Law and Other Things

presents

THE COURTS AND THE CONSTITUTION

2020 AND 2021 IN REVIEW

26-27 MARCH, 2022

THE COURTS AND THE CONSTITUTION

ABOUT

The Courts and the Constitution Conference envisages furthering engagement and scholarship on public law by way of review of the major constitutional law developments in and outside courts, taking place in India. We were unable to conduct the Conference in the previous year, and thus, the current edition will undertake the exercise for the preceding two calendar years. The Conference aims to broadly reflect on the past, present, and future of Indian constitutionalism. It is an attempt to bring together diverse voices from the bench, bar, academia, and journalism to deliberate on the landmark legal developments which are bound to have a long-term impact on governance and rights of the citizenry.

This conference is being organised by the Editorial Team of the 'Law and Other Things' Blog in collaboration with its institutional sponsors, the Centre for Constitutional Law, Policy & Good Governance, NALSAR University of Law and the School for Policy and Governance, Azim Premji University. The event will take place in a hybrid model, conducted online as well as at the campus of NALSAR University of Law, Hyderabad.

THE STATE OF THE JUDICIARY

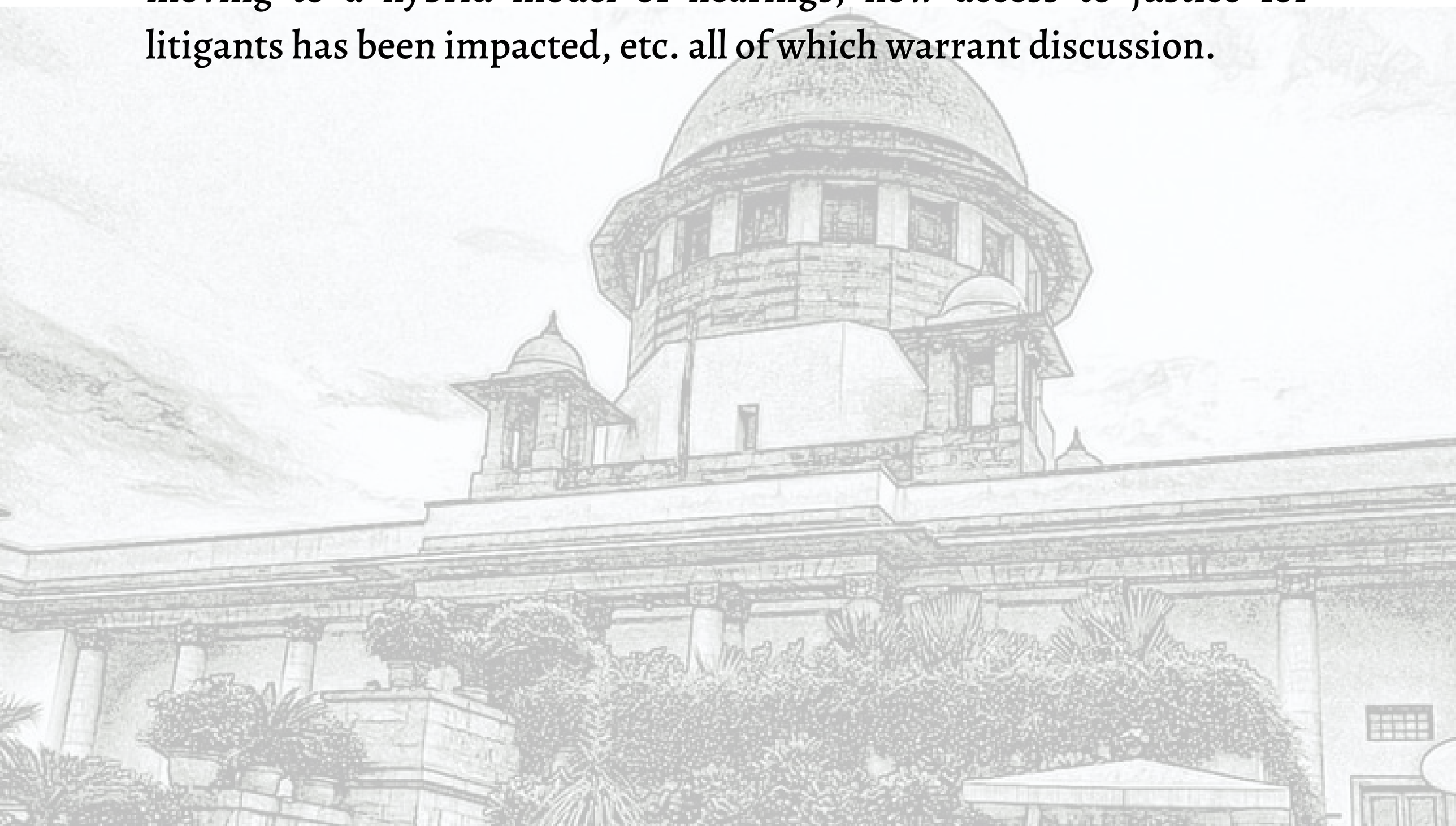
SESSION - 1

Over the last few years, there has been a perception of a gradual decline in the independence of the judiciary. Until very recently, despite an ever-increasing docket, the Supreme Court did not have any new appointments being made, supposedly as a result of an impasse from within the judiciary. This impasse raises serious questions of doctrinal importance; what happens when the Collegium is unable to achieve consensus? Can three of the five judges on the Collegium proceed with making a recommendation? The *Three Judges cases* that led to the formation of the collegium have been heavily criticized for creating a system lacking objectivity, transparency, and accountability. Less spoken of, however, is the ambiguity inherent in the Third Judges case on intra-collegium dynamics.

While the stalemate has marked a new issue in the realm of judicial appointments, many existing issues like want of diversity and inclusivity have continued. However, it is heartening to note that visible efforts have been made in this regard, with India likely to get its first female Chief Justice in B.V. Nagarathna. Further, concerns have been raised about the influence of post-retirement benefits on a judge's impartiality, with a retired chief justice accepting nomination to the Rajya Sabha, and another's appointment as chairperson of the NHRC in the recent past. Moreover, the propriety of the Central Government making appointments by breaking up the recommendations sent to it, and also the transfer of judges who seek accountability from the Government are concerns that have been flagged.

