The Indian Advocate

JOURNAL OF THE BAR ASSOCIATION OF INDIA

NATIONALISM AND NATIONHOOD

- Goods and Services Tax
- Insolvency and Bankruptcy Code
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From the President's Desk

Full Circle: The Contributions of the Indian Bar through the years

Indian law evolved from religious prescription to the current constitutional and legal system which incorporates principles of common law and other secular legal systems. India has a recorded legal history beginning from the Vedic Age. Some semblance of a civil law system may have been in place during the Bronze Age and the Indus Valley civilization. Law as a matter of religious prescription and philosophical discourse has an illustrious history in India. Emanating from the Vedas, the Upanishads and other religious texts, it was a fertile field enriched by different Hindu philosophical schools and later by Jains and Buddhists.[1]

The present-day legal profession owes its origin to the East India Company. The Charter of 1774 empowered the Supreme Court at Calcutta to enroll advocates and attorneys. However,only English and Irish barristers and attorneys were allowed to practice, and no Indian had the right to appear before the Court.[2] In 1793, Lord Cornwallis first made an attempt to organize the legal profession. He issued Regulation VII, which authorised the Sadar Diwani Adalat to enroll pleaders for the Company's courts in Bengal, Bihar and Orissa.[3]

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1 *History of the legal profession*, The Bar Council of India, http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/.

2 M.P. Jain, Outlines of Indian Legal History 667 (N.M. Tripathi (P) Ltd., 1990).

3 *Id.* at 145, 673.

The Legal Practitioners Act, 1846 was the first all-India law concerning the practice of law by pleaders in India. It introduced important reforms, such as throwing open the office of pleaders in the courts of the Company to all person, irrespective of nationality or religion.[4]

Before the Indian High Courts Act of 1861 was enacted, there were two judicial fora- the East India Company Supreme Courts exercising jurisdiction in the Presidency Towns, and the Sadar Courts exercising jurisdiction over the mofussil.[5] Though the Charter Acts and the Letters Patentempowered the Supreme Courts to enroll advocates who could be authorised to act and plead in the Supreme Courts, rules were made empowering advocates only to appear and plead and not to act, while attorneys were enrolled and authorised to act and not to plead. In the Sadar Courts and subordinate courts, pleaders who obtained a certificate from those courts were allowed both to act and plead. When the Supreme Courts and the Sadar Courts were abolished and their jurisdictions transferred to High Courts under the Act of 1861, this differentiation in the functions of legal practitioners was continued in the High Courts. As a result,in the Original Side of the High Courts, advocates were allowed only to appear and plead, instructed by Attorneys who were only empowered to act.[6]

There were six grades of legal practice in India after the founding of the High Courts – (a) Advocates, (b) Attorneys (Solicitors), (c) Vakils of High Courts, (d) Pleaders, (e) Mukhtars, (f) Revenue Agents.[7]

Various other Acts were passed later and eventually, after Independence, the Indian Parliament enacted the Advocates Act, 1961 to consolidate all laws relating to the legal practitioner, and to provide for the constitution of the All India Bar Council and State Bar Council. Section 29 of the Advocates Act,1961 provides that there shall "be only one class of persons entitled to practice the profession of law,

4 Id. at 673.
5 Id. at 673-674.
6 Aswini Kumar Ghosh v. Arabinda Bose, 1953 SCR 1.
7 Supra note 1; see also supra note 2 at 673-675.

namely, advocates". The Section applies not only to persons practising as advocates before any court/authority in litigious matters, but also to persons practicing in non-litigious matters.[8] Practicing the profession of law involves a larger concept while practicing before the Courts is only a part of that concept.

After liberalisation of the Indian economy in 1994, legal practice has grown tremendously. Practising the profession of law now involves a larger concept of which practising before the courts is only a small part. An advocate's right to practice envisages a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. For instance, from traditional practice of corporate law and employment law decades ago, the corporate and employment practice has now moved to advising on complex structuring of mergers, demergers of companies in India, advising and ensuring compliance with substantial number of rules, regulations related to Companies Act, 2013, Securities Act and SEBI regulations, Competition Law, advising oncomplicated restrictive stock option schemes, drafting and advising on terms and conditions of employment, complex employment documentation, employee handbooks/manuals, advising on restrictive covenants in employment arrangements, employment issues arising at the time of corporate restructuring including mergers and acquisitions, outsourcing initiatives and reductions-in-force,issues relating to expatriates, international workers, State Security Agreements, e-commerce, information technology exemptions, sexual harassment issues etc. to name a few.

Indian Legal Profession is poised to take a giant leap into the global arena. Foreign Law Firms and Foreign Law Practioners have been

[8] Lawyer's Collective v. Bar Council of India, (2010) 2 Mah LJ 726.

constantly lobbying for opening of legal profession in India. In our view this is the right time for India to open up Legal Service Sector to Foreign Lawyers. The profession has grown from strength to strength particularly since early 1990s. It can face any competition from the Foreign Lawyers who wish to establish their presence in India. In terms of competence, efficiency, knowledge, use of technology and speed, Indian Legal Profession is second to none. It can not only face the competition to be offered by foreign Lawyers in India but can also set-up its own presence in foreign jurisdictions, thus providing global opportunity for Indian Legal Profession to grow.

In terms of reciprocal arrangements and coupled with internal legal reforms Indian Legal Profession has the potential to give global standing to Indian Lawyers. The Government of India including the Ministry of Commerce and Industry and the Ministry of Law and Justice and the Law Commission of India have initiated the process of taking effective steps to open the Legal Service Sector In India. We welcome this initiative.

The Legal Profession was introduced in India under the Colonial Rule. The Colonial Rule also saw the emergence of India's Legal Profession taking the Nationalistic role in the struggle for Freedom. Mahatma Gandhi, Pandit Jawaharlal Nehru, Dr. Rajendra Prasad, Sardar Vallabhai Patel, Dr. B.R. Ambedkar, Dr. Shyama Prasad Mukherjee, Mr. C. Rajagopalachari and many other lawyers were in the forefront during our struggle for freedom and in framing our Constitution. Post-Independence, Indian Legal Profession continued to be involved in Nation-Building activities - many became Members of Parliament and State Assemblies. Some leading lights of the profession became Presidents, Vice Presidents, Prime Ministers of India, Speakers of the Parliament and Ministers in the Central and State Governments and some of them held responsible positions in the Opposition. In the recent past in the UPA Government as well as in the (BJP) NDA Government leading Lawyers have held important positions in the Central Cabinet.

In view of global economic developments Indian Legal Profession

is positioned to take up the international role. In the not too distant future we may witness Indian Lawyers achieving big name and fame outside the frontiers of India. The legal profession has come a Full Circle – from colonial subjugation to global presence.

This issue of Indian Advocate is dedicated to Nationalism – with all its colours, contours and connotations. Our Editor-in-chief Ms. Madhavi Divan and her team have done a commendable job in bringing out this issue – full of thoughts, philosophies, conceptions and ideals of Nationalism.

Lalit Bhasin[†]

[†] President, Bar Association of India and Society of Indian Law Firms.

Editor's Note

Having recently assumed mantle as editor of this venerated journal, I am acutely conscious of the pedigree that precedes me and indeed, of the responsibility thrust on me. Past editors include Mr. C.K. Daphtary, Mr. K. Parasaran, Mr. R.K.P. Shankardass and Mr. Raju Ramachandran. They have left me big shoes to fit into and I cannot help feeling like a Lilliput amidst a galaxy of Gullivers. Therefore, at the very start of this journey I would be grateful for suggestions and feedback from members of the Bar Association of India so that we can ensure that this journal retains the standard and relevance it deserves.

2017 has been a difficult year for the bar and particularly for the Bar Association of India. Two past Presidents, Mr. RKP Shankardass and Mr. Anil Divan have passed on. We also lost Mr. Tehmtan Andhyarujina, Mr. P.P. Rao, Mr Krishnamani and Ms. Shyamla Pappu. The loss of these leading lights leaves the bar a much darker place. Amongst them were some of our finest arguing counsel. But that was not all. As jurists, they combined advocacy with academia and rigorous writing on the law. In the rough and tumble of Mondays and Fridays in the Supreme Court, younger generations of lawyers might have relegated the task of writing on the law to another day. The passing of an older generation jolts us into the awareness that that day cannot be postponed any longer. The responsibility to contribute to the development of the law through writing is one that now rests squarely on our shoulders. It is only when one puts pen to paper that settled legal assumptions are revisited and questioned. The exercise is invaluable for the development of the law and indeed, for our own growth as practitioners of the law. It is also a precious asset for future generations of lawyers.

For this maiden venture as editor, I mooted the idea of a themed issue. A single theme that threads together the issue enables a fuller exploration of diverse facets of a subject of contemporary relevance. I also believe that such an exercise might be useful as a source for meaningful reference on the subject in the future. This issue of the Indian Advocate focuses on the very topical and often sensitive subject of 'nationalism' and ' nationhood' in the Indian context. What does it mean to be Indian? How do we interpret Article 1 (1) of the Constitution of India which declares that "India, that is, Bharat shall be a Union of States"? What is the glue that binds us together as citizens of a very diverse nation?

Being 'Indian' means different things to different people and it is that range of diverse views that this issue brings to the reader. The right to hold and assert those divergent views is also quintessentially 'Indian'.

With globalisation and the growth of multi-cultural societies through cross continental migration, one might have expected that the idea of nationhood being tied to territory or to particular people with a shared history, race or religion would have gradually melted away. But those are not the trends the world is currently witnessing. The election of Donald Trump as President of the United States, Brexit in the UK and similar nationalistic trends in other parts of Europe fuelled by the fear of foreign immigrants are testimony to that. Nationalistic tendencies assert themselves with renewed vigour across the western world, as they do in India. The resurgence of national identity manifests itself in myriad ways in India- through cries of Bharat Mata ki Jai, through compulsory playing of the national anthem in cinema theatres, or through demands for yoga or Sanskrit in the educational curriculum, even through cow vigilantism. On the other side of the spectrum are the JNU debates, the cries for "azaadi", whether in the context of Kashmir or otherwise, fierce opposition to the idea of a uniform civil code, a demand in some quarters, for reservation on religious lines.

The cacophony on both sides can be shrill and it is easy to get

drowned out in the din. But it is nonetheless necessary to debate the notion of nationhood and nationalism. So long as national boundaries do exist on this planet, we need to engage on the vital question: What is the common denominator of shared values that bind together citizens of a country? The greater the diversity and plurality, whether of region, race or religion, as in India, the greater the need to identify that spoken or unspoken substratum of values that cements together the citizens of a country and sets them apart from others.What is that non-negotiable "basic structure" of values that defines "India, that is Bharat....a Union of States".

You will find in this issue, papers by a range of authors- former judges, jurists, senior advocates and some younger lawyers, and law students, a few making an able debut as writers. This issue also brings to the reader less explored facets of cementing a diverse country- for example, a unified tax regime as GST seeks to introduce with the idea of "one market one tax"; and creating uniform standards for law practitioners across the country.

Madhavi Divan[†]

[†] Advocate, Supreme Court of India.

Free Speech, Nationalism And Sedition*

Justice A.P. Shah†

> A parochial, selfish, narrow minded nationalism has caused so much misfortune and misery to the world. A mad and exaggerated form of this cult of nationalism is today running rampant….1

Today, we are living in a world where we are forced to stand for the national anthem at a movie theatre, we are told what we can and cannot eat, what we can and cannot see, and what we can and cannot speak about. Dissent, especially in the university space, is being curbed, and sloganeering and flag raising have become tests for nationalism. We have a 21-year-old University student who is subject to severe online hate, abuse, and threats, only because she dared to express her views.[2]

In any society, at any given point of time, there will always be people holding divergent views. Such views are integral and inevitable in a healthy, functioning democracy. Nowhere has this been better expressed than in the judgment of the Bombay High Court in *F.A. Picture International v. CBFC*,[3] where the Court said:

> ….History tells us that dissent in all walks of life contributes to the evolution of society. Those who question

* A version of this article was delivered as a speech for the M.N. Roy Memorial Lecture on April 19, 2017 at the Constitution Club, New Delhi.

† Former Chief Justice of the High Court of Delhi and former Chairman of the Law Commission of India.

1 M.N. Roy, Nationalism: An Antiquated Cult (Bombay, 1942).

2 Barkha Dutt, *Wounded by a thousand words*, The Week, March 12, 2017, http://www.theweek.in/theweek/specials/gurmehar-kaur-controversy.html.

3 AIR 2005 Bom 145.

> unquestioned assumptions contribute to the alteration of social norms. Democracy is founded upon respect for their courage. Any attempt by the State to clamp down on the free expression of opinion must hence be frowned upon.[4]

Unfortunately, however, our institutions of learning are under attack today and there is a concerted attempt to destroy any independent thought. Today, sadly, in this country I love, if anyone holds a view that is different from the government's "acceptable" view, they are immediately dubbed as "anti-national" or "*desh-drohi*".

This marker of "anti-national" is used to intimidate and browbeat voices of dissent and criticism, and more worryingly, can be used to slap criminal charges against them. All these factors have led me to choose the present topic to generate further discussion and debate. I think it is all the more important to discuss and talk about nationalism.

What is "nationalism"? At the very outset, I would like to caution against, what the celebrated Nigerian author Chimamanda Adichie terms, the "danger of a single story" – the danger of understanding an idea only from a single perspective and ignoring the diversity of views present.[5] Mridula Mukherjee points out the nuances in the word "nationalism", and how it encompasses the ideas of progressive nationalism, a revolutionary pro-people nationalism, and a regressive and jingoistic nationalism.[6] Hitler's nationalism, after all, was very different from Gandhi and Nehru's nationalism.[7] The European conception of nationalism, developed from the days of the Treaty of Westphalia and in the age of imperialist expansion, focused on the enemy within, whether the Jew or the Protestant. In contrast, the Indian concept of nationalism, developed as an opposition to an external imperialist British state, was more inclusive in uniting the people against them. This was then, an "anti-colonial nationalism", where the primary identity of Indians was

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5 David Brooks, *The Danger of a Single Story*, The New York Times, April 19, 2016, https://www.nytimes.com/2016/04/19/opinion/the-danger-of-a-single-story.html?mcubz=3.

6 Mridula Mukherjee, *What it Means to be Independent*, The Hindu, August 15, 2016, http://www.thehindu.com/opinion/lead/What-it-means-to-be-independent/article14570147.ece.

7 *Id.*

not their religion, caste, or language, but their unity as equals in their demand for freedom. It is thus important to remember that there is no single overarching "right" conception of nationalism. How then did M.N. Roy understand nationalism? In Roy's view, nationalism was representative of the desires and ambitions of a group of people within a certain geographical area, as opposed to people uniting on the basis of class.[8] Nationalism thus emphasised the placing of one's country's interest over the interest of the rest of the world. There was a time in the 19th century, when countries were still isolated from each other, when nationalism was a historic necessity under whose banner people came together and humanity progressed. However, he believed, it had now become a selfish, narrow-minded "antiquated cult", and the world should progress towards internationalism and international cooperation.[9] The ambitions of different nations began to conflict with each other, contributing to an exaggerated and irrational form of nationalism, which manifest itself in the rise of Fascism and Nazism, eventually leading to the Second World War. Nationalism, in Roy's eyes, had thus become a synonym for revivalism, whose advocates were consigned to glorify the past and advocate for a return to the bliss of the middle ages and a simpler life.

Rabindranath Tagore, the composer of the Indian national anthem, had even more radical views on nationalism. He believed that a fervent love for the nation represented a conviction of national superiority and a glorification of cultural heritage, which in turn was used to justify narrow-minded national interest. Writing in 1917, Tagore said, "when this organisation of politics and commerce, whose other name is the Nation, becomes all powerful at the cost of the harmony of higher social life, then it is an evil day for humanity".[10] He thus cautioned against such an exclusionary and self-aggrandizing form of nationalism that was based on a hate culture against an imagined or actual Other, who was viewed as the enemy.

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8 *Supra* note 1.

9 *Supra* note 1.

10 Rabindranath Tagore, *Nationalism in the West*, 1971, *available at* http://tagoreweb.in/Render/ShowContent.aspx?ct=Essays&bi=72EE92F5-BE50-40D7-8E6E-0F7410664DA3&ti=72EE92F5-BE50-4A47-0E6E-0F7410664DA3.

On the other hand, the revivalists focus on the glory of ancient India, going back to the Aryan race as the building block of the Indian civilisation. This takes the form of cultural nationalism, where anyone celebrating "Western" festivals such as Valentine's Day or even couples merely holding hands are to be ostracised and attacked. As religious nationalism, it endorses the two-nation theory, which envisages a nation under Hindu rule, a Hindu *rashtra* in *Akhand Bharat* (a United India). This is premised on the belief that only a Hindu can claim the territory of British India as a land of their ancestry, i.e. *pitribhumi*, and the land of their religion, i.e. the *punyabhumi*. As Vinayak Damodar Savarkar propounded, "Hindu *Rashtra* (state), Hindu *Jati* (race) and Hindu *Sanskriti* (culture)."[11] Muslims and Christians are viewed as foreigners, who are indigenous to the territory of India, and whose religion originated in a separate holy land. Writing in 1938, when Hitler was on the rise, Savarkar justified Hitler's policies towards the Jews. He said, "A nation is formed by a majority living therein. What did the Jews do in Germany? Being in minority, they were driven out from Germany."[12] I am not sure whether his views changed after the Second World War, and when the extent of the holocaust came to be known. Savarkar further believed that minority groups must lose their separate existence and separate identity if they want to live in India. Roy, unsurprisingly, was critical of such views. While discussing the declaration made by the President of the Hindu Maha Sabha that "the majority is the nation", Roy said that it sounds quite in "tune with formal democracy", but in reality "particularly in the prevailing atmosphere of Indian politics, it means that in a nationally free India, the Muslims, constituting nearly 1/3rd of the population, will have no freedom."[13] He was thus against removing an imperialist regime and replacing it with a nationalist regime, which would continue to deny real freedom to most of the Indian people.

It is important to remember that both Tagore and Roy wrote in the

[11] Vinayak Damodar Savarkar, Essentials of Hindutva (CreateSpace Independent Publishiing Platform, 2016) (1923).

[12] Vinayak Damodar Savarkar, *Speech at Malegaon*, October 14, 1938, MSA Home (Special) 60 D (g) III, 1938.

[13] *Supra* note 1.

context of the First and Second World War respectively. They had thus, witnessed first-hand, how the pursuit of the glory of the nation had resulted in the great wars, and betrayed the ideas of liberty, equality, and fraternity of the French Revolution. Today, in independent India unfortunately, having such views is almost blasphemous and perhaps seditious.

India is a diverse country and people hold different views about nationalism, the idea of India, and our place in the world. We must respect these differences - not silence those who hold a different view on nationalism and patriotism for the country. Elevating only a single view– one that idolises the nation and staunchly rejects any internal or external criticism– will only polarize citizens against each other. At the end of the day, it is important to question, what is the defining characteristic of a nation – is it the territorial boundary, or the collection of people that is a country's defining feature. Our Constitution starts with a solemn declaration of "We, the people of India…". In this context, is being anti-national equivalent to being anti-Government or is the hallmark of an anti-national that they are against the interest of the people, especially the minorities and the depressed classes? Can an entire University and its student body be branded "anti-national"? Our state of affairs is especially sad when we consider that the freedom struggle gave us a country and a Constitution that was committed to the ideals of democracy, free speech, civil liberties, and secularism. Unlike Pakistan, religion is not the founding basis of our nation. Our right to free speech and expression is not a gift or a privilege that the Government bestows on us; it is our right, guaranteed by the Constitution of India, and won after decades of struggle and sacrifice by the people of India.

I. Free speech and the Constitution

Writing in *Young India* in 1922, Gandhi said, "[W]e must first make good the right of free speech and free association before we make any further progress towards our goal. We must defend these elementary rights with our lives".[14] Gandhi's views were based on his belief that

[14] MK Gandhi, *Immediate Issue*, Young India, January 5, 1922, in Collected Works of Mahatma Gandhi Volume 22, 392 (Publications Division, Government of India, 1999).

liberty of speech may not be assailed even when the speech hurts and that "freedom of association is truly respected when assemblies of people can discuss even revolutionary projects".[15] Gandhi was not alone in his ideas. Our early nationalist leaders too, from Raja Ram Mohan Roy to Bal Gangadhar Tilak, made the grant of civil liberties to ordinary Indians an integral part of the national movement. These very ideas were incorporated into the Constitution by the Constitution drafters. They understood that while the freedom of worship is part of democracy and is a fundamental right, the edifice of modern democracy must be the freedom of thought and expression. Our Constitution is drafted as a positive, forward-looking, inclusive document that binds the aspirations of all Indians. The Preamble expresses the resolve of the people to constitute India into a sovereign, socialist, secular, democratic republic securing justice, liberty, equality, and fraternity of its citizens. This achievement is even more noteworthy if we consider, as Fali Nariman recently pointed out, that in a Constituent Assembly of 299, 255 members (85%) were Hindus.[16] Despite being in a massive majority, the Constitution drafters took pains to protect the interests of the minority, the oppressed, and the dissenters. Having been given a magnificent and inclusive Constitution, it then fell on the Supreme Court to protect the rights guaranteed therein, especially the right to free speech and expression.

II. Free speech and the Court

The Supreme Court has repeatedly emphasised the value of free speech, noting that the freedom of speech and expression lies at the foundation of all democratic organisations, inasmuch as free political discussion facilitates public education and enables the proper functioning of the processes of government. The Court has emphasised the function of free speech as promoting autonomy and self-fulfilment, maintaining truth, and performing the function of a watchdog. It has also given express recognition to the value of free speech in a "market place of ideas", by quoting the famous dissent of 1919 of Justice Holmes

[15] *Id.*

[16] Fali S. Nariman, *Lest we crawl*, The Indian Express, March 25, 2017, http://indianexpress.com/article/opinion/columns/bjp-elections-uttar-pradesh-hindutva-narendra-modi-congress-4584270/.

in *Abrams v. United States:*[17]

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas –
>
> that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[18] (emphasis supplied)

The value of free speech is thus, both intrinsic and instrumental, and has consistently been linked to democratic ideals. For example, the censorship of the play "*Mee Nathuram Godse Boltoy*", which was extremely critical of Mahatma Gandhi, was not permitted by the Bombay High Court. In an insightful judgment in *Anand Chintamani Dighe v. State of Maharashtra*,[19] the Court highlighted the importance of respect for, and tolerance of, a "diversity of viewpoints", as being essential to sustain a democratic society and Government. The Court further went on to state, "[P]opular perceptions, however strong cannot override values which the constitution embodies as guarantees of freedom in what was always intended to be a free society."[20] In the same vein, the Supreme Court in *Director General, Doordarshan v. Anand Patwardhan* held, that the State cannot prevent open discussion, regardless of how hateful such discussion was to the State's policies.[21]

The importance of dissent is best understood by the Supreme Court's view in *S. Rangarajan v. P. Jagjeevan Ram*[22] that, "[I]n a democracy it is not necessary that everyone should sing the same song..."[23] It has thus long been understood that free speech has to be countered by more

[17] 250 US 616: 63 LEd 1173 (1919).

[18] 250 US 616: 63 L Ed 1173 (1919) at L Ed 1180 (as quoted in Shreya Singhal v. Union of India, (2015) 5 SCC 1 at para 11 (page 129).

[19] (2002) 2 Mah LJ 14.

[20] Anand Chintamani Dighe v. State of Maharashtra, (2002) 2 Mah LJ 14 at para 19.

[21] (2006) 8 SCC 433.

[22] (1989) 2 SCC 574.

[23] S. Rangarajan v. P. Jagjeevan Ram, (1989) 2 SCC 574 at para 35.

speech; that the response to criticism is not to shut it down, but to engage with, and respond to, the speaker.

Moral vigilantism, as Upendra Baxi rightly recognises, has no place in our Constitutional polity and democracy.[24] Free speech, though, is under attack. The joy over the striking down of Section 66A of the IT Act in *Shreya Singhal v. Union of India*[25] was soon replaced by despair over the Supreme Court's decision to uphold the constitutionality of criminal defamation in *Subramaniam Swamy v. Union of India*[26] and its "order" directing all cinema halls across India to play the national anthem before the start of a film, and requiring the audience to stand up as a "show of respect".[27] I shall discuss the *National Anthem* order in further detail later on in my speech.

Just last month, in relation to the comments made by Azam Khan regarding the Bulandsher gang rape, the Supreme Court raised the question of whether the right to free speech under Article 19(1)(a) is to be controlled singularly by the language under Article 19(2) or is it also impacted by the expansive right to life and personal liberty under Article 21 of the Constitution?[28] The answer to this question will have a profound impact in restricting the scope of Article 19(1)(a) and undermine our Cconstitutionally guaranteed right. Even the Bombay High Court, whose decisions I have referred to above, has on occasion failed to protect the right to free speech. Recently, it constituted a three member committee (comprising of two lawyers) to give a report on the scenes in the movie Jolly LLB-2 it found "objectionable", because it was prima facie of the view that certain scenes – those involving a cowering judge and some dialogue between the lawyers – were in contempt of the judiciary and the legal profession.[29] Mind you, this was a movie where

[24] (Interview with) Upendra Baxi, *In This Democracy, We Must Not Distrust Dissent or Suspect Dissent, or Disagree with it*, The Caravan, April 24, 2016, http://www.caravanmagazine.in/vantage/democracy-must-not-distrust-suspect-dissent-disagree.

[25] (2015) 5 SCC 1.

[26] (2016) 7 SCC 221.

[27] Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421.

[28] Kaushal Kishore v. State of Uttar Pradesh, W.P. (Crl.) No. 113 of 2016 (Supreme Court).

[29] Ajaykumar v. Union of India, PIL No. 11 of 2017, January 30, 2017 (High Court of Bombay).

the Central Board for Film Certification ("CBFC"), i.e. the Censor Board, has given the requisite certification for its release. It was also a case where the High Court entertained the writ petition (later converted to a PIL) based only on two trailers and some photographs! As Justice Lodha had said, while dismissing a similar petition when Jolly LLB-1 released, if the Petitioners don't want to watch the movie, no one is forcing them.[30] The Bombay High Court's order, the report of the three member "committee", and the proximity of the release date, essentially forced the producers and director of the movie to "compromise" and undertake to make the requisite modifications and deletions to the objectionable scenes.[31] I only hope that these judgments are aberrations in an otherwise glorious history of the Indian Judiciary in protecting and promoting the constitutionally guaranteed right to free speech and expression.

However, free speech must be protected institutionally– not only by the Courts, but also by statutory institutions and the media. Unfortunately, we read about reports where the CBFC, our "Censor Board" has refused to certify a movie such as *Lipstick under my Burkha*, because it was "lady oriented", contained "sexual scenes, abusive words, audio pornography";[32] deleted the line "*mannkibaat*" from the upcoming movie *Sameer* because that is the name of the Prime Minister's radio show;[33] and demanded that the *Hanuman Chalisa* be muted from a scene in *Phillauri*, because it failed to ward off a ghost.[34] How can you forget that in *Udta Punjab*, an adult-only certified movie, the Censor

[30] Utkarsh Anand, *Don't watch Jolly LLB if it offends you, SC tells lawyers*, The Indian Express, March 15, 2013, http://archive.indianexpress.com/news/dont-watch-jolly-llb-if-it-offends-you-sc-tells-lawyers/1088711/.

[31] Ajaykumar v. Union of India, PIL No. 11 of 2017, February 6, 2017 (High Court of Bombay).

[32] *Censor Board refuses to certify "Lipstick under my Burkha"*, The Hindu, February 23, 2017, http://www.thehindu.com/entertainment/movies/censor-board-refuses-certificate-to-lady-oriented-lipstick-under-my-burkha/article17353939.ece.

[33] *Censor Board deletes "Mann kiBaat" from film dialogue because it is the PM's show title*, The Wire, March 25, 2017, https://thewire.in/118836/censor-board-deletes-mann-ki-baat-from-film-dialogue-because-it-is-the-pms-show-title/.

[34] *CBFC mutes Hanuman Chalisa in Phillauri, other censor cuts*, Hindustan Times, June 9, 2017, http://www.hindustantimes.com/bollywood/cbfc-mutes-hanuman-chalisa-in-phillauri-other-censor-cuts/story-TRzxvldjcsoF2sPmABkKdN.html.

Board demanded 94 cuts (based on 13 suggestions), including deleting the name "Punjab", deleting certain abuses and deleting the words "Election", "MP", and "party worker".[35] If this is not an assault on the freedom of speech and expression, then I don't know what is.

The freedom of the press is part of the freedom of speech guaranteed under Article 19(1)(a). This is because a free press is essential to disseminate different views, and promote democratic ideals. More importantly, today, when mass-communication and digital media have become prevalent, the media assumes an even greater importance in playing the role of the opposition and checking facts. In fact, no other institution wields as much power and influence on public opinion as the media. However, in recent times, a section of the media, through its biased and one-sided reporting, has unfortunately aided in the restriction on free speech. A news channel airs false and doctored footage, while others openly flame the fans of this patriotic and anti-national debate. It is ironic that the media, which played a critical role in asserting its right to free speech during and after the emergency, and in the process helped develop our Article 19(1)(a) jurisprudence, is now the institution that is compromising and challenging the same freedom of speech of the dissenters today.

We also have social media, where online trolling and threats of rape and murder are regularly made against people supposedly making anti-national statements. I am left to ask myself, which part of Indian culture permits or promotes the making of such statements threatening a girl with rape or murder? Who are these people on Twitter and other social media, who take comfort in their anonymity to make such aggressive threats against individuals? Having discussed the meaning of nationalism and the importance of free speech in some detail, it is appropriate for me to now turn to examine issues that are raised by nationalistic fervour, whether sedition, the national anthem, the attack on universities, and cow slaughter. A common theme linking these topics is the idea of "cultural nationalism", where cultural conformism is

[35] *How censor board made Udta Punjab bleed: Here are all the 94 cuts*, Hindustan Times, June 9, 2016, http://www.hindustantimes.com/bollywood/how-cbfc-made-udta-punjab-bleed-here-are-all-the-94-cuts/story-R5V1SvN0IC3aaNUigtUm9M.html.

being foisted upon the entire nation, without consideration of people's personal choices, values and regional differences.

III. Nationalism and Sedition

Sedition is a word, almost everyone in India has heard of today, because of the events at the Jawaharlal Nehru University("JNU") last year.[36] Historically, our conversation around sedition centred around British injustice in convicting and sentencing Tilak and Gandhi to prison for their publication of allegedly seditious material. Tilak, before his arrest in 1908, reportedly told a police officer, "[T]he government has converted the entire nation into a prison and we are all prisoners. Going to prison only means that from a big cell, one is confined to a smaller one".[37] Gandhi, in 1922, pleaded guilty to the charge of sedition, stating that he was proud to oppose a Satanic government.

These stories are shared with bristling outrage about the British misuse of this law and pride with which our freedom fighters opposed them. More than 90 years later, however, we are still grappling with the fact that the crime of sedition was invoked against a group of 20-something University students for doing what students in a campus should feel entitled to do– raise slogans, debate, disagree, and challenge each other on complex, political issues that face the nation today.

Sedition laws were enacted around the 17th century in England in a bid to protect the Crown and the State from any potential uprising. The premise was that people could only have a good opinion of the government, and a bad opinion was detrimental to the functioning of the government and the monarchy. It was subsequently introduced in the Indian Penal Code in 1870. The first major case was when Bal Gangadhar Tilak was brought to trial for sedition in 1897 for his lectures and songs at the Shivaji Coronation Ceremony. Given that these speeches and songs made no mention of overthrowing or disobeying the government, the Court widened the interpretation

[36] Aranya Shankar, *JNU student leader held on 'sedition' charges over Afzal Guru event*, The Indian Express, February 13, 2016, *available at* http://indianexpress.com/article/india/india-news-india/afzal-guru-film-screening-jnu-student-leader-held-for-sedition/.

[37] Bipan Chandra, The Epic Struggle 19 (Orient Longman Limited, 1992).

of sedition by equating "disaffection" to "disloyalty," and including within it hatred, enmity, dislike, hostility, contempt, and every form of ill will towards the government.[38] This interpretation became a part of the legal text, when Section 124A was amended to add the words "hatred" and "contempt" alongside "disaffection", which was defined to include disloyalty and feelings of enmity. Thereafter, in 1908, Tilak was again charged with sedition for the publication of a critical article in his magazine *Kesari*. He was held guilty and sentenced to six years imprisonment by the Bombay High Court, which ruled that no one was permitted to "attribute dishonest or immoral motives to the Government".[39]

The next landmark sedition case pre-independence was Gandhi's trial for the offence of sedition for his articles in the *Young India* magazine. The trial itself was remarkable for his decision to plead guilty to the charge of sedition and Justice Broomfield's reluctance to sentence him, because he did not believe that Gandhi deserved to be charged with sedition in the first place.[40]

Interestingly, during the Constitution Assembly debates, there were two attempts made to include sedition as a ground for restricting free speech. Eventually, however, due to trenchant opposition by members of the Constituent Assembly and their fear that sedition would be used to crush political dissent, it was dropped from Article 19(2) and the Constitution. These actions of the framers were expressly noted by the Supreme Court in 1950 itself, in its decisions in *Brij Bhushan v. State of Delhi*[41] and *Romesh Thappar v. State of Madras.*[42] The decisions of the Supreme Court prompted the First Amendment to the Indian Constitution, wherein Article 19(2) was amended and "undermining the security of the State" was replaced with "in the interest of public order". However, while speaking in Parliament, Nehru clarified:

38 Queen- Empress v. Bal Gangadhar Tilak, (1898) ILR 22 Bombay 112.

39 Emperor v. Bal Gangadhar Tilak, (1908) 10 BLR 848.

40 *The Trial of Mahatma Gandhi*, Bombay High Court, 1922, http://bombayhighcourt.nic.in/libweb/historicalcases/cases/TRIAL_OF__MAHATMA_GANDHI-1922.html.

41 A.I.R. 1950 SC 129.

42 A.I.R. 1950 SC 124.

> Take again Section 124-A of the Indian Penal Code. Now so far as I am concerned that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. (emphasis supplied)

Finally, in 1962, a Constitution Bench of the Supreme Court had the chance to authoritatively decide on the constitutionality of Section 124A of the IPC in *Kedar Nath Singh v. State of Bihar*,[43] in light of the "public order" restriction in Article 19(2). It had to grapple with conflicting decisions of the Punjab and Patna High Courts on the constitutionality of sedition. The Court upheld the constitutionality of sedition, but limited its application to "acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence." It distinguished these acts from "very strong speech" or the use of "vigorous words" which were strongly critical of the Government.

The final case that I would like to discuss is the 1995 decision of the Supreme Court in *Balwant Singh v. State of Punjab*,[44] where it acquitted the persons who had shouted slogans such as "*Khalistan zindabaad, Raj Karega Khalsa*" outside a movie hall a few hours after Indira Gandhi's assassination on charges of sedition. Instead of simply looking at the "tendency" of the words to cause public disorder, the Court held that "raising of some lonesome slogans, a couple of times… which neither evoked any response nor reaction from anyone in the public" did not amount to sedition, for which a more overt act was required. The Court took cognizance of the fact that the accused had not intended to "incite people to create disorder" and that no "law and order problem" occurred.

It is through this lens that one should view the JNU incident. The law, as we saw above, is quite clear on the distinction between strong criticism of the government and the incitement of violence, with only the latter being related to sedition. Thus, regardless of whether the

[43] 1962 Supp (2) S.C.R. 769

[44] (1995) 3 SCC 214.

