DELHI SCHOOL OF PUBLIC POLICY & GOVERNANCE
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Mitigating Undesirable and Unintended (but mostly Foreseeable) Consequences during Decision-Making

Applying "Wicked" Problem-Solving Approaches to Public Law and Public Policy Problems

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ABSTRACT

This short law/ policy brief examines important cases for potential application of "wicked" problem-solving approaches to complex policy and legal problems; andhas been especially written as background reading material for in-service training of mid-career IAS officers at LBSNAA, Mussoorie, India.

Key Words: policy making, legal theory, policy problems, wicked problem solving, perverse problem solving

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Introduction

As recently as on the 24th of July this year, the Supreme Court of India needed to intervene in the case of a well-intentioned bail condition imposed by the Delhi High Court: a requirement for an accused to *drop his Google Map pin location regularly to an Investigating Officer (IO) throughout the period of his release on bail*.[1] The *legal* question that the affected party presented to the Supreme court therefore, is *whether* such a condition amounts to a requirement for *continuous surveillance;* and consequently, whether a bail condition such as this would stand in the face of *Article 21 constitutional rights* in India on the *protection of life and personal liberty* of her citizens? In addition, forthcoming deliberations by the Supreme Court on the issue will need tograpple with the *right to privacy* recognised as a fundamental right by the Supreme Court itself[2], perhaps even invoking of the *Doctrine of Proportionality* that usually gets attracted in cases of *judicial oversight* of *State actions*, namely, that *an administrative measure to address a situation must not be more drastic than is necessary for attaining the desired result*.[3]

On further unpacking, such a bail condition could lead to many more *unintended* consequences; for instance: whether at some future point of time, all accused persons (including all IOs) in India, *by logical implication*, need to *necessarily* start using digital devices compatible with *Google Maps*, perhaps to the point of discontinuing the use of *MapMyIndia*, (*Apple) Maps* and other *competing* web service applications, in favour of alegal insistence on using *only one specific software application/ service*? And whether such court-mandated (forced)*user consent*(though online agreement to standardised "terms of service") that *Google Maps* and other similar software/ service applications *necessarily require* at the time of their installation on a digital device—consent that

[1]*Shakti Bhog Bank Fraud: Supreme Court slams bail condition requiring accused to share Google location with police*, Bar&Banch (24 July 2023), *available online* https://www.barandbench.com/news/litigation/shakti-bhog-bank-fraud-supreme-court-raman-bhurari-bail-condition-google-location.

[2]*Right to Privacy is "intrinsic to Life and Liberty", rules SC*, The Hindu (24 August 2017), *available online* https://www.thehindu.com/news/national/privacy-is-a-fundamental-right-under-article-21-rules-supreme-court/article62042245.ece.

[3] Pradeep, N.A., *Doctrine of Proportionality in Indian Administrative Law: An Analysis*, Indian Journal of Law, Polity and Administration, *available online* https://www.ijlpa.com/_files/ugd/006c7e_560d9a4671824e4dbd773ce0c285edc4.pdf?index=true.

allows[4] *Google Maps* to store and share user locations for marketing and promotional purposes; consent that allows for surveillance and recall both by national and by foreign governments for reasons well beyond tagging/ tracking—could ever be treated as *voluntary and informed consent*, especially when contrasted with multiple instances where the Supreme Court has itself insisted on *voluntary and informed consent* as a *necessary* piece of the *right to privacy* puzzle in the digital domain?[5]

In all fairness, electronic tagging and surveillance are not new technologies; and have been used in more than one situation by more than one legal jurisdiction elsewhere: for instance, the United States court system can require *ankle bracelets (clamps)* as a condition for release on bail/ parole to monitor undesirable movement of such persons[6]; and parts of the United Kingdom, through so-called *sobriety tags*, rely upon the use of electronic sensors that can sense alcohol content in a person's sweat to alert law enforcement authorities in the case of repeated alcoholic offenders.[7] However, the use of electronic tagging in most developed country jurisdictions appears to be relatively *narrow* and *specific*, relying upon specialised hardware and software that *only and directly communicates* with prison/ law enforcement authorities, and therefore usually[8] *does not* lead to serious derogation of an individual's privacy *beyond the bare minimum* that may be *absolutely necessary* to achieve certain restrictions that are fundamental to the essential purposes of granting bail or parole, or to the broader issue of possible prevention of further criminal offences by such persons.