While the ever-increasing pendency of matters is becoming a mounting concern, equally concerning is the type of cases that find place in that pile. Many issues of significant constitutional importance like the challenge to the abrogation of Article 370, electoral bonds and transparency in financing elections, the challenge to the CAA, etc. all remain pending in the Supreme Court without being heard. This has led to the suggestion that the Supreme Court be split into a Constitutional and an Appellate Court. We hope to have a discussion on how allocation powers must be redistributed to ensure the effective functioning of the Supreme Court.

The pandemic has also given rise to newer questions like strengthening the E-Courts Project, usage of AI in the Indian judiciary, impact of online court hearings on livelihoods for lawyers, variations in judicial behaviour over online hearings, permanently moving to a hybrid model of hearings, how access to justice for litigants has been impacted, etc. all of which warrant discussion.



PUBLIC HEALTH CRISIS AND THE CONSTITUTION

SESSION - 2

In the aftermath of the COVID-19 crisis, this panel aims to cover the constitutional issues relating to developments that took place during, and as a response to, the coronavirus pandemic. The onset of the pandemic in 2020, and the second wave in 2021, necessitated action on the part of the Union and state governments to deal with the rapidly changing situations. This also brought with it questions about executive and legislative excesses during an emergency, the role of courts in management of the pandemic, and measures to balance the two considerations of dealing with a public health emergency while protecting fundamental rights and freedoms.

During the first wave of the coronavirus crisis, the judiciary took varying degrees of action in multiple issues including the migrant crisis, decongesting of prisons, etc., where the Court took suo motu cognizance and issued guidelines to the governments for their effective disposal. At the same time, we witnessed the Supreme Court struggling to balance the rights of the lesser privileged sections of the society, whether that be in matters of COVID-19 testing or rampant exemptions to labour law benefits granted by the state government, with the concerns of resource limitations and financial blows to businesses.

During the second wave of the coronavirus crisis, the role of Courts to perform an oversight function over the government's exercise of its administrative powers became *sine qua non*. With respect to the observance of COVID protocols during elections, supply of oxygen and essential drugs (or lack thereof) to hospitals, or provision of statistics regarding the state of the pandemic, Courts have focused on directing officials to fulfil their responsibilities. At the same time, the Court showed a degree of executive deference in its decisions and a hands-off approach towards cases involving socio-economic rights, including the right to health, leading to questions as to the scope and extent of judicial oversight by the Courts in respect of (mis)management of the pandemic by the government.

