

TRANSCRIPT & NOTES:

The Need for Empathy: Understanding India's COVID-19 Lockdown (with Kalpana Kannabiran)

Gauri Pillai (0:01): This episode of RightsUp was recorded on 18th of April 2020. Government responses to the COVID-19 pandemic are changing daily and so this interview is of its time. To learn more about the developments in India's response to the pandemic since this episode was recorded, please see the accompanying Show Notes.

Welcome to RightsUp, a podcast from the Oxford Human Rights Hub. We're doing a three-part podcast series on the COVID-19 pandemic. Today's episode focuses on the response of the Indian Government to the pandemic. It looks particularly at the human rights implications for the vulnerable and marginalised in India.

I'm Gauri Pillai and today I'm speaking to Professor Kalpana Kannabiran, who's a professor of sociology and the Director of the Council for Social Development Hyderabad.¹ She has worked extensively on understanding the social foundations of non-discrimination, structural violence, and questions of constitutionalism and social justice in India, with a specific focus on gender, sexual minorities, caste, 'adivasi'² and indigenous rights, and disability rights.

The COVID-19 pandemic has affected all of us in many ways. States around the world have imposed restrictions of varying levels of stringency to control the spread of the virus. The Central Government in India introduced a nationwide 21-day lockdown on 24th of March 2020. The lockdown saw an almost complete restriction on the movement of people and the closure of all establishments except those providing essential services. India's lockdown has been described as the world's biggest coronavirus lockdown and the harshest coronavirus containment measure in the world. The lockdown was declared with a four-hour notice period. It has been extensively reported that the impact of the lockdown has fallen most heavily on those most vulnerable.

Professor Kannabiran, thank you for joining us today.

Professor Kannabiran (2:34): Thank you for inviting me to have this conversation, Gauri.

Gauri Pillai (2:37): Absolutely. So my first question to you is about the very framing of the discourse around the pandemic. In your opinion, why is it important to talk about rights when talking about the COVID-19 pandemic, which has otherwise primarily been seen as a public health crisis? Do you think there is a tension here between the rights of individuals, and the interests of the State in the preservation of public health?

Professor Kannabiran (3:03): To open up the framing of the discourse, I would like to begin with Prime Minister Narendra Modi's address to the nation on the 14th of April 2020, when the lockdown was extended, which opened with the following words, and I quote: *'The Constitution of India speaks of "We the people of India". Who are the people of India? The demonstration of our collective strength*

¹ Council for Social Development. <http://csdindia.org>

² 'Adivasi' is a collective name used for the many indigenous peoples of India, deriving from the Hindi word 'adi', meaning 'of earliest times' or 'from the beginning', and 'vasi', meaning inhabitant or resident. For further overview, see 'Adivasis', *Minority Rights Group International* <https://minorityrights.org/minorities/adivasis-2/>

on Babasaheb Ambedkar's birthday is our best tribute to him' (unquote).³ This is the first time he was invoking the Constitution in the context of corona, and importantly the invocation was on Ambedkar Jayanti.⁴ And this serves as a springboard for us to examine rights, State responsibility, citizenship, and the Constitution in pandemic times.

The foregrounding of the opening lines of the Preamble, '*We the people of India*', frames the core concern for us in terms of citizenship rights and State responsibility, not State interests, and I do wish to mark the difference between these two. COVID-19 and the tumult it has brought in its wake needs to be seen through the lens of the constitutional commons, which belongs equally to all. This means, as a starting premise, that the most vulnerable and the most precarious have a prerogative over State resources and State protection on every count. For after all, when we speak about substantive equality, is this not what we talk about? So as a first step, what we need to do is to cut through the universalising discourse around the COVID-19 pandemic, and to recognise that it spreads its tentacles unequally across the country. The lives of the poor — rural, urban, forest-dwelling, itinerant peoples — matter. The lives of migrant workers matter. The lives of the homeless matter. The lives of wage workers matter. The lives of persons with disabilities matter. Muslim lives matter. Dalit lives matter.⁵ Adivasi lives matter. The effects of the public health emergency that COVID presents aggravates an existing and ongoing emergency that these communities have had to manoeuvre on a daily basis for decades. The lives of medical and health professionals and care workers engaged in testing, treatment, and care matter. They have been rendered precarious by the systematic dismantling of public health systems in the country and the consequent ill-preparedness of governments, lacking in capacity and capability, to handle a crisis in this scale. And I really think that the genesis of the problem that we are facing lies here.