In sum, it will be interesting to see how litigation on the subject now unfolds before the Supreme Court; since both the direction by the Delhi High court *effectively appears* to require a person asking for bail, to necessarily share his *location* with *Google/ Alphabet*

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[4] *See, e.g.,How Google uses location information*, Google, *available online*https://policies.google.com/technologies/location-data?hl=en; *see, also, Foreign Intelligence Surveillance Act (FISA) and Section 702*, FBI, *available online* https://www.fbi.gov/investigate/how-we-investigate/intelligence/foreign-intelligence-surveillance-act-fisa-and-section-702#:~:text=FISA%20Section%20702%20is%20an,takes%20action%20to%20reauthorize%20it.

[5] *See, e.g.,* Desai, N. (2017), *India: Supreme Court holds that Right to Privacy is a Fundamental Right guaranteed under the Constitution of India*, Mondaq, *available online* https://www.mondaq.com/india/privacy-protection/629084/supreme-court-holds-that-the-right-to-privacy-is-a-fundamental-right-guaranteed-under-the-constitution-of-india.

[6] *See, e.g.,* Office of Justice Programs (2011), *Electronic Monitoring Reduces Recidivism, available online* https://www.ojp.gov/pdffiles1/nij/234460.pdf.

[7] *See, e.g.,* Ministry of Justice (2021), *Sobriety tags launched in England to tackle alcohol-fueled crime*, GOV.UK, *available online* https://www.gov.uk/government/news/sobriety-tags-launched-in-england-to-tackle-alcohol-fuelled-crime.

[8] There are, however, numerous exception reports that indicate serious threats to human rights because of such electronic surveillance methods; *see, e.g.,* ACLU (2022), *Three People Share How Ankle Monitoring Devices Fail, Harm and Stigmatise, available online* https://www.aclu.org/news/criminal-law-reform/ankle-monitoring-devices-fail-harm-and-stigmatize.

and *only through that platform* with an IO, rather than *directly and only communicating with* an IO as was actually intended by the Delhi High Court.

"Wicked" Policy Problems and the Doctrine of "Absurdity"

Modern academic discourses acknowledge that most public policy problems—even *simple and routine* ones such as releasing an accused on bail *with electronic surveillance* as analyzed earlier in this brief; legislating or setting *prima facie* thresholds/ standards for initiating a case of sedition[9]; evolving a regulatory framework for resolution of contractual disputes[10]; ensuring quality outcomes during government contract award and implementation[11];and regulating partisan advertising by incumbent governments[12]—are all *inherently* "wicked" problems.[13] Here, "wicked" is used as meaning *persistent* and *non*-"tame", i.e., not amenable to simple or simplistic solutions, but *definitely not* as "evil" in *any* sense of the word. Further, wicked problems are generally not amenable to a "stopping rule", i.e., any attempt to solve such a problem usually leads to multiple unintended consequences, which in turn require many more *attempts at consequential problem-solving, thus converting* complex problem-solving into*a never-ending exercise* rather than a *single-shot* task. Last, but not the least, *solution providers* attempting to address such complex problems (problem-solvers such as political executives, legislatures, judicial institutions, and civil servants)need to always come out as "correct" and can never be "wrong", i.e., that they are always politically, legally, administratively and even *optically* liable for the consequences of the solutions that they generate, because both the *effects* and the *after-effects* of their solutions can matter a great deal to the people and the institutions that are touched by such policy solutions.[14]

In this context, some *related doctrines* in legal theory that could assist in solving "wicked" public law problems[15], are the *Absurdity Doctrine*[16]and the *Doctrine of*

[9]*Law Commission recommends Stricter Sedition Law*, SCO (03 January 2023), *available online* https://www.scobserver.in/journal/law-commission-recommends-stricter-sedition-laws/.
[10]*See, e.g.*, Verma, S. (2023), *Reforming Arbitration and Dispute Settlement in Public Contracts in India*, SSRN, *available online* https://ssrn.com/abstract=4369637.
[11]*See, e.g.*, Verma, S. (2020), *Harking Up the Wrong (L1) Tree,* SSRN, *available online* https://ssrn.com/abstract=3749204.
[12]*See, e.g.*, Verma, S. (2014), *Government Advertising*, SSRN, *available online* https://ssrn.com/abstract=2435870.
[13]*See, e.g.*, Head, B.W. (2008), *Wicked Problems in Public Policy,* The University of Queensland, copy available with Author.
[14]*See, e.g.*, Newman, J., and Head, B.W. (2017), *Wicked Tendencies in Policy Problems: Rethinking the Distinction between Social and Technical Problems*, Oxford Academic, copy available with Author.
[15]*See, e.g.*,Almedia, B. (2021), *The Law and Its Limits: Land Grievances, Wicked Problems, and Transitional justice in Timor-Leste*, International Journal of Transitional Justice, copy available with Author.