This brings us to a discussion on separation of powers as a constitutional doctrine and the interplay between the executive and judicial powers in times of a public health crisis, given the Indian constitution does not envisage a strict separation. We look forward to discussions on the various issues that arose during the pandemic - including new jurisprudential introductions by the Supreme Court, and standards of judicial review during the times of a public health emergency.

EMERGING VOICES – THE SHAMNAD BASHEER MEMORIAL ROUNDTABLE

SESSION - 3

In memory of Prof. (Dr.) Shamnad Basheer, the panel titled 'Emerging Voices' will present the work carried out by young and emerging scholars to privilege diverse voices producing scholarship on the intersection between intellectual property law and constitutional law. It will bring forth perspectives from both legal scholars, as well as those outside the law, to emphasize social diversity. The panel shall discuss various issues as discussed below.

Owing to the pandemic, a majority of the Indian education system shifted online, resulting in the emergence of various ed-tech start-ups. Consequently, issues relating to the impact of online learning on copyright law and access to educational material have attained importance. Further, there is a need for discussion on the impact of the online system on the constitutionally guaranteed right to education. In this regard, a key issue is the dual role of technology in increasing access and creating barriers.

Additionally, with growing access to the internet and smartphones, the content creator economy has also grown over the pandemic. Issues relating to its regulation have been raised. Important examples include the dynamically changing notions and thresholds of novelty of ideas and their expression, and how this interacts with the constitutional guarantee of free speech. The issue has also been discussed by the Parliamentary Standing Committee in its March 2021 Report titled - Review of the Intellectual Property Regime in India.

Further, the rise of online healthcare and digitization of health records has raised issues concerning data privacy, bodily integrity and intellectual privacy. Extensive debates concerning intellectual property rights waivers for vaccines to enhance access have come to the fore. The pandemic has also revived the discussion on traditional knowledge and indigenous methods of medical treatment which warrants more discussion. This panel will hope to explore the interlinking of these accessibility and intellectual property issues arising in various sectors, with constitutional guarantees and provisions regarding the same.

CONTEMPORARY ISSUES IN INDIAN FEDERALISM

SESSION - 4

The years 2020 and 2021 have raised several questions about federalism - both in the political arena and before the Courts. Issues concerning management of the COVID-19 pandemic, the repealed farm laws, asymmetric federalism vis-a-vis reservations, and centralized entrance exams such as NEET, resulted in the Union and state governments being at loggerheads with each other.

In a seemingly significant victory for cooperative federalism, the Supreme Court upheld the power of the Delhi Assembly panel to summon Facebook officials. Around the same time, the promulgation of the Farm Bills by the Union Government in the Parliament raised significant issues of legislative competence of the Centre in light of the legislative federalism established by Schedule VII of the Constitution. Centre's unilateral enhancement of the Border Security Force's (BSF) powers has been scrutinized for violating the principles of federalism. The federal balance has been further challenged by the Centre's attempt to extend the jurisdiction of the CBI to the states without their consent. The Supreme Court disallowed this on grounds of the federal character, and actions taken by other central agencies like the NIA, ED and NCB are also being scrutinized through similar lenses. This raises questions about the tension between national security and the public order and policing remit of states. Further, on the fiscal federalism front, the GST compensation debacle has also raised serious concerns. The overarching theme here is whether this marks the shift from cooperative federalism envisaged by the Constitution, to a now developing coercive federal structure.

Next, questions concerning the state government's constitutional power to identify and enlist OBC communities arose before the Supreme Court vis-a-vis the landmark Maratha reservation judgment. In a different case, while determining the validity of 100% reservation in scheduled areas, questions about asymmetric federalism & the Vth Schedule gained significance. Additionally, the governmental response to the COVID-19 marked issues such as lack of consultation with states in policy-making, sweeping enforcement powers by central agencies, state's lack of access to funds and fiscal apportionment. This has brought to the limelight questions concerning fiscal, legislative and executive federalism such as whether the Union can impose a one size fits all requirement in respect of lockdown, vaccine procurement and border closures? Further, should the Union 'allow' states to deal with public health crises within the state?

In a nutshell, the years 2020-21 have raised several burning questions about India's federal structure. What are the contours of the Centre's legislative powers under Schedule VII? Even when the Centre is acting within its legislative powers, is there a responsibility to protect sub-national interests vis-a-vis asymmetric federalism? Further, do crisis situations like the pandemic merit centralisation, and whether this sets a dangerous precedent? Finally, how can institutional mechanisms like the GST Council and state legislative assemblies enable cooperative federalism?