Gauri Pillai (6:01): Thank you for framing the debate in those terms. Do you think we should also locate the debate against the larger socio-political context in India, beyond the narrower confines of the pandemic itself?

Professor Kannabiran (6:14): Within this larger scenario, I think we also need when we— especially when we talk about rights and State responsibility, we also need to make a specific mention of Kashmir. We can't forget that when the COVID-19 lockdown happened, Kashmir was already reeling under a nine-month lockdown post-abrogation of Article 370.⁶ When I made a trip to Kashmir as part of an all-women team in early February, what we found was that the lockdown post-abrogation had completely decimated jobs, incomes, there was a distress sale of land and assets, and the entire medical system — which was at one time robust — was in a shambles because of no internet connectivity.⁷ So on top of this, 'What does the lockdown consequent on COVID-19 do to Kashmir?' is something that really merits a specific, you know, a specific focus.⁸

³ Babasaheb Ambedkar (full name Bhimrao Ramji Ambedkar) was a Dalit leader and a key architect of the Indian Constitution. For further details, see 'Bhimrao Ramji Ambedkar' *Britannica* <https://www.britannica.com/biography/Bhimrao-Ramji-Ambedkar>

⁴ Statement from Professor Kannabiran: 'I will for the moment ignore his countervailing references to 'saptapadi' and 'agnipariksha' at the conclusion of this address and his reference to self-isolation as inscribing a 'lakshman rekha' in his previous address although they fence in the reference to the Constitution and Preamble with patriarchal Brahmanical rhetoric.'

⁵ In legal and constitutional terms, Dalits are known in India as Scheduled Castes. For further details, see 'Dalits', *Minority Rights Group International* <https://minorityrights.org/minorities/dalits/>. See also Aishwarya Singh and Meenakshi Ramkumar, 'Failure of the Indian Supreme Court to protect the rights of Dalits' *Oxford Human Rights Hub* (30 September 2019) <https://ohrh.law.ox.ac.uk/failure-of-the-indian-supreme-court-to-protect-the-rights-of-dalits/>

⁶ See also Pranay Bhattacharya, 'Human Rights and Internet Shut-Downs in Jammu and Kashmir' *Oxford Human Rights Hub* (6 September 2019) <https://ohrh.law.ox.ac.uk/human-rights-and-internet-shut-downs-in-jammu-kashmir/>

⁷ Kalpana Kannabiran et.al. *Interrogating the 'Normal' in Kashmir*. Report of a visit to the valley 31 January-4 February, 2020. <https://indianculturalforum.in/2020/03/04/interrogating-the-normal-in-kashmir/>

⁸ See generally, Ayush Verma Pratik Kumar, 'Jammu and Kashmir Public Safety Act, 1978: India's use of preventive detention violates human rights' *Oxford Human Rights Hub* (17 March 2020) <https://ohrh.law.ox.ac.uk/jammu-and-kashmir-public-safety-act-1978-indias-use-of-preventive-detention-violates-human-rights/>

The lockdown also calls up other kinds of vulnerabilities and other kinds of vindictiveness that derogates from rights, and I refer specifically, for instance, to the fact that GN Saibaba⁹ is accused under the Unlawful Activities Prevention Act,¹⁰ and he is in prison with multiple disabilities, and we are talking about releasing prisoners from prisons during the pandemic.¹¹ We have people like Anand Teltumbde¹² and Gautam Navlakha¹³ who have been taken into custody while the pandemic lockdown is on. And in fact, the NIA [National Investigation Agency] which sought the permission of the court on the 14th of April — the day the Prime Minister addressed the country — and I quote: *‘to use handcuffs on Anand Teltumbde to avoid physical contact with the accused amidst COVID-19 pandemic and the spread of novel coronavirus’* (unquote).¹⁴ So you can see that this, you know, the ripples of the rights derogations that are apparently consequent on the pandemic, really have connections, back and forth, that spread far out and we need to, you know, somewhere account therefore, for the larger context, the larger political and social context, within which the pandemic lockdown has happened.

