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*The Social life of technicalities: 'terrorist' lives in Delhi's courts*

**1. Introduction**

In 2008, a series of bomb explosions occurred in several cities in India, including Delhi. The Delhi Police's Special Cell arrested and charged several of young men for the bomb blasts, one of whom I call Fahad. Fahad was one of the main accused and was charged with physically planting one of the bombs in a crowded market in central Delhi. He was also implicated in the conspiracy behind the bomb blasts in other cities. He and most of the other accused in Delhi were subsequently accused were arrested and charged with coordinating the bomb blasts in Delhi and in another city, let's say Surat in the state of Gujarat. I followed the trial in Delhi from its beginnings in 2008 till the middle of 2013.

This case attracted much attention because of several factors. Firstly, it was the biggest 'terrorist attack' in Delhi since the 2001 attack on Parliament. Secondly, soon after the bomb explosions in Delhi, officials with the Special Cell were involved in a high profile 'encounter' in a Muslim locality in south Delhi with some people who were allegedly behind the bomb explosions. Thirdly, some of Fahad's co-accused were students at Delhi's Jamia Milia Islamia. For these reasons, the trial against Fahad and others became the focus of human rights activists, some of who were also academics at the Jamia Milia Islamia – the university where Fahad and his co-accused were students. These professors and activists would often come to the courtroom to watch the case.

On one occasion, some of the activists and myself sat at the back of the courtroom as we waited for the case against Fahad and others to be called. As we leafed through the chargesheet that the police had filed, she asked ‘All of this is just paper, where is the politics?’ I was a bit confused by this question and asked what she meant. She paused, and then in reply, she asked more pointedly ‘Is there any evidence of targeting them [the accused] because they are Muslim?’ Her question implied that the case could be thought of through the lens of nationalist politics and communal identity. I thought for a moment, as I mentally ran through what I knew about this case and finally said ‘Yes! In the Special Cell police station, they were all made to shout ‘jai shri ram!’ whenever the police spoke to them.’ The sheer inadequacy of my answer was only evident when I uttered it. Was there another way to think of the trial, outside available tropes of religious identity, nationalist politics and ever-expanding state power?

There is little doubt that anti-terror policing mostly impacts and is targeted at religious minorities and dalits. But when I asked any terror-accused about their case, they would only rarely narrate the story of their cases in terms of identity politics or the security state. Instead they narrated their cases in mostly procedural terms: several told how the police kept them in illegal custody for several days; other terror-accused told me of how the police had fabricated the daily diaries of the police station; another told me how the main witness against him had ‘turned hostile’ against the prosecution; two others told me about how the police were not taking proper ‘sanction to prosecute’ before filing charges under the Unlawful Activities (Prevention) Act, 1967.

How does one square this picture of minorities being targeted by anti-terror laws, with everyday life in courts which seem more interested in pouring over case files and haggling over the meaning of legal words? On the one hand we have an image of forced confessions and

fabricated cases Muslims or Dalits, and on the other we have an image of courtrooms that are more interested in the nuances of procedure. One response would be to understand what sorts of politics lies behind courtroom procedures. But this sort of query reaches an analytical limit when one seeks to find a certain type of politics behind every type of legal technicality. For example: how can one see communal politics enmeshed in ideas of the security state, in mundane judicial activities such as, say, verifying whether a document produced during the investigation had been properly attested and certified? This is not to argue that everyday legal procedures are cut-off from the outside world, but rather to say that the society and politics does not colonise legal technicalities as is often imagined.

Terrorism trials in particular are framed by ready political tropes of exceptionalism and the state of emergency (Singh, 2006, 2007; Rogers, 2008). Unlike these accounts of terrorism trials, my ethnography shows that terrorism trials in Delhi, are not exceptional in any meaningful manner and are marked by ordinary trial processes. What is often surprising about terrorism trials is precisely that they are so similar to other criminal trials. What I highlight in this article is what is common to many other criminal trials – that the investigative and courtroom processes crucially depend upon legal processes and technicalities.

This article is a response to types of questions that seek to understand courtroom processes as continuations of social structures. I argue that that we need to ask different questions to understand what the relevance of these seemingly prosaic rules and processes. This involves ethnographic attention to the mundane rules and procedures that ethnographers of Indian courtrooms have tended to look at as tools to understand broader social and political concerns. As Riles (2001; 2006) points out the usual ways of understanding politics and social structures are inadequate to comprehend bureaucratic practices since the work of these practices

often seem so outside what we normally understand as politics – hence these practices are often perceived as being outside analysis itself (Riles 2006: 88). She argues that what often drives legal and bureaucratic procedures is not a social power that lies outside or behind the process – but the process is its own driver. In this article I seek to bring focus to these procedures themselves. I suggest that an ethnographic appreciation of these unremarkable processes would yield a picture of how we understand life in a courtroom. I argue that the labour of working with these rules and procedures, yields new forms of sociality that cannot be understood as mere extensions of social and political life outside the courtroom.

As a first step towards such an ethnography of legal technicalities, I look at two existing ethnographic modes of looking at courtrooms in India. The first imagines courtrooms as being extensions of society, whereas the second, which has a minor role in Indian scholarship, perceives courtrooms as spaces where society is produced. I argue that both these modes of scholarship look at courtroom processes as being means to the end of understanding something that lies outside or behind these procedures. They understand legal processes as products of or producers of social power. They do not pause to look at these rules and procedures themselves.