JNU students' slogans were anti-national, hateful, or an expression of contempt and disdain against the government, if they did not incite violence, it does not get covered under sedition. As Upendra Baxi reminds us, we should remember the distinction between "constitutional patriotism" (and fidelity to the constitutional purpose) and "statist patriotism" (what Gandhi called "manufacturing affection for the state").[45] Keeping this in mind, I would like to express my anguish on the language of the Delhi High Court's bail order and the unnecessary invocation of patriotism and nationalism. Gandhi said, "[A]ffection cannot be manufactured or regulated by the law. One should be free to give full expression to their disaffection unless it incites violence".[46] This, as we have seen above, is in fact the standard of *Kedar Nath*. Unfortunately, the broad scope of Section 124-A allows it to be used by the State to go after those who challenge its power, whether it is the JNU students, activists such as Hardik Patel and Binayak Sen, authors such as Arundhati Roy, cartoonists such as Aseem Trivedi, or the villagers of Idinthakarai in Tamil Nadu protesting against the Kudankulam Nuclear Power Plant. These examples are demonstrative of the misuse of the provision. The law is clear that mere sloganeering is not enough, and must be accompanied by a call for violence. However, at the stage of registering the FIR and initiating criminal proceedings, the question of the interpretation of the section in line with the Supreme Court's jurisprudence, does not arise. Thus, sedition charges are easily slapped, but seldom stick, and cause immense harassment in the process. Even if one is eventually acquitted of sedition, the process of having to undergo the trial itself is the punishment – and more importantly, the deterrent against any voice of dissent or criticism. The enforcement or the threat of invocation of sedition constitutes an insidious form of unauthorised self-censorship by producing a chilling effect on the exercise of one's fundamental right to free speech and expression. That is why the law needs to be repealed. However, it is unlikely that any government will give up this power, and it is therefore left to the courts to re-examine

[45] Upendra Baxi, *How to govern dissent*, The Indian Express, February 27, 2016, http://indianexpress.com/article/opinion/columns/jnu-row-sedition-anti-national-debate-jnusu/.

[46] *Supra* note 38.

the constitutionality of sedition. It is not enough to expect an acquittal by the courts after 4-5 years; we need to stop the misuse of the law to silence dissent by removing the source of the power itself.

Interestingly, England, from whom we have inherited the offence of sedition, recently repealed the offences of sedition and seditious libel, along with defamatory libel, and obscene libel. In doing so, the Justice Minister, Ms. Claire Ward observed in 2009,

> Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today…. The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom…Abolishing these offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech.[47]

IV. Nationalism and the University Space

It seems that February is the season for targeting dissent. If it was JNU and *azaadi* in 2016, February, 2017 saw the Ramjas/Delhi University ("DU") protests. University spaces are traditionally meant to be spaces for dissent, where students engage and challenge each other and the dominant narrative, in an attempt to develop their own principles and beliefs. In fact, the best Universities in the world are those that champion free thinking and disagreement amongst their students, faculty, and administration. However, this space is under challenge in India. Just think about the events that have transpired over the last couple of years that have sought to undermine academic institutions and academic freedoms – from the backlash against University of Hyderabad's Rohit Vemula's mother, declaring that she was not a "dalit"; to the charges of sedition levelled against JNU students; to protests at Ramjas/DU about the organisation of a seminar; and the outcry against an undergraduate

[47] *Criminal libel and seditious offences abolished*, Press Gazette, January 13, 2010, http://www.pressgazette.co.uk/criminal-libel-and-sedition-offences-abolished/.

student's tweet. As part of the "#FightbackDU" campaign that was launched in response to the Ramjas protests, a 21-year-old student, Gurmehar Kaur, tweeted a photo "I am not afraid of ABVP". A video, where she held a placard saying, "Pakistan did not kill my father, war did" went viral and became the subject of intense national discussion and debate, with cricketers, actors, and politicians all joining in to criticise the girl. In fact, she was subject to such hostility, threats, and violence, especially online that she had to get security and leave Delhi. Have we really reached such a stage of insecurity that a 21-year old's views must be met with such backlash? That the Union Home Minister for the State must tweet, "Who is polluting this young girl's mind?"[48] The guarantee of freedom of speech rings hollow, if the State cannot guarantee freedom after speech.

The inaction of State institutions like the police in light of the violence and bullying by certain groups, leads to a fear psychosis amongst students. Unless some remedial action is taken, we will produce an entire generation of students who will never have been encouraged to question the dominant ideas and encouraged to think differently. This will influence not just the nature of democratic citizenship, but will have a direct impact on innovation and creative thinking that are necessary for economic progress of a nation.

V. Nationalism and patriotism

Before concluding, I would like to talk about two more issues connected to free speech and nationalism. The first relates to the Supreme Court's national anthem order requiring all movie-goers to "stand up in respect" for the national anthem before the start of a movie in order to "instil a feeling within one a sense of committed patriotism and nationalism".[49] The order of the Court, which seems a little short on reasoning to help understand how such an interim order was passed, befuddles, and seems contrary to the spirit of the Constitution and past precedent, *Bijoe Emmanuel v. State of Kerala*,[50] which made it clear that we cannot be forced to sing the anthem. It is important to remember

[48] *Supra* note 2.

[49] Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421.

[50] (1986) 3 SCC 615.

that the right to free speech and expression also includes the right not to speak or express ourselves. However, under the guise of "law", the Court has now stepped in and restricted our fundamental rights. As Pratap Bhanu Mehta points out, the order fails to understand a facet fundamental to liberal democracy- everything that is desirable or makes for a better citizen does not, and should not, be made compulsory.[51] In fact, making something compulsory undermines the very meaning of that action and the respect that is normally accorded to it. It is a form of, what I would call, "conscripted nationalism". Just as joining the Army is a noble career path, our lawmakers have rightly decided that India will not follow conscription, presumably because they believe in the liberty of the individual and the right to choose. Unfortunately, the judiciary thought otherwise. I know of many people who considered themselves patriotic and would always stand when the national anthem was played. But the Supreme Court's order has fundamentally changed their relationship with the anthem and has resulted in undermining its import. The order may have ensured that cinema audiences throughout are now standing before the national anthem plays, but what the Court fails to have realised is that such an action is a performance, motivated by fear of being beaten up, rather than genuine respect and love for the anthem. In the end, it has undermined patriotism amongst fellow Indians.

Similarly, preventing people from eating the food they want and effectively forcing a life choice on them undermines any feelings of nationalism and unity, and is another insidious form of cultural nationalism. Recently, Mohan Bhagwat called for a national law against cow slaughter. But we must be wary of forcing a single ideology or way of living on the entire country, especially a country as diverse as India, where states such as Kerala, or the various states in the North East consider beef a staple part of their diet. One reads multiple reports about slaughterhouse crackdowns in UP, crackdowns that are primarily

[51] Pratap Bhanu Mehta, *Unconstitutional patriotism: order on national anthem shows what is wrong with the Court*, The Indian Express, December 3, 2016, http://indianexpress.com/article/opinion/columns/national-anthem-cinema-halls-supreme-court-order-unconstitutional-patriotism-4407560/.

targeted at Muslim butchers, leaving lakhs of people with fear, but without stable employment. We also recently had the horrific incident in Una where seven dalits were beaten by cow-vigilantes for alleged cow slaughter. And how can we forget the lynching of Akhlaq, who was suspected of allegedly storing and consuming beef, but where the first thing that was sent for forensic examination was not his body, but the food that is in the fridge. Is this what the value of human life comes to? Nationalism, when it devolves into such a form of cultural nationalism, is disturbing. I am personally very proud of being an Indian and of Indian culture. My wife and I practice Yoga. But I am not comfortable with the drive to make Yoga compulsory, to be foisted upon everyone, as if that were a badge of nationalism and Hindu pride. Enforced nationalism cannot promote true culture. When a culture is arbitrarily prescribed and foisted, freedom of the creative spirit of man disappears or is suppressed. Only free souls can create abiding cultural values; they may physically belong to one class or geographically to a particular country; spiritually, they transcend all social and territorial limitations.

VI. Conclusion

It has long been known that suppressing and censoring people's speech will not remove the underlying simmering sentiment. In fact, it will only serve to alienate that section of the population further. If we must give true meaning to the Prime Minister's promise of "*sabka saath, sabka vikaas*", then we must celebrate not only those who profess affection for the State, but also those, who believe that change is necessary or injustice is being committed. We cannot have an Orwellian situation, where the government speaks in one language, but then fails to walk the talk. After all, as Desmond Tutu said, "if you are neutral in situations of injustice, you have chosen the side of the oppressor". The strength of a nation is not gauged by the uniformity of opinion of its citizens or a public profession of patriotism. The true strength of a nation is revealed when it does not feel threatened by its citizens expressing revolutionary views; when there is a free and open press that can criticise the government; and when citizens do not resort to violence against their fellow citizens, merely for expressing a contrary view. That is when we will have achieved liberty of speech. And that is

when we will be truly free. I would like to end this speech with a short poem "Speak" from one of my favourite poets, Faiz Ahmed Faiz:

Speak, for your lips are free;
Speak, your tongue is still yours
Your upright body is yours
Speak, your life is still yours
….
Speak, this little time is plenty
Before the death of body and tongue
Speak, for truth is still alive
Speak, say whatever is to be said...

Patriotism and Nationalism for a new Indian mindset

Dr. Subramanian Swamy[†]

India, that is *Bharat*, is the name of our nation as stated in the foremost article of the Constitution. The term 'Indian', that is *Bharatiya*, signifies a citizen of the Republic of India as constituted on January 26, 1950. But while India is a new Republic, it is not a new nation. Modernity also does not reject its time- tested traditions. Today's India is thus a modernising but ancient nation in search of a renaissance.

The term 'Indian' or *Bharatiya*, describes only the legal status of those living in India. However, since Bharat has been the term in Hindu religious texts since time immemorial, the implication is that India is a continuing entity and not a new country formed in 1950.[1] Then again, our nation may be defined as *Hindustan* i.e., the land of Hinduism and other religions of reformers such as Buddha, Mahavira, Guru Nanak and perhaps Zarathusthra. The definition would also include Muslims and Christians, who proudly acknowledge that their ancestors are Hindus but whose later generations converted or were made to convert to these two foreign theologies.

This interpretation of our identity was and will be resisted by those who wish to comply with the genetically discredited "Aryan-Dravidian" racial divide concept or to the internationally imposed concept of "secularism", in particular Reverend Martin Luther's narrow definition

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[1] An example may be seen in the mantra of Maharishi Vishvamitra in the Rig Veda 3.52.12.

that did not go beyond the separation of the domains of the Church and the State in political governance.[2]

This European concept of secularism is, however, not what the Constitution of India states—Article 25 for instance, which enshrines the freedom of conscience and free profession, practice and propagation of religion, lays down that religion can be restricted or interfered with by the State on grounds of morality, public order and health.

Our *Hindustani* culture may be seen in a composite of Articles 51A(f) and (h) of the Constitution.[3] At the core of this composition, is the ancient Hindu Vedic value system which may called *Hindutva*. Just as the River Ganga may be a composite of many other rivers merging, but yet it at its core, it is seen as the Ganga.

Even in the other provisions of the Constitution, Hindu cultural primacy is recognised. The various constitutional institutions including the Parliament and the Supreme Court, etc., have Sanskrit *slokas* as their motto, such as *Satyameva Jayate*, *Dharma Chakra Pravartana* and *Vasudeva Kutumbakkam*. The official language Hindi is required to be written in the holy Sanskrit script of *Devanagari* (Article 343), and where necessary, Hindi must augment its vocabulary *primarily* from Sanskrit language (Article 351).

Although secularism and equality before law are a part of our core values, the flavour of social and economic development of the nation is rooted in Hindu cultural values. This becomes clear in the Directive Principles of State Policy in Articles 38 to 51 and 51A. In the governance of the country, these Directive Principles have to be followed, and it shall be the duty of the State to apply these principles while making laws (Article 37).

What are these Directive Principles? Gender equality is ensured in education, employment, wages, and inheritance among others,the Uniform Civil Code, Panchayat system for village administration

[2] Martin Luther, On Secular Authority (1523).

[3] Article 51A lays down the fundamental duties of every citizen, of which sub-clause (f) is "to value and preserve the rich heritage of our composite culture, and sub- clause (h) is "to develop the scientific temper, humanism and the spirit of inquiry and reform".

(Article 40), prohibition of liquor consumption (Article 47), ban on the slaughter of cows (Article 48), and preservation of our rich heritage (Article 51A).

It is obvious that these principles are all rooted in Hindu culture (not Islamic or Christian) embedded in the Constitution, and thus constitutionally,these are the guiding directives for enactment of laws.

Another ancient Hindu value is democracy, embedded in the concept of discussion (*shrashtratha*), consensus, and tolerance. Hence, Jews, Syrian Christians and Zoroastrians persecuted the world over, found a safe sanctuary in India and were co-opted into Hindu society while retaining their religious identity. This is the essence of secular democracy. This enlightened concept of secularism was resisted by the erstwhile political dispensation which focussed on the appeasement of aggressive, proselytizing religious minorities, the Muslims and Christians. Muslims and Christians theologically believe that it is their way only to God or the "highway" to the Devil. Hindu theology explicitly recognises that all religions lead to God.

A republic must be of citizens committed to this enlightened secularism, and possessing a high level of integrity and patriotism. Integrity implies the inner strength and mental equilibrium which enables one to meet with equanimity, the victories and set-backs of contemporary politics and international affairs in order to defend the nation. This quality is called patriotism. The word "nationalism" is popularly regarded as a synonym of patriotism. However, patriotism and nationalism are not synonyms. By the rigorous definition, it is possible for an Indian citizen to be patriotic without being a nationalist. But a nationalist by definition is a patriot also. Therefore, nationalism has a wider definition and is inclusive of patriotism.

Patriotism is defined as love for one's country of domicile, or of residence by birth and this love is accompanied by a readiness to make a sacrifice to defend the country. Patriotism means to put one's country above narrow personal and parochial interests and not be consumed by greed or pecuniary benefit to betray it.

Nationalism in the context of India, that is *Bharat*, is defined by a mindset that is based on the identification of oneself mentally

and physically, in thought and deed, with the ancient and unbroken civilization and culture values of the nation. This is also what is meant by *Hindutva* or Hinduness. Patriotism is good citizenship by deeds while nationalism is an emotion based on the inalienable identity in mind and body with the country of your ancestors, near or remote. Nationalism is rooted in citizenship but goes beyond duties to the nation. Therein is the difference in mindset.

The occupying British in India knew that they could rule without serious challenge, only if such nationalistic mindset is discouraged and eschewed. The mindset created for Indians by the Imperialist British was imposed by the educational system. As articulated by Thomas Babington Macaulay,[4] the British sought to make Indians obedient by brain washing- much as a lion in a cage before a ringmaster in a circus- and making them develop a deep inferiority complex about themselves and thus instinctively accept passively the status quo as necessary for one's orderly future.

That mindset did not change after 1947 but instead morphed into one in which the reference context for superiority remained the same, that a foreigner of European origin is inherently superior. What was explicit before, became implicit after 1947. This captive mindset is what now urgently needs to be changed if our nation has to undergo a renaissance, jettison its unwanted baggage of the past, and achieve its full potential. That cannot be achieved by mere patriotism. It needs a vigorous nationalist mindset.

What India needs today is nationalism premised on the scientific truth of genetics research, which is that all Indians have the same DNA structure. Ever since the genetic studies on DNA began to be published in research journals, the Aryan-Dravidian racial divide came gradually to be regarded by most independent scholars as hogwash. As genetically determined, Indians are one indigenous people. And thus, since Hinduism preceded all other religions, our traditional value system came to be regarded as "Hinduness" or what is translated as

[4] Thomas Babington Macaulay, *Minute on Education*, February 2, 1835, *available at* http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html.

Hindutva. This is what Justice J.S. Verma held in the famous 1995 judgment in the *Manohar Joshi* case.[5]

Hindutva or Hinduness is a collective mindset that identifies India as the motherland of all, from the Himalayas to the Indian Ocean. 'Hindu' probably is a combination (*sandhi*): 'Hi' from Himalaya, 'Indu' from Indu Sagar. Therefore, one does not require to be a Hindu in terms of religious theology. It is the collective mindset of the people of how we see who we are that matters and not the piety of the individual in that collective. In this *Hindutva*, the minorities of Islamic and Christian faith can join in if they acknowledge explicitly the truth that they are descendants of Hindus, which is the scientifically established genetic truth.

Thus, the identity of our nation may be recognized as *Hindustan*- a land of Hindus and those others who acknowledge that their ancestors are Hindus. There is nothing religion-specific in our nationhood concept. Nationalism is based on our *Hindutva* identity. There are eight components of the *Hindutva*-induced mindset that the nation needs today:

First, India's Hindus and others must regard and foster the concept of the nation as the unbroken civilization of *Hindustan*; and their common history of endeavours, struggles, defeats and victories. Ancient Hindus and their descendents have always lived in this area from the Himalayas to the Indian Ocean. This an area was called *Akhand Hindustan*, and did not come from outside.

Second, *Hindutva* requires that national policies for development should synchronize and harmonize material goals with spiritual advancement.

Third, Modern India is a spiritual State that adopts the concept of equality of religions (*sarva pantha sama bhaava*). Hence the declaration in the Preamble of the Constitution that India is a secular State should be replaced by spiritual State.

Fourth, a national law requiring prohibition of induced and collective religious conversion. Such a law will, however, not bar a

[5] Manohar Joshi v. Nitin Bhaurao Patil, (1996) 1 SCC 169.

voluntary group re-conversion to Hindu religion, or the return of any Indian to his or her ancestor's faith.

Fifth, that there is no theologically sanctioned concept of a birth-based social hierarchy in Hindu *shashtra*. *Varna* (class) was never conceived as birth-based in Hindu scriptures as Lord Krishna educates Arjuna in the *Gita*, but it was in fact a choice. The present purely birth-determined *varna* is un-Hindu, and is excess baggage that is to be off-loaded and purged from the body-politic of the nation in the interest of *Hindustani* unity. True nationalism of all Indians is only possible then.

These attributes constitute a mindset that a modern *Hindustani* must have so as to be in a position to confront the challenge that *Hindutva* civilization is facing from Islamic terrorists and foreign Christian missionaries. These elements are unfortunately also aided and abetted from by confused Indians.

A society based on *dharma* is vitally needed at this moment in our history, because there is a dimension to the current national crisis, namely, the moral decay and the decline of character in our society, which if not stemmed, will slowly poison our nation to death. This decay and decline is visible in every aspect of our life—politicians defecting for office and cash, bureaucrats taking bribes, teachers selling exam questions, students passing by cheating, businessmen adulterating products, lawyers cheating clients, and doctors betraying their patients. To some extent, such degeneration is there in every society, but the alarming aspect in India is the pace of this decay and the spread of it. Consequent to this decay is the wave of dangerous cynicism amongst the youth. Today, with the new dispensation in power, there is hope that therewill be a national renaissance-based modernity which is rooted in our immutable ancient wisdom embodied in *Hindutva*. That will enable an evolution from patriotism to nationalism.

Nationalism: the Divine Right of the Majority*

A.G. Noorani†

"If Hindu Raj does become a fact, it will, no doubt, be the greatest calamity for this country.…Hindu Raj must be prevented at any cost," wrote B.R. Ambedkar.[1] He was against majoritarianism, which in the Indian context meant unbridled rule of the majority community, the Hindus.

In a memorandum on the Rights of States and Minorities submitted to the Sub-Committee on Fundamental Rights set up by the Constituent Assembly's Advisory Committee on Fundamental Rights, Minorities, etc. in 1947, Ambedkar wrote:

> Unfortunately for the minorities in India, Indian nationalism has developed a new doctrine which may be called the Divine Right of the Majority to rule the minorities according to the wishes of the majority. Any claim for the sharing of power by the minority is called communalism, while the monopolising of the whole power by the majority is called nationalism. Guided by such political philosophy the majority is not prepared to allow the minorities to share political power, nor is it willing to respect any convention made in that

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† Advocate, Supreme Court of India.

1 B.R. Ambedkar, Pakistan or the Partition of India 358 (Government of Maharashtra, Bombay, 1990) (1946).

> behalf as is evident from their repudiation of the obligation (to include representatives of the minorities in the Cabinet) contained in the Instrument of Instructions issued to the Governors in the Government of India Act of 1935. Under these circumstances there is no way left but to have the rights of the Scheduled Castes embodied in the Constitution.[2]

He was not wrong. One of the finest minds of the Socialist movement, Prem Bhasin, wrote:

> ….A large and influential section in the Congress sincerely believed even during the freedom struggle that the interests of Hindu Indians could not be sacrificed at the altar of a united independent India. Pandit Madan Mohan Malviya and Lala Lajpat Rai had, for instance, actually broken away from the Congress and founded the Nationalist Party which contested elections against the Congress in the mid-twenties. In later years, in the forties, even Sardar Vallabhbhai Patel was sometimes accused of being soft on the Hindu Revanchists, who believe in and practised tit-for-tat in that turbulent and fateful period.[3]

Later events have proved the validity of Prem Bhasin's assessment.

I. Birla's letter

Small wonder that one of the leading industrialists, B.M. Birla, wrote to Vallabhbhai Patel on June 5, 1947:

> I am so glad to see from the Viceroy's announcement of the Partition of India that things have turned out according to your desire. It is no doubt a very good thing for the Hindus and we will now be free from the communal canker.
>
> The partitioned area, of course, would be a Muslim state. Is it not time that we should consider Hindustan as a Hindu state with Hinduism as the state religion? We have also to strengthen the country so that it may be able to face any

[2] B.R. Ambedkar, *Memorandum and Draft Articles on the Rights of States and Minorities*, March 24, 1947, *in* B. Shiva Rao et al., The Framing of India's Constitution: Select Documents, Volume II, 113 (1967).

[3] Prem Bhasin, *The Congress-BJP Duo*, Janata (1998).

future aggression.[4]

Patel's retort was swift. He replied on June 10, 1947:

> I also feel happy that the announcement of 3 June at least settles things one way or the other. There is no further uncertainty.… I do not think it will be possible to consider Hindustan as a Hindu state with Hinduism as the state religion. We must not forget that there are other minorities whose protection is our primary responsibility. The state must exist for all, irrespective of caste or creed.[5]

If a Hindu state was excluded, what other state had Patel in mind but a secular one? Ambedkar was perceptive. He believed that it was not necessary to declare India a Hindu state formally by amending the Constitution and making Hinduism the state religion. The same result could be achieved by administrative measures. Significantly, the Supreme Court has held secularism to be part of the basic structure of the Constitution which cannot be discarded even by constitutional amendment.[6]

Ambedkar thought that the elaborate constitutional provisions on administration would work. He told the Constituent Assembly on November 4, 1948, when he moved for the adoption of the Draft Constitution:

> While everybody recognises the necessity of the diffusion of constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution,

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[4] SARDAR PATEL'S CORRESPONDENCE- 1945-50, VOLUME 4, 56 (Durga Das ed., Navajivan Publishing House).

[5] *Id.*

[6] S.R. Bommai v. Union of India, (1994) 3 SCC 1.

> without changing its form, by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.[7]

The leaders of the Congress sought to inculcate secularism right from the 1st Congress held at Bombay in 1885. S. Srinivasa Aiyangar, president of the 41st Congress in 1926, articulated the credo of secularism very ably, as did Vallabhbhai Patel in the presidential address to the 45th Congress at Karachi in 1931.[8]

II. Revivalist hate

But by then, forces that did not share the Congress' ideology, did not participate in the freedom movement,and were charged with revivalist hate, had come to the fore.

Lala Lajpat Rai noted their growth in the ninth of a series of thirteen articles that he wrote for *The Tribune* in 1924:

> In their own way, Hindu revivalists have left nothing undone to create a strictly exclusive and aggressive communal feeling. Early in the eighties of the last century, some of the Hindu religious leaders came to the conclusion that Hinduism was doomed unless it adopted the aggressive features of militant Islam and militant Christianity. The

[7] 4 November 1948, *in* Constituent Assembly Debates Book No.2, Vol. VII,38 (Lok Sabha Secretariat).

[8] See A.G. Noorani, *Roots of Indian Secularism*, Frontline, August 8, 2014, http://www.frontline.in/the-nation/roots-of-indian-secularism/article6233782.ece.

> Arya Samaj is a kind of militant Hinduism. But the idea was by no means confined to the Arya Samaj. Swami Vivekananda and his gifted disciple Sister Nivedita, among others, were of the same mind. The articles which she wrote on aggressive Hinduism are the clearest evidence of that mentality.
>
> It must be remembered in this connection that Western knowledge, Western thought, and Western mentality took hold of the Hindu mind at a very early period of British rule. The Brahmo Samaj was the first product of it. In the early sixties the Brahmo Samaj was a non-Hindu body, and under its influence Hindu scholars, thinkers and students were becoming cosmopolitans. Some became Christians; others took to atheism and became completely westernised. Thus, a wave of indifferentism about Hinduism spread over the country. The Arya Samaj movement, and aggressive Hinduism, was a reaction against that un-Hinduism and indifferentism. Most of the early Hindu leaders of the Indian National Congress were in this sense non-Hindus. What did Mr. S.N. Banerjea or Lal Mohan Ghosh or Ananda Mohan Bose care for Hinduism? Even Mahadev Govind Ranade was but an indifferent Hindu. G.K. Gokhale was not a Hindu at all.[9]

Intellectual integrity here went hand in hand with communal bias. In 1899 Lajpat Rai asserted that "Hindus are a nation in themselves."[10]

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[9] Lala Lajpat Rai, *The Hindu-Muslim Problem (1924)- Part 9: Hindu revivalism and other communalist trends*, THE TRIBUNE, 12 December 1924, *in* LALA LAJPAT RAI: WRITINGS AND SPEECHES, VOLUME 2, 1920-1928 170-222 (Vijay Chandra Joshi ed., University Publishers, Delhi, 1966), *also available at* http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_lajpatrai_1924/txt_lajpatrai_1924.html.

[10] CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS 19 (Hurst, 1996) (excerpting Lala Lajpat Rai's speech at the first Punjab Hindu conference held at Lahore, 1909 when the British government introduced limited franchise in British India and separate electorates for Hindus and Muslims).

On December 14, 1924, he advocated the partition of India and partition of Punjab.[11]

III. Revivalism and nationalism

Bankimchandra Chatterjee's novel *Ananda Math*, in which occurs the song *Vande Mataram*, is intensely religious. The novel was anti-Muslim and pro-British. J.N. Farquhar recorded that from 1895 to 1913, "….a frightful portent flamed up in India, anarchism and murder inspired by religion… that in all the best minds the new feeling and the fresh thought are fired by religion, either a furious devotion to some divinity of hate and blood, or a self-consecration to God and India…"[12] He went further to connect this "anarchism" with the work of Dayananda Saraswati, Vivekananda and others: "It is as clear as noonday that the religious aspect of anarchism was merely an extension of that revival of Hinduism which is the work of Dayananda, Ramkrishna, Vivekananda and the Theosophists."[13]

Another scholar opined:

> One may not wholly agree with such views, yet there is some element of truth in them. That truth is that Hindu revivalism had a powerful influence upon the 'revolutionaries' of India. Bankimchandra Chatterjee's Ananda Math had a very powerful impact upon the revolutionaries of the day. His depiction of future Mother India was singularly religious; Future Mother India was Durga, the goddess with resplendent face, wearing all sorts of weapons of force in her hands, and in the left hand seizing the hair of the Asura, her enemy, and in the right hand assuring all not to be afraid. The revolutionaries who moved incognito

[11] Lala Lajpat Rai, *The Hindu-Muslim Problem (1924)- Part 11: Some suggestions for political improvements*, The Tribune, 14 December 1924, *in* Lala Lajpat Rai: Writings and Speeches, Volume 2, 1920-1928 170-222 (Vijay Chandra Joshi ed., University Publishers, Delhi, 1966), *also available at* http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_lajpatrai_1924/11part.html.

[12] J.N. Farquhar, Modern Religious Movements in India 353 (Macmillan & Co. Ltd., 1915).

[13] *Id.* at 358.

> as 'Sanyasins' were like the characters in Ananda Math. Durga, the goddess and the mother, became one with the country, the greater goddess and the mother. His Bande Mataram became the hymn for the revolutionaries.
>
> Hindu revivalism has influenced the development of Indian nationalism both positively and negatively. We reach a stage here when it must be pointed out that the positive contribution of revivalism to Indian nationalism becomes feeble and the negative role of revivalism becomes more prominent.[14]

IV. Majority rule for Hindu Raj

The leaders of these dark forces knew how to instal Hindu Raj—using the majority to establish it. In 1942, Syama Prasad Mookerjee made a bid for power by a deal with the British in order to instal Hindu Raj. His innermost thoughts, bared to the pages of his diary, expose the Parivar's motivations and also illustrate the central problem of all plural societies: "As seventy-five per cent of the populations were Hindus, and if India was to adopt a democratic form of government, the Hindus would automatically play a major role in it."[15] He and his political heirs sought to utilise the vote for the ends of power using the Hindutva card.

If a Hindu Rashtra was propounded during British rule, after Independence began the drive for a Hindu state for that Hindu Rashtra. M.S. Golwalkar's reply to the question "Do you opt for a Hindu state?" is revealing:

> The word Hindu state is unnecessarily misinterpreted as a theocratic one which would wipe out all other sects. Our present state is in a way a Hindu state. When the vast majority of people are Hindus, the state is democratically Hindu. It is also a secular state and all those who are now

[14] B.R. PUROHIT, HINDU REVIVALISM AND INDIAN NATIONALISM 171-173 (Madhupriya, Bhopal, 1990).

[15] SYAMA PRASAD MOOKERJEE, LEAVES FROM A DIARY 106 (Oxford University Press, 1993).

> non-Hindus have also equal rights to live here. The state does not exclude anyone who lives here from occupying any position of honour in the state. It is unnecessary to call ours a Hindu state or a secular state.[16]

A Hindu state can be called by any name, once the administration is run by Hindutvaites.

V. Hostile state discrimination

The *locus classicus* on hostile discrimination by the state is a case decided by the United States Supreme Court in 1886 titled, *Yick Wo v. Hopkins*.[17] Yick Wo, an emigrant from China, ran a laundry in San Francisco. A city ordinance required laundry owners to obtain a licence if the building was constructed of wood. Of the 320 laundries in the city, 240 were owned by persons of Chinese origin. Three hundred and ten were constructed of wood as, indeed, were nine-tenths of the houses in San Francisco. Yet, all applications for a licence by Chinese laundrymen were refused. Applications by all others, bar one, were granted. About 150 Chinese laundrymen were arrested for violating the ordinance.

The Supreme Court of California rejected Yick Wo's petition for *habeas corpus*. An appeal to the Federal Circuit Court was also unsuccessful. The petitioner took his case to the Supreme Court and made legal history. The Court observed:

> ….an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and

[16] Ritu Kohli, Political Ideas of M.S. Golwalkar: Hindutva, Nationalism, Secularism 39 (Deep and Deep Publications, 1993).

[17] 118 US. 356.

> benign provisions of the Fourteenth Amendment to the Constitution of the United States.[18]

The Supreme Court of California further uttered these ringing words in the above case:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[19]

This is the test— "an evil eye and an unequal hand". Apply this test to the government at the Centre and you will appreciate why and how we have crossed the threshold to a Hindu state. The President nominated (now elected) by the ruling party too is placed on a similar footing ideologically.

What *The New York Times* wrote in an editorial on February 27, 2017, on Donald Trump's silence on the killing of an Indian engineer in Kansas applies to the present government's wilful and sustained silence on acts of violence against Muslims. The article states,"[I]f Trump does nothing, he will enable the perpetrators of hate crimes and he will damage the vitality and strength of the country."[20] The editorial slammed Trump for being "shockingly slow" to condemn acts of hate perpetrated across the country following his election, saying his "denunciations of and policies" targeting Mexicans, Muslims, and others have "reawakened and energised the demons of bigotry".[21]

The present government's deprecation of the lynchings of Muslims were feeble and belated, instead of an early and stern condemnation that was expected and required of it.

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18 Yick Wo v. Hopkins, 118 US. 356 at 373.

19 *Id*. at 373- 374.

20 The Editorial Board, *Who Belongs in Trump's America?*,The New York Times, February 27, 2017, https://www.nytimes.com/2017/02/27/opinion/who-belongs-in-trumps-america.html?mcubz=3.

21 *Id*.

VI. Attack on Christians

The regime of the day spawns a clime which fosters hate and crime. The late Archbishop of Delhi, Alan de Lastic, wrote to the then Prime Minister in May 2000, drawing his attention to the atmosphere of hate and violence.[22] The All-India Christian Council laid the blame for the spurt in attacks on Christians squarely where it belonged—the Government of India. Its president, Dr Joseph D'Souza, said on June 16 in Chennai: "We are intrigued by the response of the Central and State governments who refuse to see the pattern of the violence."[23] The Bajrang Dal's Gauleiter (Sah-Sahayojak) for the Braj region, Dharmendra Sharma, declared that Christians were now "bigger enemies" than Muslims.[24]

We now have a government whose Hindutva puts its previous tenures in the shade. Lynchings of Muslims has become common. So are cries for a Hindu state. The drive will pick up speed. The government aims to claim that it has fulfilled its triple demand: its Kashmir adventure had "solved" the problem; for a uniform civil code, the first steps are being taken and no other government has so relentlessly campaigned for a reform of Muslim law. It is a pity that the Chief Justice of India Justice J.S. Khehar rushed post haste to unprecedentedly set up a Bench during the vacation to hear the matter on the constitutionality of triple talaq. As far as the Ram temple at Ayodhya is concerned, it will say: "have patience, we have crossed the threshold to a Hindu state in India. Can't you see the dread on the faces of Muslims, Christians, Dalits and other minorities?"

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[22] *See* A.G. Noorani, The RSS and the BJP: A Division of Labour 105-106 (LeftWord Books, 2000).

[23] *Id*. at 105.

[24] *Supra* note 21 at 105.

The Law of Sedition in the Indian Context

Soli J Sorabjee[†]

Our Constitution guarantees certain fundamental rights to citizens and non-citizens in Part III of the Constitution of India. However, no fundamental right in our Constitution is absolute. Freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution, can be reasonably restricted on the grounds specified in Article 19(2). In the Draft Constitution of India (1948), one of the heads of restrictions proposed on freedom of speech and expression was "sedition", aptly described by Gandhiji as "the Prince of the Indian Penal Code". In the heyday of British colonialism, sedition law was frequently invoked to crush the freedom movement and to incarcerate freedom fighters, including prominent nationalist leaders like Tilak, Gandhi, Nehru and others.

Shri K. M. Munshi opposed the inclusion of sedition in the Draft Constitution of India as a head of restriction on freedom of speech and expression and moved an amendment for its deletion. In the course of the debates in the Constituent Assembly, Munshi pointed out that:

> Even holding an opinion, which will bring ill-will towards government, was once considered sedition …. Our notorious Section 124-A of Penal Code was sometimes construed so widely that I remember in a case criticism of a District Magistrate was believed to be covered by Section 124-A. But public opinion has changed considerably since

[†] Senior Advocate and former Attorney General for India.

> and now that we have a democratic government a line must be drawn between criticism of government which should be welcome and incitement to violence which would undermine security or order on which civilized life is based …. As a matter of fact, the essence of democracy is criticism of government. The party system which necessarily involves advocacy for the replacement of one government by another is its only bulwark; the advocacy of a different system of government should be welcome because that gives vitality to democracy.[1]

During the debates in the Constituent Assembly, the Founding Fathers, in view of their bitter experience of the arbitrary application of sedition law by the British colonial regime, agreed with Munshi and deliberately omitted sedition as one of the permissible grounds of restriction on freedom of speech and expression under Article 19(2).[2] However, sedition remains as a criminal offence under Section 124-A of the Indian Penal Code, 1860 ("IPC"), and provides *inter alia*, for a sentence of life imprisonment and fine upon conviction.