Gauri Pillai (9:06): In your response, you specifically highlighted the rights violations that have been occurring in Kashmir, and the arrest of human rights defenders like Gautam Navlakha and Anand Teltumbde. For our global audience, could you perhaps talk a bit more about the context surrounding some of these issues?

Professor Kannabiran (9:22): On Kashmir, Article 370 of the Constitution — which provides autonomy to Kashmir and recognises autonomy in Kashmir — was abrogated on the 5th of August 2019. And the State of Jammu and Kashmir was split-up into two union territories: Ladakh, and Jammu and Kashmir. And consequent on the abrogation of [Article] 370, you had several of the mainstream political leaders in Kashmir taken into custody under the draconian Public Safety Act [PSA]. But it wasn't only the leaders who were taken into custody; there was a large section of youth, particularly, and some very senior lawyers, who were also placed under detention under the PSA, not only in jails in Kashmir, but also in prisons in Delhi and in Uttar Pradesh. And the lockdown in Kashmir bolstered the military occupation in the region, and was accompanied by a shutdown of internet.¹⁵ Dr GN Saibaba was of course arrested earlier. And Gautam Navlakha, and Professor Anand Teltumbde were arrested on the 14th of April under the Unlawful Activities (Prevention) Act, on charges of plotting to assassinate the Prime Minister and collaborating in Maoist activities. And the argument— our argument, as human rights defenders, has been that these are completely unsubstantiated charges, and that the FIR [First Information Report] should be quashed because there are several discrepancies in the FIRs. But despite that, both Gautam Navlakha and Anand Teltumbde were taken into custody on the 14th of April. So this is the kind of context in which I raised these issues.

Gauri Pillai (11:47): Thank you for that. So now to just, sort of, specifically focus on the lockdown. Something that you mentioned in your previous response was that we should take into account the fact that the prerogative for resources should be for the most vulnerable and the most precarious in India, and as I said earlier, the lockdown has been criticised for having an especially adverse impact

⁹ Indian human rights defender. See, for example, 'India: UN experts call for release of human rights defender Saibaba' (30 April 2020) *UN Office of the High Commissioner for Human Rights* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24534&LangID=E>

¹⁰ For discussion on the Unlawful Activities (Prevention) Amendment Bill 2019, see Rongeeet Poddar, 'Constitutionality of India's Unlawful Activities (Prevention) Amendment Bill, 2019: India's McCarthyism Moment', *Oxford Human Rights Hub* (14 August 2019) <https://ohrh.law.ox.ac.uk/constitutionality-of-indias-unlawful-activities-prevention-amendment-bill-2019-indias-mccarthyism-moment/>

¹¹ See also Aashna Jain, 'Have prisons in India become ticking time bombs amidst COVID-19 outbreak?' *Oxford Human Rights Hub* (27 April 2020) <https://ohrh.law.ox.ac.uk/have-prisons-in-india-become-ticking-time-bombs-amidst-covid-19-outbreak/>

¹² Indian scholar and civil rights activist. See 'India arrests activist Anand Teltumbde over 2018 caste violence' *Al Jazeera* (14 April 2020) <https://www.aljazeera.com/news/2020/04/india-arrests-activist-anand-teltumbde-2018-dalit-event-200414112452191.html>

¹³ Indian journalist and human rights defender. See 'India: Crackdown on dissent continues during COVID-19' *Amnesty International* (20 April 2020) <https://www.amnesty.org/en/documents/asa20/2174/2020/en/>

¹⁴ *State (NIA) v. Anand Teltumbde*, Spl Case No. 414/2020 (NIA Case No. RC. 01/2020/NIA/MUM). Remand Application.