Thereafter, I argue that there are two reasons for studying these technicalities on their own terms. Firstly, I argue that these legal technicalities are central to the function of any trial – the production of juridical truth. I seek to bring insights from Actor-Network Theory (ANT) scholars to look at the role of these technicalities in epistemological procedures of trial courts.

Secondly, I depart here from the ‘law itself’ strand of legal anthropology, which seeks to strip away modes of sociality from studying legal technicalities, to argue that legal technicalities engender forms of social life. I look at how terror-accused came to understand laws, and shared information, strategy and documents about mundane legal rules. I look at how through gradual

and collaborative processes, small communities of knowledge came to built up around legal technicalities.

## **2. Courtrooms as microcosms of society**

I seek to understand courtroom processes on their own terms. This is not to say that courts are immured from wider society or politics, but rather to argue that the courtroom is not a space that is simply appended to the social. Before moving on, I outline what I see are the two dominant modes of understanding trials in relation to society. The first mode enmeshes courts and other legal institutions in society and looks at legal rules and processes as being invariably penetrated by social relations and power structures outside of these institutions. The second mode looks at trials as ways in which the social is constructed. In this way, both modes of scholarship about trials look at trials as microcosms of society.

### *2.1 Courtrooms as extensions of society*

Most of ethnographies of courtrooms in India operate with in a legal pluralism framework (Berti 2011: 357) and understands courtrooms as a node in broader social and political environments. For example, an early work by Cohn (1965) looks at how courts, lawyers and other officials are enmeshed in wider social networks. Cohn adopts Galanter's conceptual distinction between 'local law-ways' (norms sanctioned by community based groups) and 'lawyers' law' (the state law) to look at how local law-ways are affected by and affect lawyers' law. Cohn outlines the various ways in which the lower courts are shot through by social worlds: the use of community based networks inside the courts to channel information and bribes, or the use of the courts by untouchable castes in an attempt to end upper caste dominance. While he

began with a distinction between local law-ways and lawyer's law, his essays show how local law-ways enter the courts, and the lawyer's law enters the local.

Similarly, Galatner's aim is to move an understanding of the Indian legal system away from questions of legal doctrine to looking at the people who inhabit the lower levels of the judiciary in order to understand 'who they are, what they do, how they interact with one another and with other social groups.' (1968-69: 202). He also argues that law is a path to study modern India and that legal ethnographers should look at court cases as windows into aspects of and conflicts in Indian society (Galanter 1992: 3). Similarly, Berti argues that court cases are not just important to study the unfolding of legal rules by which disputes are settled, but also highlight the 'workings of society from the vantage point of litigation and arbitration' (2011: 355; Berti & Bordia 2015: 1). Elsewhere, Berti in an ethnography of courtroom discourse of a murder case in rural north India, argues that focus was

"not so much to understand what really happened within the village or family prior to the court hearing, but to analyse how village or family dynamics are played out inside the courtroom and how they actually interfere with the trial proceedings...Indeed, what has so far been overlooked is that the court itself is a site where a dispute may be resolved informally, but with the trappings of formal procedure" (2010: 237.)

The focus on dispute resolution in trial courts makes two important contributions to legal scholarship. Firstly it takes away focus from the doctrinal questions that a focus on the higher judiciary has led to. Secondly the negotiable status of the rule shows the ways in which courts are not sealed off from social worlds but are firmly enmeshed in them (Bordia 2009: 9; Starr & Goodale 2002:2). The study of courts emerges as a way of accessing wider social debates and conflicts.

Anti-terror trials in India have similarly been looked as throwing light on fractures in the idea of Indian citizenship, communal identities, and anxieties over the strength of the state. The case that has attracted the most scrutiny in recent times is *State v. Navjot Sandhu & Others*,<sup>1</sup> better known as the *Parliament attack case*.

Writings about this case have highlighted how the escalating nationalist frenzy after the attacks gave cover to a shoddy investigation by the Special Cell: false confessions, fabricated evidence and circumvented evidentiary procedures. These have highlighted the institutional violence meted out to India's minority populations. One essay juxtaposes the media trial and the actual trial to show how the media image and the courtroom image of the terrorist feed off each other (Sengupta 2006). Coming, as it did, months after September 11, 2001 the case became enmeshed in the discourse of the global war on terror (Chomsky 2005; Mukherji 2005). With most of the accused being Kashmiris and the central government at the time being lead by the Hindu nationalist Bharatiya Janata Party, the case was also seen against the backdrop of Hindu nationalism and the Indian occupation of Kashmir. The accusation that the terrorists received backing from Pakistan, only increased the shrillness of the nationalist discourses about this case (Roy: 2006, 2006a; Sengupta 2006a). Similarly, writing about cases under a previous anti-terror law, the Terrorist and Disruptive Activities Act (TADA), Balagopal argues that terror cases are filed against people 'from the political, social, ethnic and economic periphery of Indian society' (1994: 2054). The anti-terror trials are not just about adjudicating the guilt or innocence of the accused, but also a way of thinking about subjectivity, political identity, citizenship along the lines of religious, caste or ethnic identity, and the nature of the Indian state and security apparatus.

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<sup>1</sup> (2005) 11 SCC 600.