Sedition was construed by the Privy Council to include any statement that caused "disaffection", namely, exciting in others certain bad feelings towards the Government, even though there was no element of incitement to violence or rebellion.[3] On the other hand, the Federal Court of India presided over by the distinguished Chief Justice, Sir Maurice Gwyer, ruled in *Niharendu Dutt Majumdar v. King Emperor*,[4] that sedition law is not to be invoked "….to minister to the wounded vanity of government … The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency."[5]

Thereafter, our Supreme Court had occasion to deal with the constitutionality and interpretation of Section 124-A of the IPC,

1 1 December 1948, *in* Constituent Assembly Debates, Book No.2, Vol. VII, 731 (Lok Sabha Secretariat).

2 *Id.*, 2 December 1948 at 786.

3 King- Emperor v. Sadashiv Narayan Bhalero, 10 74 IA 89.

4 (1942) 4 FCR 38.

5 Niharendu Dutt Majumdar v. King Emperor, (1942) 4 FCR 38 at 350.

regarding the offence of sedition. In its landmark decision pronounced in 1962 in *Kedar Nath Singh v. State of Bihar*,[6] the Supreme Court dissented from the view of the Privy Council and adopted the view of the Federal Court. According to the Supreme Court, mere criticism of the government or comments on the administration however vigorous or pungent or even ill-informed, did not constitute sedition. The Supreme Court limited the application of Section 124-A to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence. Incitement to violence is the essential ingredient of the offence of sedition.

In 1995, the Supreme Court in the case of *Balwant Singh v. State of Punjab*,[7] applied the principle propounded in *Kedar Nath Singh* to prosecute certain persons who were in a crowded place in front of the Neelam Cinema, on 31.10.1984- the day Smt. Indira Gandhi, the then Prime Minister of India was assassinated. These individuals had after coming out from their respective offices after duty hours, raised the following slogans:

1. Khalistan Zindabad
2. Raj Karega Khalsa, and
3. Hinduan Nun Punjab Chon Kadh Ke Chhadamge, Hun Mauka Aya Hai Raj Kayam Karan Da.[8]

The Supreme Court ruled that keeping the prosecution evidence in view, the slogans were only raised a couple of times and did not evoke a response from other persons of the Sikh community or people of other communities. Therefore, it was difficult to hold that raising of such casual slogans a couple of times without any other act whatsoever, justified prosecution for sedition. The Court ruled that "….the casual raising of the slogans, once or twice by two individuals alone cannot be said to be aimed at exciting or attempting to excite hatred or disaffection towards the Government as established by law in India….", and therefore Section 124-A could not be invoked.[9]

6 1962 Supp (2) SCR 769.
7 (1995) 3 SCC 214.
8 Balwant Singh v. State of Punjab, (1995) 3 SCC 214 at para 2.
9 *Id*. at para 8.

Thereafter, in the case of *Nazir Khan v. State of Delhi,*[10] the Supreme Court made the following significant observations:

> It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus where the pledge of a society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of the society and the present Government; that it would also be legitimate to presume that they desired a change in the policy; that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the society planned to achieve its object by force and violence.[11] (emphasis added)

Therefore, incitement to violence is the gist of the offence of sedition. That is how Section 124-A of the IPC has been interpreted and upheld as constitutional by the Supreme Court. Therefore, the question whether certain speech or acts constitute sedition are essentially questions of fact which have to be determined by a Court of law keeping in mind the principles enunciated by the Supreme Court in *Kedar Nath Singh* and elaborated in its subsequent judgments.

The legal position which emerges in view of the principles laid down by the Supreme Court in the aforesaid decisions is that merely shouting slogans like Pakistan or "Khalistan zindabad", however deplorable, *per se* would not attract Section 124-A. Criticism of the judgment of

[10] 2003 (8) SCC 461.

[11] Nazir Khan v. State of Delhi, 2003 (8) SCC 461 at para 33.

the Supreme Court upholding the conviction of Afzal Guru[12] on the ground that he did not have a fair trial, is untenable because in my opinion Afzal Guru had a fair trial at all stages of the proceedings. Nonetheless, criticism of the Supreme Court judgment is *per se* not seditious, unless there is speech which calls for avenging the 'injustice' done to Afzal Guru by the commission of acts against the government, or which advocate the overthrow of the government by violent means. However, if a person has said "*Hindustan murdabad*", that the Indian state is tyrannical and it is better to do away with it, and it is necessary to overthrow it, that could attract Section 124-A.

It is true that Section 124-A has often been misused by ill-informed and over enthusiastic prosecuting agencies. In such cases, the illegal and arbitrary action deserves to be struck down. The remedy does not lie in deleting Section 124-A from the IPC. Remember that there is no statutory provision which cannot be misused thanks to human ingenuity or cunning. Mere misuse is no reason for deleting or omitting the statutory provision. The aim should be to strike down the arbitrary action of invoking Section 124-A rather than its deletion because in certain situations Section 124-A may well be invoked in keeping with its interpretation and the principles laid down by the Supreme Court in *Kedar Nath Singh* and other decisions mentioned above.

In my opinion misuse of Section 124-A in some cases, however regrettable, is no ground for its deletion or repeal. The provision protects and preserves the sanctity of the Indian state.

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[12] State (NCT of Delhi) v. Navjyot Sandhu, (2005) 11 SCC 600.

Plural Societies: Man's Neurological Compulsions*

JUSTICE M.N. VENKATACHALIAH†

Any debate on the Uniform Civil Code cannot proceed without first considering the question as to whether such a debate is required at all. Concealed behind the debate, is the real issue as to who prescribed what and for whom? Personal laws are outside the sweep of the equality clause. When the Uniform Civil Code is discussed, what is really debated is how the religious minorities perceive it. Any denial of this makes the debate sterile and glib. The origin and sources of plural societies and the values of a liberal democracy are an essential background to the debate.

What then are the sources of pluralism and diversity? Professor K.N. Sharma, a distinguished physiologist observed, "[T]he priceless object of evolutionary heritage containing the blueprint of human destiny does not lie in the farthest reaches of outer space or in the inky blackness of deep seas. It lies rather inside our skull and is, of course, the human brain".[1] Man's ecological liberation and the establishment of this superiority over other living creatures, led him to contemplations on the quality of his own life. But equally, the structure of the human brain is itself the source of the split-mindedness which seems to be

* A version of this article was delivered as a speech at the S.V. Gupte Centenary Memorial Lecture, January 30, 2004 at the India Habitat Centre.

† Former Chief Justice of India.

1 Professor K.N Sharma, *Brain and the Dilemma of Man*, Transaction No. 46, THE INDIAN INSTITUTE OF WORLD CULTURE, 1975 at 1, *available at* http://www.iiwcindia.org/transactions/transaction46.pdf.

inherent in man's condition and been testimony to his tortured history. As to this interesting neurological explanation of the disposing potential for pluralism Professor Sharma quotes the Hungarian author Arthur Koestler to say:

> What the record indicates is that in the major disasters in our history, individual aggressiveness for selfish motives played an almost negligible part compared to unselfish loyalty and devotion to tribe, nation, religion or political ideology. Tribal wars, national wars, civil wars, religious wars, world wars, are waged in the purported interest of the community, not of the individual, to decide issues that are far-removed from personal self-interest of the combatants.[2]

It would then seem that the basic problem with man has been his extreme loyalty rather than aggressiveness. It is this fanatical loyalty that acts as a motive force and has led him to the point of self-sacrifice to the kind and country, leader or group. The author observes:

> It may be suggested that the self-assertive tendencies in the emotional life of man are less harmful to the species than his self-transcending or integrative tendencies. One can recall from history that the victims of individual crimes are far too less and rather insignificant as compared to the masses cheerfully sacrificed in blind devotion to religion, dynasty or political system. It is a curious fact that man, when alone, behaves in a different manner seeking self-interest, than when he is in a group. The group loyalties, with which he identifies himself, take precedence over his individual expressions. The clues for this ambivalence in his nature are perhaps best provided in the peculiarity of the human to sustain affect-based systems that are incompatible with its reasoning faculties but nevertheless co-exist with them.[3]

The other factor equally basic to the human predicament, is the emergence of language as an exclusive behaviour. Language not only

[2] *Id.* at 2.
[3] *Id.*

promotes communication but is also an exclusive behavior. Quoting Professor Sharma again:

> Language not only promotes communication and understanding but it also accentuates the differences in tradition and beliefs and thus tends to erect barriers between tribes, nations, regions and social classes. Everyone acknowledges the power of language in influencing our way of life. From the primitive use of vocabularies to the organised development of languages, man has made a remarkable progress as are documented in the ever-inspiring pieces of poetry and literature.

Professor Sharma further states that:

> ….the human brain is a hierarchical system essentially consisting of three brains representing the reptilian, the paleomammalian and the neomammalian stages of phylogenetic development.[4] The reptilian brain corresponds to the greater part of the brainstem and contains much of the so-called reticular system, the mid-brain, and the basal ganglia. This is the oldest of the three brain and is faithful in doing what [its] ancestors say, but it is not a very good brain for facing upto new situations. It seems to be a slave to the precedent and performs stereotyped responses thus playing a primary role in instinctively determined functions….[The] evolution of the lower mammalian brain, which nature has built on top of the reptilian brain….plays a fundamental role in emotional behavior.[5] (corrections supplied)

Tendencies towards pluralism and plural societies are quite often man's choice and not his inheritance and therefore cannot easily be subordinated to purely rational analysis or logical arguments.

I. Law in Pluralist Societies

The purpose of law in plural societies is therefore not the progressive assimilation of the minorities in the major itarian milieu. What then is

[4] *Id.* at 3.

[5] *Id.* at 4 to 5.

law's function? In the words of Lord Scarman, "…the purpose of the law must be not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members".[6]

The function of law and choice of legal policies in pluralist societies are by far the most fascinating challenges to our civilization. Large masses of the globe are inhabited by plural societies of one kind or the other. The challenges are staggering by their sheer scale and variety. The challenges are pervasive and assail the basic assumptions of justice, democracy, rule of law, morality of political authority, systems of government, the role of the judiciary, etc.– some of them held fundamental or even axiomatic. These challenges appeal to the immutable values of a higher order of society and civilization. Man's capacity for human law and human justice are put to its ultimate test. The ultimate question is whether civilizations on earth have the moral maturity to accept the human person as the unit and a measure of all things.

The question "what is justice?", in the maze of the irreconcilabilities of interest in pluralist societies, is an invitation to the most abstract sort of philosophical speculation of its meta-physical elements. What ready answers can be given to questions of our times such as: What makes a government legitimate? What is justice to the poor people living virtually next to people who have more money than they could ever possibly spend? Is it fair that hard-working people of considerable talent go unrewarded, while others, smiled-upon by fortune and raised with wealth and power, are constantly "rewarded" in return for no work and no contribution to society whatsoever? Do people whose ancestors were treated unfairly deserve compensation for what their grandfathers suffered? Can a legal system impose upon an individual the burden of personal sacrifice so as to ensure opportunity to others? What then should be done to equalize the condition of those with inherited disadvantages? Lord Scarman asks much the same question and says:

> …It is a platitude that society must be just. But what in the context of a plural society do we mean by justice? Are we

[6] Rt. Hon. Lord Scarman, *Minority Rights in a Plural Society*, *in* Minorities: A Question of Human Rights? 63 (B. Whitaker ed., Elsevier, 2013).

> seeking justice as between groups? Or do we remain true to our western philosophy that what ultimately matters is the right and duty of the individual human being and that justice implies for each one of us 'equal justice under the law'. . . to quote the inscription over the portico of the U.S. Supreme Court building. Clearly we desire both justice as between groups and equal justice under the law for every one of us. The dilemma of the plural society is that it is not always possible to achieve both. How, then, does one regulate justly, the clash of interest between the group and the individual.

These are the in-built dilemmas of all human organization. Plural societies are the products of irreversible movements of mankind. Short of genocide or mass transportation, most of them are here to stay. Pluralism is not a mere transient vestige of a historical condition, but a permanent feature of the public culture of modern democracies.

II. Architecture Of An Inclusive Society And Liberal Democracies:

The great gifts of democracy have now become cherished global goals. The Human Development Report, 2003 says that in the last twenty years alone, 81 more countries of the world have moved towards democratic practices; some 33 of them had their earlier military regimes replaced by civil governments.[7] 62% of the world's population today enjoys the benefit of a free press. In the last decade alone, the number of countries ratifying the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") has increased from 60 to 150. There are some 37000 registered international NGOs the world over. In the developing countries alone, the circulation of newspapers has increased from 29 per thousand population to 60. Television has increased fourteen-fold. This great global thrust towards democracy and open societies is the most significant feature of the last quarter century.

[7] U.N. Dev. Prog., Human Development Report, 2002 (Oxford University Press, 2002), *available at* http://hdr.undp.org/sites/default/files/reports/263/hdr_2002_en_complete.pdf.

Now civil rights and fundamental freedoms are indeed taken for granted. Herman Finer said, "[T]he political, social and economic gifts of democracy endow mankind with vast riches. We are so accustomed to the exercise of our civil rights that we have ceased to realize that they are as vital to our moral life as breathing to our physical, and we take this miracle for granted!" An inclusive participatory democracy, not a mere numerical majoritarian democracy, is the single most significant factor in human development. A majoritarian democracy, it is rightly said, is a mere crude statistical interpretation of democracy.

Authoritarian regimes often argue that they have advantages in building strong States that can make tough decisions in the interest of people. They also argue that democratic processes create disorder and impede efficient management and that countries must choose between democracy and development, between extending political freedom and expanding incomes. The Human Development Report 2002 observes:

There are good reasons to believe that democracy and growth are compatible. With just two exceptions, all of the world's richest countries – those with per capita income of more than $20,000 (in 2000 purchasing power parity) – have the world's most democratic regimes. In addition, 42 of the 48 high human development countries are democracies.[8]

The Report further argues that democracies are better than authoritarian regimes in managing conflicts and catastrophes. Democracy provides political spaces and institutional mechanisms for debate and change, particularly in managing sudden turn downs that threaten human survival. The Report says:

> Consider China, India and Democratic People's Republic of Korea. In India famines were common under colonial rule – for example, 2 to 3 million people died in the 1943 Bengal famine. But since independence and democratic rule, there has been no recurrence of famine – despite severe crop failures and massive losses of purchasing power for large segments of population as in 1968, 1973, 1979 and

[8] *Id*. at 56.

> 1987. Each time the government acted to avoid famine. Food production fell largely in 1973 during drought in Maharashtra, but famine was averted partly because 5 million people were put to work in public works projects. In contrast, in 1958-61, famines in China killed nearly 30 million people. And one of the worst famines in history continues in the Democratic Republic of Korea, having already killed 1 in 10 citizens.[9]

Democracy versus authoritarianism has always engaged men's mind. The Rt. Hon. Lord Justice Laws, in his Margaret Howard Lecture, 2002, titled 'From Homer To Socrates – the rule of law in Greek Literature', refers to a passage from the Suppliant's Theban Herald's speech justifying dictatorship in exactly the way Mussolini must have done:

> I speak for a state where one man rules,
> Not a rabble. We don't have loud mouths there,
> Filling our ears and twisting us
> This way, that way,
> Whichever way their own profit lies,
> One day riding high, next scrabbling,
> Slandering, blaming the innocent
> And skipping off scot-free…
> The People! How can a people rule?
> Has a people single voice, a single brain?
> Has a people experience? Farmworkers,
> Good at what they do, no doubt,
> But who expects them to drop their hoes
> And bend their intelligence then to affairs of state
> They've nothing; they're tongues on legs;
> They talk themselves up
> From the furrow to the stars,
> They sicken their betters.

[9] *Id.* at 58.

But Theseus of Athens answers him:

> If a state gives one man absolute power,
> Puts itself in one man's hands, it's doomed.
> The rule of law dies first. He makes up for the laws
> To please himself. In an equal state,
> Where all are equal, all are free,
> The law's written down, it's the same for all'
> Rights guaranteed for rich and poor alike,
> Weak stands upto strong, its voice is equal,
> The contest's not in strength, but justice,
> When we gather in Assembly, our heralds ask
> 'in Athens's name', for the city's sake,
> Who wants to speak? If you've something to say,
> You say it, it's an honour; if you've not, you don't.
> Democracy we call it.

The Grand Inquisitor in Dostoevsky's 'Brothers Karamazov' confronted the apparition of Christ on precisely this question:

> Whether to leave the determination of what is right to the freely questioning masses and risk unrest, turbulence, riot, murder and war: or to take choice out of the hands of the masses, stilling their unrest by bread, the circus, a myth, a hierarchy, and the infallibility of a doctrine enforced by imprisoning and torturing the disobedient.

The very need for social organization of man stems from the fact that all incomplete human beings seek the fulfillment of their destiny in the enriching atmosphere of human companionship and political institutions. Democracy provides the most profound opportunities for this mutual enrichment. It provides the highest opportunity for each member to achieve and bring out the best in him. It is this great society that India's Constitution dreams of.

III. Constitution: Vision of Indian Society

The founding fathers of the Indian Constitution envisioned thesanctity of all religious truths by extolling religious freedom and

freedom of conscience for everyone and emphasizing the duty to honour and respect the composite culture of this ancient land. It is a mistake to think that democracy survives only if the composition of society is homogeneous. A strong democracy in the words of Benjamin Barber:

> ….rests on the idea of a self-governing community of citizens who are united less by homogenous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. Strong democracy is consonant with indeed it depend upon – the politics of conflicts, the sociology of pluralism and the separation of private and public realms of action.[10]

In this land, Hindus, Muslims, Christians, Zorastrians and followers of many other faiths have lived for ages in harmony and peace. Islamic culture has made its own splendid contribution to the enrichment of this composite culture. Justice and equity are the values on which this liberal culture is sustained. Dr. Ambedkar, defending the provisions in the Draft Constitution of India (1948) for the protection of minorities, uttered some memorable words. He said:

> In this country both the minorities and the majorities have followed a wrong path. It is wrong path. It is wrong for the majority to deny the existence of the minorities. It is equally wrong for minorities to perpetuate themselves. A solution must be found which will serve a double purpose. It must recognize the existence of the minorities to start with. It must also be seen that it will enable that majorities and the minorities to merge someday into one. The solution proposed by the constituent assembly is to be welcomed because it is a solution, which serves this two-fold purpose. To die-hard who have developed a kind of fanaticism against minorities protection. I would like to say two things. One is that the minorities are an explosive force which, if it erupts,

[10] BENJAMIN BARBER, STRONG DEMOCRACY 113 (University of California Press, 2003).

> can blow up the whole fabric of the State... the minorities in India have agreed to place their existence in the hands of the majority... they have loyally accepted the rule of the majority which is basically a communal majority and not a political majority. It is for the majority to realise its duty not to discriminate against minorities. Whether the minorities will continue or will vanish must depend upon this habit of the majority. The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish.[11]

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[11] B.R. Ambedkar, The Essential Writings of B.R. Ambdekar 486-487 (Oxford University Press, 2002).

Where are the Conservative Judges in India?

Vikramjit Banerjee[†]

The short question which rather like *Banquo's* ghost[1] haunts most progressive legal thinkers in India today, is the spectre of a nationalist takeover of the country's judiciary. It has been ingrained into the rhetoric of the entire progressive and liberal discourse that the judiciary is the last bulwark against the flood of right-wing ideology which threatens the existence of India. To that end, any appointment of any judge who sympathizes with the right is interpreted as a sign of judicial perfidy. It is common to term any judge who speaks about traditional conservative values as being politically beholden. Sometimes these allegations are made explicitly, sometimes these allegations are made in the form of an innuendo. The fact that at the very least 30% of the country's voting population and that the overwhelming government of the day prefer traditional conservative values is disregarded. It has almost become a *sine qua non* of legal academic discourse to posit oneself as a liberal. The converse is to deliberately tar those who do not contribute to this liberal/progressive consensus as retrograde or politically motivated and therefore unfit to hold judicial positions. It is perceived that sometimes this *fait accompli* finds resonance from within the higher judiciary itself.

This article addresses the question of conservative/traditionalist

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1 Banquo is a character who haunts Macbeth in William Shakespeare's play "Macbeth". Banquo is murdered by the usurper Macbeth and appears as a ghost before him during crucial points in his life. Interestingly Banquo's son inherits the throne of Scotland after the death of Macbeth.

judges in the higher judiciary and their importance to the legitimacy of the constitutional process. It raises the question as to why there is a lack of conservative/traditionalist judges in the higher judiciary? In trying to answer that question, the article will address the following relevant discussion points: what is progressiveness and what is conservatism? What is the importance of progressive ideology in Indian constitutional discourse? What would be the contours of conservative legal ideology in India and lastly,what is the future of conservative legal ideology and how does one remedy the absence of the same in Indian judicial pronouncements?

I. Progressiveness and Conservatism in relation to Legal Discourse

There is a long history of dispute between conservatives and progressives. This dispute can be traced to the conflicts in western society at the time of the formation of the modern state as we know it.While some sections wanted to walk the path of revolution and change the entire structure- social, political and economic- others wanted a state structure which changed slowly in accordance with the culture of the people. The latter did not want the ancient institutions close to destroyed.

This conflict had various progenitors. The first group can broadly be called progressive and the latter, conservative. There were numerous actors, politicians and political thinkers who wrote extensively in and around the time of the 17th and 18th centuries on the issues of the day. However, in popular imagination, the divide was exemplified by the fundamental point of difference between two friends at the time of the French Revolution, Edmund Burke and Tom Paine. Paine believed that the history of the world was linear: a progression from the backward world to a continuously brighter future for humankind. He believed that the only way to progress was to bring in fundamental changes in social structures. On the other hand, Burke believed that humans should always change for the better, however, large-scale changes would jeopardise the stability of the society and small incremental changes keeping in mind the social balance of the society should be the way forward.[2] Paine was a progressive, while Burke was a conservative.

[2] Roger Scruton, How to be a Conservative 20-21 (Bloomsbury, London, 2015).

In many ways, this dichotomy of approach has fundamentally affected judicial thinking all over the world, especially in common law jurisdictions. It is best expressed in the US judiciary where differences between the conservatives and the liberals are apparent and clear.[3] In constitutional terms, it means that while progressives believe that the Constitution must be used as a means of social change, the conservatives believe that the Constitution is a method to protect society from radical changes. While in older democracies like the UK and the US, the differences have always been apparent and are now accepted as part of the judicial landscape, it has been a different story in post-colonial countries which became independent after the Second World War.

At the end of the Second World War, progressiveness, both from the Left and the Right, was the dominant political ideology of the day. The people who worked the Constitutions of such newly independent countries were deeply influenced by progressive ideas. They therefore tried to interpret their Constitutions through an ideology of progressive thinking. The same is apparent by a cursory examination of the logic of the judgments which were pronounced during that time. For the first thirty years after the Second World War, there was very little challenge to the said consensus. If there was some challenge, it came from the socialists who wanted another turn of the revolution and change at an even faster pace than that the progressives were comfortable with. However, in the 1980s, there came the charge of renewed conservativism all over the world which was also manifest in the struggle to appoint a judiciary which would be appreciative of conservative concerns.

The problem was that while the judiciary remained wedded to the progressive ideology through which its first judges viewed the world, the people and the polity became increasingly conservative in matters of society and religion. This struggle has been continuing. In Israel, this issue turned into a political issue and there was a great struggle to appoint conservative judges to the Supreme Court.[4] An uneasy

[3] Yuval Levin, The Fractured Republic 211 (Basic Books, New York, 2016).

[4] Daniel Friedmann, The Purse and the Sword: The trials of Israel's Legal Revolution (Oxford University Press, New York, 2016).

compromise was struck by accommodating conservative concerns about ideological diversity on the bench. In India, the struggle has been much more muted. So marginalised have been the voices of Indian legal conservatism that the completely incorrect assertion by the progressives that the Indian Constitution is a liberal document has been accepted without debate.

II. The Progressive Ideology of the Indian Constitutional discourse

The existence of "progressiveness" as an inherent value of the Constitution has been in the mind of the Supreme Court from the time of the framing of the Constitution. This is apparent from both the use of the word itself as well as the ideology immediately after the formation of the Republic and the Court through the Constitution. It has been posited on numerous occasions that "progressiveness" is an objective part of the vision of the creation of a new governmental structure post the framing of the Constitution.[5] In *Manoj Narula v. Union of India*,[6] the Court has gone so far as to say that the "Constitution has been made for a progressive society."[7]

Progressivism has been used to interpret the entire social justice debate.[8] The term and the idea has been a tool to interpret economic legislation as well.[9] The judgment of the Supreme Court in *Indra Sawhney v. Union of India*,[10] is a *locus classicus* on the point of how the Court used progressivism as a tool to incorporate the clearly Lohia-ite socialist political slogan of "caste is class" into the interpretation of fundamental rights. The Court has even used the ideology of egalitarian progressiveness to interpret the constitutional provision relating to freedom of speech and expression- the classic liberal provision.[11]

In relation to the question of minority rights and identity politics which is the touchstone for progressive liberal politics today, the

5 State of Jharkhand v. Harihar Yadav, (2014) 2 SCC 114 at para 57.
6 2014 (9) SCC 1.
7 Manoj Narula v. Union of India, (2014) 9 SCC 1 at para 74.
8 Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 at para 14.
9 Dalmia Cement (Bharat) v. Union of India, (1996) 10 SCC 104.
10 1992 Supp(3) SCC 217.
11 Santokh Singh v. Delhi Administration, (1973) 1 SCC 659.

idea that protection of minority rights was an end in itself and not a means to an end,was grafted into constitutional jurisprudence by way of progressive values in a pluralist society in the oft quoted, allegedly nationalist judgment of *Ismail Faruqui v. Union of India*.[12] In *Society for Unaided Private Schools of Rajasthan v. Union of India*[13], the Court went to the extent of making religious/linguistic minority protection an exception to the constitutional scheme, rendering it beyond the purview of laudatory socio-economic legislation. Attempts to politically organise people based on religion were brushed aside in the name of secularism.[14] The Court has even held that the very basis of the constitutional scheme is a rights-regime based entitlement paradigm.[15] It would seem that progressivism has been and has become the *raison d'etre* of the Constitution.

Interestingly, some of the first dissents to this powerful progressive consensus has also come with the above mentioned judgments. The dissent of Justice Radhakrishnan in the *Society for Unaided Private Schools* case is a brilliant argument in classical liberal and libertarian thinking, going to the extent of quoting Murray Rothbard- the libertarian thinker on education.[16] The dissent of Justice Dhananjay Chandrachud in *Abhiram Singh* is another exceptional argument against the prevailing paranoia of allowing religion in politics, where the judge employed a literal interpretation of the Constitution and not a purposive one to facilitate the supposed "ends" of the Constitution.[17] The majority in *Bal Patil v. Union of India*[18] can also be construed as a first and very tentative attempt of making out the argument that religious minority rights are a means to an end and not an end in itself.

The judgment of the Supreme Court in *Ismail Faruqui* is in many ways a path breaking judgment in that it relied on Hindu texts. The

12 (1994) 6 SCC 360 at paras 38 to 39.
13 2012 (6) SCC 1.
14 Abhiram Singh v. C.D. Commachen, 2017 (2) SCC 629.
15 I.R. Coelho v. State of T.N., 2007 (2) SCC 1 at paras 110-112.
16 Society for Unaided Private Schools v. Union of India, 2012 (6) SCC 1 at para 305.
17 Abhiram Singh v. C.D. Commachen, 2017 (2) SCC 629 at paras 111 to 121.
18 2005 (6) SCC 690.

judgment quotes a scholarly article which extracts Hindu texts in an argument over a dispute which was temporal and concerned the State.[19] But, it falls short of creatively coming out for a conservative framework in the Indian constitutional context. This prevarication is also seen in the other famous, supposedly "nationalist" and pro- Hindutva judgment of *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*,[20] where the Court had to secularise the concept of Hindutva in order to construe it as constitutionally acceptable, rather than holding that the basis of the present Constitution exists in a deeply Indic/*Bharatiya* milieu and therefore, the constitutional justification for Hindutva needs to be read and tested in that context.

There is only a small number of judgments which reflect a socially conservative view point. Even in cases where the end-result can be construed to serve conservative interests, like in the case of *Suresh Kumar Koushal v. Naz Foundation*,[21] the rhetoric is clothed in modernism and rights-based rhetoric, and the related Indic/ *Bharatiya* ethos is not addressed.

In the case of socially progressive legislation which have greater ramifications, the Supreme Court has broadly leaned towards giving them full effect even when it was aware that the said actions of the Government were not well thought. On the question of the fundamental right to property, the Court has been till date extremely reluctant to give it clear protection. Calling it a "human right" without extending the umbrella of fundamental rights clearly shows that the Court may have at times been a reluctant progressive but a conservative it hasn't been by any means.[22]

No doubt there have been attempts to present the Court as a conservative institution, and public discourse was indeed very strong on that account after *Naz Foundation.* But, the glaring truth is that social conservatism has been largely unknown to the discourse of

[19] (1994) 6 SCC 360 at paras 34 to 35.
[20] (1996) 1 SCC 130.
[21] 2014 (1) SCC 1.
[22] Indore Vikas Pradhikaran v. Pure Industrial Coke and Chemicals, 2007 (8) SCC 705 at para 53.

the Indian judiciary. What we do see at times however is disguised conservatism- in other words, promoting conservative ends through progressive logic. This is best exemplified inthe case of *S.M.D. Kiran Pasha v. State of A.P.*,[23] where the Court engaged in an arcane Hohfeldian analysis instead of acknowledging an Indic/*Bharatiya* background of obligations on the State to ensure the protection of fundamental rights. The relevant concept of *Raj Dharma* could have been easily employed instead. On the few occasions when the Court has relied on *Bharatiya*/ Indic/Hindu sources as a source of societal fact or proposition of law, it does that to justify progressive ends.

It would seem that conservatism is a species which is non-existent in the Indian legal discourse. It is therefore important to discover what could be the basis of an Indian conservative legal and judicial paradigm.

III. What would be Indian judicial/ legal conservatism?

The first thing about Indian legal conservativism is that it has to accept the uniqueness of the Indian identity. It is also imperative that Indian legal conservatism be based on the unique, *Bharatiya*/Indic/ Hindu identity which underlies society. Just as the US Supreme Court has acknowledged the Judeo-Christian heritage of the United States of America,[24] and the European courts have been deeply influenced by the uniquely European and Christian heritage of Europe,[25] the Indian conservative judge has to acknowledge the importance of*Bharatiya*/ Indic values while interpreting the Constitution.

This would obviously mean that any part of the Constitution has to be read in accordance with the dominant value system of the people. This would no doubt also include the interpretation of fundamental rights, the directive principles of state policy and fundamental duties individually, and the interplay between them, in a manner conducive to the values of the people. Naturally, it would also mean that the same would result in reading and interpreting the Constitution in

[23] 1990 (1) SCC 328.

[24] Church of Holy Trinity v. United States, 143 US 457; *see also* Marsh v. Chambers, 463 US 783.

[25] Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 Geo. Wash. Int'l L. Rev. 807-851 (2016).

such a manner as would facilitate and promote the underlying values of our society, including suitably interpreting minority rights, social legislations and cases which involve social values.

The logic of such a discourse,it is obvious, will have to be based on Indic/*Bharatiya* sources and the prima facie intention of the Constitution should be interpreted so as to ensure that progress does not cause fracturing of society or deepening of existing divides.

It is apparent that the Supreme Court has kept away from using Indic/*Bharatiya* logic while interpreting the Constitution and has shied away from promoting conservative ends. The biggest possible reason seems to be a combination of ignorance about Indic/*Bharatiya* sources of law and a reluctance to be seen or identified as conservative.

This has led to a strange dichotomy whereby the polity has increasingly become conservative, while the judiciary has continued to use progressive logic and rhetoric in trying to arrive at solutions to problems within society for which it has little sympathy and even lesser legal vocabulary to comprehend. This has resulted in situations where the courts have on the one hand, recognised that there is an essential difference between the reality of India and judicial thinking, but yet,have chosen to opt for progressive Constitution logic, even though it does not work practically.

IV. How to Remedy the Situation

To come back to the question posed in the beginning- where are the conservative judges today in India- it seems there are very few. In fact, as mentioned in the first part, so hostile is the judicial atmosphere, that those who identify with Indian conservatism usually keep their views private. This has resulted in a dichotomy between the Indian judiciary and Indian society beyond the modernised urban centers. The Rule of Law outside the district towns in the vast rural countryside still remains a foreign concept.

After 70 years, it is about time that the situation is remedied. Bringing about fundamental changes in the judicial system is one solution, including the devolution of realistic judicial powers to Gram Panchayats. However, such changes would require constitutional

amendments and political consensus and are not immediately possible. Some immediate steps are required to address the situation.

The judiciary should acknowledge that there is something as normal as Indian legal conservatism. It is also important to incorporate conservative logic into judicial pronouncements. To do this, it is important that the judiciary appoint more legal conservatives to the bench to interpret the law. This will bring about larger ideological diversity, as well as the capability to deliver realistic justice to the people. It would also reduce the gap between the judiciary and the populace.

Although structural changes such as the decentralisation of judicial powers and functions may be better solutions to this problem of increasing distance between the judiciary and the people, but that would mean further changes to the Constitution which is not the scope of the present paper. But, for the present, including more social conservatives who are willing to promote and facilitate conservatism and Indic/ *Bharatiya* values would be a great beginning.

Nationalism and the Supreme Court of India

Pallav Shishodia[†]

Nationalism is a political ideology that postulates values such as loyalty, commitment and dedication to one's nation. The nation-state of India is immense in terms of both its area and its cultural pluralism. This makes India, the largest functioning democracy, unique among the nations of the world. While the idea of nationalism sounds simple, when one talks of a nation with people belonging to diverse religious and linguistic backgrounds, nationalism becomes a far more complex notion.

The Supreme Court of India has, on multiple occasions, dealt with issues relating to nationalism and its manifestations. One such decision was *Bijoe Emmanuel v. State of Kerala*,[1] which arose from a judgment of the Kerala High Court rejecting the prayer of the writ petitioners, Bijoe Emmanuel and his siblings- school students who were expelled by the Kerala education authorities for refusing to sing the national anthem at the school assembly. The petitioners stated that they belonged to the sect of Jehovah's Witnesses and their faith did not permit them to worship or sing the national anthem. The court examined whether expelling the students for their silence during the singing of the national anthem, violated their right to free speech under Article 19(1)(a), and their right to profess, practice and propagate their religion under Article 25 of the Constitution of India. The Supreme Court held that

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[1] (1986) 3 SCC 615.

the religious beliefs of the Jehovah's Witnesses, "may appear strange or even bizarre" but needed protection under Articles 19(1)(a) and 25 of the Constitution.[2]

In another case, the Supreme Court reversed the decision of the High Court of Madhya Pradesh, which allowed a writ petition filed against film director Karan Johar.[3] The High Court had directed the producers of the popular movie, *Kabhi Khushi Kabhi Gham*, to delete a scene in which an Indian-origin student sang the Indian National Anthem in a UK school. The High Court had observed that the National Anthem "which is the glory of the country and portrays the unity of the country cannot be shown in a variety show or as cultural programme of a school as an item".[4] The Supreme Court held, that in view of the Central Government's instructions, the movie-going audience is not expected to stand in the midst of a movie, as that would interrupt the exhibition of the film and create disorder and confusion rather than add to the dignity of the National Anthem.[5]

Another significant case in the context of nationalism is *Union of India v. Naveen Jindal*.[6] Naveen Jindal, challenged the prohibition on flying of the National Flag by Indian citizens. The Supreme Court dismissed the Centre's appeals and held that the right to fly the National Flag freely was rooted in the fundamental right to free speech and expression under Article 19(1)(a).[7] Citizens therefore have a right to express allegiance and feelings of pride for the nation, such a right being subject only to reasonable restrictions.[8] The Court further observed that "the National Flag indisputably stands for the whole nation, its ideals, aspirations, its hopes and achievements".[9] It further observed that, "….When it goes up the flag mast, 'the heart of a true citizen is filled with pride'".[10]

2 Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615 at para 8.
3 Karan Johar v. Union of India, (2003) 8 SCC 717; Karan Johar v. Union of India, (2004) 5 SCC 127.
4 Shyam Narayan Chouksey v. Union of India, AIR 2003 MP 233 at para 32.
5 Karan Johar v. Union of India, (2004) 5 SCC 127 at para 3.
6 (2004) 2 SCC 510.
7 Union of India v. Naveen Jindal, (2004) 2 SCC 510 at para 90.
8 *Id.*
9 *Id.* at para 7.
10 *Id.* at para 8.