ENVIRONMENTALISM AND GOVERNANCE IN SOUTH ASIA

SESSION - 5

The economic downturn caused by the pandemic has once again brought to fore the conflict between environmental protection and developmental concerns. The Supreme Court, in particular, has dealt with this debate in *Citizens for Green Doon v. Union of India* – a case concerning a road expansion project in the ecologically sensitive region of the Himalayas. Here, the Court conducts a balancing exercise between the imperative of tourism and environmental concerns. We see this exercise being undertaken in the Court's engagement with the issue of air pollution in the Capital as well. In certain cases, the Court has been accused of framing this exercise as a 'forest versus people' issue. For example, in *Municipal Corporation, Faridabad v. Khori Gaon Residents Welfare Association*, the Court relied on the Forest (Conservation) Act, 1980 to evict residents of Khori Gaon for unauthorised occupation on land that is disputed to be a forest itself.

Questions on the role of government institutions are pertinent as well – case in point being the Draft Environmental Impact Assessment (EIA) Notification, 2020. The proposed changes include inter alia, dilution of participatory governance measures, exemption from public hearing and allowance for ex post facto clearance. The notification also reduces the time frame for hearings and allows for hearing in the form of video conferences, which results in the exclusion of a large number of stakeholders, especially those in villages and tribal regions with little to no internet.

But while there has been the dilution of essential environmental governance measures at the executive side, the Supreme Court has heralded the National Green Tribunal (NGT) as a strict watchdog, by asserting its *suo motu* powers.

With climate change emerging as a threat to multiple livelihoods and developmental projects being characterised as an even graver threat – the long-standing debate on the interpretation of the Directive Principles of State Policy (DPSPs) read with fundamental rights to determine the liability of the government in environmental protection remains.

In 2021, South Asia has been deemed to be living through a "new climate normal." These questions of developmental conflict, government responsibility and rights adjudication are hence common for the subcontinent. The panel seeks to examine environmental jurisprudence across South Asia, focusing on the struggle of realising constitutional rights in the face of climate justice, and shedding light on the emerging standards of judicial review adopted by these Courts in these challenges. The discussion will thus be foregrounded in this debate on 'economy versus ecology' – and the new narrative of inhabitants posing risk to the environment they live in.

CIVIL LIBERTIES AND CRIMINAL JUSTICE

SESSION - 6

Recently, India's status as a free country has been changed to "partly free" in a report by Freedom House. This panel will look at the reasons behind such a downfall by looking at the various ways civil liberties have been curtailed by exploiting the criminal justice system. It will broadly focus on three civil liberties – right to life and personal liberty, right to free speech, and right to privacy.

Article 21 of the Constitution has been under severe attack recently due to the frequent invocation of laws such as the UAPA, NSA, NDPS with their stringent bail conditions to curtail the liberty of an individual. Amidst this attack on Article 21, we have seen certain bright spots coming from the judiciary in cases such as - *Thwaha Faisal v. Union of India*, *Iqbal Ahmed Kabir Ahmed v. State of Mahrashtra* and the bail orders of Asif Iqbal Tanha, Devangana Kalita, and Natasha Narwal (Delhi HC, June 2021). These judgments have shown that even with draconian laws like the UAPA, the judiciary can still adhere to the basic principles of bail and preserve the right to life and personal liberty of individuals.

Further, there has been a criminalization of dissent and protests by invoking sedition law and UAPA against several activists, students, farmers and political opponents. Despite this, 2021 saw the largest protest in history from farmers in India. There has also been a watering down of standards that are necessary to be met for restricting free speech and right to assembly on grounds of public order by the judiciary. The case of *Amit Sahni v. Commissioner of Police* (Shaheen Bagh protests case) and the bail orders in the case of *Sharjeel Imam v. State* and *State v. Safoora Zargar* serve as clear examples of such watering down. Further, the issue of hate speech has come into the consideration of the Supreme Court recently in cases such as – *Amish Devgan v. Union of India* and *Firoz Iqbal Khan v. Union of India*.

Lastly, the right to privacy has been deeply threatened due to a spate of recent incidents which includes – Pegasus software scandal and TekFog. In the Pegasus software scandal, the Supreme Court has intervened and opened the debate on 'national security' vs 'privacy.' The Court has also not blindly deferred to the Central government by the simple invocation of the catch all phrase of 'national security'. Other privacy issues that have arisen have been the usage of Facial Recognition Technology by the Delhi, UP and Telangana Police, the creation of Digital Health IDs, and the right to be forgotten.

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