Harmonious Construction.[17] The *former* allows judicial/ legal institutions to *disregard* plain meaning (or well-meant intentions) of statutes in cases where the (unintended) outcomes turn out to be plainly ridiculous and/ or absurd; while the *latter* doctrine attempts to arrive at *legally consistent and harmonized outcomes*, even if process of harmonisation requires the rejection of any conflicting words, language or intentions amongst different statutes. Simple applications of these doctrines *within legal domains* are resolving drafting mistakes through the recognition of *Scrivener's Errors* ("scrivener" meaning scribes as being a set of professionals who could read and write during early times)[18]—also sometimes referred to as *Vitium Clerici*[19]; while more advanced applications of these twin doctrines relate to statutory interpretation in more complex cases, such as were a statute to make it illegal to "draw" blood in the streets, would its terms apply to a doctor performing an emergency surgery on the road? Or whether a prisoner violates a law against prison escape, if he or she breaks out of a prison building or an escort vehicle that is on fire?[20]

Recognizing "Wicked" Problems in Law and in Public Policy

Historically, the world of law-making and statutory interpretation appears to have been much ahead of public policy discourses in terms of either *explicitly* or *implicitly* recognizing the "wickedness" of legal problems: for instance, while the law may bar one person from taking the life of another person, the former is allowed to claim the *right to self-defense if threat is imminent* as a valid exception to the "thou-shalt-not-commit-murder" rule, albeit with a consequential *shift of the onus of proof* if such an exception were to be claimed.[21] This constant *provisos* and *exception-making*, together with continuous *shifting of the onus of proof*, is perhaps merely a simple and early example of recognition of most real-life legal situations as inherently "wicked".

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[16]*See, e.g.,*Jellum, L. (2011), *But That is Absurd! Why Specific Absurdity Undermines Textualism*, Legislation Commons, *available online*https://ssrn.com/abstract=1808976.

[17]*See, e.g.,* Subramanian, S., Gokani, N., and Aneja, K. (2022), *Right to Commercial Speech in India: Construing Constitutional Provisions Harmoniously in Favour of Public Health*, Cambridge university Press, *available online*https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1923573ABC356AEAF1B3B348EC97045D/S1073110522000535a.pdf/right-to-commercial-speech-in-india-construing-constitutional-provisions-harmoniously-in-favor-of-public-health.pdf.

[18]*See, e.g.,* Gold, A.S. (2006), *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, Brooklyn Law School/ SSRN, *available online* https://ssrn.com/abstract=960584.

[19]Meaning *the Mistake of a Clerk*, Black's Law Dictionary, *available online*https://thelawdictionary.org/vitium-clerici/.

[20]Gold, *supra* n.19.

[21]*See, e.g.,*Bakircioglu, O., *The Right to Self Defence in National and International Law: The Role of the Imminence Requirement, available online* https://mckinneylaw.iu.edu/iiclr/pdf/vol19p1.pdf.

Modern policy and legal issues have now become far more complex and intertwined than ever; and they therefore create an immense scope for adoption of highly creative and effective approaches if only "wicked" policy concepts were to be suitably factored-in while attempting solutions to such complex real-world problems. It was this recognition—the imperative for adoption of *creative inter-disciplinary approaches*—that seems to have prompted India's Prime Minister—perhaps the most decisive and hands-on ever—to unequivocally emphasize on the *need for capacity-building* and *ending silos* while addressing the *National Training Conclave* in June earlier this year.[22] India's Home Minister had closely followed this dictum in a recent public address when he emphasised on the need for use of *simple and clear words* in legislative drafting.[23]

Earlier, sometime in 2018, Justice D. Y. Chandrachud, now the Chief Justice of India, while speaking on the "Narrative of Justice", had spoken about judges being artists in their own right: shaping legal discourses just as novelists shape the narrative of their characters. As India's most incisive and insightful Chief Justice leading a Supreme Court consisting of some of the sharpest legal brains ever, it was only appropriate and expected of him to conclude his address with the thought that the purpose of a good storyteller is *not* to tell us *how and what to think*, but rather to *lead us*, and eventually to *figure out on our own*, the *right questions to think about*.[24]

Confronting and addressing wicked policy and legal problems is something that both India's Prime Minister and the Chief Justice of India have thus directly and indirectly emphasized upon—the *fundamental need* for adopting an *unending "what-if" and "if-so" approaches* focused on asking the *right* questions, while always attempting *flexible and constantly-evolving solutions* to such questions—approaches that can perhaps prove to be more effective at delivering efficient solutions on a real-time basis, responding very fast, proactively and with foresight, at pace with complex policy and legal problems

[22] *PM inaugurates first-ever National Training Conclave*, PMO (11 June 2023), *available online*https://www.pmindia.gov.in/en/news_updates/pm-inaugurates-first-ever-national-training-conclave/#:~:text=Prime%20Minister%20Shri%20Narendra%20Modi,rich%20political%20and%20administrative%20experience..