The Court further held that the "National Anthem, National Flag and National Song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country".[11]

In *Rajeev Mankotia v. Secretary to the President of India,*[12] the petitioner filed a writ petition against the decision of the Central Government to convert the Viceregal Lodge, Shimla into a tourist hotel. The Viceregal Lodge is a historical monument of national importance, having hosted many significant national events during the colonial era. In its judgment, the Supreme Court observed,

> …Viceregal Lodge is a mute witness to the destruction of Indians, their subjugation as subjects of British empire who ruled the country for over three centuries by the policy of "divide and rule."…Equally, it is also a witness to the heralding of a new era of independence though ancient India was fragmented into two nations, namely, India, i.e., Bharat and Pakistan. India, thus, became a sovereign, socialist, secular democratic republic under a written Constitution. Democracy is its basic feature; constitutionalism, rule of law and democratic governance as basic means to establish an egalitarian social order… Such being the historic evidence furnished by the Viceregal Lodge, is it not the duty of Indians and of the Government of India to preserve the Viceregal Lodge as a monument of national importance for posterity…If we forget the past and repeat the same mistake, we would stand to lose our nation's unity and integrity; stand to lose the opportunity to integrate into the world our great democratic Bharat Republic. Viceregal Lodge teaches us these lessons and it is for all of us, individually and collectively, to learn, awake, arise and work for integration, unity and fraternity, which are our fundamental duties.[13]

[11] *Id.* at para 27.

[12] (1997) 10 SCC 441.

[13] Rajeev Mankotia v. Secretary to the President of India, (1997) 10 SCC 441 at para 13.

Only the spirit of confident nationalism can take into its stride the embarrassment of past in this manner.

In *Sanjeev Bhatnagar v. Union of India*,[14] the Supreme Court discussed the contours of Indian nationalism while considering a petition under Article 32, which sought the deletion of the word 'Sindh' from the National Anthem on the ground that the geographic area of Sindh is no longer a part of independent India. The Court dismissed the petition and held,

> A National Anthem is a hymn or song expressing patriotic sentiments or feelings. It is not a chronicle which defines the territory of the nation which has adopted the anthem. A few things such as the National Flag, the National Song, the National Emblem and so on, are symbolic of our national honour and heritage….The National Anthem is our patriotic salutation to our motherland, nestling between the Himalayas and the oceans and the seas surrounding her. The mention of a few names therein is symbolic of our recollection of the glorious heritage of India…[15]

The Court further observed:

> The poem is a reflection of the real India as a country- a confluence of many religious, races, communities and geographical entities. It is a message of unity in diversity. It is a patriotic song. It has since the decades inspired many by arousing patriotic sentiments representative of the ethos of the country. Any classic, once created, becomes immortal and inalienable; even its creator may not feel like making any change in it.[16]

These thoughts were articulated at a time when public discourse on nationalism was contemplative rather than rancorous. Today, the simplicity of nationalism sounds pedestrian, its presumptuousness annoys and its innocence is laughed at. Social media exhorts its followers

[14] (2005) 5 SCC 330.

[15] Sanjeev Bhatnagar v. Union of India, (2005) 5 SCC 330 at para 11.

[16] *Id.* at para 12.

to move away simply to something more exciting, from loftiness to crass thoughts and from innocence to mischievous actions.

A lot is said about seditious slogans in the country. The populace is made to believe that the Kashmir issue owes its origin to politically-active University campuses, and not to the alienation of the citizens in Kashmir. It is believed that once these slogans are stopped, the Kashmiris would integrate as nationalists-in-waiting; the lullabies of nationalism would also silence the anti-nationals in North East India and other hotbeds of insurgency. A favourite topic of the nation's media is the cow, or *gaumata*. Again, there seems to be a deeply felt belief that cow protection would lead the nation back to the glory of ancient times. Then there are passionate ideologues who obstruct the shooting of films or prohibit their release, protest about Valentine's Day celebrations, prohibit Pakistani players, artists and authors from coming to India, rename towns and roads, all supposedly to protect the history, culture and heritage of this great nation. A not so vociferous nationalist may be considered to be an anti-national. All of a sudden, the idea of nationalism, world over, has become multi-dimensional, presenting a new paradigm for national identity and an antidote to insecurities bred due to "others".

Consistent with the times of hyper nationalism, in *Shyam Narayan Chouksey v. Union of India,*[17] the petitioner approached the Supreme Court to seek directions to the Union of India to specify what would constitute disrespect and abuse of the National Anthem.[18] The petitioner made suggestions to ensure respect to the National Anthem and prevent its commercial exploitation. He stated that he was motivated to come to Court as the National Anthem is often played in impermissible circumstances. For instance, the National Anthem was played during an interview to test the behavioural pattern of a candidate. On another occasion, it was played in a variety show for dramatic effect.[19] The Court gave interim directions prohibiting the commercial exploitation, dramatization or inclusion of the National

[17] (2017) 1 SCC 421.

[18] Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421 at para 1.

[19] *Id*. at para 2.

Anthem as part of any variety show, also prohibiting the printing or display of it in a disrespectful manner.[20] The Court also directed that,

> 9.4. All the cinema halls in India shall play the National Anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the National Anthem.
>
> 9.5. Prior to the National Anthem being played or sung in the cinema hall on the screen, the entry and exit doors shall remain closed so that no one can create any kind of disturbance which will amount to disrespect to the National Anthem. After the National Anthem is played or sung, the doors can be opened.
>
> 9.6. When the National Anthem shall be played in the cinema halls, it shall be with the National Flag on the screen.
>
> 9.7. The abridged version of the National Anthem made by anyone for whatever reason shall not be played or displayed.[21]

These directions were issued as the Court believed that "love and respect for the motherland is reflected when one shows respect to the National Anthem as well as to the National Flag. That apart, it would instill the feeling within one, a sense of committed patriotism and nationalism…It does not allow any different notion or the perception of individual rights, that have individually thought of have no space. The idea is constitutionally impermissible."[22]

Nobody knows what this "constitutionally impermissible idea" is. It is also not clear as to what these "notions or perceptions of individual rights" are that "have no space". The Court also stated that "a time has come, the citizens of the country must realize that they live in a nation" as if to say that they lived elsewhere.[23] Therefore, the Court held that "it is clear as crystal that it is the sacred obligation of every

[20] *Id.* at para 9.
[21] *Id.*
[22] *Id.* at para 11.
[23] *Id.* at para 11.

citizen to abide by the ideals engrafted in the Constitution. And one such ideal is to show respect for the National Anthem and the National Flag."[24] Constitutional jurists are still in search of the jurisprudential basis for this new concept of "constitutional patriotism". Later on, the Court clarified its decision in *Shyam Narayan Chouksey* and stated that physically handicapped citizens shall be exempt from the obligation to stand when the National Anthem is played and also that the doors of the cinema halls shall be closed but not bolted![25]

Recently, in *Ashwini Kumar Upadhyay v. Union of India*,a prayer to ascertain the feasibility of singing or playing the National Anthem and National Song in schools on every working day has been kept alive by the Court.[26] But, the Supreme Court declined to examine the question of playing of the National Anthem in the Parliament/Assembly, public offices, courts etc. Again, the selection, as also conversely, the non-selection of certain venues over others is baffling and not based on any reasonable criteria.

Leave aside addressing the conscientious objections of critics to the mandatory playing of the National Anthem in cinemas, the Court did not even apply the test propounded in the *Karan Johar* case, as to whether such a direction preserves the dignity of the National Anthem. Nobody appears to have given a thought to the inappropriate nature of the venue or to the timing and mood of moviegoers who merely look forward to be entertained by a Hollywood or Bollywood film: popcorn in one hand, cola in the other, wailing children, and families trying to settle down in the darkness of the theatre. The constitutional duty of every citizen to respect the National Anthem and National Flag arises irrespective of the hour of the day, sense of occasion and nature of frivolity. This untimely assertion of nationalistic credentials before a movie defies reason. Plays, dance shows and musical performances are not covered by the order. Similarly, the solemn proceedings of court, government and legislatures have also been excluded without reason. All start serious business without the playing of the National Anthem.

[24] *Id.*

[25] *Id.* at para 18-20.

[26] W.P.(C) No. 98 of 2017 (February 17, 2017).

Quite like socialism in the decades after our independence, nationalism appears to be the new fad for public discourse today. But are there any real issues of nationalism which need adjudication by courts? Do we really need any more such orders? If yes, then what should be the other areas of public life to which the Supreme Court must extend this interim order? Or is this judicial assertion of aggressive nationalism just a passing thought? Would one be less of a nationalist if one does not go to the movies for months and deprives oneself of a healthy dose of on-screen nationalism? There are many more such questions.

An activist court cannot be above the fray of controversies. This case and the newly propounded notion of nationalism may get lost in adjournments, but if it does not, the next round promises more interesting moments.

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Censorship and Nationalism

Gautam Bhatia[†]

In recent times, issues of censorship and nationalism have been at the forefront of public debate, both inside and outside the court. In the legal landscape, the question of sedition assumed fresh salience last year, when Section 124A of the Indian Penal Code, 1860 ("IPC") was invoked in an FIR against certain (unknown) individuals, who were alleged to have shouted "anti-constitutional" slogans during a gathering at New Delhi's Jawaharlal Nehru University ("JNU").[1] As a result of the FIR, three individuals spent a few weeks in judicial custody, before being released on bail. In the meantime, the Special Cell – to whom the case was transferred – is yet to file either a charge-sheet or a closure report, fifteen months after the alleged incident.[2] However, while the actual case appears to have gone into cold storage, the incidents – or alleged incidents – sparked an important debate on the nature, scope, and limits of the sedition provision, from a legal and constitutional point of view.

The debate, for the most part, has centred around the relationship between "seditious speech" and "public order". Section 124A criminalizes sedition, which is defined as bringing into "hatred or contempt", or

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[1] Aranya Shankar, *JNU student leader held on 'sedition' charges over Afzal Guru event*, The Indian Express, February 13, 2016, *available at* http://indianexpress.com/article/india/india-news-india/afzal-guru-film-screening-jnu-student-leader-held-for-sedition/.

[2] Prawesh Lama, *A year on, no chargesheet yet in JNU sedition cases against Kanhaiya, Umar*, Hindustan Times, March 2, 2017, *available at* http://www.hindustantimes.com/delhi-news/a-year-on-no-chargesheet-yet-by-delhi-police-in-jnu-sedition-cases-against-kanhaiya-umar/story-IZcMpi5t0Ucyk4VdyZ0qqM.html.

"exciting disaffection towards" the "government established by law in India."Briefly, the argument is as follows: Article 19(1)(a) of the Constitution of India guarantees the fundamental right to freedom of speech and expression, while Article 19(2) permits "reasonable restrictions" upon this right in the interests of, *inter alia*, the "sovereignty and integrity of India", the "security of the State", and "public order". In *Kedar Nath Singh v. State of Bihar*,[3] the Supreme Court upheld the constitutionality of Section 124A of the IPC, but read it down. It did so by adopting a view of sedition according to which the gravamen of the offence was not in the *content* of the speech (what is suggested by a plain textual reading of the words "disaffection", "hatred", and "contempt), but in its "tendency" to bring about public disorder.[4] The link between speech and public disorder has been sharpened and clarified in judgments after *Kedar Nath Singh*, which dealt with other issues. In *S. Rangarajan v. P. Jagjivan Ram*,[5] for example, the relationship between speech and disorder was defined in terms of a "spark in a powder keg".[6] In *Arup Bhuyan v. State of Assam*,[7] and *Shreya Singhal v. Union of India*,[8] the Supreme Court further refined this proximity test by laying down an "incitement" standard, i.e., speech could be curtailed on grounds of public order only if it amounted to "incitement to an offence"(as opposed to mere "advocacy", a distinction drawn by Nariman, J. in *Shreya Singhal*).[9]

That the sedition standard broadly conforms to this is borne out by the judgment of the Supreme Court in *Balwant Singh v. State of Punjab*,[10]

3 1962 Supp (2) S.C.R. 769.

4 Kedar Nath Singh v. State of Bihar,1962 Supp (2) S.C.R. 769 at paras 21,22,25,27 (citing and accepting the views of Sir Maurice Gwyer in the Federal Court judgment of NiharenduDutt Majumdar v. King-Emperor, (1942) F.C.R. 38, and the dissenting opinions of Fazl Ali J. in RomeshThapparv. State of Madras, A.I.R. 1950 SC 124 and Brij Bhushan v. State of Delhi, A.I.R. 1950 SC 129).

5 (1989) 2 SCC 574.

6 S. Rangarajan v. P. Jagjivan Ram,(1989) 2 SCC 574 at para 45.

7 (2011) 3 SCC 377.

8 (2015) 5 SCC 1.

9 Arup Bhuyan v. State of Assam, (2011) 3 SCC 377 at para 12; Shreya Singhal v. Union of India, (2015) 5 SCC 1 at paras 21, 47, 50 and paras 12, 13 (citing the concurring judgment of Brandeis, J. in Whitney v. California, 274 US 357).

10 (1995) 3 SCC 214.

where the Supreme Court acquitted two men for raising slogans such as "*Khalistan zindabad*" and "*Raj Karega Khalsa*" outside a cinema hall in Punjab on the evening after Indira Gandhi's assassination.[11] Central to the Court's verdict of acquittal was the fact that the sloganeers were not at the head of a crowd, nor did their slogans elicit any kind of reaction from the crowd.[12] The analysis, again, took the form of linking "seditious speech" with public disorder.

Consequently, the sedition debate, from the legal perspective in the JNU case – as evidenced by the oral arguments praying for bail for Umar Khalid and Anirban Bhattacharya – centred upon the context in which the alleged sloganeering took place, its propensity to cause public disorder, and the question of whether disorder was actually caused (it was not).[13] This debate, however, is well-worn by now, and there is little new to add.[14] What I want to focus more on in this essay instead, is that part of Section 124A that has received comparatively little attention. Even after judicial interpretation, Section 124A does not proscribe all speech that causes public disorder (there are other provisions in the IPC, such as Sections 295A and 153A, which deal with certain other kinds of speech leading to public disorder). The speech must also be directed against the "government established by law".[15]

"Government established by law", however, is not a self-interpreting phrase. Nonetheless, some clarity about its meaning is required, because in the aftermath of the JNU incident, a new phrase entered the popular lexicon, i.e., "anti-national" (in contradistinction with the FIR, which uses the term "anti-constitutional"). "Anti-national", presumably, means speech directed against the nation, or the concept of the nation. However, this too is highly abstract; what, precisely, qualifies as "the nation", and is it the same as "government established by law"?

[11] Balwant Singh v. State of Punjab, (1995) 3 SCC 214 at para 2.

[12] *Id.* at para 8.

[13] State v. Anirban Bhattacharya, Bail Application No. 1153/ 16 and Bail Application No. 1154/ 16, (District Court, Patiala House March 18, 2016).

[14] The author has traced the judicial chronology of the link between seditious speech and public order in some detail elsewhere. *See generally* Gautam Bhatia, Offend, Shock, or Disturb: Free Speech under the Indian Constitution ch. 4 (Oxford University Press 2015).

[15] Pen. Code § 124A.

In *Kedar Nath Singh*, the Supreme Court took a stab at answering this question by stating that:

> ….Now, the expression "the Government established by law" has to be distinguished from the persons *for the time* being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted.…[16] (emphasis added)

Therefore, in the view of the Court, there was a distinction between "government established by law", and the political or other actors who carried on the task of 'governance'. The Court's stress on the phrase "for the time being" indicates that it certainly had in mind political figures, whose tenure in office was subject to the churn of democratic elections. Consequently, speech directed at a specific constitutional functionary – say, for example, the Prime Minister, or the President, or a high-level administrative official – could not qualify as "seditious", even though it might involve inciting people to violence. However, while it is easy to define the term "persons for the time being engaged in carrying on the administration", it is much more difficult to do so with "the visible symbol of the State". What might this mean, and how might speech be directed against a "visible symbol"? Moreover, what kind of sanctity ought to be accorded to "symbols", given the Constitution's commitment to free speech and aversion to punishing thought-crimes?

To come to a satisfactory answer, comparative law might help. German constitutional law, for instance, endorses a concept called "militant democracy" or *streitbaredemokratie*,[17] which arose out of the German experience with Nazi rule. Militant democracy permits, and demands of the judiciary, that it defend the foundational principles of the "liberal democratic order" against people who take steps to abolish it. For instance, Article 9 of Germany's Basic Law (the equivalent of the

[16] Kedar Nath Singh v. State of Bihar,1962 Supp (2) S.C.R. 769 at para 24.

[17] *See* Jan Werner-Muller, *Militant Democracy*, *in* The Oxford Handbook of Comparative Constitutional Law (Rosenfeld & Sajo eds., Oxford University Press 2012).

Constitution), prohibits associations whose "aims and activities" "are directed against the constitutional order."[18] Article 18 stipulates that whoever abuses the freedom of expression to "combat the free democratic basic order" shall forfeit his rights, and that the adjudication of this issue will be undertaken by the Federal Constitutional Court.[19] Article 21 specifically declares those political parties as unconstitutional, that "seek to undermine or abolish the free democratic basic order", and stipulates that the determination of unconstitutionality is the responsibility of the Federal Constitutional Court.[20] Consequently, the logic behind the concept of militant democracy as embodied in these articles, is that the very freedoms granted by the liberal democratic order (expressed through the Constitution) cannot themselves be used to subvert and destroy the very Constitution through which they assume concrete reality (or, in the memorable words quoted in *Kesavananda Bharati v. State of Kerala*,[21] albeit in the context of Article 368, "….Article 368 should not be read as expressing the death-wish of the Constitution or as being a provision for its legal suicide").[22]

In *Refah Partisi v. State of Turkey*,[23] the European Court of Human Rights ("ECHR") propounded its own theory of militant democracy, when it upheld the Turkish Constitutional Court's dissolution of the Refah Partisi political party, which had gained 25% of the national vote, and was part of a coalition government. Refah Partisi's manifesto, and the public utterances of its ministers, included plans to replace the secular order, set up a system of *sharia* courts, and also use armed struggle to achieve its goals. In *Refah Partisi*, the ECHR affirmatively quoted a previous judgment- *United Communist Party of Turkey and Others v. Turkey*,[24] as follows:

> "Democracy is without doubt a fundamental feature of the

[18] Grundgesetzfür die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.) art. 9.

[19] *Id.* art. 18

[20] Basic Law art. 21.

[21] (1973) 4 SCC 225.

[22] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 at para 2043.

[23] Refah Partisi v. State of Turkey, 2003-II Eur. Ct. H.R. 267.

[24] 1998-I 21.

> 'European public order'... That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights... [I]nterference with the exercise of [human] rights ... must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[25]

In that case, it was found that Refah Partisi intended to alter the basic democratic order, and do so through non-democratic means. Consequently, its dissolution, which was undoubtedly an infringement upon its right to association and expression, was justified. Of a similar import was the judgment of the Supreme Court of Israel in *Neiman v. Chairman of the Central Election Committee for the Eleventh Knesset*,[26] where, drawing upon John Rawls' famous dictum about "tolerating the intolerant", it was held that a political party could be dissolved only if they had "negating the existence of the State of Israel as one of its goals".

What is striking about these constitutional provisions and judgments is that they appear to discriminate between two kinds of speech –speech based on content, i.e., speech that negates the constitutional order, and speech that does not. This seems to be at odds with the basic premise of the right to free speech which is to ensure an open marketplace of ideas. As Laurence Tribe writes:

> It should be clear that no satisfactory theory of free speech

[25] Refah Partisi v. State of Turkey, 2003-II Eur. Ct. H.R. 267 at para 86 (quoting United Communist Party of Turkey and Others v. Turkey, 1998-I Eur. Ct. H.R. 21 at para 45).

[26] EA 2,3/84 39 (2) PD 225 [1985] (Isr.).

> can presuppose or guarantee the permanent existence of any particular social system. For example, a free speech theory must permit evolution from a society built on the ideals of liberal individualism to a society aspiring to more communitarian visions – just as it must permit evolution from communitarianism to individualism.[27]

It can be argued, however, that Tribe's example is not entirely apposite, because "liberal individualism" and "communitarianism" are, at the very least, both compatible with the "democratic order" that is established by a Constitution. This, however, might also suggest in the Indian context, a test for the precise meaning of the term "government established by law" as a system of republican, democratic government, which owes its existence to the rule of law guaranteed by the Constitution; or, in other words, the system of government that is set up by, and must conform to, the Constitution's basic features.

The basic features are important here because unlike ordinary constitutional provisions, they are beyond even Parliament's constituent power of amendment. Consequently, if there is one set of principles that (are supposed to) command universal assent, it is the set of basic features. Defining seditious speech as speech that is directed against the Constitution's basic features would, in my submission, achieve the fine balance between maintaining and protecting the market place of ideas without imposing the State's dominant viewpoint on the one hand, and ensuring that constitutional freedoms are not used to subvert and destroy the Constitution itself, on the other. After all, the Constitution truly isn't a suicide pact.

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[27] Laurence H. Tribe, *Towards a Metatheory of Free Speech*, 10 Sw. U. L.Rev. 237 (1978) at 239.

The Indian Civilizational Ethos: Nationalism and The Challenges of Finding Expression

Anirudh Sharma[†]

With the advent of the World Trade Organisation ("WTO") in 1995 and the General Agreement on Tariffs and Trade ("GATT") in 1994, a section of acclaimed academicians prophesized that the days of nation-states and nationalism are soon going to be a thing of the past.[1] However, with the United States walking out of the UNESCO on October 12, 2017,[2] Britain voting to walk out of the European Union ("EU") on June 23, 2016,[3] and a large number of anti-dumping and other trade-related disputes pending with the Dispute Settlement Body of the WTO, all those hopes have gradually come to naught. Nation-states are here to stay. Indeed, nationalistic feelings have resurfaced with renewed vigour across the world, especially in countries which have achieved freedom through national liberation movements. India is no

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1 Susan Strange, *The Erosion of the State*, Current History, 96 (613), 2017 at 365-369.

2 Felicity Vabulas, *Trump is pulling the U.S. out of UNESCO. The bigger pattern is the problem*, The Washington Post, October 16, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/16/trump-is-pulling-the-u-s-out-of-unesco-the-bigger-pattern-is-the-problem/?utm_term=.12be2737eb9c(The decision of US to withdraw from UNESCO was announced officially on 12.10.2017).

3 Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC News, October 26, 2017, http://www.bbc.com/news/uk-politics-32810887 (The UK is scheduled to leave the EU on 29.03.2019).

exception. While describing the difference between a revolution and a national liberation movement, Professor Michael Walzer describes the latter as a struggle against a foreign aggressor. He says, observing as follows:

> The differences make up the larger part of the story. Although it might seem to merit the name, the American Revolution is never called a national liberation struggle, nor does it match the model I have been describing. The revolution wasn't a case of national liberation because it involved no ancient nation, living in exile or at home, whose religious culture, partly because of its traditional character and partly in response to foreign operation, was passive, hierarchical and deferential.[4]

India's national liberation movement against the British gave impetus to nationalistic sentiments, which are now an integral part its DNA. Nationalistic feelings are central to the spirit of the Indian Constitution. In a public interest writ petition, where a citizen asserted the right to fly the national flag atop his factory, the Supreme Court held that, "[s]o long as the expression is confined to nationalism, patriotism and love for the motherland, the use of the National Flag by way of expression of those sentiments would be a fundamental right."[5] But what is Indian nationalism? Is it identified by the country's geographic boundaries, or does it comprise of other ingredients that constitute the way of life of its people? How did nationalism evolve out of the national liberation movement of India and in what form did it find expression among the masses?

In the 1600s, British colonists arrived in India, bringing with them their own value system and ethos- an ethos which was very different from that of native Indians. British politician Thomas Babington Macaulay, the architect of the Indian Penal Code, 1860, wrote a Minute on Indian education, in which he said:

> It is, I believe, no exaggeration to say that all the historical

[4] Michael Walzer, The Paradox of Liberation- Secular Revolutions and Religious Counterrevolutions 135 (Yale University Press, 2015).

[5] Union of India v. Naveen Jindal, (2004) 2 SCC 510 at para 77.

> information which has been collected from all the books written in the Sanscrit language is less valuable than what may be found in the most paltry abridgments used at preparatory schools in England. In every branch of physical or moral philosophy, the relative position of the two nations is nearly the same.[6]

Macaulay saw his role as a "civilising mission". He declared:

> We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect. To that class we may leave it to refine the vernacular dialects of the country, to enrich those dialects with terms of science borrowed from the Western nomenclature, and to render them by degrees fit vehicles for conveying knowledge to the great mass of the population.[7]

The ethos of the British colonists threatened the Indian way of life. Macaulayism has been described as the conscious policy of diluting indigenous culture, through the planned substitution of the alien culture of a colonizing power by means of the English education system.[8] The class of Indians he wanted to engender was one that was steadfastly loyal to the British in their mission to exploit India; one that would create fissures in Indian and Hindu society.[9] The impact of

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[6] T.B. Macaulay, *Minute dated February 2, 1835*, *in* Bureau of Education Records- Selections from Educational Records, Part I (1781-1839), 107-117 (National Archives of India, 1965), *available at* http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html (Macaulay came to the conclusion that the intrinsic superiority of Western literature was fully admitted by those members of the committee who supported the oriental plan of education).

[7] *Id*.

[8] Christophe Jaffrelot, The Hindu Nationalist Movement and Indian Politics 343 (Hurst & Co., 1996).

[9] N. Jayapalan, History of Education in India 56-58 (Atlantic Publishers and Distributors, 2008) ("However it can be contended that Lord Macaulay's minute was designed to create a class of persons who should be "Indian in blood and colour, but English in taste, in opinions, morals and in intellect".")

this education system has been so deep and damaging that even seven decades after independence, its impact is still pervasive. There continues to flourish a class of Indians who take pride and pleasure in mocking and deriding the achievements of indigenous Indian civilization. In fact, Mahatma Gandhi wrote about Macaulay, pointedly observing that, "the foundation that Macaulay laid of education has enslaved us".[10] Such an enslaved society, whose religious and traditional character was suppressed,would struggle to find utterance and expression long after independence.[11]

As a part of the concerted policy of British imperialism, the achievements of Indian civilization and culture were deliberately suppressed, and a process of Westernization was simultaneously unleashed.[12] For example, in the "*Oxford Dictionary of World History*", there is no reference to the Nalanda University or any other ancient university of India.[13] Nalanda University, which dates back to the 3rd century B.C., had an enormous library- a veritable treasure trove, which housed a range of treatises on various Indian systems of surgery, healing and Buddhist traditions.[14] The destruction of this glorious university by Bakhtiyar Khalji around the end of the 12th century, was much more than just the razing of a monument. It was akin to setting fire to the civilizational ethos of India. The loss of those priceless treatises, and a gold mine of knowledge was both real and metaphorical. The demolition of the Bamiyan Buddha statutes by the Taliban in Afghanistan,much closer to present times,attracted worldwide condemnation. However, the loss caused by the destruction of Nalanda is far more immeasurable. The loss has never been adequately acknowledged.

The nationalist conception of an Indian identity free from Western colonial perspectives, has not been encouraged for the most part of the

[10] MK Gandhi, Hind Swaraj or Indian Home Rule 78 (Navajivan Publishing House, 1938).

[11] Walzer, *supra* note 4.

[12] *Id.*

[13] Edmund Wright, Oxford Dictionary of World History (Oxford University Press, 2015).

[14] *Early Libraries: 400s CE*, Eduscapes, http://eduscapes.com/history/early/400.htm.

last seventy years. Opposition to a Western-centric notion of living was mocked at well before independence, as Mahatma Gandhi observes in *Hind Swaraj*,[15]

> ….Its true test lies in the fact that people living in it make bodily welfare of the object of life. We will take some examples. The people of Europe today live in better build houses than they did 100 years ago. This is considered an emblem of civilisation, and this is also a matter to promote bodily happiness. If people of a certain country, who has hitherto not been in the habit of wearing much clothing, boots, etc., adopt European clothing, they are supposed to have become civilised out of savagery.... this is a test of civilisation. These are all true test of civilisation. And if anyone speaks to the contrary, know that he is ignorant.

Indian nationalism is a call to the glory of the Indian civilisation. Indian civilisation manifests itself in different walks of life, including surgery and the sciences. There is enough evidence to prove the existence of a department of surgery at the Nalanda University. However,writings by scholars of international repute, which support this claim, are not considered authoritative enough.[16] For instance, Dominik Wujastyk writes:

> Susrutasamhita, "The compendium of Susruta", is a world classic of the history of science. It was composed in South Asia, in the Sanskrit language, and its earliest content may date from as early as 250 BCE. It was reedited several times until about CE500, when the text achieved the general form in which we have it today…. since the mid-nineteenth century, the text of Susrutasamhita (henceforth SS) has been the subject of hundreds of studies, epitomes, commentaries, editions and translations. It has entered the fabric of the history of medicine as one of the best-known Asian medical classics. The SS is especially famous

[15] MK Gandhi, *supra* note 10.

[16] *Pediatric Surgery in Ancient India* (*ch.4*), *in* John G. Raffensperger, Children's Surgery: A Worldwide History (McFarland, 2012).

> for its chapter on surgery, that reveals the extraordinarily advanced methods of plastic surgery, foreign body removal, suturing, cataract removal and other techniques that were known and practiced in classical times. In short, the SS is a foundational text in South Asian medical history.[17]

A range of traditional "Indian" ideas have gained popularity in the West. It is astonishing that a section of Indians that prides itself as "liberals", goes so far as to oppose the promotion of *Yoga* in India, on the ground that it will amount to succumbing to the "Hindutva agenda".[18] On December 11, 2014, the United Nations adopted June 21st as International *Yoga* Day.[19] Indians then awoke to the realisation that in the United States, the commercial market for *Yoga* is worth $27 billion.[20] *Yoga* suffered neglect in the very land of its birth and as a result, generations of Indians have been denied its full benefits. Likewise, the patenting of turmeric and neem in the United States pushed India to address the challenges that Indian systems of medicine such as *Ayurveda* would face.[21] It is interesting how the West, which believed in the innate supremacy of its own knowledge systems, is now drawing from the traditional knowledge of the East. Today, many Indians follow Western traditions and scoff at Indian systems which are an expression of Indian identity. *Yoga*, turmeric and neem are facets of the Indian identity. These are facts that are not acknowledged by those

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17 *See* Medical Texts and Manuscripts in Indian Cultural History (Dominik Wujastyk et al., eds., Manohar Publishers, 2013).

18 *Yoga Day organised by Modi govt to promote Hindutva agenda: Sitaram Yechury*, Firstpost, June 22, 2015,http://www.firstpost.com/politics/yoga-day-organised-modi-govt-promote-hindutva-agenda-sitaram-yechury-2305844.html.

19 *International Day of Yoga- 21 June*, Resolution 69/131, December 11, 2014, United Nations, http://www.un.org/en/events/yogaday/. Resolution no. 69/131.

20 *Over 20 million Americans practise Yoga boosting $27 billion market*, The Economic Times, June 21, 2015, https://economictimes.indiatimes.com/news/politics-and-nation/over-20-million-americans-practise-yoga-boosting-27-billion-market/articleshow/47757008.cms.

21 *See* Dr. Vishwas Kumar Chouhan, *Protection of Traditional Knowledge in India by Patent: Legal Aspect*, Journal of Humanities and Social Science, Volume 3, Issue 1 (Sep-Oct. 2012) at 35-42; *see also* G. Krishna Tulasi and B. Subba Rao, *A Detailed Study of Patent System for Protection of Inventions*, Indian Journal of Pharmaceutical Sciences 70(5), Sep-Oct, 2008 at 547–554.

who follow Marx rather than the Mahatma. In fact, those who use neem or turmeric in healing, or charcoal to clean their teeth are looked down upon for their traditional Indian way of life.[22] Ironically, Colgate, the multinational giant, which once mocked the use of charcoal to clean teeth, was forced to eat humble pie when it introduced charcoal in its dental hygiene products.[23] The very things that were once dismissed as superstitious mumbo-jumbo, turn scientific when it is accepted in the West and marketed for economic gains.

In *Hind Swaraj*, Mahatma Gandhi states,

> ….I believe that the civilisation India has evolved is not to be beaten in the world. Nothing can equal the seeds sown by our ancestors. Rome went, Greece went, Greece shared the same fate; the might of the Pharaohs was broken; Japan has become Westernized; of China nothing can be said; but India is still, somehow or other, sound at the foundation.[24]

In response to the question, that if Indian civilization was the best of all, how does one account for India's slavery, Gandhi replied:

> This civilization is unquestionably the best, but it is to be observed that all civilizations have been on their trial. That civilization which is permanent outlives it. Because the sons of India were found wanting, its civilization has been placed in jeopardy. But its strength is to be seen in its ability to survive the shock. Moreover, the whole of India is not touched. Those alone who have been affected by Western civilization have become enslaved. We measure the universe by our own miserable foot-rule. When we are slaves, we think that the whole universe is enslaved. Because we are in an abject condition, we think that the whole of India is in that condition. As a matter of fact, it is not so, yet it is as well to impute our slavery to the whole of India. But

[22] Namrata Singhi, *Colgate's charcoal U-turn irks users*, The Times of India, September 25, 2015, https://timesofindia.indiatimes.com/business/india-business/Colgates-charcoal-U-turn-irks-users/articleshow/49100310.cms.

[23] *Id*.

[24] MK Gandhi,*supra* note 10 at 52.

> if we bear in mind the above fact, we can see that if we become free, India is free. And in this thought you have a definition of Swaraj. It is Swaraj when we learn to rule ourselves. It is, therefore, in the palm of our hands. Do not consider this Swaraj to be like a dream. There is no idea of sitting still. The Swaraj that I wish to picture is such that, after we have once realized it, we shall endeavour to the end of our life-time to persuade others to do likewise. But such Swaraj has to be experienced, by each one for himself. One drowning man will never save another. Slaves ourselves, it would be a mere pretension to think of freeing others. Now you will have seen that it is not necessary for us to have as our goal the expulsion of the English. If the English become Indianized, we can accommodate them. If they wish to remain in India along with their civilization, there is no room for them. It lies with us to bring about such a state of things.[25]

India is a nation built on a common civilizational ethos. Under the leadership of Mahatma Gandhi, Indian nationalism manifested itself in movements such as the *Swadeshi* movement, through which he promoted *khadi* and the Indian cottage industries. However, today, if *Yoga* and *Ayurveda* are encouraged, certain sections of the intelligentsia, even those who profess to be followers of the Mahatma,view in it, a sinister agenda. This is a perverse effacement of the Indian identity.

