there is much to be said for conviction. And to lowly "reason", we must therefore return. Fortunately, the collegium has now decided to make its "reasons" public – at least, some of it. Last Friday, the apex court released resolutions pertaining to

the selection of judges for the Kerala and Tamil Nadu High Courts.

Given that the collegium has operated in a shroud of secrecy for more than two decades now, this is nothing short of revolutionary. Unfortunately, this path-breaking development for judicial transparency falls a bit short on some counts. For one, it does not detail the "metric" or methodology for measuring judicial merit. Rather, while assessing the quality of judgments penned by the candidate as a trial court judge, it simply states: "As regards Smt. T. Krishnavalli... Judgment Committee has awarded her Judgments as 'Good/Average'." And similarly for "Shri R. Pongiapam".

We are not told as to who or what this "Judgment" committee is. Or which "judgments" of the said candidates were being considered? Or even what counted as a "good" judgment, as opposed to an "average" one. Most problematically though, we're left wondering how "average" judgment writing skills made the cut to one of the highest constitutional posts?

### Legal legitimacy

If we're serious about judicial merit, we have to be more rigorous in our measurement, particularly on factors such as the quality of the "judgment", i.e. how well the

judge writes and reasons out her decision.

To this end, we must begin with legal clarity or "legibility". Access to law means nothing if it takes specialised legal genius to determine the essence of a ruling. Given the verbosity of some decisions, it is well-nigh impossible to locate the "ratio" of a decision (legal terminology for the operative part of a judgment). Illustratively, the Ayodhya verdict ran into more than 1,000 pages, guaranteeing that not many people in the entire country would have read it.

One might be forgiven for thinking that this volubility encodes a great deal of insightful judicial analysis. Hardly. As Justice Ruma Pal, a former judge of Supreme Court, once lamented: "Many judgments are in fact mere compendia or digests of decisions on a particular issue with very little original reasoning in support of the conclusion."

Add to this frame the rather tortuous language and purple prose deployed by those that think themselves to be the next Justice Krishna Iyer in the making. And one can well understand why, when other jurisdictions are busy engaging in a critical analysis of the law, we're still stuck with: what precisely is the law? In March this year, the Supreme Court castigated a High Court judge for rendering a decision in language so dense that it bordered on the mystical. But a quick search revealed that just a week ago, the very same judge issued another decision in similarly spirited language.

If we are serious about judicial merit, we have to do better than this. Granted, the strength of judgment writing alone cannot be the sole criterion, and one has to also assess other attributes such as integrity, collegiality, work ethic, fairness, independence, etc. But these are not as readily amenable to empirical measurement as is "judicial reasoning".

The collegium resolutions do speak to some of these more subjective virtues, but again in a rather

rushed and inscrutable manner. Sample this statement about a candidate's supposed integrity (or lack of it): "As regards Shri A. Zakir Hussain (mentioned at Sl. No. 3 above), keeping in view the material on record, including the report of Intelligence Bureau, he is not found suitable for elevation to the High Court Bench."

And similarly, for a certain "Dr K Arul".

Just three lines disposing of Mr. Hussain and Dr. Arul. No mention of the quality of their judgments, what colleagues had to say about their collegiality, etc. But simply some undisclosed "material on record" and a secret IB report. The very same IB that allegedly ambushed one of our finest lawyers, Gopal Subramaniam, and thwarted his chances of travelling to the apex court.

In order to uphold constitutional values such as judicial independence, our judges were compelled to arrogate to themselves the power to pick their very own. At the very least, they must ensure that those that are picked are truly meritorious: and certainly above "average".

### Work in progress

The latest move by the collegium marks a monumental milestone in our judicial history. While it needs to be applauded with all the vigour we have, we also have to be mindful that this is only the beginning, and much more remains to be done. To begin with, the collegium needs to make public its methodology for measuring "merit". Institutional alternatives to the collegium make no sense, unless one first works out an optimal metric for measuring merit.

Quoting from the superhero series *Spiderman*, a Supreme Court judge once said: "With great power comes great responsibility." And "accountability", if I might add.

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# Is 'deep sea fishing' the silver bullet?

The Palk Bay conflict requires a multi-dimensional approach



AJIT MENON & JOHNNY STEPHEN

On September 8, the Tamil Nadu Fisheries University (TNFU) organised a one-day workshop in Chennai on deep sea fishing, the aim being to promote deep sea fishing as an alternative to trawling in the Palk Bay. Proponents of deep sea fishing argue that the lure of better catch in far-off seas and avoiding the risks of cross-border fishing in Sri Lankan waters will ensure its success. But is it as simple as that?