[23] PIB, *available online*https://pib.gov.in/PressReleasePage.aspx?PRID=1924177#:~:text=Shri%20Shah%20said%20that%20Legislative,the%20law%20should%20be%20clear..

[24] *If the Dialogical Role of Law is forsaken, Law becomes a Diabolical Instrument*, LiveLaw (16 December 2018), *available online* https://www.livelaw.in/if-the-dialogical-role-of-law-is-forsaken-law-becomes-a-diabolical-instrument-chandrachud-j-at-idia-conference/.

unfolding and interacting with each other in immensely complicated real-world domains.

Greater Uniformity through "Wicked" Problem-Solving?

A typical issue with ensuring *uniform implementation of complex solutions in large organisations*, such as state and federal governments, is ensuring *uniformity of approach*, *commonality of application and due process*, and *achievement of similar outcomes* amongst *multiple units* of the government, each of which normally could come with *wildly varying baggage* like *grossly unequal* administrative histories, *uneven* attitudes and understanding of policy issues, and *differentiated* capacities and commitment in engaging with solutions. Higher courts in India have been facing a similar lack of uniformity in achieving important human rights outcomes, for instance during the release of arrested persons on bail, where each district or subordinate court tends to apply both the letter of the law, as well as court-settled law, in a manner that can appear "too subjective" and even "contradictory" to most public stakeholders and observers.[25]Adoption of "wicked" approaches can perhaps provide better outcomes, as they can employ smarter techniques such as *flipping* the onus just like constant shifting of the burden of proof or leading of evidence; and can therefore potentially achieve much more uniform results by treating practical legal problems as inherently wicked, avoiding in the process pitfalls of classical, traditional, and "tame" solutions.

Distinguishing "Wicked" Solutions *from* the "Perverse"

While attempting to understand "wicked" problem-solving, it may be necessary to *distinguish it* from "perverse" problem-solving; even though the dividing line between wicked and perverse can sometimes be uncomfortably thin in a few cases. "Perverse" solutions are one where latent intent and/or administrative procedures being adopted for programme rollout (sometimes by *stealth*) may be contrary to genuine policy or legal requirements. Perverse problem solving, given that one of its important objectives can usually be *outsmarting the very stakeholders it claims to serve*, usually leads to

[25]*See, e.g., Supreme Court's contradictory verdicts reinforce the need for a Bail Act*, Indian Express (17 August 2022), *available online* https://indianexpress.com/article/opinion/columns/upma-gautam-writes-supreme-courts-contradictory-verdicts-need-bail-act-8094260/.

several undesirable and even adverse consequences. This is especially so when solutions are not well-thought out, or when various parts of/ stakeholders in the policy solution are often working to fulfill their own stealthy/ unstated intentions, rather than as an integrated whole working towards common objectives.

"Wicked" problem solving, on the other hand, is intrinsically *creative*, *persistent,* and *comprehensive*, in sharp and complete contrast to "perverse" problem-solving: the latter usually employs fundamentally "evil" (i.e., improper) approaches/ mechanisms while attempting solutions to complex public problems.[26] An instance of perverse approaches in solving complex policy problems is the pre-2014 enrolment methodology adopted for encouraging *Aadhaar*-holders during UIDAI's initial years, when the UIDAI ecosystem attempted to *deny digital public services* to non-*Aadhaar* holders all the while claiming that *Aadhaar* enrolment was *voluntary*—a highly improper and misleading approach[27] that was subsequently discarded both by the Government of India when it rolled out comprehensive legislation governing UIDAI[28] in 2016, as well as by India's Supreme Court through its 2018 decision upholding the constitutional validity of the UIDAI Act.[29]

The current solution for fast-tracking *digiyatra* enrolment being rolled out by the PPP concessionaire[30] at the Delhi Airport could be equally aggressive and "perverse", and may come up for sharp criticism both by the Government of India and by India's higher courts in the near future, given that much like pre-2014 Aadhaar enrolments, the overarching attempt appears to be one to coax (force?) more and more airport users to enroll themselves using a *latent threat of denial of airport services*. The solution under implementation enables faster entry into terminal building for *digiyatra* subscribers through dedicated entry gates *versus* delayed entry or potential denial of flight boarding opportunities for non-subscribers (because of queues and congestionat "non-