In these works the social and political world intercedes in court processes making the latter contingent and negotiable. Further, the law is seen as a tool to understanding the contours and fault lines that run through society. Here, anti-terror trials are symptomatic of nationalist politics, where religious, caste and economic minorities are targeted using anti-terror laws. I do not deny this. But this view would appear to argue that courtroom disputes are social and political conflicts that have been translated into a legal dispute. The law becomes a specific lens through which social worlds can be viewed and a terror case comes to represent religious, ethnic and caste conflicts. The courtroom space becomes another theatre in which nationalist politics and social conflicts can be re-enacted. In these modes of scholarship, there is the space of a pre-existing society – with all its structures, hierarchies and conflicts – and the court case is then merely affixed to the social.

## *2.2 Courtrooms as producing society*

If the first strand of scholarship imagines courts are extensions of social worlds, the second looks at how courtroom trials construct the social. Here, the emphasis is not on how the trial is not inflected by the local social networks. Rather, the concern is how social categories are discursively constructed through the trial. Whereas for the first strand of scholarship the social flows into courtroom processes, for the second strand, the social is an effect of the courtroom.

A volume of the *Political and Legal Anthropology Review* carried several articles that explored how trials constructed society and social categories. Ran-Rubin's (2008) contribution analyses a murder trial in South Africa and analyses the role of legal discourse in the production of competing moral orders. The juridical field of the trial is the site in which discourses around gender and racial violence and the relation of this violence to the post-apartheid state, are

constructed. Jonah Rubin's (2008) contribution analysed the lawsuit against members of the Salvadoran military filed in a court in the United States, for human rights abuses committed in Salvador. Rubin argues that in presenting their case, the plaintiffs could only narrate the political and historical contexts of the violence in terms that were recognised by the law. In doing so, the trial required the depoliticisation of the plaintiffs and that the violence to be narrated solely in personal terms, bereft of any political context. In a similar vein, Laura Bunt's article (2008), which looks at the trial of the gang-rape of an indigenous woman, argues that in order to achieve a conviction, the survivor of the gang-rape had to instrumentally deploy certain constructions of race to distance herself from her own indigeneity, and at the same time had to draw a racial distance between herself and her attackers. In all three of these contributions, social categories and relationships are constructed and deployed through the trial.

This is not to say that the social categories constructed through the trial process are immured from categories outside the courtrooms. Rather, in some ethnographic work on trials, courtrooms perform the double function of both enabling the social to enter legal processes while constructing social at the same time. For example, Pratiksha Baxi's (2014) work on rape trials in Gujarat shows how identity, social hierarchy and criminal culpability are constructed through courtroom processes, even as social pressures from 'outside' buffet courtroom processes. In the chapter on the rape of a child by her father, the book shows us how the body of the child is forced to occupy different juridical identities. In the chapter on sexual violence against Dalit women, the book argues that the caste-based dimensions of rape are being effaced from the law's imagination of violence in society. While the book's chapter on how rape trials are 'compromised' shows us how the legal procedures are used to cover informal processes of resolving the case, much of the book is also concerned with the construction of the identity of the

rape victim and her relationship with her own body and with the perpetrators of the crime. Similarly, Susan Philips' (1994; 2000) ethnography of language used in Tongan courts reflects on how social relationships enter in legal discourse and how legal discourse simultaneously invokes these relationships to construct an image of Tongan nationhood and society.

### **3. Taking on the technicalities**

These two ways of understanding the trial make important contributions to theorising the law. They challenge law's self-image of being based on rules, and demonstrate that below the surface, these rules are malleable. They also show how courtroom processes feed off, reify and duplicate forms of public discourse and in doing so construct an imagination of social categories and relationships. Both these ways of understanding show that legal processes are not immured from the world, but are intimately connected to the world outside.

But what if we want to look at the trial, the inside, on its own terms rather than as being inextricably connected to the outside world? There is another strand of legal anthropology that seeks to account the 'inside' of a trial on its own terms. In trying to account for the role played by the mundane things that characterise a trial – a focus on rules, procedures and other technicalities – this strand of scholarship seeks to understand the '*agency of the technocratic legal form*' (emphasis in original) (Riles 2005: 980). Taking a leaf out of methodological approaches developed by Actor-Network Theory (ANT) and its focus on scientific tools, Riles argues that scholars ought to look at the role of mundane routines and legal technologies in understanding how knowledge is produced in the legal sphere. Riles seeks to adopt for legal anthropologists, the insight from STS literature about agency of scientific tools in the production of scientific truths: "Truths in this view is an artefact of networks of material and non-material,

human and non-human actants.” (Ibid: 987). Riles argues that scholars interested in law ought to take on the technicalities of the law to explore how legal processes take on a life of their own in producing juridical truth, and how the law is not just a reflection of ‘wider cultural trends’ (Ibid: 980).

In the next part I show what can be gained from a focus on the technicalities. In the first section that follows, I look at the itinerary of one rule that mandates the ‘presence’ of the accused at his trial and how this rule is implicated in the production of juridical truth. In the second part I depart from Riles’ analysis and I look at how these processes engender forms of sociality.