¹⁵ See also Pranay Bhattacharya, 'Human Rights and Internet Shut-Downs in Jammu and Kashmir' *Oxford Human Rights Hub* (6 September 2019) <https://ohrh.law.ox.ac.uk/human-rights-and-internet-shut-downs-in-jammu-kashmir/>

on this very set of people. So my question is, is there something specific about the socio- economic context in India which has resulted in this kind of an impact flowing from a lockdown?

Professor Kannabiran (12:19): What has happened as a result of this lockdown is that the rights of the working poor, the non-working poor, and the vulnerable have been grossly violated in the very manner in which the lockdown was first announced, with four-hours notice, and then extended with no notice, and in the abject neglect with which they were treated by the State in the first few days of the lockdown. And we saw several images of this in the media. We have particularly searing accounts and details from Delhi, both from communities that were affected by the recent violence in northeast Delhi in February — when Muslims especially were targeted for mass violence — and also from the exodus of migrant workers.

Just to look a little more closely at what this vulnerability really means, I would point towards the work— a recent article by economist KP Kannan, who maps the worker population for us in the light of the implications of the COVID-19 lockdown for the working poor. His estimates of 2018 show us that out of 461 million workers, 92 million are designated as belonging to the formal sector. All the rest belong to the informal sector. Even of these 92 million in the formal sector, 49 million are informal workers in the formal sector; that is, contract workers, temporary staff etc. Which means out of 461 million in 2018, just about 10 per cent belong to the formal sector.¹⁶ So we are talking about— when we're talking about the dispossession of the working poor, and the vulnerability of the working poor, we are really talking of very large numbers.

So when you say, lockdown and stay indoors, and I will, you know, draw a *Lakshmana Rekha*,¹⁷ we're talking about a people who have no choice but to stay outdoors, to use Sanchez's words, and to live 10 to a room, and to be mobile as a livelihood strategy. Workers in agriculture, artisanry, street-vending and construction comprise the largest section of the workforce, and this is entirely informal. It's no accident or coincidence that these workers belong to the most vulnerable sections — Dalit, Muslim, Adivasi for the most part. We also know from other work — for instance, the work done by Ritajyoti Bandyopadhyay — that 40 per cent of the urban population lives in informal settlements, in urban areas, so this is what he calls a '*re-ruralising*' of the city, while remaining invisible in the city. Urban migrants, to refer to other work in this area, are never completely cut off from their roots in their villages. Tariq Thachil, for instance, calls it '*circularity*', where several times a year they return to the villages.¹⁸ So, the circular movement between village and city is something that they depend on, and it is something that keeps them going, because the city is never home, it is the village that is home. So when you suddenly lockdown — work sites get shutdown, landlords demand payment of rent, and you have no wages to pay the rent with — you don't just stay put. The natural impulse is for you to go back home, so that you can actually survive. But there's no way of going back home because there is a complete transport shutdown. And while we had evacuation of people who were abroad, and you had evacuation of foreigners from India, for the working poor, there were no arrangements made. So vulnerability is also exacerbated by a very skewed concern and a very skewed approach to redress that is actually weighted against the working poor.

Gauri Pillai (17:08): So I'd like to pick up now on something that you said earlier, about how we need to cut through the universalising discourse around the poor and the vulnerable, and I think we agree that people in poverty are not a homogenous class of persons. So, has the lockdown exacerbated the

¹⁶ KP Kannan, 2020. 'COVID-19 Lockdown: Protecting the Poor Means Keeping the Indian Economy Afloat.' *Economic and Political Weekly-Engage*, 3 April 2020. <https://www.epw.in/engage/article/covid-19-lockdown-protecting-poor-means-keeping-indian-economy-afloat>

¹⁷ A term derived from the Hindu epic *Ramayana*, it refers to a strict convention or a rule, never to be broken. It has been criticised as a '*patriarchal, Brahmanical convention of protection*'. See ' "Don't do politics". But why not?' *Heraldo* (21 April 2020) [https://www.heraldo.in/Edit/Opinions/"Don't-do-politics"-But-why-not-/159593](https://www.heraldo.in/Edit/Opinions/)

¹⁸ 'An Expert Explains: "India's coronavirus lockdown will spotlight migrants" role in cities' *The Indian Express* (3 April 2020) <https://indianexpress.com/article/explained/migrant-labour-role-india-lockdown-tariq-thachil-6343869/>

disadvantage faced by people in poverty with intersecting identities, whether it be religious minorities, women, children?