[26]*See, e.g.,* Auld, G., (), Bernstein, S., Cashore, and B., and Levin, K. (2021), *Managing Pandemics as Super Wicked Problems, available online*https://link.springer.com/article/10.1007/s11077-021-09442-2.
[27]*See, e.g., Voluntarily Mandatory*, The Hindu (30 September 2013), *available online* https://www.thehindu.com/opinion/editorial/voluntarily-mandatory/article5182756.ece.
[28]*Preamble* to Act No. 18 of 2016, *available online* https://uidai.gov.in/images/Aadhaar_Act_2016_as_amended.pdf.
[29]*See, e.g., Supreme Court upholds validity of Aadhaar: sets conditions for use*, The Hindu (), *available online* https://www.thehindu.com/news/national/aadhaar-verdict-live-updates-supreme-court-to-decide-the-validity-of-aadhaar-scheme/article25044764.ece.
[30]*See, e.g., Chaos at Delhi International Airport,* Zee News (14 December 2022), *available online* https://zeenews.india.com/aviation/delhi-international-airport-congestion-whats-the-fuss-all-about-and-how-to-avoid-rush-2548000.html.

digi yatra gates"), thus translating into an inherent threat of missing one's flight merely for valuing and upholding one's privacy rights.[31]

An even more problematic aspect could be the unnecessarily fast-track registration of airport users by the PPP concessionaire using *inadequately trained* handlers engaged at the airport entry gates, in its eagerness to *enroll the highest numbers within the shortest possible timelines*. The way this registration actually works in practice, and why it could become problematic from legal perspectives, is that passengers eager to catch their flights and desirous of entering the airport building are made to register by such handlers before face-scanning machines "in a huff" without any meaningful information or explanation the nature of user consent against such "instantaneous" registration: procedures that could fundamentally threaten essential requirements for obtaining *voluntary and informed consent* solidly set forth by India's Supreme Court repeatedly in a large number of cases.[32]

This is especially so given the background that the scheme operates under the aegis of a private corporate entity[33](a body corporate) with a privacy policy that leaves important issues either substantially under- or unaddressed[34]; making it inherently prone to virtually unconstrained data-sharing, without any clear need for user intimation, let alone user consent. The most interesting parts, of course, are that there is no opt-out from the scheme for a user with his/ her sensitive personal information; and that the privacy policy can be altered by a private entity without user intimation, let alone user consent[35], rendering user consent as practically meaningless *ab initio*: a problematic formulation that stands in sharp contrast to multiple Government of India policies[36]on the subject.

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[31]*See, e.g., NITI Aayog seeks clarity from Center on Digi Yatra's privacy policy*, Business Standard (06 November 2022), *available online*https://www.business-standard.com/article/current-affairs/niti-aayog-seeks-clarity-from-centre-on-digi-yatra-s-data-privacy-122110600104_1.html; *see also*, Kodali, S., and Marda, V. (2019), *The Privacy Cost of Digi Yatra's Seamless Travel Promise*, HuffPost, *available online* https://www.huffpost.com/archive/in/entry/digi-yatra-face-recognition-hyderabad-airport_in_5d2d9725e4b085eda5a15c28.

[32]*See, e.g.,* Ray, T. (2023), *Digi Yatra: Convenience at a Cost?*,ORF, *available online* https://www.orfonline.org/expert-speak/digi-yatra-convenience-at-a-cost/.

[33]*See, e.g.,* Verma, S. (2018), *Data Confidentiality in Public Contracts,* SSRN, *available online* https://ssrn.com/abstract=3159135.

[34]*See, e.g.,* Jain, A. (2023), *Planning to use Digiyatra?,* Internet Freedom Foundation, *available online*https://internetfreedom.in/planning-to-use-digiyatra/.

[35] Clause 17 of *Privacy Policy*, DYF, *available online* https://digiyatrafoundation.com/privacy-policy.

[36]*See, e.g.,* ICMR (2017), *National Ethical Guidelines for Biomedical and Health Research involving Human Participants*, ICMR, *available online* https://ethics.ncdirindia.org/asset/pdf/ICMR_National_Ethical_Guidelines.pdf.