### *3.1 Procedures and the production of juridical truth*

Actor-Network Theory (ANT) scholars have provided us with insights into the role that tools and processes have in the production of scientific facts (Latour 1999; Labour and Woolgar 1986). These works highlight the fact that scientific facts are not objectively discovered, but are rather products of the applications of certain tools and procedures. The production of scientific knowledge was premised on the use of mundane, repetitive procedures, and these works highlighted that small differences in these tools and processes could have profound epistemological consequences.<sup>2</sup>

In this section I attempt to show how legal procedures and rules can seem to take on a life of their own in the production of juridical truth. I focus on two technical rules: the requirement

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<sup>2</sup> Latour (2010) attempts to bring these insights to bear on the law in his seminal ethnography of France’s Conseil d’Etat. While his work on scientific practices focuses on how objects in the world are mediated into existence by scientific tools and processes, his work on law gives little space to understand how the law comes to “refer to a world outside of itself” (Oorschot & Schinkel, 2015: 501). Unlike his work on science which is concerned with the production of scientific truth, his work on law is less concerned about the production of juridical truth and instead is concerned with the “processes of enunciation” (Pottage, 2012).

that eyewitnesses to a crime point out particular accused in court and the procedural requirement for the accused to be present in court during his trial. The first evidentiary rule is necessary as it demonstrates to the court that the eyewitness has actually identified a particular person who is accused of committing a crime. The second requirement is stated in s. 273 of the Code of Criminal Procedure, 1973 (CrPC) and is a codification of an older common law rule for criminal trials. It is meant to ensure that the accused person has a right to hear the evidence against him or her and that he or she has a right to confront and question witness' testimony.

Let us return to the trial of Fahad and others that I mentioned earlier. After they were arrested in Delhi, Fahad and most of his co-accused were subsequently transferred to a jail in Surat. While Fahad and the others were in Surat, the Gujarat government issued an order under Section 268 CrPC prohibiting the transfer of Fahad and his co-accused outside the Surat jail. Effectively, this meant that they could not be produced before the Delhi Court to attend their pre-trial hearings. As accused had to be present in court for pre-trial proceedings, the magistrate in Delhi who was handling the case could not go on with various stages that preceded the trial – such as taking cognisance of the case and committing the case to the Sessions Court for trial.

Attempting to get these pre-trial hearings underway, the magistrate in Delhi repeatedly issued warrants directing the jail superintendent in Surat to produce Fahad and the others before it. In reply after reply, the superintendent merely stated that she was unable to comply with the Magistrate's orders due to the order issued by the Gujarat State government.

Perhaps realising that the accused were not going to be produced in Delhi anytime soon, on one date of hearing the Magistrate said that she had decided to use a then recent amendment to S. 167 CrPC, which allowed accused persons to be produced before a Magistrate "through the medium of electronic video linkage" to complete certain pre-trial processes. The lawyers and

myself proceeded to the 'Video conferencing court' and soon the Magistrate, the police and the prosecution arrived as well. The court staff established a videoconferencing connection with the Surat ial, and we saw Fahad and others on the screen. With the accused being 'present' in the Delhi court, the Magistrate took cognizance<sup>3</sup> of the chargesheet filed by the Delhi police and committed<sup>4</sup> the case to the Court of Sessions for trial.

Once the case is committed to the Sessions Court for trial, the court first has to hear arguments on whether there is any evidence in the chargesheet filed by the police to justify even holding a trial for the accused. At the end of hearing arguments on charge, the Sessions Court can frame specific charges against the accused. Fahad and his co-accused were 'produced' in court via the video-conferencing facility, even during these arguments on charge. During these arguments the defence lawyers occasionally remarked to the judge that while the accused could be produced before a Magistrate via videoconference to comply with pre-trial procedures, it was unprecedented that a person only hear of the charges against him through a video-conference link. They stated that under S. 273 CrPC their clients had a right to be present in court while the trial against them took place. The lawyers argued that they were unable to confer with their clients or to take instructions from them and this would undoubtedly impact upon their arguments. The judge responded that they did not need to confer with their clients during arguments on charge because all arguments were based on only what the police had filed in their chargesheet.

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<sup>3</sup> This is a process detailed in s. 190 of the Code of Criminal Procedure, 1973 whereby the magistrate, upon reading the charge sheet, comes to a conclusion that there is a case to be answered by the defendants.

<sup>4</sup> In India's judicial hierarchy, the Court of Sessions is superior to a Magistrate's court. A case is committed to the Court of Sessions when the magistrate who takes cognizance of a case comes to the conclusion that the case involves charges that are out its power to try.

After hearing arguments on charge, the trial judge proceeded to frame charges against Fahad and the others under various provisions of the Unlawful Activities (Prevention) Act and the Indian Penal Code. The problem of their physical absence arose at this moment because the accused had personally sign the plea document before the court. The Sessions judge had no choice but to once again direct the government of Gujarat to physically transfer Fahad and his co-accused to Delhi to enter their plea to the charges.

The proceedings were once again caught in a familiar back and forth between the Delhi courts and the Surat jail. For several months, orders were sent by Sessions Court in Delhi only to be met with the same reply by the Surat Jail Superintendent: that the Gujarat government's orders under S. 268 prevented her from transferring Fahad and his co-accused to Delhi. In the meanwhile, several of Fahad's co-accused filed a petition in the Supreme Court against the Gujarat government's order. They argued that the Gujarat government was violating their right to a speedy and fair trial. In response, the Gujarat government agreed to revoke the order under s. 268.