Professor Kannabiran (17:33): Yes, certainly. And I think the, you know, the focus has to be on intersecting vulnerabilities. The fact is that the largest number of people who have been affected are Muslim, Dalit, Adivasi, for the most part. Among them, particularly among Adivasi and Dalit communities, women, women migrant workers, are a very large segment. But what has in fact come up really strongly after the lockdown is the targeting of Muslims, which has been extremely troubling. And this targeting of Muslims, in so many different ways, is cause for concern. There are fake news reports and incitement by a stridently Islamophobic media that use terms like '*corona-jihad*', '*corona-terrorism*', '*Islamic insurrection*', '*corona-bombs*' in shows on COVID-19.¹⁹ And the Supreme Court refused to intervene to censure these news agencies, saying that he did not wish to '*gag the press*', the term that it used was '*gag the press*'. And we know that this is not, you know, this is not a free press. This is— the terms and these programmes are actually, in fact, an incitement to violence.

Gauri Pillai (19:31): From what you've said so far it is becoming increasingly clear that this pandemic cannot be viewed as an isolated health crisis, and in fact, it sort of maps on to existing fault lines of inequality in Indian society. It has been argued that the lockdown violates the rights of individuals under Article 21 of the Constitution of India,²⁰ which guarantees them the right to life and personal liberty, including their right to livelihood. It's also been argued that the lockdown violates their rights to equality and non-discrimination because it disproportionately impacts certain groups of people. In this light, do you think that the lockdown meets the standards of the proportionality test, which requires that there be a balance between the extent to which the right is infringed and the object sought to be achieved by the State?

Professor Kannabiran (20:22): What does not make the proportionality test is the means by which it was affected. It was an arbitrary decision. It was not transparent and totally lacking in empathy. There is no justice in saying, at 8pm, that four hours hence there will be a nationwide curfew and that it will last for three weeks. The positive measures taken with the well-being of the largest section of people ought to have been spelt out to the smallest detail. There was no dearth of time, no dearth of resources or access to all forms of media, most of which are by now totally controlled by the Government. So the proportionality test for me rests both in the means — that is, the process — and the end — the measure. We can only address the question of the proportionality of the measure when we have settled the question of the process, and we have a repeat of the process on 14th April, despite the extreme hardship imposed the first time. So, was the lockdown necessary? Let's assume it was necessary. Does it meet the proportionality test? No, it doesn't in its modalities.

Gauri Pillai (21:40): Right, so do you think, when you talk about modality, something that we should consider in our analysis of proportionality is the kind of mitigation measures that have been put in place to mitigate the impact of the lockdown on the poor — and the Central and state Governments have put in place such relief package? So can you maybe comment on some of the strengths and shortcomings of these relief packages when we look at it through a rights lens?

Professor Kannabiran (22:07): After the lockdown was announced, practically all state Governments and the Central Government put together, not just relief packages, but also administrative measures to alleviate distress, to provide support, and so on. And I looked at close to 500 GOs [Government

¹⁹ See especially the petition of *Jamiat Ulama-i-Hind & Anr. Vs. Union of India*. <https://www.livelaw.in/top-stories/cannot-gag-the-press-cji-on-plea-seeking-action-against-media-houses-for-communalising-coronavirus-pandemic-155177?infinitescroll=1> Accessed on 17 April 2020.

²⁰ For full text of the Constitution of India, see <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>

Orders] and notifications spread across all the states and the Central Government.²¹ There are some common elements across all the states, but then there are specific— there are certain specific measures and modalities that stand out.

And I think both in terms of recognising the centrality of the Directive Principles, Part Four of the Constitution and in terms of putting that out, rolling that out in terms of State action, the Kerala Government is a frontrunner. As early as 25th March, we have a GO passed by the— a Government Order passed by the Kerala Government, which is an extremely detailed order that sets out a range of guidelines on food support, empowering local self-governments' provision of uninterrupted essential medical services to persons suffering, for instance, from cancer, diabetes, heart disease... You have specific income and food support for transgender persons, and shelters for them.