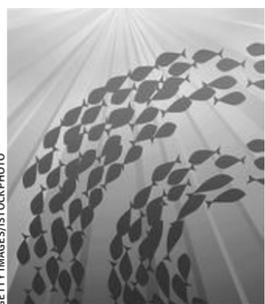
Deep sea fishing has always been an integral part of the country's Blue Revolution vision to exploit fishing resources to the maximum within the 200 nautical mile exclusive economic zone (EEZ). The present plan in the Palk Bay is to extract 2,000 trawlers from the bay and replace them with deep sea vessels that fish in the Bay of Bengal and Gulf of Mannar. The time period for this transition is three years (2017-2020), with 500 boats to be replaced in the first year alone. The Central and Tamil Nadu governments have committed ₹800 crore and ₹320 crore, respectively, to the plan. Each vessel will be fitted for tuna long-lining and/or gillnetting, and have a unit

cost of ₹80 lakh. Of this unit cost, trawl owners have to only pay ₹8 lakh upfront and ₹16 lakh through a loan from the Pandyan Grama Bank. The balance ₹56 lakh will be a subsidy shared by the State and Central governments.

### Complex issue

The Palk Bay fishing conflict has figured prominently in high-level meetings between India and Sri Lanka. The origins of the conflict are complex and it is difficult to resolve. The main issue is what to do with the oversized fleet of Tamil Nadu trawlers that fish regularly in Sri Lankan waters, often damaging the boats and gear of small-scale Tamil fishers from the Northern Province of Sri Lanka. The Sri Lankan government has not only passed a legislation banning trawling but its navy has also been vigilantly patrolling the International Maritime Boundary Line, "capturing" Indian trawl boats and fishers.

The plan is to remove as many trawl vessels from the Palk Bay as possible. Prospective beneficiaries of the deep sea fishing project should possess a registered, seaworthy trawl vessel of over 12m in length that must be scrapped or disposed of outside the Palk Bay. The disposed vessel should also have been physically verified. Equally important, new replaced tuna long liner boats cannot trawl or operate in the Palk Bay. The government is now creating a new deep sea fishing harbour at



Mookaiyur, located just south of the Palk Bay in the Gulf of Mannar, where many of these vessels are likely to be berthed. Priority is to be given to owners who have had their boats apprehended or damaged in Sri Lanka. Beneficiaries are not allowed to sell their boats within five years of obtaining them though it is unclear how that will be enforced.

### A slippery slope

Administrators and scientists alike have raised questions. First, are there sufficient stocks of fish in the adjacent waters of the Bay of Bengal and Gulf of Mannar to make deep sea fishing economically viable for a large and new fleet of vessels? And do Palk Bay trawl fishers, who are used to one-day fishing, have sufficient skills and an interest for deep sea fishing?

The Indian government report of the Working Group for Revali-

ating the Potential of Fishery Resources in the Indian EEZ suggests that oceanic regions have a maximum potential yield of 208,000 tonnes. Importantly, however, while the report highlights that oceanic stocks are not fully exploited, it does not state where the remaining oceanic stocks in the Indian Ocean exist nor whether this might be in the Bay of Bengal or the Gulf of Mannar. Moreover, the report warns that oceanic resources are transboundary and hence are targeted by a number of other countries too.

In fairness, the authorities have taken note of training needs and are setting up special facilities in collaboration with the TNFU and the Central Institute of Fisheries Nautical and Engineering Training. Applicant trawl owners also expect to employ a few specialised workers from the operational deep sea fishing fleet of Thoothoor, at least for the initial period of operation. The question of what will become of trawl crews remains largely unaddressed, potentially jeopardising the local economy of the region.

For trawl fishers, the main concern is whether deep sea fishing is a sound investment or not. Some fishermen have expressed doubts about the high operational costs of deep sea fishing and the loan repayment schedule imposed by the Pandyan Grama Bank. Therefore, they have been pressurising the government to minimise the ap-

plicants' financial contribution.

### Monitoring is important

Whether deep sea fishing will reduce the Palk Bay fishing conflict depends entirely on the downsizing of the existing trawl fleet. On paper, the necessary safeguards are in place. But rules are not always followed. The government will have to ensure that remaining vessels are not upgraded in size or engine horsepower, as many trawl owners in the Palk Bay have been increasing their engine capacities surreptitiously, well beyond legal limits.