Thanks to this concession from the Gujarat government, the accused persons were sent to Delhi to enter a plea before the Sessions Court, accompanied by the Gujarat police. One by one they were called forward, the charges against them were read out and they were asked to enter a plea. They each entered a plea of 'not guilty and claim trial' and then signed statements to this effect. However, the defence lawyers were taken by surprise when they were informed that the Gujarat police were retaining custody and would be taking them back to Surat. The lawyers were clearly agitated as they were under the impression that accused were going to be detained in Delhi for the duration of the trial. They argued that there would be no chance that the trial would be fair if they accused could not be physically present during the trial. They argued that S. 273 of

the Code which mandated that "all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused" was an essential to fair trial, and that they would not be able to mount an adequate defence of their clients if they were unable to take instructions from their clients during the course of the testimony of witnesses. While the recent amendment to the Code of Criminal Procedure allowed the Magistrate to conduct pre-trial hearings with the accused 'present' via a video link, they argued that there was no provision that allowed a Sessions Court to hold an entire trial via a videoconferencing facility.

The prosecutor on the other hand argued that it was in the interests of the accused that they be produced via videoconferencing. He stated that because of the distance between the two cities, it was not feasible for the accused persons to be physically present in courts in both Delhi and Surat, if the trials were to run simultaneously. He argued that this was the only way that the state could meet its obligation to provide the accused persons with a speedy and fair trial. Both the prosecution and the defence were claiming to act in the best interests of the accused persons and in accordance with the law: the prosecution argued that they had an obligation to uphold the right of the accused to a speedy trial and that the trial-via-video conferencing would not violate the accused's right to be present at their trial as they would be present, even if only virtually. The defence lawyers on the other hand argued that there was no way they could have a fair trial if they could not confer with their clients during the course of the hearings. Both sides claimed that S. 273 was non-derogable, with one claiming that presence-via-videoconferencing violated this provision, and the other arguing that it did not.

The Sessions judge ruled that even though there was no provision allowing the recording of evidence while the accused persons were present via videoconferencing, there was nothing barring it either. She ruled that no prejudice would be caused to the accused terrorists' right to a

fair trial, as their counsel would represent the accused. In response to the contention that the lawyers would have no opportunity to consult with their clients during the trial, the judge told the lawyers, “you can go to Surat to take instructions” and stated that the lawyers could appeal the decision if they were not happy with it.

With these pre-trial procedures out of the way, the trial proceeded in the only videoconferencing courtroom in the court complex<sup>5</sup>. On each date the case was listed, the judge and her staff left their assigned courtroom and held proceedings in this video-conferencing enabled room, with most of the accused being 'present' via an audio-video link to the jail in Surat.

According to the judge and the prosecution, the requirement of the ‘presence of the accused’ was satisfied through their mere virtual presence – and sometimes even that was not required. Through the portion of the trial that I witnessed, the 'presence' of the accused via-videoconferencing was repeatedly interrupted by power cuts, and network failure. On some days, the judge proceeded with the examination of witnesses despite the video link having failed, on the ground that the witnesses being examined on that date were only ‘proforma’ witnesses and it was not essential for the defence to cross-examine them. When the link did work, the accused often complained that they could not hear what was going on in the courtroom in Delhi. There was only one microphone and one speaker, which meant that the defence lawyers could not have any private communications with their clients during the proceedings. When it did work, the families of the accused who came to the court, waved into the camera and exchanged a brief word, just before the judge entered the courtroom. Nevertheless, the judge and the

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<sup>5</sup> This case was not heard via videoconferencing only because it was a terrorism trial. During my fieldwork period I saw other criminal proceedings be conducted via videoconferencing. Pre-trial motions for all sorts of criminal cases were regularly held via videoconferencing. Other terrorism cases where the accused were in jails outside Delhi were held in a regular manner while non-terrorism criminal cases were also held via videoconferencing.

prosecution maintained that the accused were sufficiently present in court for there to be a fair trial, for the accused to mount an effective defence and for the requirements of S. 273 to be met. At that point, it was almost as if technology and law conspired to deny Fahad and his co-accused any opportunity to effectively participate in their trial.

Soon however, the valence of S. 273 changed – beginning with the testimony of eyewitnesses who were to identify particular accused persons. At this stage of the trial, witnesses – who had purportedly seen particular accused individuals doing certain things – were asked by the prosecution to physically point out to particular individuals on trial. As the accused in this case were present only on a video screen, the witnesses were asked to identify the individuals on the screen. As witness after witness identified accused persons, defence lawyers repeatedly objected to this mode of identification. In their opinion identification by witnesses could only be done in person and not through a grainy image in a television screen. The prosecutor ignored and the judge merely recorded these objections. The lawyers felt that this represented one area where the trial could eventually be faulted and an acquittal obtained – that the accused had not been properly identified.

Matters came to a head when a witness was summoned to identify Fahad. Several weeks before this witness came to court, Fahad's lawyers, sensing that they would need their client's simultaneous instructions for this crucial phase of the trial filed an application asking that Fahad be produced in person. The judge did not rule upon the application and merely kept it pending.

The police accused Fahad of hiring an autorickshaw to a market in central Delhi. Once he reached there, the police alleged that he asked the driver to wait for a couple of minutes while he went to purchase something. According to the police, Fahad left the bomb in the autorickshaw and left the scene. Meanwhile the driver parked the rickshaw and walked several metres away.