But in terms of, you know, what kind of State actions, not limited to relief, that might— that one needs to think about... Practically every state has guidelines on the release on parole of prisoners in order to decongest prisons. Now, in the State of Jammu and Kashmir, after August 5th, a number of people were detained, initially in Central Jail Srinagar, and then transported to Agra and Ambedkar Nagar in Delhi. Now, these prisoners have been released — the Supreme Court order very clearly says that prisoners should be provided decongestant transportation back home in the lockdown period. But now I know of more than a couple of instances of families of persons who have been released in Agra who were required to take passes and hire private taxis that cost up to 30,000 Rupees to go all the way to Agra and fetch the prisoners back. These prisoners were taken to Agra by air by the police.

Gauri Pillai (25:17): I also have a question about the legislative framework through which the Central and state Governments have imposed this kind of lockdown and the other measures surrounding the crisis. From what I understand, the lockdown was declared by the Central Government under the National Disaster Management Act of 2005, and several states have invoked the Epidemics Disease Act of 1897 to take various measures. And both these legislative frameworks seem to really discuss the nature of powers given to a state to manage a disaster or control an epidemic. So, in your opinion, how adequate are these frameworks when assessed from a human rights perspective?

Professor Kannabiran (25:55): In February 2017, the Government of India circulated a draft of the *Public Health (Prevention, Control and Management of Epidemics, Bioterrorism and Disasters) Bill 2017*. This was a Bill that was meant to repeal the Epidemic Diseases Act of 1897. There is much work on the Epidemic Diseases Act, especially its workings in colonial India, and there is no doubt that it is an extremely draconian legislation which needs to be repealed. However, any Act which replaces it must be firmly located within the constitutional framework and it must integrate human rights and public health concerns seamlessly.

On this count, the Public Health Bill falls short, because it fully reproduces the authoritarian writ of the State. My point in even alluding to the alternatives to the Epidemic Disease Act is to underscore the absence of an alternative to the Act, so it is a default setting that goes against the public interest and the common good.

Now, that said, it is still possible for state governments to frame regulations under the Act — we have several governments that have done that, in fact, specific to COVID — that integrates human rights concerns in the implementation of the Act. In fact, that is really the only route before us today. Well, although some states have framed regulations, the test lies in the integration of human rights standards. The brevity of the Epidemic Diseases Act — four sections in all — can be seen as a boon by what I would like to call an insurgent administration. It leaves the field open for state governments to

²¹ Statement from Professor Kannabiran: 400 of these GOs were accessed from <https://covid-india.in> (viewed on 17 April and 18 April 2020).

devise their own modalities and designate the requisite resources — in terms of finance, personnel and institutional mechanisms — because nothing is prescribed under the Act. It is possible, therefore, for a state, through administrative and executive empathy, to write the Constitution into its implementation, taking on board the concerns voiced by epidemiologists, public health professionals, and human rights advocates in the context of the 2017 Bill.

The second legislation that has been invoked by the centre is the National Disaster Management Act 2005, which really occupies a very different administrative and legislative space. Simply put, an epidemic or pandemic is not a disaster and cannot be treated as one. By that token, the public authorities responsible for handling and mitigating disasters — namely, the Ministry of Home Affairs — is not the authority that should oversee State action in a pandemic context. However, that said, the structure of the NDMA is useful to replicate, with reference to the implementation of the Epidemic Diseases Act in the current context. I must stress that I'm not suggesting this as an enduring solution, merely as one that we can possibly explore given the absence of options before us.

Gauri Pillai (29:22): So now moving on, let's talk about the role of courts. What, in your opinion, should the role of courts be and what degree of deference should courts grant to the State?