Equally of concern is the Tamil Nadu Fisheries Department's capacity to monitor, control and carry out surveillance (MCS) of the process of decommissioning. Regulations have always existed but have rarely been implemented judiciously. The deep sea vision, moreover, is monomaniacal with no other solutions to trawling offered. The Palk Bay conflict requires a multi-dimensional approach. Various other solutions such as buy-backs, alternative livelihoods and skill development need to be rolled out with a simultaneous focus on a strong MCS system. Only then can this intransigent fishing conflict be finally resolved.

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## LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

### Vadnagar visit

Narendra Modi has naturally felt nostalgic on his first visit to his home town after becoming the Prime Minister, which also explains his philosophical utterance ("I drink poison for nation", October 9). But why should anybody in public service feel so emotional? Mr. Modi, after launching various schemes such as "Make in India", has to only closely monitor their implementation and plan steps with his cabinet colleagues and the administrative set-up to overcome the hardships faced by people. The real satisfaction of people and the development of the nation in all spheres would make him feel that he is drinking nectar.

M. SUBBIAH,  
Chennai

### Administrative reforms

The writer's suggestions ("Fixing the steel frame", October 10) are worth looking into, but he seems to have ignored how civil servants bend backwards before elected representatives to curry favour with them. There are numerous examples of how they do this in: allotment of housing sites and study leave to go abroad, ignoring public interest. Their transfers are often whimsical even before they can find their feet in their respective portfolios. However there are some who are straightforward and known for their impeccable integrity who are boosted by their political bosses. In the end, civil servants who have qualified in the prestigious civil service examination and trained at Mussoorie

must be sincere and care about their self-esteem.

NAGRATHNA DWARAKANATH,  
Bengaluru

The writer seems to be advocating a cluster-based development of manpower in the IAS in order to gain administrative efficiency. But this kind of specialised manpower is already present at the directorate level in the ministries concerned. These directorates are part of the administrative hierarchy of India and staffed with well qualified people, many of them from the IITs. He has compared our system with that of the U.K.'s but we have to remember that the educational qualifications of an officer's political masters are often lower than of his counterparts in the U.K. Using the example

of the defence forces is inappropriate as defence staff have very little public interface to deal with. Defence officers do not deal with politicians. Varied experience no doubt increases the capability of officers to deal with various interdisciplinary problems, but in the cluster-based approach, there may be some inefficiency in certain sectors.

SUSHOBHAN BISWAS,  
Kolkata

### End of the track

To my knowledge, as a retired Railway official, what the Railway Minister has meant in his comments about ending the "VIP culture" in the Railways is to end the practice of having "bungalow peons" and "personal peons", a reminder of the British legacy where senior British

railway officers used people to cater to their personal needs ("Railways move to end decades-old VIP culture", October 9). Undoubtedly, the number of "staff" in this category should be about a lakh of people or about 10% of the staff strength in the Indian Railways. They still accompany senior officers on their travels and are generally used to look after the officer's personal belongings. In officers' bungalows, they are asked

to clean floors, wash clothes, take care of children and guard the premises. They are hardly seen in offices.

Now that the Railway Minister has made clear his intention to stop this, it will be bitter news for those in the Indian Railways who enjoyed life all this while by wasting public money in this undesirable manner.

SUBRAMANIAN NAGARAJAN,  
Chennai

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### CORRECTIONS & CLARIFICATIONS:

In the news item headlined "I swallowed poison to serve the nation" (Oct. 9, 2017), it was wrongly stated that the September 27, 2017 issue of *Frontline* carried a story on the Vadnagar excavation. The correct date is October 13, 2017. The headline of the *Frontline* story is "Vadnagar's Wall of Fame" and not "The Wall of Vadnagar."

It is the policy of The Hindu to correct significant errors as soon as possible. Please specify the edition (place of publication), date and page. The Readers' Editor's office can be contacted by Telephone: +91-44-28418297/28576300 (11 a.m. to 5 p.m., Monday to Friday); Fax: +91-44-28552963; E-mail: readerseditor@thehindu.co.in; Mail: Readers' Editor, The Hindu, Kasturi Buildings, 859 & 860 Anna Salai, Chennai 600 002, India. All communication must carry the full postal address and telephone number. No personal visits. The Terms of Reference for the Readers' Editor are on www.thehindu.com