Several moments later, according to the driver's statement during the investigation, there was an explosion. The driver, who survived the blast, was then summoned to court to identify Fahad as the person who had hired his rickshaw. He was asked to point Fahad out from amongst the different accused 'present' on the video screen.

The driver struggled to identify Fahad. The driver asked each of the accused come forward to the camera so that he could take a closer look at each of their faces, and then he asked for long shots of each of the accused so that he could look at their height and build. The witness was flailing and a police officer tried to signal to the driver which person to identify. The defence lawyers protested and the judge ordered this officer to leave the courtroom immediately. After a tense 45 minutes, the rickshaw driver told the court that he was unable to identify the accused. The prosecutor caught unawares by the failure to identify Fahad stated that the accused could be brought to Delhi on a subsequent date for them to be identified by the witness.

Fahad's lawyer first made a tentative objection that gathered steam rapidly over the next few minutes. She objected and suggested that the prosecutor had double standards. With an increasing tempo, she argued that for all this time the prosecution had stated that the accused's presence via video conferencing was sufficient – even where they were being identified on a video screen – but when this 'presence' failed to suit the prosecution, the prosecution could ask the physical presence of the accused. She argued that if another opportunity were given to the witness to identify Fahad, the police would use the time to coach the witness on who to identify and his testimony would undoubtedly be tainted. After heated arguments, the judge agreed with the defence and discharged the witness, temporarily closing off any opportunity for the rickshaw driver to identify Fahad.

This importance of this victory for Fahad and his lawyers was difficult to overstate. I joined the defence lawyers and Fahad's brother for a jubilant coffee break after the session had concluded. They laughed about how the prosecutor had been caught in his own words and had effectively, over the course of several months, argued himself into a corner. Fahad's brother and I elatedly discussed the fact that the prosecutor could not argue that the physical presence of the accused was now necessary, because he had previously argued that their presence over a video screen was good enough to comply with the legal requirement of 'presence' of the accused.

Had the driver's testimony gone to prosecutor's plan, the driver would have identified Fahad correctly, and the court's evidentiary record would have noted this fact. If the driver had correctly pointed out Fahad from the rest of his co-accused on the computer screen, the prosecutor might have been surer that the case against Fahad had been cemented. Meaning that the following facts would have been produced by the trial: that Fahad hired the autorickshaw, took it to a market, asked the driver to wait there, and a that bomb exploded in the autorickshaw. The driver's failure to identify Fahad effectively meant that the court's record had now reflected that Fahad could not be identified as the person who had left the bomb in the rickshaw. The fact that the prosecutor had previously argued that the virtual presence of the accused was enough to comply with the requirements of s. 273 meant that he could no longer argue that the court required Fahad's physical presence. The juridical truth that the prosecutor wanted of the trial, could no longer be produced.

### *3.2 The social life of technicalities*

In the previous section I argued that prosaic rules of procedure and technicalities could be understood beyond their relationship to extra-legal ideas of social power and that the study of

legal processes should not be reduced to the “politics, culture, history or personalities surrounding it” (Riles 2005: 1029). As Pottage suggests, there stripping ‘away the modes of sociality’ (2014: 150) of law, enables us to see the law as a ‘vehicle for instances and agencies’ (Ibid) only for itself. Taking on Riles’ suggestion that socio-legal scholars often erase the salience of technicalities and that we should take a study of the law “on its own terms (2005: 1030), I argued that we can see the ‘agency’ of these technicalities in the production of juridical truth.

One of the criticisms of this ANT methodological approach is that it fails to account for how life is lived (Ingold, 2011). While it provides a way of understanding how objects and processes can act as agents and how agency is distributed through a network, it provides us little way to understand human ability and creativity in inhabiting certain milieus. While I do not have the space to rehearse these arguments in full, what I will take away from this critique of ANT is that what is required is an account of how people creatively use technicalities and processes to make their lives liveable. As I show here, technical legal processes enable modes of sociality in the courtroom.

Through my time in Delhi’s trial courts, I was told of terror-accused (who were all detained in a single jail block at that time) who shared courtroom strategies and legal arguments between them. They copied petitions, applications and other written documents from each other. In these processes two things emerged – a relationship between them through the sharing of legal techniques, and a co-production of legal knowledge. I demonstrate this through the narrative of a terror-accused I call Qayoom.

In 2011, a Delhi trial court acquitted Qayoom and his co-accused of several terrorism-related charges. He and six others were accused of coming to Delhi from Kashmir with

the intention of carrying out terrorist attacks. According to the police version of events, the Special Cell received secret information in July 2006 about the presence of terrorists in Delhi, and further information about the car they would be arriving in and the road they would take. They set up a checkpoint on this road, and when they saw the car approach, they signalled for it to stop. Instead, the car sped away forcing the police to give chase. According to the police, when the car was finally cornered, the occupants of the car began to fire on the police and there was even an abortive attempt to throw a hand-grenade at the police. Eventually, the police say, the terrorists were overpowered and arrested. These alleged terrorists then gave the police further information about other terrorists arriving by train. As a result of this information, according to the police, Qayoom was arrested outside a *gurdwara* near New Delhi railway station.