In *Hind Swaraj*, Mahatma Gandhi declared that India had become irreligious under the influence and pressure of Western civilisation.[26] The Indian civilisation goes back to at least five millennia and its historical culture, religion and civilizational ethos is entwined in its way of life. On the question of nationalism and civilisation, Gandhi emphasised that India has to be religious for its survival and declared that "she will be ruined" if she imitates England.[27] India's nationalism draws from the fact that, as Gandhi said, India is not merely a nation,

[25] *Id*. at 60-61.
[26] *Id.*at 36.
[27] *Id.* at 29.

it is a civilization and one which the hegemonic Western civilizations sought to destroy. This charge against Western civilisation is the essence of *Hind Swaraj*. The preservation Indian heritage was Gandhi's aim and he mobilized the Indian masses towards this cause. Professor Michael Walzer acknowledges the victory of Gandhi's *swadeshi* ideology, observing that, "[t]he odd man out in this schematic story is Mohandas Gandhi, who succeeded in turning traditionalist passivity into a modern political weapon."[28]

The Indian way of life is based on a close relationship with nature, where rivers, forests and cattle are all treated as sacred and worshipped.[29] There are many indigenous traditions, besides *Yoga* and *Ayurveda*, which constitute an integral part of Indian cultural and spiritual life,and should therefore be entitled to protection as part of the right to life guaranteed under Article 21 of the Constitution of India.[30] Many Indians who fancy themselves as liberals, oppose not only *Yoga* and *Ayurveda* on the ground that they regard them as exclusive Hindu practices, but also the chanting of "*Om*". *Om* is chanted the world over as an incantation associated with auspiciousness and peace. It is popular with Hindus, Buddhists and Jains as a part of meditative practice. In *Jagdev Singh* v. *Pratap Singh*,[31] the Supreme Court of India considered the spiritual significance of *Om* in these words:

> ….But it is difficult to regard "Om" which is a preliminary

[28] Walzer, *supra* note 4 at 20.

[29] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534 at para 22 ("On the contrary, it is common knowledge that the cow and its progeny i.e. bull, bullocks and calves are worshipped by Hindus on specified days during Diwali and other festivals like Makar Sankranti and Gopashtmi. A good number of temples are to be found where the statue of "Nandi" or "Bull" is regularly worshipped. However, we do not propose to delve further into the question as we must state, in all fairness to the learned counsel for the parties, that no one has tried to build any argument either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution").

[30] *See* Ramsharan Autyanuprasi v. Union of India, (1989) Supp 1 SCC 251 ("It is true that life in its expanded horizons today includes all that give meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Article 21 of the Constitution").

[31] AIR 1965 SC 183.

> to an incantation or to religious books, as having religious significance. "Om" it may be admitted is regarded as having high spiritual or mystical efficiency: it is used at the commencement of the recitations of religious prayers. But the attribute of spiritual significance will not necessarily impart to its use on a flag the character of a religious symbol in the context in which the expression religious symbol occurs in the Section with which we are concerned. A symbol stands for or represents something material or abstract in order to be a religious symbol, there must be a visible representation of a thing or concept which is religious. To "Om" high spiritual or mystical efficacy is undoubtedly ascribed; but its use on a flag does not symbolise religion, or anything religious.[32]

When a picture of a meditating Buddha is advertised as a symbol of India, it is not considered as a violation of the principles of secularism. Similarly, when pictures of the Taj Mahal, a mausoleum of the Mughal era, is projected by the Ministry of Tourism, it is not regarded as inconsistent with the principles of secularism, and rightly so. Yet, when *Yoga* or *Ayurveda* are promoted, or *Om* is chanted, eyebrows are raised by self-styled secularists. On the other hand, the United Nations doesn't find anything communal about *Yoga* or *Om*, and has celebrated the practices by releasing stamps depicting 10 *Yoga asanas* (poses) with *Om* printed in Devanagri script.[33] Is this truly secularism, or is it a denial of what is inherently and innately "Indian"? The role of nationalism in reviving the honour of the Indian way of life, is branded as "communal". Can we not coexist as a multi-cultural society without constantly being apologetic about, or worse, denying what our ancient civilization left us?

The perverse denial of all that is regarded as innately Indian is the real affront to the forging of a national identity. It is evidence that Macaulay's spirit has not left India.

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[32] Jagdev Singh v. Pratap Singh, AIR 1965 SC 183 at paras 10 and 11.

[33] *UN to issue 10 stamps of asanas on International Yoga Day*, The New Indian Express, April 19, 2017, http://www.newindianexpress.com/world/2017/apr/19/un-to-issue-10-stamps-of-asanas-on-international-yoga-day-1595313.html.

That said, it is true that misguided elements in the country use nationalism as a cover for perpetrating atrocities. But one cannot undermine nationalism for that reason. Even those who want to protect the cow, an animal deeply sacred to the Hindus, are fully entitled to peacefully espouse their cause. Violence cannot be justified under any circumstances and must be tackled with an iron hand. But it is hard to understand why sacred sentiments close to the heart of the majority of peace-loving Indians should be scoffed at and why beef parties should be held just to cock a snook at cow lovers. The protection of the cow is recognised in a directive principle under Article 48 read with Article 51A (g) of the Constitution.[34] Directive principles have been described by the Supreme Court of India as the very soul of the Constitution.[35] Therefore, cow protectors are performing their constitutional duty when they espouse cow protection, though it is unacceptable if they resort to violence in that process. Cow vigilantes who take the law into their own hands ought to have due regard for the fact that Indians had to struggle for the acknowledgment of such rights and duties against colonial powers. Remedies towards the actualization of these rights and duties now include judicial processes. Therefore, now the actions of those who do not respect age-old sentiments and instead, adhere to a colonial mind set, may be addressed legally and democratically.

Nationalism can also be traced to Article 51-A(d) of the Constitution, which makes it a fundamental duty to defend the country and render national service when called upon to do so. The Supreme Court has observed that the right to assert nationalistic pride forms a part of Fundamental Rights.[36] Recently, in *K.S. Puttaswamy v. Union of India*,[37] in the context of the right to privacy, the Supreme Court observed that, "the right of privacy is also integral to the cultural and educational rights whereby a group having a distinct language, script or culture shall have the right to conserve the same." Therefore, an indigenous

[34] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.

[35] Bhim Singh v. Union of India, (2010) 5 SCC 538 at para 53.

[36] *See* Union of India v. Naveen Jindal, (2004) 2 SCC 510; Board of Control for Cricket v. Cricket Association of Bihar, (2016) 8 SCC 535 at para 90;Mohd. Arif v. State (NCT of Delhi), (2011) 13 SCC 621.

[37] W.P. (C) No. 494 of 2012 (pronounced on August 24, 2017).

culture and the right to preserve it is a facet of "life", protected under Article 21 of the Constitution of India.

Indian nationalism is a positive legal concept with roots in Indian culture, civilisation and the Indian national liberation movement. India has its own unique, time-tested civilisation, culture and way of life, which cannot be viewed through the lens of Western civilizational ethos. India must preserve and protect its tangible and intangible assets which make it a civilization and a nation. This is especially so since even the best of its civilisation was suppressed by colonial powers, and later, by its own intelligentsia for decades after Independence. The first stage of success of the Indian liberation movement was the establishment of democratic government. The next stage starts when the traditional Indian belief system begins to express itself, and the lost pride of the Indian civilisation projects itself.

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The Global Discontents of Nationalism

Samiksha Godiyal and Nidhi Khanna[†]

Nations have been described as "imagined communities" and it is often a struggle to explain the attachment people feel towards this invention.[1] The concept of nationalism, as a unifier and a source of identity, is not natural to the existence of human beings. This abstraction was fashioned and saluted because in the face of diversity and divisiveness, it offered commonality. A commonality that was founded on the least controversial aspect of people's lives– the place of birth and/or residence. Nationalism had the ability to unite people under the same metaphorical roof irrespective of race, gender, community, language and religion. Everybody was a crucial participant in the development of the nation.

Global history is witness to the fact that nationalism was born out of a need to unify against an aggressor, whether it be colonial aggression or the hegemony of the Church. However, as the world moved towards globalization, nationalism propped itself up in opposition as a false unifier, or more accurately, as a divisive force. Nationalism has also transcended geographical, physical boundaries and trans versed into the realm of race and religion, suffering distortions through time. This paper examines the cyclical pattern of integration and segregation tugging at the fabric of world history through the lens of law.

I. Nationalism as a unifier

Arguably the biggest benefactor in the advancement of nationalism,

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[1] Benedict Anderson, Imagined Communities- Reflections on the origin and spread of nationalism (Verso, London, 1983).

was colonization. In India, nationalism was a response to British imperialism. While there are several theories regarding the underlying interests which propelled nationalism in India – ranging from capitalist alignments to social reform movements, peasant discontent and the self-conscious working class – the common thread is that nationalism was linked to a shared enemy.[2] Nationalism provided the colonized a unified identity against the colonizer and the strength of numbers to overcome external domination and deprivation. Beginning in the early 19th century, movements for freedom from the British rule in India were localised in territory and object. It was the establishment of the Indian National Congress that led to the organization, politicization and activation of the masses since 1885. One of the ideological foundations of the Congress movement was to structure a nation through a common struggle against colonialism and the Congress leaders were committed to instilling feelings of national unity and nationalism.

The development of contemporary nationalism was not a reaction to foreign rule universally. Contemporary nationalism in Europe has been attributed to historical events of the 18th to 20th centuries- for instance, the unification of Italy as a nation under Giuseppe Mazzini, the prophet of Italian nationalism, the rise of Germany and Napoleon's unconscious contribution to inspiring nationalism in conquered countries.[3] An important factor in the rise of European nationalism was the contact of political democracy and religious skepticism.[4] Religious skepticism beginning in the 18th century, the separation between the Church and the State during the French Revolution and the damage to the pre-eminence of religion, created a void which was filled by nationalism as an alternate system of faith.[5] There was an undeniable secular bias

[2] Amalendu Guha, *Great Nationalism and Problem of Integration: A Tentative View*, Economic and Political Weekly, Vol. 14, No. 7/8 (Feb, 1979) at 455-458; *see also* Bipan Chandra et al., India's Struggle for Independence 1857-1947(Penguin, New Delhi, 1989).

[3] Jawaharlal Nehru, Glimpses of World History (Penguin, New Delhi, 2004) (1934) at 507.

[4] Carlton J.H. Hayes, Nationalism as a religion (1926).

[5] *Id.* ; Heinz- Gerhard Haupt, *Religion and nation in Europe in the 19th century: Some comparative notes*, Estudos Avancados, 22 (62), 2008.

attached to contemporary nationalism and the process of secularization required a demarcation between the autonomous aspects of human activity (the economy, society and polity) and religious institutions.[6] Even in this context, nationalism was inclusive by embracing secularism and rejecting the hegemony of the Church.

II. Neo-Nationalism: a Divisive Force

Unification is, however, not peculiar to nationalism. Globalization effects similar cohesiveness. The disintegration of territorial barriers, the movement of people, information, goods and services and the integration of markets, economies, culture, information, religion, ecological concerns and political systems, are characteristics that embody the labyrinthine complexity of the seemingly innocuous and inevitable concept of globalization.[7]

Thomas Friedman proposes an intriguing theoretical timeline for globalization.[8] Globalization 1.0, pigeon-holed roughly between 1492 to 1800, shrank the world and was defined by "countries globalizing for resources and imperial conquests".[9] It was followed gradually by Globalization 2.0, marked by the years 1800 to 2000, where companies were "globalizing for markets and labour".[10] The years after 2000 (or specifically, as some may argue, after September 11, 2001) witnessed the rapid onset of Globalization 3.0. The dynamic attributes of Globalization 3.0, as conceived by Friedman, are a yet evermore shrinking world and the tendency of individuals and groups globalizing for better opportunities and experiences.[11] The consequences of this individual, personal identity-centric Globalization 3.0 have been almost paradoxical- while the dissemination of new cultural and religious identities has resulted in the hybridization of societal culture, there has

6 David Reynolds, One World Divisible- a global history since 1945 (Penguin Books, 2000) at 650-657.

7 *Id.*

8 Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century (Farrar, Straus and Giroux, 2005).

9 *Id.*

10 *Id.*

11 *Id.*

also been an assimilation or homogenization of these identities into a more "global culture".[12]

Globalization 3.0 is an epoch-marking event in history which clashes head-on with nationalism as we know it. This is largely owed to the fact that both these occurrences are identity centric. Nationalism, although an international phenomenon, has a geographically-bound workstation. Globalization challenges this structure by merging these multiple workstations to create a single, large one. Nationalism sees it as an existential challenge and has propped up opposition in multiple ways. Some examples include global terrorism, activist movements such as Occupy Wall Street and trade protectionism, which global, *laissez-faire* economics seeks to extinguish. Global terrorism, often characterised as a *modus operandi* of ultra-nationalism, is considered to have been a direct offshoot of Western cultural hegemony. In his book *Jihad* v. *McWorld*, Benjamin Barber describes how *Jihad*, a shorthand he uses for the politics of religion and culture, counters the centrifugal pull of McWorld, a metaphor for globalization.[13]

Of late, this conflict intensification has led to nationalism creating an artifice where its shields of secularism, tolerance and assimilation have become swords. An ideology which was formerly synonymous with unification, employs the very values that reflected diversity to promote divisive undertones. Nations, and religious and cultural identities within them,have become fiercely sovereign and protectionist and walls, both metaphorical and physical, are being created to prevent the trickling in of global values. Ironically for nationalism, this emerging trend is as global as its adversary.

Global events highlighted below show how the law is being used to protect religious and cultural values fashioned as "nationalism". The law becomes a protectionist tool in the face of the existential challenge of globalization, which purportedly seeks to homogenise these religious and cultural values into oblivion.

[12] The most interesting evidence of this is internet culture, where memes like the disgruntled Pakistani grandmother and the Asian Dad, transgress geographical and cultural boundaries to receive global resonance.

[13] Benjamin R. Barber, *Jihad v. McWorld*, The Atlantic, March 1992 (Barber later regretted the use of the term *Jihad* in this context).

III. Nationalism and the West

The integration of religio-cultural values migrating from the East is seen as a cultural threat by the global West. Growing immigration was the primary driving force behind the UK referendum to leave the European Union– the Brexit. The French and American election campaigns too centred around the fear of the masses with respect to immigration, in light of the increased terror attacks. Attempts to weed out such "foreign" influences can be seen in the European Union ("EU") cases dealing with religious symbols as also the executive order of the President of the USA, restricting Muslim immigration into the country.

1. Religious symbols and the EU

The wearing and display of religious symbols in public has been the subject matter of multiple challenges before the European Court of Human Rights ("ECHR"). In *Mann Singh v. France*, a practising Sikh's challenge to the requirement of remaining bareheaded for his driving license photograph was rejected as being a restriction within the "State's margin of appreciation" for public safety and law and order considerations.[14] A similar justification was employed in *Phull v. France*, dealing with a challenge by a practising Sikh to the requirement of removing his turban as part of security checks at the airport.[15] In *El Morsli v. France*, a Moroccan national married to a French man was denied an entry visa for refusing to remove her headscarf for an identity check by male personnel at the French consulate general in Marrakech.[16]

In *Dahlab v. Switzerland*, however, the attempt to scuttle religious freedom was not as veiled as in the above cases.[17] In *Dahlab*, the ECHR rejected the complaint of a Government-school teacher, a Muslim convert, who was restrained from wearing a headscarf to the school on the grounds that the restriction was not unreasonable and that her students were at an impressionable age.[18] In *Kurtulmus v. Turkey*,

[14] Mann Singh v. France, 2008 Eur. Ct. H.R. 1523.
[15] Phull v. France, 2005-I Eur. Ct. H.R. 409.
[16] El Morsli v. France, [2008] Eur. Ct. H.R. (No. 15585/06) (4 March 2008).
[17] Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447.
[18] *Id.*

the Court upheld a similar restriction on a university professor from wearing an Islamic headscarf, reasoning that such a restriction was legitimate in order to protect the rights and freedoms of others, and that the university dress code was aimed at upholding principles of secularism and neutrality.[19] In *Leyla Sahin v. Turkey*, the Court argued that a medical student at an Istanbul University could be restrained from wearing the Islamic headscarf, having regard to the States' margin of appreciation and the necessity of such interference with religious liberty in a democratic society.[20] The Court considered what the impact of wearing the Islamic headscarf, perceived as a religious duty, might have on those who chose not to wear it.

The Court has been consistent in its approach of rejecting religious freedom claims in other cases relating to educational institutions, workplaces and the courtroom.[21] In *S.A.S. v. France*, the challenge was against a restriction on wearing the full-face veil in public. The ECHR upheld the restriction by citing respect for the necessary democratic conditions of "living together" and explaining how the veil was an obstruction incompatible with this aim.[22]

Interestingly, while the principles of public safety, secularism and "living together" should be unifying in nature, the ECHR's interpretation have resulted in exclusion of certain non-native religious communities. While cultural norms of religious minorities were excluded from society in the above cases, in *Lautsi v. Italy*, the Court protected the majoritarian religious symbol of the crucifix in a state school stating that the fact that the crucifix accorded the majority religion predominant visibility was not sufficient to denote a process of

[19] Kurtulmus v. Turkey, 2006-II Eur. Ct. H.R. 297.

[20] Leyla Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173.

[21] For more cases relating to restrictions in educational institutions, *see* Dogru v. France, 2008 Eur. Ct. H.R. App. No. 27058/05, Aktas v. France, 2009 Eur. Ct. H.R. App. No. 43563/2008. At the workplace, *see*Eweida and Chaplin v. the United Kingdom, 2013 Eur. Ct. H.R. 37 and Ebrahimian v. France, 2015 Eur. Ct. H.R. 1041. In a courtroom, *see* Barik Edidi v. Spain, 2013 Eur. Ct. H.R., App. No. 21780/13..

[22] The "living together" principle was also upheld as a justification in Belcacemi and Oussar v. Belgium, 2017 Eur. Ct. H.R. 655.

indoctrination.[23] This inconsistent approach towards the protection of religious values hints at a divisive, protectionist mentality in the EU.

2. White Supremacy-Trump and the Immigration Executive Order

The white supremacy movement, historically represented by the Ku Klux Klan ("KKK") and neo-Nazis, witnessed a return in August this year through racially-charged hate crimes and violence in Charlottesville, Virginia. The election of Donald Trump to the White House was cited as a factor in the regeneration of groups in the US that reject various ideas of a liberal democracy.

On June 26, 2017, the Supreme Court of the United States delivered its judgment in *Trump v. International Refugee Assistance Projec*t, a case involving challenges to Executive Order No. 13780 *"Protecting the Nation from Foreign Terrorist Entry Into the United States"*("Order").[24] The Order was an obvious progression by the new US President after the resounding success of a largely xenophobic election campaign, founded primarily on the perils of immigration and Islamic terrorism. The Order altered the practices concerning the entry of foreign nationals into the United States by, among other things, suspending entry of nationals from six designated countries for 90 days.

While the Respondents succeeded in obtaining preliminary injunctions against the enforcement of several provisions of the Order, the Court broadly upheld the President's powers to limit immigration, stating that these powers "are undoubtedly at their peak when there is no tie between the foreign national and the United States".[25] The Court, however, limited this power, protecting the vast majority of people seeking to enter the United States to visit a relative, accept a job, attend a university or deliver a speech.[26] The Court said the ban could not be enforced against a foreign national who had "a credible claim of a bona fide relationship with a person or entity in the United States."[27] The Court reasoned that the distinction should be easy to administer.

[23] Lautsi v. Italy, 2011 Eur. Ct. H.R. 2412.

[24] Trump v. International Refugee Assistance Project, 582 U.S. (2017), https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf.

[25] *Id.*

[26] *Id.*

[27] *Id.*

While the United States Court of Appeals for the Fourth Circuit in Richmond had stated that the Order "drips with religious intolerance, animus and discrimination" against people from the six affected Muslim countries, the Supreme Court chose to water down the Order rather than setting it aside, resulting in a partial victory for the Government.[28]

The Order, and the Supreme Court decision, echo the resurgence of white supremacy. The US has used national security as a justification to restrict the liberty of movement and consequently prevent physical integration. In an atmosphere charged with racial hate, one cannot but wonder if security is just an excuse to protect the "white" culture.

IV. Islamic Nationalism

Islamic nationalism in geo-politics is commonly evidenced with the Taliban's rise in power against Western influence in the Middle East, and the conflict in Chechnya and Syria, among other global examples, including terrorism. However, a quiet, but creeping form of Islamic nationalism is prevalent in Islamic societies which use the law as a protector of religious and cultural values.

Islamic law, founded on principles enunciated in the Quran- the last word-has long opposed the influx of Western, democratic cultural principles into personal law. This is most evident in debates around family law reform in predominantly Muslim majority countries.[29] Mali, for example, is a secular state according to its Constitution. The National Assembly adopted a new family code in 2009, which included provisions to set the minimum age for marriage at 18; change inheritance rules for women including their dwelling in the marital home after their husband's death; change rules for adoption; define marriage as a secular act and the protect the integrity of the human body by regulating issues like female genital mutilation. The enactment met with large demonstrations in Bamako, and the High Islamic Council of Mali used the words "visions from another culture, another milieu" to describe the

[28] *Id.*

[29] Quentin Wodon, Islamic Law, *Women's Rights, and State Law: The Case of Female Genital Cutting and Child Marriage*, The Review of Faith & International Affairs, 13(3), 81-91, http://www.tandfonline.com/doi/pdf/10.1080/15570274.2015.1075762?needAccess=true.

reforms. Ultimately, the code was not signed into law, showing just how strongly protectionist Islamic cultural nationalism is.[30]

Nigeria transitioned into democracy in early 1999; however, ethnic groups which dominate Northern Nigeria introduced an Islamic penal code and other Sharia laws, asserting their right to self-determination. Nigeria's moderately secular tradition is threatened for instance in the state of Zamfara, where the government claimed that its religious reform was bringing about several changes. All spheres of public life are being transformed into Islamic-oriented institutions, and this state-sponsored Islamization affects non-Muslims as well since they are subjected to Sharia proscriptions like the Islamic dress code in school for all students, the ban on alcohol and gender separation in hotels, schools and public transport.[31]

In Pakistan, which was founded on the dream of an Islamic state, blasphemy laws are used to protect Islamic law from transgressions. In 2010, in the *Asia Bibi blasphemy* case, a Pakistani Christian woman was convicted of blasphemy by a Pakistani court, receiving a sentence of death by hanging. She was accused of insulting prophet Muhammad when she had an argument with a group of Muslim women for drinking the same water as them. The religious protectionist forces were so strong that the governor of Punjab, Salman Taseer was assassinated for supporting the convicted girl and opposing blasphemy laws.

Pursuant to a decree by the Supreme Leader Ali Khamenei against all forms of perceived western culture, raids were organized in Iran by the Islamic Revolutionary Guards Intelligence Organization in concert with Iran's judiciary. Following these raids, Branch 117 of the Criminal Court of Douro Shiraz sentenced twelve professionals of the fashion industry to prison terms ranging from five months to six years in December 2016.[32] The professionals were accused of

[30] *Id.*, similar opposition was seen in case of attempted reforms in Yemen, Palestine and Morocco.

[31] Johannes Harnischfeger, Democratization and Islamic Law: The Sharia Conflict in Nigeria (Campus Verlag, 2008).

[32] *Briefing: Iran's Fashion Industry is the Latest Victim of Khamenei's War on Western Culture*, Center for Human Rights in Iran, December 8, 2016, https://www.iranhumanrights.org/2016/12/arrest-model-continues/; *An interview with ILNA*, Iran Labour News Agency, https://goo.gl/YwhQ2Z.

causing corruption and encouraging people of the Islamic community to commit corruption and prostitution through the dissemination of vulgar, pornographic images on the internet using Western models and mannequins as well as propagating the culture of nudity in the West.[33]

Closer home, the Supreme Court of India recently delivered its judgment in the case of *Shayara Bano v. Union of India*.[34] In *Shayara*, the challenge was against the practice of instantaneous triple talaq (talaq-e-bidet), a form of arbitrary talaq which conferred the power to initiate a divorce only to the husband, and without notice through any forum, including text messages and Whatsapp. The Court in a 3-2 decision, set aside the practice; however, it refrained from attacking Islamic principles itself, attempting to maintain the fabric of the minority religion. The Petitioner wives' claims of distorted interpretation of Sharia law were not addressed, leaving the All India Muslim Personal Law Board with the prerogative of interpreting Islamic law to fashion restrictions against the rights of women.

The events discussed sabove bring out the exclusionary character of Islamic nationalism which involves not only fierce protection of religious traditions, but also an active attempt to ward of external influences and throttle cultural aberrations.

V. India and the Rise of Hindu Nationalism

Following the global trends, the meaning ascribed to nationalism has ominously changed in India as well. Through a discernible pattern, nationalism is becoming synonymous with the creation of a dissent-free homogenous society.

Whether it is the allegations of sedition against the students of JNU for debating the legitimacy of the separatist demands in Kashmir or the backlash faced by Gurmehar Kaur for voicing her unhappiness with the idea of war against Pakistan, freedom of dissent in political discourse is waning.[35]

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33 *Id.*

34 Shayara Bano v. Union of India, (2017) 9 SCC 1.

35 Kanhaiya Kumar v. State of NCT of Delhi, W.P. (Crl.) No. 558/2016, Delhi High Court (March 2, 2016)

Photographs of Ravi Sisodia's dead body draped with the Indian national flag instantly strike the question– what did the man do to deserve such commemoration? Ravi Sisodia was one of the accused in the Dadri lynching case. As part of the growing beef vigilantism, Sisodia and other villagers killed Mohammed Akhlaq for allegedly storing beef in his fridge in Dadri, Uttar Pradesh, where cow slaughter is banned. While the devout Hindus are prohibited from consuming beef, the meat is staple for Muslims and even some poorer Hindu families. In this context, the transformation of nationalism in India is complete. From being a unifier during India's freedom struggle, it is now used as the basis for exclusion. In Mohammed Akhlaq's case, the exclusion was religious, was executed violently and was celebrated.

Neo-nationalism in India is also aggressive. This aggressive brand of nationalism requires every Indian to wear their patriotism on their sleeve; and once again, the law and the legal system has been used as a tool to assist in its advancement. In *Shyam Narayan Chouksey* v. *Union of India*, the Supreme Court has directed that the national anthem will be played before the screening of every movie and everyone is required to stand for the National Anthem.[36] The Union Government has unequivocally canvassed that singing the national anthem everyday should be made compulsory in all schools and has sought orders from the Supreme Court to make this a reality.

Nationalism, which grew as an identity against an external force, is now an instrument for creation of "outsiders" within the society. Citizens are being coerced to think, act and speak in a manner consistent with the majority values or risk being branded "anti-national". The desire for homogeneity is so compelling that, drawing inspiration from Himmler's Lebensborn Program, the RSS has purportedly designed a customised "Aryan" baby project that guarantees tall, fair and intelligent babies.[37] The focus has shifted from a united country to a uniform

[36] Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421.

[37] Radhika Iyengar, *RSS' custom babies and Hindutva theory of Aryans as the 'original Hindus'*, Indian Express, May 12, 2017, http://indianexpress.com/article/opinion/web-edits/rss-custom-babies-and-their-theory-of-aryans-as-the-original-hindus/

country; even though freedom of dissent is possibly the best safeguard for a pluralist democracy.

VI. Overcoming False Unifiers

If the reader recalls, competing occurrences have previously resulted in one giving way to another, and filling the void left by the incumbent phenomenon. Religion and colonialism were exposed as false unifiers, paving the way for nationalism. A similar epoch presents itself today as nationalism is continuously being used as a false unifier against the rise of globalization.

It remains to be seen whether the current isolating wave of nationalism can overcome the emergent globalisation and its integrating forces. Certain recent events indicate that the value of integration may not be completely eroded. The post-Brexit elections in the UK and the recent French elections show that principles of liberty and humanitarian rights – the bedrock of Western democracy – can still triumph over distasteful forms of nationalism.[38] In electing Emmanuel Macron in May 2017, the French rejected an aggressive social media campaign, the likes of which brought Trump and Modi to power. Instead, they chose to propel their inclusive collective consciousness by embracing a more globally aware social media. Similarly, in *Abhiram Singh v. C.D. Commachen* the Supreme Court has prohibited religious speech during elections in an effort to preserve the secular ethos of the Indian Constitution and to prevent the propagation of divisive ideas.[39]

So, the possibility of a break in the chain of events set rolling by neo-nationalism cannot be ruled out. In his book *The End of History and the Last Man*,Francis Fukuyama argued that the universalisation

[38] The "snap" elections in the UK in June 2017 were conducted with the aim of securing a majority for the Conservative party in the run up to the negotiations to leave the EU under Article 50 of the Treaty on European Union. Two terror attacks took place during the campaign and yet in a surprising turn of events, the Conservative parties recorded a net loss of 13 seats, and a hung Parliament was the result of the elections. In France, the young, liberal politician Emmanuel Macron won the Presidential elections despite a fierce, anti- immigration campaign by his conservative adversary, Marine le Pen.

[39] (2017) 2 SCC 629.

of Western liberal democratic ideals at end of the Cold War marked the end of history.[40] The question which arises in the current wave of pervasive rejection of these values is whether Fukuyama's theory is doubtful or is merely experiencing doldrums.

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[40] Francis Fukuyama, The End of History and the Last Man(Penguin UK, 1993).

Nationalism and the World Order

Vedant Kapur[†]

> Patriotism is when love of your own people comes first; nationalism, when hate for people other than your own comes first.[1]

The world order as we have known it, emerged from the ruins of the Second World War. It was a reaction to the havoc unleashed by the pursuits for national supremacy of the colonial powers building up over the past few centuries. Its objective was to bring peace, reciprocity, co-operation and respect for sovereignty amongst nations through treaties and organizations like the United Nations. Countries, or rather nation states, started the shift towards democratic forms of government as opposed to military rule or monarchy. Democracy, brought with it accountability of the authorities and freedom for the people of a country. In principle, everyone was equal and entitled to certain basic human rights and opportunities. At the international level, international organizations were formed to ensure cooperation and peace between countries. Nobody wanted another war and diplomacy and bureaucracy became the order of the day. In fact, it was the threat of mutual destruction, which essentially maintained a strained peace due to the balance of power in the Cold War era, limiting actual physical destruction.[2] The European Union was in some ways a romantic culmination of the idea of internationalism.

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[1] George W. White, Nation, State, and Territory: Origins, Evolutions, and Relationships-Volume I 119 (Rowman & Littlefield, 2004) (quoting Charles de Gaulle, former President of France).

[2] George P. Schultz, *William J. Perry, Henry A. Kissinger and Sam Nunn, A World Free of Nuclear Weapons*, The Wall Street Journal, January 4, 2007, https://www.wsj.com/articles/SB116787515251566636.

Ironically, the imbalance resulting from the dismantling of the USSR in 1991 has brought with itmore frequent and destructive incidents over the past couple of decades. The definitive shift away from 'internationalism' started with the 9/11 attack in the United States of America (2001). It has picked up momentum over the past few years (post the global financial crisis in late 2008) with an emergence of a more isolationist and protectionist outlook in the national political discourse and agenda around the free world. There are many factors and trends, which have led to re-emergence of aggressive nationalism as a governing policy - going beyond the principled patriotism. The recent shift back towards nationalism and a more protectionist government worldwide is marked by two major events that have transpired over the past year- the Brexit, and the election of Donald Trump as the President of the United States of America. It is also evidenced in the recent French election campaign and results. This shift now threatens the very existence of the European Union.

One of the major factors influencing this rise in nationalism is migration, particularly from war- torn regions of the world. The developed nations, having established their dominance in the international sphere through economic and cultural means, attract people from all over the globe. Countries in Europe and North America are the most sought after for better opportunities. In fact, in the post Second World War world,the free movement of people is of paramount importance, and a basic human right. The Universal Declaration of Human Rights, under Article 13, adopted by the United Nations General Assembly, includes the right to free movement as a human right. The said article reads as follows:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.[3]

The borders between member states in the European Union are amongst the most porous. This region, as set up under the Schengen

[3] Art. 13, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

Agreement, is known as the Schengen Area.[4] The Schengen Area is a visa-free zone for citizens of countries that are part of the European Union. People outside of the European Union require only a single visa to travel through the 28 countries forming the Schengen Area. In recent times, especially following the Arab Spring Movement and the rise of militant Islamic movements such as ISIS in Iraq and Syria,refugees displaced from their home countries have taken advantage of these ideologically borderless regions. The rising volume of refugees coming in each year has significantly queered the nationalist pitch leading to negative outcomes. The naturalized citizens of the countries playing host to the refugees and migrants bear the cost of this, while at the same time facing the loss of jobs to incoming refugees who are ready to work for cheaper wages.

Countries like the United States of America, Canada and many other European countries have a major work force consisting of immigrants, both documented and undocumented. Immigrants not only work for cheaper wages, but also do menial jobs and are willing to work under unsafe conditions. Hence, the attraction for corporations and smaller employers to hire immigrants is evident- costs are reduced and there is lesser awareness of the labour law regime and employment rights.

In addition, the influx of immigrants causes tremendous pressure on the infrastructure and resources of countries. This results in a drastic fall in the overall living standards. As migrants and refugees are starting over and have minimal resources, at least in the beginning, they rely heavily on the State. States are then not only required to provide financial aid, but they have a responsibility to ensure the welfare of the new populace in terms of food, housing and transport. A report by Professor Robert Rowthorn, Emeritus Professor of Economics at Cambridge University, and published by Civitas, a think tank working in the political and public welfare sphere, claims that benefits of migration are short-lived. The report emphasizes the long-term effect of the pressure of an ever-increasing population on the economy and productivity of the country.[5]

[4] Schengen Agreement, 2000 O.J. (L 239) 1.

[5] Lizzie Dearden, *Mass Immigration: Report Warns of Strain on Britain's Infrastructure Caused by Population Growth*, Independent, August 1, 2014, http://www.independent.co.uk/news/uk/home-news/mass-immigration-report-warns-of-strain-on-britain-s-infrastructure-caused-by-population-growth-9641788.html.

Nationalism plays a major role in attempting to stop migration. Such feelings arise when natural-born citizens feel that people from other countries are encroaching upon what is rightfully theirs. The major driving force behind the exit of the United Kingdom from the European Union was the citizens' need to "get back" their country from the immigrants. Political leaders, like Nigel Farage and Boris Johnson, who supported and advocated for the United Kingdom to leave the European Union, used unchecked migration as a primary argument against membership in the European Union.[6]

In the United States of America, Donald Trump's election campaign revolved mainly around the curbing of immigration rights and putting America first.[7] It may be argued, that his calls for a massive wall to be built on the Mexican border, and for the banning of refugees from war- torn regions in the Middle East, touched upon the basic fear of the citizens. It became easy for people to ignore Trump's eccentric behaviour and outrageous remarks, because the people knew that Trump would not be worried about international relations- a really frightening scenario in modern times-and would instead put their interests first.

Nationalism, and the isolationist policies that come along with it, is given more fuel, for in recent times political leaders have started to blame terrorism on immigrants and foreign, "barbaric" cultures. With a major rise in global terrorism dominated by terrorist groups using religious propaganda, it is becoming easier for the proponents of nationalism to advocate the tightening of international borders and the creation of an anti-outsider environment within their country. This is true especially in the post-9/11 world. The infamous War on Terror under the Bush administration was the first open attack by a democratic country on any one group of people since the end of the

[6] Oli Smith, 'A voice for the true Leavers!' Farage salutes Boris' intervention for saving the Brexit dream, Express, September 18, 2017, http://www.express.co.uk/news/politics/855243/Nigel-Farage-Boris-Brexit-intervention-Leavers.