Complex Problem-Solving: "Tame" *vs* "Wicked" Approaches

A typical problem faced with timely progression of public projects has been the high incidence of delayed payments by procuring officials to prime contractors: a problem that policymakers have traditionally approached as a "tame" problem, sometimes erroneously *assuming complete innocence on part of procuring officials* and *on part of the procurement system itself*.[37] In contrast, actual reasons for delay in payment of dues can be both genuine and non-genuine, perhaps even vitious in some jurisdictions: a procurement system could encourage sanctioning more projects that can be financially sustained, if only to make "good" impressions on voters and public stake holders towards the onset of elections. Within a general cash-crunch situation, procurement officials could genuinely be unable to make payments due on account of high monetary liabilities spread over a large number of financially unsustainable public projects; and as if to rub salt into one's wounds, unscrupulous procurement officials could also (ab)use delayed payments as a conscious strategy to divert funds to favoured contractors or even discourage new entrants from bidding, displaying a preference for entrenched and friendly contractor engagement in future cases—a clear case of what can only be termed as *futuristic*(pun intended) bid-rigging.[38]

Traditional solutions treat this payment delay as a "tame" problem, advocating the adoption of *equally tame approaches* such as setting financial limits on project sanction against allocated budgets for a given financial year; increased contract monitoring and better financial performance management; and dispatching regular reminders and threats of disciplinary action against erring procurement officials. Most states in India have historically adopted such tame approaches, with little or no impact on addressing or mitigating the basic problem as such.

A "wicked" problem-solving approach on other hand, treats this situation from an entirely different perspective; and both the Government of India (in October 2021)[39]

[37] *See, e.g.,* Verma, S. (2020), *No Longer "Heads I Win, Tails You Lose",* PublicProcurementInternational.com, *available online* https://publicprocurementinternational.com/wp-content/uploads/2020/05/SV-2020-Final-Payments4.pdf.
[38] *Ibid*.
[39] Ministry of Finance (2021), *General Instructions on Procurement and Programme Management*, *available online* https://doe.gov.in/sites/default/files/General%20Instructions%20on%20Procurement%20and%20Project%20Management.pdf.

and the State Government of Haryana (starting even earlier in late 2020/ early 2021)[40],have adopted radical, out-of-the-box solutions by permitting and enforcing nominal interests on delayed payments as part of agreed contract terms and conditions. While such a solution, *prima facie*, may seem to be adverse or inimical to conserving scarce financial resources, even to the point of favoring contractors over the *public fisc*, it is easy to foresee how such a solution operates in practice to both *stem the problem* and *stem the origin of the problem* itself. Mandating interest payments has a secondary "wicked" effect of *automatically* holding a procuring official accountable and liable for unnecessary payment delays; and allows for automatic *inter-se* testing of procuring officials' efficiency and integrity by making possible a comparison of their "percentage of delayed payments" as a fraction of total procurement payments made by each procuring official.

This interest "payment burden"-based solution, in turn, *automatically* reduces funds available for sanctioning future projects in an undisciplined procurement system, forcing policy managers to begin preferring financially sustainable announcements. Thus, allowing interest payments works more like a "wicked" solution rather than a "tame" one. It essentially forces higher-level decision-makers to limit themselves to a given number of projects every year, rather than continuing to prefer rather profligate announcement of projects that remain incomplete and delayed for long periods of time, while creating significant liabilities for delayed payments at the same time, thus reducing the scope for fiscal profligacy even further—something akin to an *automated, self-policing* mechanism.

Wicked Policy Problems: Other Real-Life Applications

An understanding of *Wicked Policy Problems* could be of great relevance not only to India's civil servants, but also to her legal and judicial professions, if the two sides are

[40] The State Government of Haryana took the *bull by its horns*, in a manner-of-speaking, by mandating interest liability for delayed payments by procuring officials in late 2020/ early 2021 for pending bills of media publications. This was quickly followed in 2021 itself for the case of pending farmers' dues in mandis (agricultural trading markets) for delayed payments against procurement of grains etc. (*Haryana farmers to get 9% interest on delayed payments, says CM Khattar*, https://www.livemint.com/news/india/haryana-farmers-to-get-9-interest-on-delayed-payments-says-cm-khattar-11616549078873.html); and in 2022 for the case of delayed payments by state government boards and corporations for works contracts (*Press release 20 January 2021*, https://haryanacmoffice.gov.in/20-january-2021). The Haryana innovation also includes "flipping" responsibility (much like shifting of the burden of proof in litigation) for making entries into measurement books, transferring it to contractors in place of government engineers, thus creating early reference points in the procurement process from which to start measuring relative contractor and procuring official (in)efficiencies.

not to keep conflicting, either internally or amongst each other, as more and more complex and intertwined policy and legal solutions are attempted in *rapidly* developing countries such as in India. The *Defense Procurement Procedure* of 2005/2006 vintage, for instance, has carried within it a clause that rather counter-intuitively *discriminates against Indian bidders* participating in "Buy (Global)" category of defense acquisitions, by insisting on an upfront and direct indigenous content in technical offerings by Indian bidders, as compared to relatively simpler, indirect, and longer-term obligations on foreign vendors through offsets.[41] The "wicked" problem, in this context, of course was, "what" and "how to" design technical requirements for Indian bidders that could end, or at least limit, this discrimination against Indian bidders vis-à-vis foreign vendors participating in "Buy (Global)" contracts.