After a trial that lasted for about 5 years, the trial court found that the Special Cell of the Delhi Police had fabricated evidence, and concocted the story of the shootouts and the arrests of Qayoom Bhat and his co-accused in this case. The trial court not only acquitted the all of the accused people, it also ordered investigations and prosecutions of the police for the fabrication of evidence.<sup>6</sup>

This rare judgment was made possible by the efforts of Qayoom and his co-accused. During the course of the trial they filed applications under the Right to Information (RTI) Act asking for the log books of the vehicles that that the police said they used while pursuing and apprehending them, and for the Daily Diary entries which recorded the movements of the various police officials said to be involved in the case. The replies to the applications revealed that the

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<sup>6</sup> The state filed an appeal against these acquittals before the Delhi High Court and the police officials filed an appeal against the trial court's direction that they be prosecuted for fabrication of evidence. The Delhi High Court dismissed the state's appeal and upheld the acquittals of Qayoom and his co-accused. But it also quashed the trial court's direction that the police officials be prosecuted. The last time I spoke to Qayoom he was planning to file an appeal in the Supreme Court against the High Court's order quashing the prosecution of the police officials.

vehicles that the police said they used to apprehend the 'terrorists' never went to the place where the 'terrorists' were allegedly arrested, and the police officers involved in the case lied about their whereabouts on the relevant days.

Their first task was to make sure that they understood the police's version of events as narrated in the chargesheet. He told me of the way in which they collaboratively translated the chargesheet from English to Urdu.

I didn't understand English that much, but whatever I could, I read and tried to understand. Some of the boys couldn't read Hindi, so someone used to read it in Hindi, and I would write it down in Urdu. Then I would read it out to my friend and he would write it down in English. Like this we translated it into English and Urdu, and Urdu to English because if people could not read the documents, then the case itself is bad.

People should know what is written.

Qayoom went on to tell me that this was how they read and responded to the contents of the chargesheet. But more significantly, they collaboratively went through this slow process of translation first from English to Hindi to Urdu in order to read about the then newly enacted RTI Act, and then from Urdu to Hindi to English in the writing of RTI applications that they filed with the Special Cell police station.

When I went to jail in 2005, the RTI was enacted. I'm not such an educated person, but I know a little bit. I don't know that much English, but I know a lot of Urdu. I began reading little, by little, then I came to know what power is there in this. *Voh pathar ki lakir hain* (It is a line in stone - unchangeable) - that the entire answer has to come. In 2006, we started filing RTI applications. We didn't get any proper answer. After that, in 2009, when a lot of news (about RTI) started coming – it came on TV also – then we

started in earnest. I filed an RTI, saying that on that day, you said that some police officers came in a vehicle to arrest me from the gurudwara... I took the name of the policemen and I said give me the DD (daily diary) entry, The DD entry showed some of them being on report duty and some of them being somewhere else.

Qayoom and his co-accused also filed RTI applications requesting the travel logs of the vehicles the police claimed were used to arrest them.

The vehicles [that the police said they had travelled in] were at the *thane* (police station) detail some of them had gone to Sangam Vihar (a neighbourhood in Delhi), none of them had gone to the railway station [from where we were arrested].

They also filed RTI applications with other police stations which ought to have recorded incidents within their jurisdiction in their Daily Diary reports.

I filed an RTI with the Paharganj police station, and they said we have no such record.

‘We have no record of any such incident on 11 July.’ If any militant is caught, then there is a red alert. Wouldn't the railway police force know, wouldn't the Paharganj police station know if there was a terrorist who was caught? That answer also came. Then we put all the paper together and produced before the judge.

I asked Qayoom how he came up with the idea of filing RTI applications and how he went about it. He said:

One night we were watching the news...Yes there was a TV in jail. So then we saw the news, and heard that the RTI law had come into force. After that we asked our lawyer to

bring us a book. We read it a bit, and it said that the '*RTI chiṭī pathar ki lakīr hain*' (the RTI letter is unchangeable) and that no one can lie in it. We started in 2005, but we didn't get any response, and then in 2010 maybe we started getting responses.

Me: Did you write them yourself or did you get your lawyer to do it?

Qayoom: My English is a bit bad, so my co-accused, he knew English, he wrote it out.

But we sat together and decided what to write, what to ask for. We used to write it out first in Urdu and then he would make it in English. Then we submitted it.

The answer came. The logbook showed that the officer [who arrested me] was not on duty. You can't change a logbook. They copied the logbook, put a seal on it and send it to us. The same DD entry, they copied it, put a seal on it and sent it to us. We then gave it to our lawyer.

While most of this labour went on in jails (a space that I did not have access to) and not in courtrooms, his narrative is insightful for several reasons. First notice how Qayoom and his co-accused came to understand the law by developing a sensuous familiarity with the texts. Here we see how Qayoom and the other men jailed along with him, through a slow, deliberative and collaborative process of translation from English to Hindi to Urdu and then back again from Urdu to English, began to understand what was written against them in their chargesheets and also began to read the law. It was through these small steps, 'little by little', that they came to understand legal rules. It was through this process of repetition, of copying the legal rule from one language into another that they seemed to have understood the law. They also came to understand RTI Act by the slow process of writing, translating and copying the repeated RTI applications.

Secondly, notice how it was a collaborative process. It is through the slow, collaborative reading and practices of sharing legal knowledge that Qayoom and his co-accused were able to obtain an acquittal. They first came to know about the RTI act through television and then through their own reading. In the course of his trial, he and his co-accused came to know that the police had to keep various log books – vehicle logs which kept track of the whereabouts and mileage of police vehicles and the Daily Diary Register which recorded the whereabouts of various police officials and the occurrences that were reported to the police station. Through this repeated, collaborative process of writing and filing applications, along with a knowledge of the procedures and technical aspects of police work and the RTI Act, Qayoom and others revealed that the police had (very ineptly) fabricated the case against them.