[7] Louise Liu, *Here's where President- elect Trump stands on immigration*, Business Insider India, November 10, 2016, http://www.businessinsider.in/Heres-where-President-elect-Trump-stands-on-immigration/articleshow/55342460.cms.

Cold War.[8] People from Middle Eastern and Asian countries were stopped at airports and border check-posts for invasive physical checks. Some were even taken and imprisoned in questionable centres, like the Guantanamo Bay, without following proper procedures and trials.[9] Without going into the ethics of the actions of either side, it is evident that following a terrorist attack in what was the most powerful country in the world, there came about a massive divide between countries in the West and the East. This divide was built on paranoia and the attempt of the West to dominate the "weaker" nations culturally and economically.

The Schengen Area in the European Union is under threat today because of the rising cases of terrorist attacks within the territories of member States. According to the latest report released by the Europol, in 2016 there were a total of 142 failed, foiled or completed attacks reported by eight member states.[10] More than half (76) of them were reported by the United Kingdom.[11] France reported 23 attacks, Italy 17, Spain 10, Greece 6, Germany 5, Belgium 4 and the Netherlands 1 attack.[12] The issue was raised again during the United Kingdom's referendum on its place in the European Union (Brexit). The people voting to leave the European Union felt threatened because of the mere presence of people originally from outside their country, whether it be fear of unemployment or fear of safety.

Interestingly, often terrorists are citizens of the very same country

8 Kenneth T. Walsh, *The 'War on Terror' is critical to President George W. Bush's legacy*, US News and World Report, December 9, 2008, https://www.usnews.com/news/articles/2008/12/09/the-war-on-terror-is-critical-to-president-george-w-bushs-legacy.

9 Dr. Binoy Kampmark, *The "Closure" of Guantánamo Bay. Torture, Incarceration and the "War on Terror"*, Global Research, February 25, 2016, https://www.globalresearch.ca/the-closure-of-guantanamo-bay-torture-incarceration-and-the-war-on-terror/5510200.

10 European Union Terrorism Situation and Trend Report, 2017, European Union Agency for Law Enforcement Cooperation (Europol) at 10, https://www.europol.europa.eu/activities-services/main-reports/eu-terrorism-situation-and-trend-report.

11 *Id.*

12 *Id.*

that they carry out the attack in.[13] This is irrespective of their ancestry or their country of origin or even the nationality and beliefs of the terror group sponsoring and training them. The levels of fear on both sides of the spectrum are reaching such a boiling point, that terror groups don't need to spread their propaganda or brainwash the youth. The nationalistic and "patriotic" mob creates an environment where the only way for a peaceful and equal existence for everybody is through forceful means.

The fear that natural-born citizens of host countries experience,plays an important role in the resurgence of nationalism globally. In a world where the populace is more empowered than the politicians or the clergy,political parties feed on this fear so as to come into power. This has led to increasingly right-leaning governments which emphasize on protectionist policies. Markets too are becoming more restrictive and pose a threat to the economy and job market. Nationalism in the economic sphere is not viable because it ends up adversely affecting international trade. A rise in closed-market economies is leading to decreased outsourcing of work.

The recent changes to the H-1B visa program in the United States look to bring back jobs to the American citizens.[14] Considering that the H-1B visa affects professional service industries like the Information Technology sector, which require highly trained and well- educated individuals as employees, the quality of the work force will fall drastically, especially in the immediate future. The problem in the economic sphere is that nationalism demands compromise and special treatment for homegrown companies. The co-dependent economic global structure set up in the post Second World War era is therefore under threat.

The fact that resurgence in nationalism is not simply the opinion of a handful of natural-born citizens, but of a sizeable population is

[13] Phil Hirschkorn, *Most convicted terrorists are US citizens. Why does the White House say otherwise?*, PBS Newshour, March 12, 2017, http://www.pbs.org/newshour/updates/convicted-terrorists-citizens/.

[14] Annalyn Kurtz, This is an H-1B Visa. And here's how President Trump wants to change it, Fortune, April 18, 2017, http://fortune.com/2017/04/18/h1b-visa-donald-trump/.

worrying for it emboldens xenophobic political actors. For instance, Donald Trump has attempted (and partly succeeded) to ban the entry of migrants from Muslim-majority countries around the world into the United States of America through an executive order.[15] This includes people who may have already been issued visas or were on the verge of getting green cards. The fact that a few federal judges blocked the executive order is a sign of a good democracy, but does not do much to alleviate the fear of native citizens.[16] In such cases nationalism becomes a higher priority over democracy.

Trump's wall may not have been built yet but international borders around the world are becoming stronger, albeit metaphorically. Nationalism, especially in this extremist form, is not an answer to any issue being faced by a country or its people. The only way to combat the rise of this form of nationalism is to educate people about each other's cultures and strengthen the ways in which we identify with fellow human beings.

Fortunately, the results of the recently concluded French elections have proven that democracy is not in such a dire situation. The elections resulted in the victory of Emmanuel Macron, who is poised to not only be the youngest-ever President of France, but also the youngest head of State the country has had since Napoleon.[17] This is truly staggering, especially given the fact that Macron floated his political party, *La République En Marche!*, only in April, 2016. Following an indecisive and tense first round of elections, the competition for Presidency was between Macron and the right- wing candidate of National Front party, Marine le Pen.[18] The National Front opposes the continued existence

[15] *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, Office of the Press Secretary, The White House, March 6, 2017, https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

[16] Trump v. International Refugee Assistance Project et. al, 137 S.Ct. 2080.

[17] Ashley Kirk and Patrick Scott, *French election results: How the Parliament looks as Macron's party claims an astounding win*, The Telegraph, June 19, 2017, http://www.telegraph.co.uk/news/2017/06/19/french-election-results-new-parliament-looks-macrons-new-party/.

[18] *Id*.

of France as a member State of the European Union, Marine le Pen vowed to make immigration laws more stringent.[19] Macron's victory is not only good news for France and the Fifth Republic, but also for democracy generally. The fact that the French have reposed their faith in a young, novice party shows their continued belief in democratic principles and liberty.

Almost a century ago, Rabindranath Tagore spoke about nationalism in India, and his observation still holds true today:

> [Nationalism] is the particular thing which for years has been at the bottom of India's troubles….It is my conviction that my countrymen will truly gain their India by fighting against the education which teaches them that a country is greater than the ideals of humanity.[20]

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[19] Lizzie Dearden, *French elections: Marine le Pen vows to suspend immigration to 'protect France'*, Independent, April 18, 2017, http://www.independent.co.uk/news/world/europe/french-elections-latest-marine-le-pen-immigration-suspend-protect-france-borders-front-national-fn-a7689326.html.

[20] Aniruddha Ghosal, *Rabindranath Tagore in 1908: 'I will never allow patriotism to triumph over humanity as long as I live'*, The Indian Express, December 2, 2016, http://indianexpress.com/article/explained/national-anthem-flag-in-theatre-rabindranath-tagore-supreme-court-4406145/(quoting Rabindranath Tagore).

The political status of Jammu and Kashmir: the sovereignty debate in *SBI v. Santosh Gupta*

Jayant Malik[†]

The state of Jammu and Kashmir has been witness to a turbulent and violent history since the pre-independence era. The past year has seen a surge of clashes both on the streets of Jammu and Kashmir and in the intellectual sphere. Jawaharlal Nehru University ("JNU") in Delhi was witness to a police crackdown in the wake of a "pro-*azaadi*" event that was held on campus. Charges of sedition were imposed on students who raised the issue of the sovereignty of Jammu and Kashmir. With media reports having taken a turn towards propounding a "nationalist" outlook, a majority of the Indian population is outraged at the sustained clashes that have been taking place between security forces and civilians since the death of Burhan Wani, a young Kashmiri militant. This article examines the legislative and judicial history of Jammu and Kashmir to understand the anger among the people of the troubled state.

The accession of Jammu and Kashmir has been a controversial topic for both the Centre and the State. The state of Jammu & Kashmir was created between 1820 and 1846, with the district of Poonch being absorbed separately, some would say unwillingly, in 1936. At the time of the partition of India in 1947, the district of Poonch, being the latest addition to the State, but with the least attachment to it, saw the beginning of a secessionist movement.The secessionists sought to secede to the newly formed Dominion of Pakistan. Marauding Pathans

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from across the Pakistani Border invaded the territory of the State to aid the Poonch rebels, and made significant headway towards Srinagar, the capital of Jammu & Kashmir. With his armies failing to stop the marauders, Maharaja Hari Singh, ruler of the State, turned to the Dominion of India for aid, hinting that he was willing to be absorbed into India in return for its assistance against the invaders. However, Lord Mountbatten, the Governor-General of India, felt that "*it would be the height of folly to send troops into a neutral State, where we had no right to send them, since Pakistan could do exactly the same thing, which could only result in a clash of armed forces and in war*".[1] He recommended that the legal formalities for temporary accession be completed before the airlifting of any troops into the State. However, his intentions of acceding the State on a temporary basis were tempered by a desire to hold a referendum or plebiscite at a later date.[2] These words of Lord Mountbatten clearly point towards the accession of Jammu & Kashmir being temporary in nature, which buttresses the claims of present-day agitators in the State, who believe that the natives have the ultimate right to determine where their allegiances lie.

However, in the fields of law and politics, the written word trumps the spoken one. The Instrument of Accession that Maharaja Hari Singh signed on October 26, 1947, spoke of no such plebiscite or need to determine the will of the people. His right as the sovereign ruler to accede to the Dominion of India has been contested till this day, with certain quarters making the argument that since the marauding invaders had made it almost till the gates of Srinagar, he could not claim to be in control or have sovereign right over that area, and as such had not right to determine which Dominion it should accede to.[3] Contemporaneously, Sheikh

1 Victoria Schofield, Kashmir in Conflict: India, Pakistan and the Unending War (I.B. Tauris, 2010) at 52-56.

2 *Id.*

3 The Indian Independence Act, 1947 divided pre-independent India into the two independent dominions of India and Pakistan. Between the passing of the Indian Independence Act, 1947 and the coming into force of the Constitution of India on January 26, 1950, the Governor General who was appointed as the representative of His Majesty King George VI, governed the Dominion of India. On January 26, 1950, the Dominion of India became the Union of India, a sovereign, democratic republic.

Abdullah, a firebrand political leader of the All-Jammu and Kashmir National Conference, propounded the concept of "*Kashmiriyat*", or Kashmiri nationalist identity. The genesis of *Kashmiriyat* was an attempt to forge an identity that was unique to the people of Kashmir regardless of religion. Abdullah had transformed the Muslim Conference into the All-Jammu and Kashmir National Conference in 1939, in an attempt to be more inclusive towards all religions present in the State.[4] *Kashmiriyat* can be termed as a form of Kashmiri nationalism, with an emphasis on the unique history of the Kashmiri people and the peaceful co-existence of the various religions in Kashmir.[5] This loyalty to Kashmir over one's own religious identity may be the impetus for the calls for *azaadi* that resounded through JNU, rather than a desire to accede to Pakistan. In fact, *Kashmiriyat* may have led to the failure of Operation Gibraltar in 1965, an operation where Pakistani soldiers disguised themselves as insurgents and failed in their attempts to instigate a rebellion in Jammu and Kashmir.[6] The locals, identifying themselves as Kashmiris rather than Muslims, handed over the insurgents to the Indian authorities, leading to the second Indo-Pakistani War.[7]

Immediately after the accession of Jammu and Kashmir, Abdullah, the new Prime Minister of the State, started pushing for greater Kashmiri autonomy in an effort to secure his party's political legitimacy. According to British sociologist Ernest Gellner, nationalism grants political legitimacy when ethnic boundaries do not cut across national lines. According to Abdullah, the Kashmiri people should be the sole decision-makers when it came to the question of the independence or accession of the State. However, Jawaharlal Nehru, the then Prime Minister of India, felt that the sizable Muslim population of the State might push towards acceding to Pakistan rather than India. Abdullah's efforts towards effecting a plebiscite went ignored.[8]

4 Karan Arakotaram, *The Rise of Kashmiriyat: People-Building in 20th Century Kashmir*, Col. U'grad. J. of So. Asi. Stud.,1(I) (2009).

5 *Id.*

6 Julian Schofield and R.C. Tremblay, *Why Pakistan failed: tribal focoism in Kashmir*, Small Wars and Insurgencies, 19(1) (March 2008) at 32.

7 *Supra* note 3.

8 Iffat Malik, Kashmir: Ethnic Conflict and International Dispute (Oxford University Press, 2002) at 68.

Following the annexation of Jammu and Kashmir, N Gopalaswami Ayyangar introduced Article 370 of the Constitution (then Article 306A)in the Constituent Assembly on October 17, 1949. This was prompted by the circumstances prevailing at the time, where part of the State was "in the hands of rebels and enemies". Ayyangar referred to the involvement or, in his words, the "entanglement" of the United Nations in the State and the ongoing cease-fire, which had created an unusual and abnormal situation in Jammu and Kashmir at the time.[9]

Mr. Ayyangar then goes on list some of the commitments that the Government of India had made to the people of Kashmir, including the granting of an opportunity to the people of the State to decide whether they would continue to remain with the Republic of India or leave it through a plebiscite, provided that peace returned and the impartiality of the plebiscite could be guaranteed. He also mentioned the creation of a constituent assembly that would reflect the will of the people in determining the constitution of the State and the sphere of the jurisdiction of the Union over Jammu and Kashmir.

Article 306A, according to him, was an interim measure that was meant to establish an arrangement that would serve as a means to tide over the precarious situation in the State, till the time Jammu and Kashmir could be brought into line with the other states which constituted the Union.

Considering the importance of the Constituent Assembly debates, it is not difficult to see why the Kashmir is feel that fate (or India acting as an agent of fate) dealt them a bad hand. Their land was annexed under a peculiar set of circumstances, on a temporary basis in a law that arguably did not reflect the will of the people. With the introduction of Article 370, their status as a special state was cemented, even if only for a temporary period. Thanks to Article 370, Jammu and Kashmir had the provisions of the Constitution of India applicable to it, subject to suitable modifications or exceptions in order to keep in mind the peculiar conditions of the State.

[9] *Constituent Assembly Debates (Proceedings)*, Volume X (Lok Sabha Secretariat, 2014) at 483.

It cannot be said that the introduction of Article 370 was with the intent of granting absolute political sovereignty to the State. However, Mr. Ayyangar's statements about the Government of India promising the people of Jammu and Kashmir the possibility of self-determination can be interpreted to mean that the State, while not politically sovereign, still had a special status that couldn't be equated with any other state.

The period between the introduction of Article 370 in the Constitution of India and the Supreme Court's judgment in *State Bank of India v. Santosh Gupta*,[10] was interspersed with the passing of the Constitution (Application to Jammu and Kashmir) Order, 1954 by the President of India, due to the dismissal of Sheikh Abdullah from the position of Prime Minister of Jammu and Kashmir. This was swiftly followed by the drafting and adoption of the Constitution of Jammu and Kashmir on November 17, 1956.[11]

The Supreme Court in *State Bank of India*, struck down the judgment of the High Court of Jammu and Kashmir whereby the High Court had held that various provisions of the Securitization and Reconstruction of Financial and Enforcement of Security Interest Act, 2002 ("SARFAESI") was outside the legislative competence of the Parliament of India, due to their "collision" with Section 140 of the Transfer of Property Act of Jammu and Kashmir, 1920.

The Supreme Court examined the legislative history of Jammu and Kashmir and delved deeply on Article 370 noting its "temporary" nature contrasted by the protection granted to it by its sub-clause (3). Sub-clause (3) protects the Article from ceasing to exist unless the Constituent Assembly of the state recommends so to the President of India, who in turn makes a public declaration of this. However, keeping in mind the dissolution of the Constituent Assembly of the State on November 17, 1956, after the adoption of the Constitution of Jammu & Kashmir, 1956, it could be said that Article 370 has taken a permanent place in the Constitution of India.

The judgment has examined the previous decisions of the Supreme

[10] (2017) 2 SCC 538.

[11] History of the Jammu and Kashmir Legislative Council is *available at* http://jklegislativecouncil.nic.in/Misc/aboutLC.htm.

Court on the interpretation of Article 370 of the Constitution of India including *Prem Nath Kaul v. State of Jammu and Kashmir*[12], *Sampat Prakash v. State of Jammu and Kashmir*[13] and *Puranlal Lakhanpal v. President of India*[14]. Keeping in mind the limited question before the Court, the judgment relies only on the Supreme Court's own precedents and the legislative history of the State without delving too deeply on the circumstances surrounding the accession of Jammu and Kashmir.

The Supreme Court set aside the judgment of the High Court which held that the Union Parliament did not have the legislative competence to make laws contained in Sections 13, 17A, 18B, 34, 35 and 36 of SARFAESI, so far as they relate to Jammu and Kashmir. As a consequence, SARFAESI cannot be enforced in Jammu and Kashmir. The Supreme Court noted that Section 5 of the Jammu and Kashmir Constitution only operates in those areas in which Parliament has no power to make laws for the State. As such, anything that comes in the way of SARFAESI by way of a Jammu and Kashmir law must necessarily give way to the said law by virtue of Article 246 of the Constitution of India read with Section 5 of the Constitution of Jammu and Kashmir.

The judgment of the Supreme Court, though confined to a narrow sphere of determining the applicability of the SARFAESI Act to Jammu and Kashmir, makes certain observations that cannot be ignored by those arguing for the greater sovereignty or independence being granted to the State.

On its own examination of the Constitution of Jammu and Kashmir, the Supreme Court rejects the High Court's findings of the "absolute sovereign power of the State of Jammu & Kashmir", terming these disturbing. As the Supreme Court points out, Section 3 of the Jammu and Kashmir Constitution "makes a ringing declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India." The Supreme Court further observes that this provision is beyond the pale of amendment owing to the second proviso of Section 147 of the Jammu and Kashmir Constitution, which prohibits the

[12] AIR 1959 SC 749.
[13] AIR 1970 SC 1118
[14] AIR 1961 SC 1519

introduction or movement of any bill or amendment seeking to make any change in Section 3 or Section 5 in either House of the Legislature.

The Supreme Court further goes on to compare the preambles of the Constitution of India and the Constitution of Jammu and Kashmir, noting the distinct lack of any claim of sovereignty in the latter. Further, the people of Jammu and Kashmir are not referred to as the "citizens" of Jammu and Kashmir but as merely its people. Even the Constitution of India refers to these class of citizens as "permanent residents" under Part III of the Constitution. The Supreme Court declares that the State of Jammu and Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India. As such, any attempt to attribute sovereignty to the people of Jammu and Kashmir for constituting them into a separate and distinct class of citizens would be erroneous and incorrect. The Supreme Court refers to Section 6 of the Jammu and Kashmir Constitution to emphasize the fact that the residents of Jammu and Kashmir are first and foremost the citizens of India. Under Section 10 of the Jammu and Kashmir Constitution, they have been granted all the rights guaranteed to them under the Constitution of India.

Though the present debate that is currently prevalent across India revolves around whether a plebiscite is necessary or legally tenable, it is imperative to note that the Constitution of the State of Jammu and Kashmir adopted by its Constituent Assembly makes no mention of such a plebiscite. In fact, Sections 3 and 147 of the Jammu and Kashmir Constitution read with paragraph (2) of the Constitution (Application to Jammu and Kashmir Order), 1954 shows that Jammu and Kashmir is an inalienable and integral part of India. Advocates of the plebiscite might rely on the Constituent Assembly debates, or Lord Mountbatten's intentions at the time of the execution of the Instrument of Accession or even the negotiations between Pandit Jawaharlal Nehru and Sheikh Abdullah. However, in terms of the strength of legislative instruments, the deck is squarely stacked against such parties, with neither the Jammu and Kashmir Constitution, the Indian Constitution or even the Instrument of Accession coming to their aid. Debates regarding the political promises and negotiations for a plebiscite will continue to rage, what with the habit of historical figures carrying out many

meetings behind closed doors, further fanning the flames.

With the Supreme Court's judgment succinctly laying down the legislative history of the State, it becomes clear that Jammu and Kashmir, while not being a politically sovereign state, does have a special status that requires the concurrence of the State Government before the applicability of certain amendments to the Constitution of India. In the event that an amendment to the Constitution of India takes place whereby any of the entries under the State List are included in the Union List or the Concurrent List, that amendment can be applied to Jammu and Kashmir only with the concurrence of the State Government of Jammu and Kashmir, under the terms of the proviso to Article 368. To this limited extent, it can be said that the State Government of Jammu and Kashmir enjoys a limited amount of sovereignty, which no other Indian state does.

As such, Jammu and Kashmir will continue being a politically subordinate state with no sovereignty over the Union Legislature beyond the concurrence of the State Government that is required for the applicability of certain amendments to its Constitution.

Goods and Services Tax: Economic Nationalism at Work

V. Lakshmikumaran[†]

Many of us never believed that Goods and Services Tax ("GST") would be implemented in our lifetime. The law faced several hurdles. Political consensus between the main parties at the Centre, concerns of the States regarding loss of revenue, a new and untested form of administration, capacity building around the new law and convincing Industry to adopt the new system were just some of the challenges. GST seemed a dream to behold rather than a reality. Yet, the benefits of GST were undeniable.

By 2016, more than 160 countries had implemented GST across the world with varying successes.[1] GST remains the fastest adopted tax law across the world on any measure. While most countries have felt a short-term inflationary increase upon implementation of GST,[2] the benefits of GST have outweighed the drawbacks in the medium to long term. We can expect similar benefits for India. What then makes GST special, compared to the current indirect taxes?

I. Destination based consumption tax

The hallmark of GST is the economic concept of it being a

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[1] Sesa Sen, *India's GST in line with global trends*, The Indian Express, June 19, 2017, http://www.newindianexpress.com/business/2017/jun/19/indias-gst-in-line-with-global-trends-1618248.html.

[2] Rajani Sinha, *GST impact on inflation: Here is all you want to know*, Financial Express, July 5, 2017, http://www.financialexpress.com/opinion/gst-impact-on-inflation-here-is-all-you-want-to-know/749504/.

destination-based consumption tax. This phrase 'destination based consumption tax' is used widely but its significance is not always understood. Most indirect taxes are taxes on event that have nothing to do with consumption. The tax may be recovered from a consumer directly or indirectly but these taxes are not consumption taxes. For example, excise is a tax on manufactured goods. The manufacturer pays excise duty and recovers from his buyer, for instance, a trader. The trader in turn would include this as part of his cost and recover it from a consumer. But while excise is an indirect tax, it is not a tax on consumption. Rather, it is a tax on the business of manufacturing. Over a period of time, countries realized that while businesses move for tax reasons, a consumer never changes his residence for tax purposes. For a consumer, the social and economic fabric surrounding a particular place is more important than taxes being imposed at that place. An increase in the rate of sales tax or value added tax in Delhi would never be the sole reason for people to move from Delhi to say Madhya Pradesh or Rajasthan, which may have lower taxes. On the other hand, businesses will go to the remotest corners of India to set up industrial units to avoid payment of excise duty or other taxes. Therefore, taxes move businesses but not consumers. Conversely, if the tax is ultimately on consumption, regardless of where the business is located, taxes will always be collected on such transactions.

The other leg of GST is its destination concept. The law recognizes that there are multiple stages of purchase and sale of goods and services before it reaches a consumer. In order for a tax to be truly a consumption tax, it must travel with the goods and services to the destination of the consumer for its collection. The sales taxes and value added tax regimes, while being consumption taxes (being tax on sales), remained origin-based taxes. This meant that taxes paid in the origin state remained in the origin state. For example, central sales tax paid in Delhi for a sale to Haryana remained with the State of Delhi even though the goods are likely to be resold in Haryana. This detracted the tax from being a consumption tax- it became an indirect tax on business. The erstwhile indirect tax scheme in India therefore did not conform to the economic concept of being 'destination based consumption taxes'.

II. Single common market

The result of having a complex indirect tax regime, administered by both the Centre and the State resulted in a tax scheme that fragmented India as a common market. To be tax efficient, the industry implemented practices that caused inefficiencies in business. A primary example is where the company would open warehouses in each State where it did business. This would allow for stock transfer of goods and the company could avoid the payment of central sales tax. In many States, a warehouse was not warranted. Yet, this practice was followed to gain a tax advantage. Similar issues existed for entry taxes, entertainment taxes and other State taxes. On goods, since the Centre was incapable of taxing beyond the manufacturer's factory, different valuation rules were evolved to capture some of this value. Service providers did not get the credit of State value added taxes. There were several issues plaguing the indirect tax regime. There were more incentives for a person to remain local rather than access India on the whole as a market.

The GST implemented by India, though not the most efficient form of GST, has resulted in India becoming a single common market. Supply is the taxable event – not sale, not manufacture, not entry, etc. Supply, in its basic form, is the converse of consumption. The Centre and States are administering GST in a dual-form regime. The most significant breakthrough in GST is that taxes paid in one State are now allowed as credit in another State. This is unique to India and no other country has implemented a GST system in such a manner in a federal structure. A person selling goods from Delhi to Haryana will pay his taxes in Delhi, and Haryana will give credit of such taxes on further supplies in Haryana. This means that a person in any part of India can sell to any other person in any other part of India without having to worry about taxes and tax structures.

III. Constitutional scheme of GST

The legislative powers of Parliament and the State Legislatures are provided for in Articles 246-254 of the Constitution. Article 246 empowers Parliament to exclusively legislate on matters enumerated in the Union List. Similarly, the State Legislature is empowered to legislate on matters enumerated in the State List. Additionally, both

the Parliament and the State Legislatures have powers to legislate on the entries in the Concurrent List.

According to Article 254,in case both the Parliament and any State Legislature make laws on an entry in the Concurrent List,the latter will be declared void to the extent of it is repugnant to the former. Additionally, Parliament also has the power to enactlaws that seek to add to, amend, vary or repeal State- made laws. This, therefore, highlights the quasi-federal structure of our Constitution with supremacy of the Centre.

It is in this background that the Constitution (One Hundred and First Amendment) Act, 2016("Amendment Act") sought to insert Article 246A with a non-obstante clause with respect to Articles 246 and 254. Article 246A confers a concurrent legislative power to both the Parliament and the State Legislatures to enact laws with respect to goods and services tax. The *non-obstante* clause has been included to eliminate the Centre's supremacy, which is otherwise, as discussed above, envisaged in the Constitution.

It is in furtherance of the same intention that the formation of a GST Council has been envisaged in the Amendment Act. The composition of the Council and the nature of duties vested in it, confirms the objective of ensuring a level discussion platform for both the representatives of the Centre and the States to discuss and decide on the specific aspects of the law relating to GST. The desired outcome is that the legislations for Central GSTand State GST are on the same page so as to achieve the objective of 'one single market'.

IV. GST Council

Article 279A of the Constitution provides for the GST Council and was introduced *vide* section 12 of the Amendment Act. Subsequently, the President formally constituted the GST Council on September 15, 2016.

The federal character has been recognized as part of the basic structure of our Constitution in the landmark judgment of *Kesavananda Bharati v. Union of India*.[3] The composition of the Council has been done

[3] (1973)4 SCC 225.

keeping in mind the federal structure of government. The Council is chaired by the Union Finance Minister and consists of Union Ministers of States for Finance, the State Ministers of Finance or any other Minister nominated by each State Government. The vote of the Central Government shall have a weightage of one-third of the total votes cast and the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast in a particular meeting.

The scope of duties of the GST Council so constituted, will be to put forth recommendations on the issues listed below:

a) taxes, cesses and surcharges levied by the Union, State and local bodies which maybe subsumed into GST;

b) exemptions;

c) model GST laws, principles of levy, apportionment of Integrated GST ("IGST") and principles of place of supply rules;

d) threshold limits of turnover below which goods and services would be exempt;

e) rates of tax including floor rates with bands for goods and services;

f) special rates for additional revenue in times of natural calamity or disasters;

g) special provisions for North-East States;

h) any other matter that the GST Council may decide.

Among the above scope of duties, the success of GST in India is dependent upon there being a single uniform rate across India and same set of laws and rules to be implemented by all the States. The GST Council ensures these two concerns are always controlled.

V. Rates, Exemptions and Thresholds

The most crucial role of the GST Council is the recommendation on the rate of tax to be applied to all goods and services in India. It is a delicate balancing act as indirect taxes impact the rich and the poor equally and also constitute the bulk of tax collection. A higher tax rate will lead to inflation whereas a lower rate will have an adverse effect on

the collections of the States. The GST Council has admirably balanced these concerns until now though it could have done more to limit the number of rates to three bands (concessional, standard and demerit) rather than the four-band structure we currently have.

The rate of tax will also have an impact on the compensation to be paid to the States in case of any shortfall in the collection of taxes due to implementation of GST. Over the next few months, getting a rate as close to the revenue neutral rates would be critical for the success of GST. We have already seen an adjustment for cigarettes within a month of GST implementation. More adjustments are likely to follow once the information regarding tax collections filter through to the GST Council.

VI. Model GST laws, Levy, Applicability etc.:

One of the other crucial decisions taken by the GST Council is regarding the model GST laws. In 2005-06,the States sought to adopt uniform VAT to ensure consistent rates and procedures. However, eventually, the individual states digressed from the model laws and we had fairly divergent VAT regimes in the States. Therefore, getting a model law in place for the States that is likely to be adopted with minimum deviations is important. It is heartening to see that all States have adopted the model law and rules as such (with some very minor differences). It will be important for the GST Council to continuously monitor and regulate the implementation of GST laws across the States in India if the existence of India as a common market is to survive.

There is another area that would require the attention of the GST Council in the near future. This pertains to the five (5) petroleum products - petrol, diesel, aviation turbine fuel, natural gas and crude, which remain outside the GST regime for now. Since these contribute significantly to the Centre and State exchequers, keeping these outside GST would increase their prices and can have a knock-on effect. Therefore, these goods must be brought into GST regime. It is understandable that GST is new and its effects unknown. Hopefully in the coming months with more clarity on the law, a decision in this regard would be forthcoming.

VII. Concluding remarks

GST has been welcomed by businesses (though not necessarily with the quick and last-minute manner of implementation) and the GST Council has done well in keeping a certain level of uniformity in the GST law and administration. There are however concerns with respect to the administration of GST considering the officers in charge of GST are the same as were forthe earlier tax regime. This is an area that we must improve if we want the common market to sustain.

A point to focus on is that all the decisions that the Council comes up with will be merely 'recommendatory' in nature. Therefore, even after the recommendations by the Council, the ultimate say with respect to the final implementation will be in the hands of the Centre and the States. This is in contrast to the VAT system in place in the European Union ("EU"). The European Economic Community is empowered to issue mandatory directives to the member States with an intention to harmonize VAT laws within the EU. Whether the directions from the GST Council will require a more authoritative character, is something to be discerned as the implementation progresses.

On the brighter side, the Council aims to operate while keeping in mind the spirit of co-operative federalism. There have been assurances from the Government that all issues will be decided by consensus between the members. Additionally, the collective wisdom of the Council members along with other relevant data will definitely help in coming up with recommendations, which will then serve as guiding principles. Ultimately, it depends on how well the States work with each other in the GST Council and how much leeway the Centre gives them to unify India into a common market.

On a final note, an area of deep disappointment for us must be that while the entire nation contributes and disciplines itself for GST, as a legal community we continue to remain far outside. We are the only profession that has been kept out of GST. Engineers, architects, chartered accountants, even doctors, will all partake in the pain and pleasure of GST. There will be teething troubles and there will be a necessity for life-long compliance under GST. So, while our brethren undertake the GST journey towards economic nationalism, we will be

mere spectators. I hope in the future we will be able to do more to this cause than merely help the journeymen reach their destination.

Resolution of Insolvency and Bankruptcy under the Insolvency and Bankruptcy Code, 2016

Amarjit Singh Chandhiok[†]

India has a history of financial transactions since the Vedic age.[1] Much later, English banking law lent a lot to Indian banking law.[2] Banking law has within it, the elements of contract, and other commercial and civil laws.

The economic reforms that began in 1991 changed India's business and commercial roadmap, resulting in free entry and exit of enterprises, inflow and outflow of resources and productive use of investments.[3] Here, the banks and other financial institutions became the growth drivers and were exposed to many risks involving credit, liquidity, interest, and operational and market variations.[4] The predominant among these was debt recovery.

Though the banks and non-banking entities strengthened their position through better appraisal processes, yet the incidence of Non-Performing Assets (NPAs) increased.[5] This certainly affected the

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1 See U.B. Singh, Administrative System in India: Vedic Age to 1947 (APH Publishing, 1998).

2 *Id.*

3 B.A. Prakash, The Indian Economy Since 1991: Economic Reforms and Performance (Pearson, 2011).

4 *Id.*

5 Harsh Vardhan and Rajeswari Sengupta, *The Severity of the NPA Crisis*, LiveMint, May 30, 2017, http://www.livemint.com/Opinion/8ISpQAo5B5Twan0fkPw46J/The-severity-of-the-NPA-crisis.html.

economy adversely. Slowly, it became a serious problem hitting the public-sector banks the worst. To this, there is a linkage – corporate India started falling sick as its ability to pay interest on its debts weakened.[6] This resulted in accumulation of NPAs. During the past three years, there has been a steady increase in NPAs.[7] The percentage of companies whose interest coverage was less than 1% for four or more of the past eight quarters, was at 33%, up from 29% from the previous quarter.[8] Needless to say, interest coverage denotes a company's ability to pay interest on its loans, the failure whereof turns the loan into an NPA.

As of June 2016, the total amount of NPAs for public and private sector banks was around rupees Rs. 6 lakh crores.[9] Top twenty NPA accounts of public-sector banks then stood at Rs. 1.54 lakh crore.[10] If we look back, it can be seen that the deterioration started seriously since 2009. By March 2016, the situation became worse. The lowest level of NPAs was in 2007-08 and 2008-09.[11] Asset quality of scheduled commercial banks by March 2016 showed that it is effectively a fiscal risk, imposing a burden on the already stressed State exchequer.[12]

Recovery actions by creditors did not yield desired results despite the enactment of special laws such as the Recovery of Debts Due to Banks

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6 *See* Ashish Gupta et al., *India Financial Sector*, Credit Suisse, February 13, 2017, https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&sourceid=csplusresearchcp&document_id=1071223661&serialid=RQlbzvLsLRhqIyOS1jtrJaHyQOLgQN%2F2s6%2B7x5V3cxk%3D.

7 *Id*.

8 *Id*.

9 *12 large NPAs: SBI chief rules out big hit on bottomlines*, The Economic Times, June 28, 2017, http://economictimes.indiatimes.com/industry/banking/finance/banking/12-large-npas-sbi-chief-rules-out-big-hit-on-bottomlines/articleshow/59341581.cms.

10 Samarth Bansal, *Details of NPA figures of private, public sector banks*, The Hindu, November 21, 2016, http://www.thehindu.com/data/Details-of-NPA-figures-of-public-private-sector-banks/article16670548.ece

11 *See* Reserve Bank of India, *Handbook of Statistics on the Indian Economy*, September 15, 2017, https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0HANDBOOK2017C9CF31D4B78241C9843272E441CD7010.PDF.

12 *Id*.

and Financial Institution Act, 1993, Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Act, 1985, and the winding up provisions under the Companies Act, 1956.

According to its Statement of Objects and Reasons, the Insolvency and Bankruptcy Code, 2016 ("Code") which received Presidential assent on May 28, 2016, is an enactment "to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues …" The Code is probably the only legislation in recent times so speedily enacted by Parliament, and thereafter suitably implemented.