Professor Kannabiran (29:34): The question really, for me, is not so much one of the degree of deference that courts should grant the State, but the degree of empathy the court demonstrates towards those who suffer the multiple aggravated consequences of this lockdown. That is really where the focus should be. The court need grant no deference to the State when arbitrary State action has triggered an unprecedented crisis. This is an opportunity for the court to set this right by directing the State to take specific actions on a clear understanding that the enjoyment of Article 21 rights of the dispossessed citizen hinges on the enforcement of its fiduciary duty by the State under Part Four. So this, to my mind, ought to have been the role of the court.

Gauri Pillai (30:30): To what extent do you think that the courts in India have actually shown this kind of empathy to the rights of the marginalised and vulnerable?

Professor Kannabiran (30:39): I find that there are— that there is a structural problem with the approach of the Court in COVID-19 jurisprudence, and I see the problem is threefold.

The first is a troubling lack of judicial empathy for the working poor of this country, on whom the country is utterly dependent. And I will take an example. In response to a plea to ensure payment of wages to migrant workers, the Chief Justice of India asked the petitioners and I quote, '*why wages are required when meals are provided by the Government?*'²² And in another petition, the Court even went to the extent of taking on board the State's argument that the exodus was caused by rumour mongering and fake news. So, to not be able to empathise with the situation that workers are in, and to pose questions and take on uncritically status reports submitted by Government, is very, very deeply problematic to my mind.

There is a second part to this as well, which is if the first part of it has to do with judicial empathy, the second is the reluctance of the Court to hold the State to account. So, for instance, when television channels of a certain kind, you know, in their televised programs used extremely incite-ridden phrases that I have already mentioned earlier, and I don't want to repeat, and there was a petition before the press, directing news channels not to resort to what amounts to incitement. The Supreme Court then says that it does not wish to '*gag the press*'.

²² <https://www.barandbench.com/news/litigation/migrant-workers-plaint-during-coronavirus-lockdown-will-not-interfere-in-government-decision-for-few-days-cji-sa-bobde> Accessed on 17 April 2020.

The third part of my disappointment, shall we say, with the way in which the Court has responded is its unwillingness to explore a different idea of justice that is grounded in the Constitution, and yet informed by the aggravated suffering and harms that the pandemic and the lockdown has imposed disproportionately on the poor. It's not that we don't have reports, we don't have work, that will assist the court in coming to an evidence-based conclusion, and crafting justice differently. It's not a huge step, it is well within the writ of the Court to do it. So, in a sense, for me, the solution really lies in our collective wisdom based on scholarship.

Gauri Pillai (34:25): Thank you for that, and I think your point about crafting this new idea of justice based on constitutional values kind of brings me, very well, to my last question, which is sort of looking into the future, and wondering, or thinking about, what are some of the lessons that we have learned as a country from the COVID-19 pandemic regarding measures that we can put in place within the law and the role of human rights in avoiding a humanitarian crisis of this nature?

Professor Kannabiran (34:53): The first and most important point to me is that we never lose sight of the fact that it is the workers who make or break this nation. They're already reeling from decades of mistreatment and callousness, and to just fling them into destitution, no matter what the emergency, is unacceptable. When the right to privacy was declared as a fundamental right, the judgment of Justice HR Kannan in ADM Jabalpur was resurrected in eloquent terms by the Supreme Court.²³ This, let's remind ourselves, means that fundamental rights cannot be suspended even in conditions of emergency. That's the bottom line. How have you forgotten that?

The jurisprudence of the pandemic, and post-pandemic, must be centred on calling the State to account on behalf of the poorest, most disempowered citizen. It is only if courts and law are seen to be just in the reliefs they order that we can move forward. And this is an extraordinary time, therefore the need is to understand the vulnerability of the working poor and not accommodate Governmental claims on constraints and limitations. For this, courts and Governments must revive a robust memory of the Constitution, of the Directive Principles, and act on that basis alone. Because, finally, any action, State or judicial, must be based on empathy. When we're talking about human rights and humanitarian concern, we are talking essentially of empathy. We all inhabit the constitutional Commons equally, and have an equal stake in it, right from the dispossessed worker to the Chief Justice and President of India. And we should never ever forget that.