Taking inspiration from the Prime Minister's evocation of *Atmanir bharta* in defense manufacturing[42], policy solutions have now been implemented by India's Ministry of Defense (MoD) from August 2020 onwards by regularly publishing and expanding the lists of items that can be procured only from domestic vendors[43], as well as implementation of IDEX initiatives of 2018/2020 that address this discrimination *through tangential mechanisms* such as R&D funding support for domestic stakeholders interested in defense manufacturing in India.[44]

In 2016, India's MoD also adopted new blacklisting regulations that are more flexible, more practical, and much more nuanced,[45] implicitly recognizing blacklisting of vendors as an *inherently* wicked policy problem. In the process, MoD addressed several deficiencies with the earlier, pre-2014 system of blacklisting that had been more ad-hoc and more focused on optics, often leading to blacklisting a supplier for errant behavior *first*, and *only later* discovering and managing MoD's own high degree of dependence on

[41] *See, e.g.,* Verma, S. (2013), *A Level-Playing Field That Isn't*, IDSA, *available online* https://www.idsa.in/idsacomments/DefenceOffsetProceduresCould_SandeepVerma_150113.
[42] *See, e.g.,* Verma, S. (2014), *Make In India: Reinventing India's "Make" Procedures for Defence Acquisitions*, SSRN, *available online* https://ssrn.com/abstract=2502569.
[43] *See, e.g.,* Kumar, M. (2022), *Defence Procurement: Negative Lists with Positive Implications*, IDSA, *available online* https://idsa.in/idsacomments/Defence-Procurement-mkumar-300922#:~:text=The%20third%20negative%20list%20contains,Vehicles%20and%20other%20weapons%20systems.
[44] *See, e.g., Ministry of Defence signs 250th Contract under "innovations for Defence Excellence",* The Hindu (15 May 2023), *available online* https://www.thehindu.com/news/national/ministry-of-defence-signs-250th-contract-under-innovations-for-defence-excellence/article66854098.ece.
[45] *See, e.g.,* Verma, S. (2018), *Land Ahoy!,* IDSA, *available online* https://www.idsa.in/issuebrief/debarment-systems-in-ministry-of-defence-sverma-110918.

some such blacklisted suppliers for maintaining essential spares and maintenance of its weapon systems and platforms.

An example of "tame" legislative drafting, in the context of a lack of proper appreciation of "wicked" policy-making concepts, was the draft *Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill* published in 2011: one that *omitted to allow for exceptions to Indian stakeholders in its text* that are *otherwise available to foreign players* under legal regimes such as the United States' *Foreign Corrupt Practices Act* and the United Kingdom's *Anti Bribery Act*.[46] Primarily because of a new political leadership that has been more focused on *content* rather than on *optics*, a process for correcting these drafting mistakes made in 2011 was quickly initiated in 2015 soon after a change in Government, when the *new* Law Minister took up the issue with the *Law Commission of India* (LCI)—a process that has eventually led to many significant improvements being suggested by the LCI in the drafted legislation in its comprehensive report on the subject.[47]

As another instance, the draft *Rajasthan Social Accountability Bill* of 2019, contained both internally- and externally conflicted provisions that were in stark contradiction to well-established legal principles such as *double jeopardy*[48], simply because the draft legislation looked at s*ocial accountability* as a tame rather than a wicked problem. The draft legislation failed to properly recognize that if strict legal requirements are imposed on public servants placing severely short and artificial timelines on their routine decision-making, under the threat of their incurring financial penalties and undergoing imprisonment; then they are more likely to take bad and even illegal decisions *only to* meet such absurd timeliness requirements, rather than taking robust and nuanced policy decisions as they otherwise should. Many mistakes with the originally published draft are now being corrected in the State through the setting up of a multi-stakeholder drafting committee, as well as a committee of practitioners to review and improve upon subsequent drafts of this ambitious policy attempt.