This is not the only example of people accused of terrorist crimes using the RTI to good effect (Indorewalla 2013). Examples of such legal bricolage abound, with terror accused sharing legal forms, strategy, case law, and background information on police officers. It was very common for me to be told about the happenings in one terror-accused's case, by another terror-accused. Often, one would say that he asked his lawyer to copy an argument or strategy used by another terror-accused's lawyer in another case. Qayoom's and other instances tell us two things about the relationship between legal technicalities and forms of sociality. Firstly, that it is clear that one does not learn what a rule is by being instructed in how to apply it (Kripke 1982), but rather through repeatedly and collaboratively doing things with these rules. These narratives tell us that learning a rule is based on imitation, copying and experimentation. Secondly, the fact that this doing things with legal technicalities is a collaborative process suggests that the modes of sociality that come into being around these technicalities are not interpellated or named into existence (Althusser 2014; Poveinelli 2002). Rather what emerges

here are modes of sociality that emerge through the sharing of information, documents and legal strategies. These communities of knowledge formed around legal technicalities.

Some legal scholars have suggested that foundational normative texts enable the creation of communities around them. These religious and constitutional texts engender narratives in communities that come to be built around them. The communities then generate narratives and interpretation of these foundational documents. In this way, these texts are in a two-way relationship with the communities built around them. For example Baxi (1999) argues that one way to understand constitutions is as enabling a sphere of public discussions around constitutionalism. These spheres serve as "set of ideological sites that provide justification/mystification for constitutional theory and practice" (ibid 1188). In Baxi's account, constitutions engender forms of politics and public debates about the meaning and salience of the constitution. It is through these debates that communities are built around constitutional ideologies. Similarly, Robert Cover (1983), taking the example of the Torah and the US Constitution argues that these foundational texts create communities around them that maintain interpretive commitments to these texts. Members of the community bear a common awareness of the centrality of the text to their self-understanding. The communities that are called into being by these texts, are in constant dialogue with these documents and in the process construct notions of their community in relation to the texts. What follows, in Cover's account, is that community interpretation of these texts is *jurisgenerative*, i.e. they create legal meaning.

It is easier to imagine a community being built around a foundational religious book or a constitutional document, as these texts imagine a shared identity and a narrative built into the creation of that community. What arises here is a smaller temporary community of terror-accused built around the interpretation of legal rule and technical processes. The narratives that seem to

bind Qayoom and his co-accused is one about the unfairness of the trial. This is built through a knowledge of how the police violated procedural legal rules and technical processes. Notice what Qayoom says about why he and his co-accused engaged in practices of translation ‘if people could not read the documents, then the case itself is bad. People should know what is written.’ Implicit in these statements are the ideas of police accountability and that judicial proceedings ought to be intelligible to the people who are being tried. Or later, when he talks about filing the RTI about the Daily Diary entries regarding the police officers who purportedly arrested him: ‘I took the name of the police men and I said give me the DD (daily diary) entry, The DD entry showed some of them being on report duty and some of them being somewhere else.’ Or later on when he speaks about the RTI application filed regarding the information to local police stations about his purported arrest: ‘If any militant is caught, then there is a red alert. Wouldn't the railway police force know, wouldn't the Paharganj police station know if there was a terrorist who was caught?’ These statements are premised on a knowledge of the processes of police and judicial paperwork. Qayoom and his co-accused know that the police have fill out various documents and that there are forms and registers that monitor police activity. In these statements Qayoom is giving voice to the idea that the proceedings against him were fabricated because the procedures and technicalities in building the case were obviously concocted. The notion of the unfairness of the trial - which may well have been expressed as a reflection of social and political prejudice against Kashmiri muslims - was expressed in procedural and technical terms.

#### **4. Conclusion**

In this article I have argued that we ought to look at trials and other judicial and investigative processes, not as extensions of society or ways in which social power is imagined,

but on their own terms. I have tried to show that life in a courtroom is not just an extension of, or a mirror to life on the outside and that the courtroom can be conceived as a conceptual and physical space in and of itself. This is not to say that such analyses ought to be abandoned or that there is nothing to be gained in imagining courtrooms as microcosms of society, but rather to suggest another way of understanding trial processes.

I have suggested that two reasons for taking on the technicalities. The most obvious one is to understand how trials produce juridical truth. These mundane rules and processes are important to understand how legal knowledge is produced. For if the tools of how knowledge is produced are changed, then this has epistemological consequences. The second reason for studying the technicalities is to look at the modes of sociality that they create. The courtroom is not merely a place where interlocking social and political antagonisms are played out: the world of the court constitutes its own forms of sociality. In working with the technical aspects of the paperwork that police had to perform and a knowledge of the RTI Act, Qayoom and his co-accused built a narrative of how the charges were fabricated against them. In building the narrative and in working with these documents and the RTI applications, what emerged was a little community of knowledge around these technicalities. They shared a common narrative (the police fabrication of the evidence) and a common purpose (to obtain an acquittal) and which was built upon a common interpretive commitment to these technicalities.

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