Christy Callaway-Gale (37:03): RightsUp is brought to you by the Oxford Human Rights Hub. The Executive Producer is Kira Allmann. This episode was produced and edited by me, Christy Callaway-Gale and it was hosted by Gauri Pillai. Music for this series is by Rosemary Allmann, and Show Notes for this episode have been written by Sarah Dobbie. Subscribe to this podcast wherever you'd like to listen to your favourite podcasts.

[See next page for further materials]

.....

²³ See generally Jayna Kothari, 'The Indian Supreme Court declares the constitutional right to privacy' *Oxford Human Rights Hub* (4 October 2017) <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy/>

FOR ADDITIONAL MATERIALS AND MORE RECENT UPDATES ON THE COVID-19 PANDEMIC AND LOCKDOWN IN INDIA, SEE:

- *The Hindu* Net Desk, 'Coronavirus India lockdown Day 45 live updates.' *The Hindu* (updated as at 8 May 2020) <https://www.thehindu.com/news/national/india-coronavirus-lockdown-may-8-2020-live-updates/article31531359.ece>
- Leela Murali. 'Explained: As lockdown nears end, where India stands in Covid-19 cases, research.' *The Indian Express* (1 May 2020) <https://indianexpress.com/article/explained/coronavirus-india-lockdown-cases-research-numbers-6386916/>
- Nikhil Inamdar. 'Coronavirus lockdown: India jobless numbers cross 120 million in April.' *BBC News* (6 May 2020) <https://www.bbc.co.uk/news/world-asia-india-52559324>
- Ritanjan Das and Nilotpal Kumar. 'Chronic crisis: Migrant workers and India's COVID-19 lockdown.' *LSE* (8 April 2020) <https://blogs.lse.ac.uk/southasia/2020/04/08/chronic-crisis-migrant-workers-and-indias-covid-19-lockdown/>
- Johnny Wood. 'In pictures: India under lockdown.' *World Economic Forum* (1 April 2020) <https://www.weforum.org/agenda/2020/04/coronavirus-covid-19-india-lockdown-pandemic/>
- 'India: COVID-19 Lockdown puts poor at risk.' *Human Rights Watch* (27 March 2020) <https://www.hrw.org/news/2020/03/27/india-covid-19-lockdown-puts-poor-risk>

FOR PREVIOUS OxHRH DISCUSSION ON SOME OF THE ISSUES DISCUSSED ABOVE , SEE:

- Aashna Jain, 'Have prisons in India become ticking time bombs amidst COVID-19 outbreak?' *Oxford Human Rights Hub* (27 April 2020) <https://ohrh.law.ox.ac.uk/have-prisons-in-india-become-ticking-time-bombs-amidst-covid-19-outbreak/>
- Ayush Verma Pratik Kumar, 'Jammu and Kashmir Public Safety Act, 1978: India's use of preventive detention violates human rights.' *Oxford Human Rights Hub* (17 March 2020) <https://ohrh.law.ox.ac.uk/jammu-and-kashmir-public-safety-act-1978-indias-use-of-preventive-detention-violates-human-rights/>
- Aishwarya Singh and Meenakshi Ramkumar, 'Failure of the Indian Supreme Court to protect the rights of Dalits.' *Oxford Human Rights Hub* (30 September 2019) <https://ohrh.law.ox.ac.uk/failure-of-the-indian-supreme-court-to-protect-the-rights-of-dalits/>
- Pranay Bhattacharya, 'Human Rights and Internet Shut-Downs in Jammu and Kashmir.' *Oxford Human Rights Hub* (6 September 2019) <https://ohrh.law.ox.ac.uk/human-rights-and-internet-shut-downs-in-jammu-kashmir/>
- Rongeeet Poddar, 'Constitutionality of India's Unlawful Activities (Prevention) Amendment Bill, 2019: India's McCarthyism Moment'. *Oxford Human Rights Hub* (14 August 2019)

<https://ohrh.law.ox.ac.uk/constitutionality-of-indias-unlawful-activities-prevention-amendment-bill-2019-indias-mccarthyism-moment/>

- Jayna Kothari, 'The Indian Supreme Court declares the constitutional right to privacy' *Oxford Human Rights Hub* (4 October 2017) <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy/>