[46] *See, e.g.*, Verma, S. (2014), *Fixing the Foreign Bribery Bill*, SSRN, *available online* https://ssrn.com/abstract=2498457.
[47] 258th Report of the (Twentieth) Law Commission of India, *available online* https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081610.pdf.
[48] *See, e.g.*, Verma, S. (2022), *Nightmare on Bhagwant DassRoad?*,SSRN, *available online*https://ssrn.com/abstract=3521292.

Yet another instance of wicked problem-solving is the pioneering work undertaken in India in law enforcement and anti-corruption, borrowing select concepts from "wicked" problem approaches. The present Union Government initiated several measures, starting with the 2018 amendments to the *Prevention of Corruption Act*, in the backdrop of rising fears of *post-facto rethink* and potential criminal proceedings against an otherwise well-intentioned bureaucracy. Prior sanction by the relevant appointing authority has now been mandatory before launching investigations under this Act, save for two exceptions.[49]These new efforts mirror some earlier legislative approaches: a "prior approval"-based framework at very high levels in state and Union governments was made mandatory for phone-tapping/ interception; and the *relevant Home Secretary alone* can authorise such interception in India under the legal framework evolved by the Union Government under guidance from its Supreme Court.[50] For cases under India's *National Security Act* (NSA), again, there is a mandatory requirement of approval by the Home Department and by an *independent Board* consisting of eminent High Court judges, before a person can be incarcerated for long periods of time under this Act.[51]

Wicked Problem-Solving: Some Interim Lessons and Tentative Conclusions

When viewed against the backdrop of multiple solutions that have been successfully implemented by the Union Government during the last eight years; it stands to reason that "wicked" problem-solving can be much more effective at addressing the problem of perverse incentives and unintended consequences in important areas of public policy/ decision-making. One example that is perhaps ripe for application of a "wicked" approach, is regarding the offence of *sedition*—the *most perverse* and perhaps the *gravest* of all criminal offences—one which goes well beyond terrorism and threats to national security, to *threatening and destroying the very existence of the State* itself. To tackle the mushrooming of sedition-related complaints, many times even initiated by private actors with little (or no) understanding of sedition either as a *political* or as a

[49] PIB (2021), *Measures to Combat Corruption, available online*https://pib.gov.in/PressReleseDetailm.aspx?PRID=1696775#:~:text=The%20Prevention%20of%20Corruption%20Act,senior%20management%20of%20commercial%20organizations..

[50]*See, e.g.,* Manoj, N. (2020), *Phone Tapping Laws in India,* Journal for Law Students and Researchers, *available online* https://www.jlsrjournal.in/phone-tapping-laws-in-india-by-nithin-manoj/.

[51]*See, e.g.,* Singh, P.N. (2022), *Advisory Board under the National Security Act,* The Leaflet, *available online* https://theleaflet.in/advisory-board-under-the-national-security-act-an-explainer/.

legal construct, as well as by over-enthusiastic law-enforcement agencies more focused on maintaining public order, "wicked" problem-based solutions can perhaps be found that are better at *balancing* law enforcement institutions' proclivity and social preferences for adoption of relatively aggressive approaches *with* human rights compliance requirements of a democratic, rule-of-law framework.

While the annual number of *new* sedition-related cases remains *manageable*, it is thus possible to imagine making it mandatory for registration of FIRs and launching of investigation in cases of sedition to obtain *prior approval* of the State/ Union *Home Secretary*, if a routine matter such as investigation into a corruption offence or phone-tapping of an individual require prior approval of an *Appointing Authority* and the State/ Union *Home Secretary* respectively, thus extending the same logic to investigation of the graver offence of sedition. Even more complex variants based on wicked policymaking can then further be attempted, by mandating an investigation supervised by an ADGP-rank officer (*Additional Director General of Police*) for the offence of sedition; and the possibility of an award of monetary compensation or public acknowledgement of "mistakes" for "unnecessary" incarceration—blending *nudge theory* with *wicked policy*—in cases where investigations initiated after obtaining prior approvals of the Home Department do not result in framing of a successful charge-sheet.

As detailed earlier, a "wicked" problem-solving approach is already, albeit silently, in action in India in recent times, with highly impactful and useful results in improving public services' delivery. Discarding traditional, classical, and relatively inefficient "tame" approaches, in favour of adopting more flexible, robust, efficient, and "wicked" approaches to problem-solving in complex public policy and public law domains, may well now need to be given serious thought and due consideration, particularly given the clarion call by our Prime Minister for *ending of silos* and development of *multi-stakeholder*, *multi-perspective*, and *teamwork-oriented capacity-building* of India's civil servants.