The new Code's objective is to promote entrepreneurship, availability of credit and to look after the interests of all stakeholders, as also to amend the laws relating to insolvency resolution. The Code is not confined to corporate persons, but also extends to partnerships and individuals. Thus, provisions that were earlier contained in different Acts, have been consolidated into one legislation for greater clarity and consistent application. Along with GST, the Code is an economic reform that is a laudable step, keeping in view India's commitment to the World Trade Organization (WTO) and its aim to maintain its GDP at 7%.[13]

Under the Code, even corporate debtors have an option to move the Adjudicating Authority as provided under Section 5 (11). Further, for the purpose of the Code, default is a state of insolvency. An insolvent entity can be restored as a going concern, failing which the entity is liquidated. The Code addresses all these aspects, namely, preventing insolvency, and providing a market-determined and time-bound

[13] India has been a WTO member since 1 January 1995 and a member of GATT since 8 July 1948 (*see* World Trade Organization, *India and the WTO*, https://www.wto.org/english/thewto_e/countries_e/india_e.htm.).

mechanism for resolving insolvency. It promotes ease to exit. The Committee of Creditors along with the Insolvency Professionals under the Code play an important role. The time limit provided under the Code distinguishes it from previous legislations on the subject. The Code permits 180 days for resolution of the insolvency process, with only a one-time extension up to 90 days in exceptional circumstances or deserving cases. The Code also provides a fast-track process for certain categories of corporate persons wherein the resolution process is required to be completed within 90 days with a one-time extension of 45 days.

Corporate debtors will be motivated to use the provisions of the Code, and their failure will not come in their way to participate in the new scheme, provided their creditors still have faith in them. This will bring about restructuring of their finances, thereby putting their NPAs into use. It will ultimately help them to re-build as decisions can be taken in a disciplined manner, and without the fear of any investigation.

The Code can certainly bring about two definite changes. Public-sector banks and financial lenders can take decide to opt for a resolution mechanism, or to go for liquidation. Some apprehensions can be there. For example, there may be no buyers for the assets in a particular sector, because of low or nil cash flow. The time period to resolve issues is six months, failing which liquidation would be the consequence.

The Reserve Bank of India Act, 1934 has been amended in 2017 and the accounts of twelve public-sector banks have been identified to initiate insolvency proceedings. Larger questions have come within the domain of the National Company Law Tribunal- the Adjudicating Authority under the Code. Out of twelve petitions filed in the Tribunal, eleven have been admitted, covering almost 25% of the NPAs of public-sector banks. These proceedings are not only large in terms of their debt profile but have their own complexities also. The insolvency resolution process is being watched with keen interest as it is a litmus test for the effective implementation of the Code. The process of drawing up a resolution plan for each of these accounts will serve as great learning for all stakeholders in the insolvency industry in India.

August 2017 marked the filing of a petition by a financial creditor

against a real estate defaulter to the extent of Rs.526.11 crore.[14] The said corporate debtor has over 32,000 flat buyers, some of them waiting for their homes for years after having spent their life's earnings on the flats. The flat buyers certainly did not fall within the category of financial or operational creditors. A lot will depend on the resolution process which is undertaken to deal with such human problems.

Out of the first 100 applications admitted or disposed of by the Adjudicating Authority, 55 were initiated by operational creditors, that is, suppliers of goods and/or services. Some of these applications show a disturbing trend of insolvency law being employed by operational creditors. Some of the petitions even otherwise barred by limitation, have clearly been filed to pressurize the corporate debtor and use the Code as a collection/ recovery tool, rather than for restructuring of NPAs. Insolvency proceedings are not meant to coerce or threaten any corporate debtor to pay, but are for reconstruction and reorganization. The goal is to maximize value of assets, promote entrepreneurship, ensure the availability of credit and to ensure a balance of interests of all stakeholders. Insolvency proceedings prevent inequitable distribution of available assets to any preferential creditor to the detriment of the debtor and other creditors. It is a collective debt collection mechanism.

Though the corporate insolvency provisions of the Code have been notified, the Government is now looking to implement Part III of the Code, which deals with insolvency of natural persons, be it individuals or partnership firms. It seeks to put an end to the archaic law of personal insolvency by repealing the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. Implementing Part III of the Code would require a very careful approach because of the many inter-twined social, political and cultural issues.

The Code provides for a specialized forum to oversee all insolvency and liquidation proceedings for individuals, small and medium sized enterprises (SMEs) and corporates. It empowers all classes of creditors including employees, to trigger a resolution process in case of non-

[14] The Supreme Court is hearing the matter relating to insolvency proceedings of Jaypee Infratech Ltd. in Chitra Sharma v. Union of India, Writ Petition (C) 744 of 2017 and connected matters.

payment of a valid claim. On the petition being admitted, the Code provides for the immediate suspension of the board of directors and insolvency professionals. It provides for a moratorium period, which enables stakeholders to discuss and arrive at a common resolution rather than having to approach multiple judicial forums. The Code offers a finite time limit within which a debtor's viability can be assessed and a resolution process proposed and agreed. The Code provides a balanced approach between rehabilitation and recovery, but also provides for compulsory liquidation within the time limit prescribed. It aims to develop a detailed and accessible system to reduce asymmetry between various participants and above all, it provides a clearly defined waterfall mechanism in the event of liquidation.

Effective, uniform and accessible insolvency laws are important elements of a healthy global legal system. Creation of a uniform insolvency law has been the focus of the United Nations Committee on International Trade (UNCITRAL) Working Group V, which recognized the need for uniform insolvency laws for re-organization and liquidation of business entities.

Trade and Business have become increasingly international. As a result, investors and companies frequently transact business in more than one country and as a matter of fact, many global companies have their incorporated offices in one sovereign jurisdiction while having their subsidiaries in other sovereign jurisdictions. A number of foreign companies have subsidiaries and branches in India and similarly Indian companies have set up business entities in various parts of the world. Both Indian and foreign banks have financed Indian assets and have exports across the world.

The UNCITRAL Model Law on Cross Border Issues (Model Law) is the most widely accepted blueprint to effectively deal with cross border issues by giving liberty to each country to have its insolvency and bankruptcy laws in accordance with its own municipal laws. The UNCITRAL Model Law is designed to equip countries to assist their insolvency law with a modern, harmonized, and fair framework to enable them to address instances of cross-border proceedings more effectively. Over 43 countries including key economies like United

States, United Kingdom, Australia, Singapore and Japan have adopted the Model Law.[15]

The Insolvency and Bankruptcy Board constituted under the Code regularly engages itself with all stakeholders to develop a world-class insolvency eco-system in the country. It is doing its best to see that the Code is effectively implemented. The striking feature is that every stakeholder is contributing to ensure effective and easy resolution of insolvency and bankruptcy. Of course, India has a long way to go in this direction, but a start has been made, which is highly encouraging.

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[15] UNCITRAL, *Status- UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

One Country, One Bar

Uday Warunjikar[†]

India is the largest democracy in the world. The Indian legal profession comprises of about 20,00,000 lawyers registered under the Advocates Act, 1961. Thus, India has the largest population of advocates in the world. Collectively, the number of advocates practicing in Maharashtra and Uttar Pradesh would probably be more than the number of advocates practicing in several other countries.

I. Pre-Independence Era

The history of the legal profession in India can be traced back to Indian High Courts Act, 1861 ("Charter Act"). By virtue of this enactment, the Crown established the High Court in India by the Letters Patent. Soon after, Bar Associations were established at Bombay, Madras and Calcutta. These Associations have also celebrated their sesquicentennial celebration in the recent past.

In 1879, the Legal Practitioners Act was enacted. It came into force on January 1, 1880. The Act empowered every High Court to register advocates and *vakils* on its rolls,so as to enable them to practise in that Court as well as in the subordinate courts under the jurisdiction of the said Court. Separate permission was required if an advocate wanted to appear in another High Court. *Vakils* and pleaders were confined to practice in sub-ordinate courts. The High Court also possessed disciplinary powers over advocates, *vakils* and pleaders.

In order to consolidate and amend the law relating to pleaders, the Governor General of Bombay enacted the Bombay Pleaders Act, 1920

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("BP Act") in exercise of his powers under the Government of India Act, 1919. The BP Act was applicable to the Presidency of Bombay.

In 1926, the Indian Bar Councils Act was enacted and a provision was made for the establishment of separate Bar Councils for every High Court. By virtue of this Act, the Councils could regulate entry into the profession and admission to the Bar. However, disciplinary power still remained with the High Courts.

II. Post-Independence Era

After India's independence, an All- India Bar Committee was established for the purpose of evolving a scheme for an all-India Bar and amending the Indian Bar Councils Act to bring it in conformity with the new Constitution. In 1953, the Committee recommended the enactment of a new legislation for regulation of the profession. Additionally, the Law Commission of India also submitted a report with similar recommendations. In 1959, a Bill for the regulation of the legal profession was tabled in Parliament. The Bill was passed in both the Houses of Parliament, and received the assent of the President May 19, 1961, resulting in the enactment and coming into force of the Advocates Act, 1961. The Indian Bar Council Act, 1926, the Legal Practitioners Act, 1879 and the BP Act were all repealed by the new Act. The Advocates Act was passed keeping in mind two main objectives- first,to amend and consolidate the law relating to the legal practitioners and second, to provide for the constitution of an all- India Bar Council. Despite this new enactment,the establishment of an all- India Bar was neglected for years.

III. Right to practice

Although one of the main objectives behind the Advocates Act was to establish an all- India Bar, the same has not defined under the Act. The term "legal practitioner"is defined under Section 2(i), and it includes advocates and *vakils* of any High Court, pleaders, *mukhtars* or revenue agents. According to Section 29 of the Act, advocates are the only class of persons entitled to practise the profession of law. Additionally, Section 30 provides that an advocate shall be entitled to practise throughout the territory of India. Under Section 1(3) of the Advocates Act, the Union of India was empowered to notify different

provisions of the Act on different dates. Therefore, Section 30 was not notified until June 9, 2011, after a period of around 50 years, and the provision came into force on June 15, 2011. Consequently, an advocate can practise anywhere in the country including in the Supreme Court. However, the Rules of the Supreme Court have not been amended after giving effect to the Section 30 of the Advocates Act. Order IV of the Supreme Court Rules, 1966 (now Supreme Court Rules, 2013) deals with a special class of advocates, referred to as "Advocates-on-Record" ("AOR"). An AOR has the exclusive prerogative of acting and pleading for a party in the Supreme Court. However, once Section 30 has been given effect,the question that arises is whether the system of AOR may be permitted to continue or not and whether having a special, separate class of advocates is violative of the said section or not.

Rule 1 of the Bombay High Court (Original Side Rules), 1980 contemplates that an advocate from any other High Court who is not on the rolls of advocates of the Bar Council of Maharashtra, may with the permission of the Chief Justice of the High Court appear and plead in any suit or matter in the Original Side of the High Court. There is a separate provision for maintaining the register of advocates under Rule 3 of the said Rules and advocates are required to apply for registration to the Bar. Rule 5 of the Rules states that no advocate other than one whose name is entered in the register of advocates shall be entitled to act on behalf of any person in the High Court. Advocates are required to establish an office within the limits of the ordinary original jurisdiction of the High Court, and notify the same to the Prothonotary and Senior Master. However, now these Rules should be amended to reflect the legislative intent behind the enactment of Section 30 of the Act.

IV. Designation of Advocates as Senior Advocates

The position of a Senior Advocate in India is similar to that of a Queen's Counsel in the United Kingdom. In India, only advocates are permitted to practise law as a profession. Similarly, in the United Kingdom, only barristers are permitted to practise law. Senior Advocates are designated from the class of "Advocates", while Queen's Counsel are designated from the class of "Barristers".

However, different High Courts in India have delivered judgments

on the issue of the process of designation of Senior Advocates.[1] The decision to designate an advocate as a "Senior Advocate" is taken by a full bench of a Court and is subject to challenge. Today, there is a need for uniformity in the criteria of designation. In *Indira Jaising v. Supreme Court of India*,[2] the petitioner challenged the designation process followed by the Supreme Court and demanded the framing of objective criteria. Judgment in the said case is awaited at the time of writing. Judgment is also awaited in *Shillong High Court Bar Association v. the Registrar General*,[3] where the petitioners questioned the High Court's propriety in designating advocates who did not practise in that court.

Although, Section 16(2) of the Act does not directly empower the respective High Courts or the Supreme Court to frame rules regarding the designation of advocates as Senior Advocates, it has been held by the Allahabad High Court that Section 34(2) of the Act empowers the High Court to frame rules for the purpose of Section 16 (2) as well.[4] However, these issues also need to be debated and deliberated appropriately if the creation of an All- India Bar is the primary object of the Act.

Section 16 of the Advocates Act contemplates two classes of advocates- Senior Advocates and other advocates. Section 16(2) empowers the Supreme Court and High Court to designate an advocate as a Senior Advocate. To this end, each High Court has framed its own rules for designation. Rule 2A of the Supreme Court Rules, 1966 is in *parimateria*with Section 16(2).

A bare reading of the different rules framed by High Courts shows

1 Democratic Bar Association v. High Court of Judicature at Allahabad, (2001) 5 SLR 88 (All) (FB); Veerbhadraiah v. Union of India, (2016) 2 AIR Kant R 369 (Karnataka); Basant Kumar Choudhary v. Union of India, (2005) 2 PLJR 136; Anju Mishra v. High Court of Judicature at Patna, AIR 2015 Pat 179 (FB) (Patna; this judgment deals with the creation of a special class of advocates, namely AOR, and has a discussion on the class of advocates referred to as "senior advocates").

2 Writ Petition (C) No. 454 of 2015 (Supreme Court).

3 Writ Petition (C) No. 33 of 2016 (Supreme Court).

4 Democratic Bar Association v. High Court of Judicature at Allahabad, (2001) 5 SLR 88 (All) (FB).

that there is no uniformity in respect of the Senior Advocate designation process. A homogeneous process and uniform eligibility criteria for designation of advocates as Senior Advocates are the needs of the hour.

V. Rules under section 34(1) of the Advocates Act

Rule 3 of the Bombay High Court Appellate Side Rules, 1960, framed under Section 34 (1) of the Advocates Act, provides that an advocate who is not on the rolls of advocates of the Bar Council of Maharashtra shall not appear or act in the Court unless he or she files a *vakalatnama* along with an advocate who is on the rolls of the said Bar Council. This provision also requires to be amended in view of Section 30 of the Advocates Act coming into force.

VI. Disciplinary Authority

Section 35 of the Advocates Act,which provides for a complaint mechanism against professional misconduct by advocates, too will require to be amended in light of the coming into force of Section 30 of the Act. Section 35 states that complaints against an advocate can be received and referred to a Disciplinary Committee by the state Bar Council with which he or she is enrolled. This would mean that in case of an advocate registered with the Bar Council of Maharashtra & Goa but practicing in Delhi, the disciplinary authority would lie with the Bar Council of Maharashtra & Goa and not the Bar Council of Delhi. Section 30 of the Advocates Act should be able to remove such barriers between the different State Bar Councils.

VII. Prohibition to appear

There are provisions in different statutes in India which either prohibit the appearance of an advocate in any proceedings or regulate the rights of an advocate in such proceedings. The validity of such provisions was previously considered by some of the High Courts and also the Supreme Court. The validity of Section 4 of the Industrial Disputes Act, 1947 was the subject matter of the judgment of the Supreme Court in *Paradip Port Trust v. Workmen*.[5]

Section 44B of Maharashtra Agriculture Land (Ceiling on Holdings)

[5] (1977) 2 SCC 339.

Act, 1961 was also challenged on the same grounds before the Bombay High Court in *Vithaldas Jagannath Khatri v. State of Maharashtra*.[6] Section 9(2) of the Andhra Pradesh Relief Act, 1977 was also a subject matter of a similar challenge in *Md. Abdul Ajij v. Golla Bhumawa*.[7]

In all these cases, the provisions either prohibiting the powers of an advocate or regulating his rights,were held as constitutional. However, these judgments were prior to coming into force of Section 30 of the Advocates Act. As a result,the effect of notifying Section 30 of the Advocates Act was not considered by the different benches in the above referred cases.

VIII. Conclusion

If one of the objects of the Advocates Act was to form and to establish an All- India Bar, then the impact of Section 30 of the Advocates Act on different provisions relating to the appearance of advocates before tribunals needs to be tested. Many advocates have played animportant role in the Indian freedom movement. Even prior to independence and after independence, many advocates contributed to the governance of the country and formed the backbone of civil society. Even today, advocates are members of the legislature and executive.An All- India Bar should be put in place in order to facilitate nation- building.Therefore, "advocates" as a class recognized under Section 30 of the Advocates Act, 1961 should be permitted to appear before every judicial or quasi-judicial forum in the country. Further, there should be a uniform process for designation of Senior Advocates across the country.

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6 (1991) Mah LJ 608.

7 AIR 1982 AP 349.

Nationalism in Housing

MANAVENDRA GUPTA[†]

Nationalism in its simplest sense refers to the collective spirit and common aspirations of the people of a nation. The Constitution of India, for instance, embodies the principle of 'fraternity' in its Preamble. It aims at ensuring for all its citizens, "*Fraternity* assuring the dignity of the individual and *the unity and integrity of the Nation*". Can a certain group of persons, belonging to a minority section of the Indian polity, isolate itself in matters of housing? Can it exclude persons not belonging to the same minority section from its housing facilities, notwithstanding the constitutional motto of fraternity and integrity of the nation? Can a cooperative housing society belonging to a minority group, restrain its members from alienating their house properties in favour of non-members? Does such a restraint not go against the spirit of nationalism? Does Section 10 of the Transfer of Property Act, 1882 (TPA) which disallows restraints on alienation not result in invalidation of such a restraint? The Supreme Court in the case of *Zoroastrian Cooperative Housing Society Ltd. v. District Registrar, Cooperative Societies* has upheld the rights of such a minority group to exclude persons outside the group from its housing facilities and programs even if it may appear to go against the spirit of nationalism and may appear to be contrary to the mandate of Section 10, TPA.[1] There are good reasons for what the Court has held.

The Indian courts have looked at a variety of cases to determine if such restrictions or restraints imposed by groups or communities

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[1] Zoroastrian Cooperative Housing Society Ltd. v. District Registrar Cooperative Society, (2005) 5 SCC 632.

to preserve their identities or ideologies are valid and reasonable. A restraint on alienation of property in general is prohibited by Section 10 of the TPA which declares that any condition/limitation restraining alienation of property is void except in the case of a lease where the condition is for the benefit of the lessor. The courts have faced a dilemma while deciding whether a restraint on alienation is reasonable only in the case of a special group or community, that is, a minority. Courts are normally inclined in favor of eliminating discrimination and maintaining equality and equilibrium in the society. That is what nationalism demands and implies. However, the legal position appears to be that restraint on alienation should not be waived in cases of an ordinary group or community to ensure that there is no misuse of such a rule. Rather, such a restraint should be limited to a special group and considered reasonable for only such a community which aims at promoting its economic and social upliftment as opposed to profit-making.

In order to get a proper perspective of reasonableness, one may examine how the Indian courts have interpreted a measure such as restraint on alienation of property as enforced by a cooperative housing society. For this, one may analyze two conflicting judgments of Indian courts in the light of Article 19(1)(c) and Article 19(4) of the Constitution of India, keeping in mind the cooperative societies legislations applicable in two different states of the country. These two cases, namely, *Zoroastrian Cooperative Housing Society Ltd.*, and *Delhi Dayalbagh Cooperative Housing Society Ltd. v. The Registrar Cooperative Society*,[2] will be helpful in explaining that housing societies made for community benefit are justified in restraining alienation where their purpose is to preserve their culture and ideology (and not profit-making) as opposed to those societies which restrain alienation in general coupled with the potential of profit-making. The judicial view emerging from these decisions amounts to recognizing that a restraint on alienation by such a society made for the benefit of a community does not militate against nationalism and is not hit by Section 10 of the TPA.

[2] Delhi Dayalbagh Cooperative Housing Society Ltd. v. The Registrar Cooperative Society, 195 (2012) DLT 459.

I. The US Experience

As most of the Indian Constitution and State policies are influenced by western principles, we may look at American cases which give us an understanding of how the courts in the US view a restraint as being reasonable. The policy of restraint on alienation in America has evolved over a period of time. A landmark case emerged involving such a policy in 1948 - *Shelley v. Kraemer*.[3] In that case, a restrictive covenant was enforced restricting the sales of homes in a particular locality to only whites and preventing people of other races and backgrounds from occupying the property in the locality.[4] The United States Supreme Court held that courts cannot enforce racial restrictive covenants and thus liberated the society from the restraints and limitations.[5]

In the post-*Shelley* era, after the end of World War II, the American courts looked at restraint on alienation of property through the lens of the "doctrine of reasonableness".[6] The American courts and people accepted the relevance of changes in the society and the need to secure the rights of the minority classes by taking into consideration the problems and social factors of the minorities such as interests, economic status and education of the community.

In 1983, in *Taormina Theosophical Community Inc. v. Silver*,[7] the Courts of Appeal of California deliberated on aspects of land being scarce and its transfer not being restricted by unreasonable restraints.[8] As in the *Shelley* case where a racial restrictive covenant confining sales to only whites had been struck down, the restraint imposed by the society in the *Taormina* case, confining the membership to persons aged 50 or more who had been members of the Theosophical Society for a period of 3 years, was also struck down.[9] Such persons in the *Taormina* case

3 Shelley v. Kraemer, 334 US 1 (1948).

4 Geoffrey Graber, *Choosing the Chosen: The validity of racial restrictions on the alienation of property in Israel and the United States*, 73 S. Cal. L. Rev. 437 (January 2000).

5 *Id*.

6 *Id*. at 2.

7 Taormina Theosophical Community Inc. v. Silver, (1983) 140 Cal.App.3d 964.

8 *Supra* note 2 at para 29.

9 *Supra* note 7.

as per the statistics numbered only about 6000 in the United States.[10] The court addressed the fact that the community comprised of only a minimal part of the entire population and held that such a restraint on alienation is not reasonable and is, therefore, void. The Court, thus, observed that a restraint on alienation is germane only on two counts:

1. The yardstick on which the reasonableness of a restraint should be tested.[11]
2. The availability of ownership of a piece of land not being limited to a small group of persons.[12]

II. The Indian Scenario

Following the standard of reasonableness, property issues arose in India in the context of restraint on alienation of property by cooperative societies and associations. India has been influenced, in many respects, by western policies of liberty, equality and protection of minorities. Hence, it has adopted the idea of supporting the formation of associations and cooperative societies under Part III of the Constitution of India.

Article 19(1)(c) guarantees to the Indian citizens the right to form associations and cooperative societies as a Fundamental Right. The saving clause, Article 19(4), states that nothing in Article 19(1)(c) shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of that right. In other words, Article 19(4) provides for restrictions imposed on cooperative societies to be governed by state laws and for such restrictions to be considered as reasonable depending on the object of the society.

III. The Zoroastrian Case

A major issue of restraint on alienation was raised before the Supreme Court in *Zoroastrian Cooperative Housing Society*. In that case, the Zoroastrian society restrained its members, who were all Parsis, from

[10] *Supra* note 2 at para 29.
[11] *Id.*
[12] *Id.*

selling their plots of land to any person outside the Parsi community.[13] The counsel on behalf of the Zoroastrian society argued three points to defend the bye-law containing the restraint:

1. Under Article 19(1)(c), Parsis have a fundamental right to form an association including a cooperative housing society to serve their own purposes and limited only to themselves.[14] Therefore, the Zoroastrian Cooperative Society stood on a different footing from a purely voluntary association or a society.[15]
2. There was no law as required by Article 19(4) and no provision in the Gujarat Cooperative Societies Act for imposing a restriction, much less a reasonable restriction, on the aforesaid fundamental right under Article 19(1)(c) for achieving any of the purposes mentioned in Article 19(4).[16]
3. Under Article 29, "the Parsis have the right to conserve their culture" as it was a minority.[17]

Keeping these three points in mind, the Supreme Court held that cooperative housing societies, not restricted by a law as required by Article 19(4) (e.g. a state-made Cooperative Act), have the right to restrict alienation of property only to members of its own community. Further, the court noted that so long as there is no legislative intervention by means of a 'law' eliminating a qualification for membership based on any ground such as sex, religion or persuasion or way of life, it is not open to the court to coin a theory that a particular bye-law is not 'desirable' and would be 'retrograde' and opposed to public policy as indicated by Parts III and IV of the Constitution.[18] In addition, to prove in this case that the doctrine of reasonableness is satisfied and Section 10 of TPA does not apply, the court held that it was necessary

[13] *Supra* note 1 at para 40.
[14] *Id.* at para 6.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at para 22.

to first look at the objectives of the housing society and then alone at the restrictions enforced by it.[19] The court asserted that as the object of the housing society was community welfare and economic and social upliftment, such an object cannot be questioned on the ground of any 'constitutional scheme' (such as integrity of the nation or nationalism) and the restriction enforced on its members to sell the property only to Parsis was valid.[20]

The court further held that the restraint on alienation is not an absolute restraint as the transferors have the right to transfer the property to a person who is qualified to be a member of the society as per its bye-laws.[21] The court concluded that such restrictions are at best a partial restraint on alienation and "valid if imposed in a family settlement, partition or compromise of disputed claims".[22] In light of such a qualified restriction, the court recognized *Mohd. Raza v. Abbas Bandi Bibi*,[23] and *Gummanna Shetty v. Nagavenimma*,[24] as good law and held that such a restriction by a collective body on itself is in the interests of the community as the member of the society voluntarily submerges his rights into those of the society.[25] Therefore, the bye-law of the Zoroastrian Society imposing a restraint on alienation which permitted sales to only the Parsi community was held to be valid and not ultra vires the statute or state legislation or any constitutional tenet (such as nationalism).

As the Parsi community was a minority community, keeping in mind the interests and objectives of the cooperative society, the court held that owing to the absence of an appropriate legislation under Article 19(4), the restriction on alienation by the housing society was by itself reasonable and enforceable in law. The court also noted that membership in a cooperative society brings about a contractual relationship among the members forming it subject, of course, to the

[19] *Id.*
[20] *Id.* at para 41.
[21] *Id.*at para 42.
[22] *Id.*
[23] Mohd. Raza v. Abbas Bandi Bibi, (1932) 59 IA 236.
[24] Gummanna Shetty v. Nagavenimma, (1967) 3 SCR 932.
[25] *Supra* note 1 at para 42.

Act and the Rules.[26] Therefore, as the bye-laws are contractual and consensual and not statutory in nature, the restraint on alienation imposed by the bye-laws of cooperative societies for the community itself are valid. Thus, the restraint on alienation is not hit by Section 10 of the TPA. Minority communities are special cases. Therefore, such cases can be given special treatment to safeguard the rights of minorities, so as to give them an opportunity to prosper rather than throwing them into the national or general pool with other voluntary associations or societies which will reduce the chances of members of a minority community to grow and develop. All in all, the dictum of *Zoroastrian* stands summed up by the Court as follows:

> "**34.**…it is not possible to import one's inherent abhorrence to religious groups or other groups coming together to form, what learned counsel for the respondent called "ghettos"….
>
> **38.** It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the court….
>
> **39.** The appellant Society was formed with the object of providing housing to the members of the Parsi community, a community admittedly a minority which apparently did not claim that status when the Constituent Assembly was debating the Constitution. But even then, it is open to that community to try to preserve its culture and way of life and in that process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotment of lands or buildings in one's capacity as a member of that society, to preserve its object of advancement of the community. It is also open to the members of that community, who came together to form

[26] *Id.* at para 21.

> the cooperative society, to prescribe that members of that community for whose benefit the society was formed, alone could aspire to be members of that society. … Even today, we have women's cooperative societies, we have cooperative societies of handicapped persons, we have cooperative societies of labourers and agricultural workers. We have cooperative societies of religious groups who believe in vegetarianism and abhor non-vegetarian food. It will be impermissible, so long as the law stands as it is, to thrust upon the society of those believing in say, vegetarianism, persons who are regular consumers of non-vegetarian food…"

IV. The Dayalbagh Case

The dictum in *Zoroastrian* case stands out distinctly when contrasted with the case of *Delhi Dayalbagh Cooperative Housing Society Ltd. v. The Registrar Cooperative Society.* The *Dayalbagh case* is a case with slightly different facts in which an opposite view was taken by the Delhi High Court. The Delhi Dayalbagh Housing Society (hereafter Dayalbagh Society) restricted alienation only to members/followers of the Radha Soami faith.[27] The restriction gave rise to an interesting question.

On the face of it, the facts of the *Dayalbagh* case were similar to those of the *Zoroastrian case*. The members of the Radha Soami faith placed reliance on the *Zoroastrian case* as a precedent. As in the Zoroastrian Society, the Dayalbagh Society too claimed to have been formed for economic and social betterment of the Radha Soami community. But, unlike the Zoroastrian Society, the Dayalbagh Society had a right of pre-emption to buy the property from its members who were intending to sell. The High Court perceived that the Dayalbagh society was seeking to earn profit by buying houses at ostensibly the prevailing market value while exercising the right of pre-emption.[28] "It was of no use for the society to state that the Dayalbagh society is willing to give market price while exercising the right of pre-emption since the

[27] *Supra* note 2 at para 15.
[28] *Id.* at para 57.

market price itself was dependent on as to whom the property could be sold".[29] Therefore, the court took the view that the seller would never be able to get an appropriate price when the zone of the purchasers was so restricted.

The Delhi High Court pointed out that the objective of the community was really to develop the land and transfer rights in the plot and not to indulge in sale and re-sale of property:[30] The court held that, "The society, in fact, wants to become a property broker and earn profit from the land, which is not permissible".[31] Thus, although at first blush the *Zoroastrian* judgment of the Supreme Court appeared to be binding on the High Court, still the High Court refused to treat it as a precedent. The High Court gave the following reasoning for its conclusion:

1. Under Article 19(1)(c), the Zoroastrian society had a fundamental right of forming an association including a housing society to serve its purposes and limited only to itself without making profit out of the land[32]. But the Dayalbagh Society indulged in profit making.[33]
2. Unlike the *Zoroastrian case*, where no law as required under Article 19(4) existed in the State of Gujarat, in the *Dayalbagh case*, the Delhi Cooperative Societies Act imposed a restriction and thus the restraint on alienation by Dayalbagh society was not permissible.[34]
3. Unlike the Zoroastrian society, the Dayalbagh society was not formed to preserve the culture or tradition of a particular community or religious group; rather "the Radha Soami group is only a sect of the mainstream Hindu group".[35] The California Courts of Appeal in the *Taormina*

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at para 42.
[33] *Id.* at para 57.
[34] *Id.* at para 49.
[35] *Id.* at para 27.

> case had held that if the availability of ownership of a piece of land is limited to too small a group, it is an unreasonable restraint.[36]

In other words, the High Court took note of the fact that the *Zoroastrian case* had dealt with a society formed by persons of the Parsi community which was admittedly a minority whereas in the case of the Dayalbagh Society, the society consisted of only a sect of the mainstream Hindu religion.[37] Further, the court noted that in the *Zoroastrian* case as per the Supreme Court's judgment, "there was nothing under the Act in question that precluded the formation of the society",[38] whereas in the *Dayalbagh case* there are provisions of the Delhi Cooperative Societies Act and Rules which do not allow the functioning of such a society.[39] The court held that the Dayalbagh society cannot impose a restraint on alienation of property by its members merely on the basis of a sect of a religion that comprises of just a few hundred persons out of the entire population. As there was only a limited number of persons who were followers of the Radha Soami faith and as the bye-laws of Dayalbagh Society did not conform to the Delhi Cooperatives Societies Act, the restraint on alienation by the Dayalbagh Society would not be permissible. Therefore, it will be hit by Section 10 of the TPA and be void. The Dayalbagh Society is not a diminishing community or an oppressed group, but a self- proclaimed voluntary association made not to preserve its culture but to make profit in the long-run. Hence, the restraint by it does not meet the test of reasonableness. If the restraint on alienation is permitted even in such a case, it would allow a voluntary association and society to exploit its members without anyone being able to keep a check on the objectives with which the community had formed the Housing Society in the first place. Nationalism or the general welfare of all citizens was given primacy in such a case.

V. Conclusion

In India, therefore, the doctrine of reasonableness helps one identify

[36] *Id.* at para 29.
[37] *Id.* at para 27.
[38] *Id.* at para 42.
[39] *Id.* at para 43.

the social factors which differentiate between an absolute and a partial restraint on the transfer of property in the nation. Therefore, in the light of Article 19(1)(c) and Article 19(4), one should look at restraint on alienation on a case-to-case basis and make an exception for those cases where minority communities or cooperatives take care that the restraint on alienation is not exploitative or meant to make profit but is rather designed to be used reasonably for the social cause of upliftment of the concerned community and no more.

Thus, cooperative societies made for safeguarding the interests and promoting economic and social betterment of minorities even under a constitutional system advocating fraternity and integrity of the nation are justified in restraining alienation only to members of the society. Such a restraint helps in ensuring upliftment of the concerned community and helps restore belief in the development of citizens as members of a special group or community though not as citizens of a nation.

BOOK REVIEW

'Courts of India- Past to Present'*

ASHOK H. DESAI†

This volume on the various courts and the governing laws of India covers what can be a daunting field. Our legal system has a complex history- both, because of the multiplicity of its ancient and later sources, and of various administrations which enforced it in different parts. Mayne described Hindu Law as having the most ancient pedigree of any code.[1] In the absence of a unified political rule, different parts of India had developed their own legal frameworks depending on the nature of the rule. Even in matters of criminal law, the law applicable could depend not merely on the type of crime but even on the caste or community of the party concerned.

The fascinating part of the growth of Indian law has been the manner in which it was able to absorb rules from disparate sources. For instance, the rock edict of Ashoka at Girnar was a part of a series of inscriptions spread throughout India carrying out the message of

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1 See JUSTICE RANGANATH MISRA, MAYNE'S TREATISE ON HINDU LAW AND USAGE (Bharat Law House, 2012).

the Hindu and the Buddhist approach. To this was later added the dynastic administration in various Hindu kingdoms from Kashmir to the Deccan. This was followed by a large number of Muslim dynasties with their own judicial approach set out in detailed hierarchies.

The earliest western intrusion was by traders. The Portuguese were able to introduce their law in a small portion of Western India. Notably, Governor Albuquerque imposed a ban on the practice of self-immolation by widows (*sati*) in Goa as early as 1510. The more familiar court system started after Queen Elizabeth I had granted the Royal Charter to London merchants on December 31, 1600. This led to the first factory established in Surat after obtaining an imperial *farman* of a local *nawab*. The Common Law spread by the establishment of successive areas being extended under British control starting with Calcutta, Bombay and Madras. The activities of the East India Company were founded on trading and exploitation of resources. The Company discovered that uniformity of a legal system was helpful for this purpose.

Legal pluralism during the Company rule makes for a fascinating study. For instance, Singapore was under the jurisdiction of the Calcutta High Court from 1823 to 1867 while the Bombay High Court had jurisdiction over Zanzibar!

The modern system developed rapidly after the first three Charters establishing the Mayor's Court. It developed more coherently after 1857 when the East India Company was stripped of its power and Letters Patent were granted in 1862 to the High Courts of Calcutta, Bombay and Madras and later to other courts. Each High Court developed its own rich traditions. Even earlier, and increasingly after 1862, the Courts were known for their judges and lawyers, both notable and sometimes even notorious. The first Chief Justice of the Supreme Court of Judicature at Fort William was Sir Elijah Impey whose punishment of Nand Coomar was denounced by Macaulay as "judicial murder". That very court also produced outstanding scholar-judges like William Jones,the great philologist,and Ashutosh Mookerjee. The independence of the judiciary was guarded by the courts. In Bombay in 1828, Chief Justice Sir John Peter Grant closed-down the Court when Governor

Malcolm declined to enforce its order. Madras had its galaxy from Sir Muthuswamy Iyer to C. Rajagopalachari– all legal and social leaders. Various other High Courts, especially Allahabad, Lahore and Patna also developed as great legal centres which encouraged a strong Bar. The Bar was an important resource for providing leaders to the Indian freedom movement. This practice has continued to flourish after independence when the Constitution enlarged the jurisdiction of the courts to strike down bother rant executive actions and even legislative measures if they infringed fundamental rights.

What lends this volume special distinction are the various evocative chapters on the different High Courts of India,the Privy Council, the Federal Court and the Supreme Court. Special mention must be made of photographs of the Courts starting with the earlier Indo-Gothic architecture,as well the construction of the Supreme Court and the post-independence High Courts. Another absorbing chapter is devoted to famous trials and cases that made history, including the trial of Bahadur Shah Zafar (1857-58) who was denied even his '*do gaz zameen*'; the sedition trials of Bal Gangadhar Tilak (1897-1908), resulting in his imprisonment in Mandalay;the Alipore Bomb case where Sri Aurobindo was an accused (1908-09) and was tried by Justice Beachcroft who was his contemporary at Cambridge, and the sedition trial of Mahatama Gandhi (1921) in which Justice Broomfield held him guilty,but paid him a moving tribute from the Bench. All these are illustrated by contemporary photographs and lithographs including those related to the *Bhawal Sanyasi* case, the trial of Bhagat Singh and the Indian National Army trial where Bhulabhai Desai was assisted by Nehru and Sapru in the defence team. Equally colourful are the descriptions of the Members of the Bar and the Bench and what is admirably called the ecosystem of justice including court hierarchies, administration and the legal profession.

It is clearly necessary for any lawyer to know about the sources of his legal system and its traditions. Both for its text and the illustrations,this book should become a necessary part of any legal library.

BOOK REVIEW

'On Nationalism': A Book for Troubling Times*

GOVIND MANOHARAN†

> You think your pain and your heartbreak are unprecedented in the history of the world, but then you read. It was Dostoevsky and Dickens who taught me that the things that tormented me most were the very things that connected me with all the people who were alive, or who ever had been alive.[1]

"We live in troubled and troubling times"—there can be no better articulation of the relevance and importance of the collection of essays compiled in *On Nationalism*, than these opening lines of David Davidar in the foreword to the book. These are indeed troubling times- where people are murdered on the streets in the (holy) name of an animal and families are torn apart on a rather clumsy portmanteau of English and Arabic. These acts which ought to bring together a nation in condemnation, are instead irreconcilably dividing it poles apart. The chaotic war of words in our divided nation is really a war *for* words and the meaning of images. What is secularism? Who is an Indian? Who is an anti-national? This book addresses such questions and more.

* ROMILA THAPAR, A.G. NOORANI AND SADANAND MENON, ON NATIONALISM (Aleph Book Company, 2016).

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1 Jane Howard, *Doom and glory of knowing who you are*, LIFE, Vol. 54, No. 21 (May 24, 1963) at 89 (quoting James Baldwin).

At the foundation of all these competing claims that are made to ideas and identities- both real and imaginary- is the concept of nationalism. In the context of last year's intense debate surrounding the Jawaharlal Nehru University ("JNU") incidents, this term has taken centre-stage in public discourse in India.[2] David Davidar's Aleph Book Company, which has previously published many important titles such as Late Justice Leila Seth's poignant *Talking of Justice: People's Rights in Modern India* (2014) and Wendy Doniger's controversial *On Hinduism* (2013), compiled this important set of three riveting essays on nationalism by Romila Thapar, A.G. Noorani and Sadanand Menon. Although the book was published in 2016 and this review is being written almost a year later, the ideas and arguments mooted in these essays are more relevant than ever, particularly in light of the horrors that are being justified in the name of nationalism.

Without hammering away at the obvious, it must be noted here that this book is not just a collection of essays by a somewhat motley crew of free, liberal thinkers of considerable eminence. Each essay is an argument on three different fields which have in the last few years become arenas for competing ideas of nationalism— history, law and culture. While Thapar records the historical context of Indian nationalism and its modern-day manifestation, Noorani in his forensic style analyses the evolution of the law of sedition in India and the origins of the phrase *Bharat Mata Ki Jai*. Menon's piece is carefully detailed, weaving together relevant cultural motifs such as *Vande Mataram* and *Bharatanatyam*, explaining their placement in popular culture as well as their deliberate sanitization as a manifestation of cultural nationalism.

I. Two Types of Nationalism—A Historical Perspective

> I conceive of God, in fact, as a means of liberation and not a means to control others.[3]

[2] Aranya Shankar, *JNU student leader held on 'sedition' charges over Afzal Guru event*, The Indian Express, February 13, 2016, *available at* http://indianexpress.com/article/india/india-news-india/afzal-guru-film-screening-jnu-student-leader-held-for-sedition/.

[3] James Baldwin, Nobody Knows My Name: More Notes of a Native Son 127 (Dell Publishing, 1962) (address delivered at Kalamazoo College in February,1960).

Thapar's essay, entitled *Reflections on Nationalism and History*, takes the reader back to the Indian freedom movement, when nationalism was in the air that people breathed. There was only one nation and one identity— India, and Indians. Nationalism was instrumental in bringing together communities based on a singular identity, to stand up to an external force, the British. Thapar traces the history of "nations" as a concept that took birth in post-Enlightenment Europe and asserts that the quality of nationalism as a unifier makes it non-problematic. Theocratic claims to identity or to a common, homogenous heritage had no place in the context of the freedom movement. Of course, there is no denying that present-day nationalism based on theosophical ideas were floating around in pre-independent India through the works of M.S. Golwalkar and V.D. Savarkar.[4]

Discussing the works of Benedict Anderson, Ernest Gellner and Eric J. Hobsbawm, the essay not only provides an international perspective on the concept of nationalism, but also makes a case for its pervasiveness in society, culture and most importantly, history.[5] In search of a possible explanation as to why claims to narratives in history are most important in the conflict between nationalism and pseudo-nationalism, Thapar cites Hobsbawm to say that history is to nationalism what poppy is to a heroin addict. She rightly critiques historians who have spun a narrative of Hindu victimisation at the hands of Muslim rulers with two critical facts—the two thousand year-long oppression meted out to *dalits* and *adivasis* (which is propagated in some measure even today), and the relative modernity of present-day Hindu practices which are largely derivative of *Bhakti* and *Tantric* traditions. She argues that any claim of Hindu victimisation is completely contrary to historical evidence, and in fact, "different cultures investigated other cultures to find points of integration and disagreement". Equally, her criticism of colonial

[4] *See* Dr. Shamsul- Islam, Golwalkar's We Our Nationhood Defined: A Critique with the full text of the book (Pharos Media and Publishing, 2006); V.D. Savarkar, Hindutva (Hindi Sahitya Sadan, 2003).

[5] *See* Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (Verso, London, 1983); Ernest Gellner, Nations and Nationalism (Cornell University Press, Ithaca, 1983); E.J. Hobsbawm, Nations and nationalism since 1780 (Cambridge University Press, 1990).

interpretations of Indian history, as having fanned the notion of pre-eminence of Hindus by putting religious narratives in conflict, arrives at a troubling foundational concept of pseudo-nationalism- Hindutva.

Hindutva, being the semitization of Hinduism, or "syndicated Hinduism", has grown to be known as the ascribed identity of a Hindu according to nationalist narratives. Thapar, who has always been critical of Hindutva, uses its inherent contradictions to expose the exclusion of *dalits* and *adivasis* in the name of caste. All religions in India- be it Islam, Christianity or Hinduism- preach social equality, but cannot achieve it as long as caste-based discrimination is entrenched in our societal psyche. While recognizing that there may be an apparent justification of caste-based structures in Hindu codes, she questions what theological justifications the Abrahamic religions can seek shelter under for the proliferation of discrimination. Thapar mounts a formidable case against pseudo-nationalism, which hinges on sloganeering and a jingoistic display of affection towards the "motherland" while at the same time, excludes sects of people who rightfully belong to this nation.

Thapar concludes on a personal note about the development of JNU as a marketplace for ideas and inter-sectional activism against various forms of oppression, right from its inception in 1969. It was in the wake of the 1968 student protests in France, that JNU was created by an Act of Parliament introduced in the Rajya Sabha by one of the greatest judges of the Bombay High Court, M.C.Chagla.[6]

Thapar's final call for inclusiveness as a nation to stand against any form of oppression on our citizens, especially our students who must inherit this land and our history, is buoyed up by these powerful yet poignant words- "[T]he place for arguing about the validity of revolution was not prison, but universities".

II. Weaponization of the Law and Nationalism

Well, if one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the

[6] Then the Education Minister of India from 1963 to 1966.

unprotected — those, precisely, who need the law's protection most— and listens to their testimony.[7]

A.G. Noorani's essay entitled *Nationalism and Its Contemporary Discontents in India* is divided in two parts, both dealing with the question of free speech. In the first section, he deals with the law of sedition by which various governments of India have tried to curb free speech. The second section is in relation to the phrase *Bharat Mata Ki Jai*, the compelled utterance of which, in the last few years have become an instrument of oppression at the hands of right-wing fanatics.

There is a pattern to be seen in Section 124-A of the Indian Penal Code, 1860 ("IPC") which prescribes the offence of sedition, and the Armed Forces Special Powers Act, 1958 ("AFSPA")— both these legal provisions have their origins in pre-independent India, and both were enacted by the British to control and suppress the freedom movement. While the grandfather ordinance to the AFSPA was promulgated as an immediate reaction to the Quit India movement (ironically on 15th August, 1942) by Lord Linlithgow,[8] Section 124-A was introduced by an amending Act to the IPC by Sir James Fitzgerald Stephen in the month of August, 1870. Noorani notes that the original draft of the IPC, drafted by Macaulay, contained a similar provision which was dropped at the time of its enactment in 1860.

While laboriously tracing the history of this provision, Noorani, in his inimitable style, argues that the provision was not only colonialist but also racist. Justice Heydon of the Australian High Court in his wonderful piece on the origins of the Indian Evidence Act, explains the reasons behind Stephen's colonial attitude with an interesting analogy to Virgil's admiration of the Roman Empire in the Aeneid.[9] Sir Stephen saw the role of the British Empire as somewhat similar to its Roman counterpart who spread civilization all over the world. The effect of this draconian, colonial and racist law was played out in full during the various sedition trials of pre-independent India, starting with the

7 James Baldwin, No Name in the Street (Vintage Books, 1972).

8 Viceroy and Governor General of India (1936-1944).

9 J.D. Heydon, *The Origins of the Indian Evidence Act*, Oxf. Uni. Commonwealth L. J., 10 (1) (2010) at 14-15.

first Tilak trial which was presided by Justice Arthur Strachey.[10] Justice Strachey supplied a stricter interpretation to the phrase "disaffection towards the government" in Section 124-A. Taking the reader through the second trial of Tilak and others of Jogendra Chandra Bose, the Ali Brothers and Mahatma Gandhi, Noorani makes an important point as to how the provision was progressively employed to curb Indian nationalism. Public opinion had formed against the provision, but the process before the Constituent Assembly had initially included sedition as a restriction on free speech under Article 19(2). Noorani reminds us that, K.M. Munshi played an instrumental role in having it removed in the final version of the article. Noorani thereafter notes the reflection of public opinion against Section 124-A in independent India through the Supreme Court of India, and the Press Commissions report that recommended the repeal of the section.[11]

All such developments were pointless, when the Supreme Court upheld the constitutionality of the provision in *Kedar Nath's* case.[12] Noorani notes the conspicuous absence of any detailed discussion on the Constituent Assembly's deliberation on sedition, the recommendations of the Press Commission and worst of all, any reference to the decision of the full bench of the Allahabad High Court striking down the provision.[13] Noorani (perhaps uncharitably) remarks that an undergraduate's essay on sedition with these blemishes would have been met with a deserved reprimand. Unquestionably, at least some of the above ought to have been considered by the bench in *Kedar Nath*, but like Noorani himself notes, the decision has been followed without doubt or demur by subsequent benches of the Supreme Court till date. Noorani then analyses the position in the United States and UK where the courts have frowned upon the laws of sedition and in the case of the latter, sedition was abolished by an Act of Parliament in 2009.

An arduous tracing of the history of the section is necessary to

[10] By a curious coincidence, Sir John Strachey to whom Sir Stephen dedicated his seminal "Liberty, Equality and Fraternity", was also the father of Justice Arthur Strachey.

[11] Romesh Thappar v. State of Madras, AIR 1950 SC 124.

[12] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.

[13] Ram Nandan v. State, AIR 1959 All 101 (FB).

understand the context in which this draconian law was imagined by an ultra-conservative colonialist to repress a nationalist movement, and to lay emphasis on the irony of its continuance by today's leaders against our own people. Noorani does not mince any words in calling out the present-day regime for usurping the prerogative of the courts and pronouncing the guilt of certain citizens, who he describes as *swadeshi* Joseph McCarthies. He calls for freedom to debate and to ask uncomfortable questions, be it about Afzal Guru or on any matter in a liberal democracy without the fear of being labelled "anti-national".

The second and shorter section of Noorani's essay focuses on the phrase *Bharat Mata Ki Jai* and the "fondness" of the advocates of modern-day nationalism towards it. In five points, he analyses this admiration to the phrase by right-wing groups, tracing the problematic history of the phrase from Savarkar's idea of *mathrubhumi* as being the common mother and the Holyland. He then moves on to how this was echoed by Golwalkar, and found its way into the freedom movement in the form of *Vande Mataram* from *Anandamath*. The underlying notion is that by linking religious identity to a common motherland, it helps push the argument that all Muslims/Christians in the country are originally Hindu, and until they expressly show allegiance to this Motherland/Holyland, they have no place in India. This is an instance of how a cry for unification during the Independence movement has been clinically fashioned into a weapon of oppression against citizens who do not ascribe to the notion of Hindu nationalism.

III. The question of Cultural Nationalism

> Words like "freedom," "justice," "democracy" are not common concepts; on the contrary, they are rare. People are not born knowing what these are. It takes enormous and, above all, individual effort to arrive at the respect for other people that these words imply.[14]

Perhaps, the most brazen attack that modern-day nationalism inflicts to the plurality of the nation is in the cultural sphere. In *From National Culture to Cultural Nationalism,* Sadanand Menon navigates

[14] James Baldwin, *The Crusade of Indignation*, The Nation (New York, 1956).

a wider plane, urging us to re-examine our conscience as a society. He concluded with these very same words elsewhere in the context of the shocking image of schoolgirls throwing stones in Kashmir's Lal Chowk.[15] Our conscience as a society is greatly influenced by many motifs in the cultural and artistic plane. Thus, for anyone waging a war for words and meaning of images, it is important to win this battle; Menon argues that the origins of this battle started with *Bharat Mata* and Chatterjee's *Anandmath*.

The highly chauvinistic portrayal of India as the Motherland, seeking primacy of Hindi and sanitization of art-forms to establish a cultural coherence and moral superiority is the evil of cultural nationalism. He argues that this, a rogue form of nationalism, is the cause that re-works the history books taught in schools and also strips *Sadir* of its authentic sensuality to be more appealing to the upper-caste audience and to inject a false religiosity in the art-form.[16] In fact, the art-form was renamed by the Madras Music Association as *Bharatanatyam*, to give a national appeal to it, in the wake of the calls for the ban of the nautch tradition. However, this was also intended to cleanse the art-form of its impure associations.[17]

Menon is on point when he identifies the problem with extreme mother-love as being a camouflage for extreme misogyny. At the root of any moral and cultural reformation is the oppression of the female gender. The hypocrisy is clear as day in the abuses that are hurled at women activists/writers who call for gender equality. There is something deeply disturbing about this- as Menon points out citing Wilhelm Reich- that cultural nationalism is the basic emotional attitude of the suppressed man.[18] Thus, the concerted and deliberate attempts to suppress female sexuality gets sanction from these so-called protectors of Indian culture or *sanskar*.

[15] Sadanand Menon, *When Little Girls Pick up Stones*, The Hindu, April 29, 2017, http://www.thehindu.com/society/when-little-girls-pick-up-stones/article18305180.ece

[16] *Sadir* is the ancient predecessor of Bharatanatyam.

[17] Amanda J. Weidman, Singing the Classical, Voicing the Modern: The Post-Colonial Politics of Music in South India, Duke University Press, 2006 at 116-117.

[18] Wilhelm Reich, The Mass Psychology of Fascism (1933).

The in-roads these "protectors" have achieved into film, art and even science is highly disturbing, what with the calls for exclusion of Pakistani artists in the Hindi film industry, banning of works of M.F. Hussain and the "alt-science" that is seriously debated in scientific conclaves.[19] The existence of an alternative thought is acceptable and ought to be encouraged as long as it does not obliterate any other form of competing thought. The killings of Dabholkar, Pansare and Kalburgi is the chilling consequence of cultural nationalism's violent face. Menon cautions that in the 1984 riots after Indira Gandhi's death, the Indian state officially decided that it would speak through mobs and this is not far from the truth in the face of lynchings that we have, sadly, become numb to as a society. Menon concludes by stating that we have come full circle as a nation who searched for a national culture only to arrive at the courtyard of cultural nationalism.

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These essays are a counter-offensive to the conservative thought that is forced down everyone's throat by the present-day regime and its virulent non-State extensions. Published in the wake of last year's JNU protests, it hardly loses relevance as we witness newer and more brazen manifestations of modern-day nationalism in different spheres of daily life. The ideas in these essays are fundamental to the concept of nationalism and is rooted in rational inquiry. If one alleges that the ideas in the essays lack freshness, it is amply supplied by the context in which they are reproduced—in a time when they are sought to be obviated as being the ramblings of the "sickular" and "libtard". In a country which has been fortunate to be at the centre of the social media revolution, the subversion of the form to supply false and misleading narrative to the masses is disconcerting. Gaming of the messaging by popular media and the Internet necessitates this book. Begging for a follow-up on the impact of nationalism on the media and modern-day technology, this book must find a place in the shelves of anyone in this country who still believes in debating ideas.

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[19] *Ancient India had interplanetary planes: Science Congress told*, Business Today, January 5, 2015, http://www.businesstoday.in/current/economy-politics/indian-science-congress-ancient-india-had-planes/story/214235.html.

Leading Judgments on 'Nationalism'

Ayush Puri[†]

I. The National Anthem case (*Bijoe Emmanuel v. State of Kerala*)[1]

The Appellant school children were expelled from school for refusing to sing the national anthem, even though they stood respectfully while it was sung. They contended that the tenets of their faith, Jehovah's Witnesses, did not permit them to sing the national anthem as it involved pledging allegiance to the State, and not God. Allowing the appeal, the Supreme Court held that there is no provision of law which obliges anyone to sing the national anthem. It observed that the children stood respectfully while the Anthem was sung, and that not joining in the singing is not prohibited under the Prevention of Insults to National Honour Act, 1971. The circulars issued by the state allowing expulsion on such grounds were found to be in contravention of Articles 19(1)(a) and 25(1) of the Constitution.

II. Bigamy under Hindu Law and the Uniform Civil Code (*Sarla Mudgal v. Union of India*)[2]

In this case, the Court considered the validity of a second marriage solemnized by a Hindu man after converting to Islam. The Court expressed the need for a Uniform Civil Code which would supersede all personal laws. It observed that Article 44 of the Constitution is based on the concept that there is no necessary connection between religion and personal law in a civilised society. It observed that, "Hindus alongwith Sikhs, Buddhists and Jains have for saken their sentiments in the cause

[†] Advocate, Supreme Court of India.

[1] (1986) 3 SCC 615.

[2] (1995) 3 SCC 635.

of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "Common Civil Code" for the whole of India".[3] It further observed that, "[T]hose who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation- Indian nation- and no community could claim to remain a separate entity on the basis of religion".[4] In light of these observations, the Court directed the Government of India to state, by affidavit, the steps taken and efforts made towards securing a "Uniform Civil Code" for the citizens of India.[5]

III. The 'Hindutva' cases (*Ramakant Mayekar v. Celine D'Silva*;[6] *Suryakant Venkatrao Mahadik v. Saroj Sandesh Naik*;[7] *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*;[8] *Abhiram Singh v. C.D. Commachen*)[9]

The main issue in the case of *Ramakant Mayekar v. Celine D'Silva*,[10] was whether using the word '*Hindutva*' in wall paintings and video cassettes amounted to an appeal for votes on the ground of Hinduism. The Court therefore examined whether such acts could be considered as "corrupt practices" under Sections 123(3) and (3A) of the Representation of the People Act, 1951 ("RP Act"). The Supreme Court followed the decision in *Suryakant Venkatrao Mahadik v. Saroj Sandesh Naik*,[11] and held that '*Hindutva*' is not confined to the Hindu religion and is related to Indian culture and heritage.[12] It is the context and manner in which it is used that determines its true meaning. Mere mention of '*Hindutva*' in a speech during an election campaign did not necessarily mean an

3 Sarla Mudgal v. Union of India, (1995) 3 SCC 635) at para 33.
4 *Id.* at para 35.
5 *Id.* at para 38.
6 (1996) 1 SCC 399.
7 (1996) 1 SCC 384.
8 (1996) 1 SCC 130.
9 (2017) 2 SCC 629.
10 (1996) 1 SCC 399.
11 (1996) 1 SCC 384.
12 Ramakant Mayekar v. Celine D'Silva, (1996) 1 SCC 399 at para 26.

appeal to the voters in the name of the Hindu religion.[13] The Court also relied on *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*.[14] In *Yeshwant Prabhoo*, the Supreme Court held that no precise meaning can be ascribed to the words 'Hindu', '*Hindutva*' and 'Hinduism'.[15] The term '*Hindutva*' is understood as a way of life or a state of mind and is not to be equated with narrow Hindu fundamentalism and therefore the use of such words while canvassing for votes cannot fall within the prohibition in Sections 123 (3) and/or (3-A) of the RP Act.[16] Further, the Court observed that '*Hindutva*' is used and understood as a synonym of 'Indianisation', that is the development of a uniform culture by obliterating the differences between all cultures coexisting in the country.[17]

More recently, in *Abhiram Singh v. C.D. Commachen*,[18] a bench of seven judges of the Supreme Court held that an appeal to the voters in the name of religion is hit by Sections 123 and 123A of the RP Act. Taking a contrary view to the *Yeshwant Prabhoo* case, the Court observed that the word 'his' in Section 123 refers to the religion of both, the candidate as well as that of his opponents.[19] The Court in this case did not examine the correctness of the decision in *Yeshwant Prabhoo* with respect to the meaning of '*Hindutva*' as the reference in the present case was limited to the issue of whether an appeal to voters on the ground of religion was prohibited under the RP Act.

IV. The Viceregal Lodge case (*Rajeev Mankotia v. Secretary to the President of India*)[20]

The petitioner filed a writ petition to restrain the respondent from converting the Viceregal Lodge, a protected monument into a tourist hotel. The Supreme Court observed that the "Viceregal Lodge is a mute

13 *Id*.
14 (1996) 1 SCC 130.
15 Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130 at para 37.
16 *Id*. at paras 37 and 39.
17 *Id*. at para 39.
18 (2017) 2 SCC 629.
19 Abhiram Singh v. C.D.Commachen, (2017) 2 SCC 629 at para 157.
20 (1997) 10 SCC 441.

witness to the destruction of Indians, their subjugation as subjects of British empire".[21] The Court also observed that, "it furnishes the historical evidence of the colonial holocaust unleashed on Indians and reflects upon the triumph of Indian nationalism. It has laid seedbed to the end of the British colonialism."[22] Thus, the Court opined that, if "we forget the past and repeat the same mistake, we would stand to lose our nation's unity and integrity" as well as the "opportunity to integrate into the world our great democratic Bharat Republic".[23] The Court held that the State and Union Governments should protect all such national monuments in their original form so that the cultural and historical heritage of our country is preserved.

V. The National Flag case (*Union of India v. Naveen Jindal*)[24]

The respondent was stopped from flying the national flag atop his factory. The Supreme Court while upholding the decision of the High Court held, that flying of the national flag with dignity and respect is a fundamental right under Article 19(1)(a) and could be fettered only by reasonable restrictions under Article 19(2).[25] It was also observed that,a piece of cloth, the national flag indisputably stands for the whole nation, its ideals, aspirations, its hopes and achievements as well as its honour and glory.[26] The Court observed that, "….When it goes up the flying mast, The heart of a true citizen is filled with pride".[27] National flags are intended to project the identity of the country they represent and foster national spirit. Thus, for all nations,the national flag has a great amount of significance. The Court further held that the "National Anthem, National Flag and National Song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country".[28]

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21 Rajeev Mankotia v. Secretary to the President of India, (1997) 10 SCC 441 at para 13.

22 *Id.*

23 *Id.*

24 (2004) 2 SCC 510.

25 Union of India v. Naveen Jindal, (2004) 2 SCC 510 at para 90.

26 *Id.* at para 7.

27 *Id.* at para 8.

28 *Id.*at para 27.

VI. Cinematic Depictions of the National Anthem (Karan Johar v. Union of India)[29]

The Madhya Pradesh High Court had directed the producers of the movie *Kabhi Khushi Kabhi Gham* to remove a scene depicting the national anthem and until that time, the movie was prohibited from being exhibited at any theatre. Allowing the appeal, the Supreme Court held that when the national anthem is exhibited in a newsreel or documentary or in a film, the audience is not expected to stand as the that would interrupt the exhibition of the film and would create disorder and confusion, rather than add to the dignity of the national anthem.[30]

VII. "Sindh" and the National Anthem (*Sanjeev Bhatnagar v. Union of India*)[31]

Under Article 32, the Petitioner sought a direction to the Union to delete the word "Sindh" from the national anthem on the ground that Sindh was no longer a part of independent India and its presence in the national anthem hurts the sentiments of the people. The Supreme Court observed that "a National Anthem is a hymn or song expressing patriotic sentiments or feelings. It is not a chronicle which defines the territory of the nation which has adopted the Anthem. A few things such as the National Flag, the National Song, the National Emblem and so on, are symbolic of our national honour and heritage….The National Anthem is our patriotic salutation to our motherland, nestling between the Himalayas and the oceans and the seas surrounding her. The mention of a few names there in is symbolic of our recollection of the glorious heritage of India".[32] The Court observed that 'Sindh' is not just a geographical region but also refers to a culture, of the Indus Valley Civilization, and even modern India feels proud of its having inherited the Civilisation as an inalienable part of its heritage. Therefore, the Court was not inclined to agree with the submissions of the petitioner and the petition was finally dismissed with costs.

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29 (2004) 5 SCC 127.

30 Karan Johar v. Union of India, (2004) 5 SCC 127 at para 3.

31 (2005) 5 SCC 330.

32 Sanjeev Bhatnagar v. Union of India, (2005) 5 SCC 330 at para 11.

VIII. The JNU Sedition case (*Kanhaiya Kumar v. State of NCT of Delhi*)[33]

The petitioner along with others was accused of raising anti-national slogans at the Jawaharlal Nehru University campus in Delhi upon which they were charged under Section 124A of the Indian Penal Code, 1860. The Court began by quoting from a patriotic song from the movie *Upkaar*, which according to the Court "symbolizes individual characteristics represented by different colours and love for the motherland".[34] The Court observed that persons who raised such slogans could do so in the comfort of their campus because our forces guard the country's borders.[35] It further observed that such slogans may have a demoralizing effect on the families of martyrs.[36] The Court held that the slogans were not protected under Article 19(1)(a) which is not an absolute right, and is fettered by reasonable restrictions under Article 19(2). The Court while granting interim bail directed the petitioner to furnish an undertaking to the effect that he would not participate actively or passively in any activity which may be termed as anti-national.[37]

IX. The National Anthem case (*Shyam Narayan Chouksey v. Union of India*)[38]

The Supreme Court issued various directions to prevent the misuse of and to maintain the dignity and honour of the national anthem. The Court directed that there shall be no commercial exploitation or dramatization of the anthem for financial benefit, the unabridged national anthem shall be played before the screening of any feature film and every person in the hall is obliged to stand in respect with all doors of the hall to be closed to avoid disturbance, the anthem shall not be printed or displayed in any way that disrespects or disgraces it and the national flag is to be displayed when the anthem is played in

[33] (2016) 227 DLT 612.
[34] Kanhaiya Kumar v. State of NCT of Delhi, (2016) 227 DLT 612 at para 1.
[35] *Id*. at para 41.
[36] *Id*. at para 42.
[37] *Id*. at para 52.
[38] (2017) 1 SCC 421.

the cinema halls.[39] The Court observed that, "[L]ove and respect for the motherland is reflected when one shows respect to the National Anthem as well as to the National Flag. That apart, it would instil the feeling within one, a sense of committed patriotism and nationalism."[40] Recently, in *Ashwini Kumar Upadhyay v. Union of India*,[41] a prayer to ascertain the feasibility of singing or playing the national anthem and national song in schools on every working day has been kept alive by the Court. But, the Supreme Court declined to examine the question of playing of the national anthem in the Parliament/Assembly, public offices, courts etc. The petition in *Ashwini Kumar Upadhyay* was tagged with *Shyam Narayan Chouksey*.

X. SARFAESI and Kashmir (*State Bank of India v. Santosh Gupta*)[42]

In the impugned order in the present case, the High Court of Jammu & Kashmir held that Sections 13, 17A, 18B, 3, 35 and 36 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002("SARFAESI") were outside the legislative competence of the Parliament in so far as the state of Jammu and Kashmir ("J&K") was concerned. The High Court held that the said sections were in conflict with Section 140 of the Jammu and Kashmir Transfer of Property Act, 1920 ("J&K TP Act"). The Supreme Court reversed the decision of the High Court and held that the above provisions came within the subject "Banking" in Entry 45 read with Entry 95 of List I of Schedule VII of the Constitution of India. Therefore, the Parliament is empowered by the Presidential Order of 1954, promulgated under Article 370, to enact legislations on banking,irrespective of any conflict with the J&K TP Act.[43] Significantly, the Court also observed that the state of J&K is an integral part of India and was not a sovereign state.[44] The people of J&K are first and foremost citizens of India even though some special rights have been given to them under Section 6 of the

[39] Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421 at para 9.
[40] *Id.* at para 10.
[41] W.P.(C) No. 98 of 2017 (February 17, 2017).
[42] (2017) 2 SCC 538.
[43] State Bank of India v. Santosh Gupta, (2017) 2 SCC 538 at para 26.
[44] *Id.* at paras 47-51.

Constitution of J&K, 1956.[45] The people of J&K are governed first by the Constitution of India and then by the Constitution of J&K, the latter being subordinate to the former.[46]

XI. French Burqa and Niqab Ban case (*S.A.S v. France*)[47]

A French woman practicing Islam had filed a complaint in the European Court of Human Rights ("ECHR"), stating that she was prohibited from wearing a full-face veil (*burqa*) due to the coming into force of a French law that banned the article of clothing. The Grand Chamber of the ECHR upheld the validity of the law and observed that there was no violation of Article 8 (right to respect for private and family life) and Article 9 (right to respect for freedom of thought, conscience and religion) of the European Convention on Human Rights ("Convention") as the law intended to ensure "public safety" and the "protection of rights and freedom of others". Significantly, the Court accepted the contention of the Government that the barrier raised against others by a veil concealing the face in public could undermine the notion of "living together".[48] It was further of the opinion that the veil could hinder interpersonal relationships which by virtue of an established consensus formed an indispensable part of community life within the society.[49] In a judgment delivered on July 11, 2017 in *Belcacemi and Oussar v. Belgium*,[50] the Second Section of the ECHR unanimously ruled that Belgium's ban on wearing an Islamic full-face veil in public does not violate Articles 8,9 and 14 of Convention.

XII. The Greenpeace Detention case (*Priya Parameswaran Pillai v. Union of India*)[51]

The petitioner filed a writ petition against the issuance of a Look

45 *Id*. at paras 51.

46 *Id*.

47 2014-III EUR. CT. H.R. 341.

48 S.A.S v. France, 2014-III Eur. Ct. H.R. 341 at paras 141 and 153.

49 *Id*. at paras 122.

50 Belcacemi and Oussar v. Belgium, Application No. 37798/13, Eur. Ct. H.R. (July 11, 2017), available at https://hudoc.echr.coe.int/eng#{"display":[2],"languageisocode":["FRE"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-175141"]} (French).

51 (2015) 218 DLT 621.

Out Circular ("LOC") by the Respondents. She also challenged her detention at the airport whereby she was restrained from travelling abroad on the ground that the she would otherwise resort to anti-national activities. The High Court of Delhi held that the need to restrain "anti- national activities" did not amount to a reasonable restriction under Article 19 (2).[52] The Court observed that the word anti-national is in effect a combination of two words.[53] The nearest equivalent to the word "Nationalism" would be patriotism. Patriotism as a concept would be linked to nationhood.[54] Nationhood has several attributes which are, *inter alia*, inextricably connected with symbols, such as the national flag, the national anthem, the national song, and the common history, culture, tradition and heritage that people of an organized State share amongst themselves.[55] The Court observed that "In respect of each of these attributes of nationhood, there may be disparate views amongst persons who form the nation.…Contrarian views held by a section of people on these aspects cannot be used to describe such section or class of people as anti-national. Belligerence of views on nationalism can often lead to jingoism. There is a fine but distinct line dividing the two."[56] For an anti-national activity to be brought under Article 19(2), it can only be an "aggravated form of prejudicial activities" which endangers the very existence of the State or at the very least threatens the life and limb of its citizens such as activities by "counter intelligence suspects" and/or terrorists.[57]

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[52] Priya Parameswaran Pillai v. Union of India, (2015) 218 DLT 621 at para 15.2.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*at para 15.3.
[57] *Id.*at para 15.4.

Remembering Dr. Shyamla Pappu

(May 21, 1933 to September 7, 2016)

Priya Hingorani[†]

Dr. Shyamla Pappu, daughter of Late Shri P.N. Murthy (former Registrar of the Supreme Court of India), passed away on September 7, 2016 after an extremely fulfilling career in law and having achieved what most can only dream of.

My personal interaction with Dr. Pappu began from a very young age. My mother, Late Mrs. Pushpa Kapila Hingorani,started practising law in the Supreme Court of India in the year 1961, at a time when there were just three practising women lawyers. Meanwhile,Dr. Pappu initially practiced in Bangalore and later moved to the Supreme Court. Those were particularly challenging times for women lawyers, given how few they were in number. It was perhaps natural then that both, Dr. Pappu and Mrs. Hingorani, each working actively in their own spheres for the protection of rights of the weaker and marginalized sections of society, met often to discuss issues of common interest. While Mrs. Hingorani, together with her lawyer husband, Mr. N. H. Hingorani, Senior Advocate, went on to initiate the unique remedial jurisprudence of Public Interest Litigation (PIL) in India in 1979, Dr. Pappu earned several other firsts, including the distinction of being the first woman lawyer within the entire Commonwealth to be designated as Senior Advocate, and the first woman lawyer to be appointed as the Central Government Standing Counsel in the Delhi High Court. Later, Dr. Pappu was appointed as the Special Standing Counsel for the Government of India in the Supreme Court and worked in that

[†] Advocate, Supreme Court of India and Vice President, Bar Association of India.

capacity for two years.

As a child, I would frequently go to my parents' chambers within the Supreme Court compound, which usually involved a trip to the canteen for sandwiches and gulab jamuns. I would meet Dr. Pappu on several such occasions and she always exuded great warmth and affection. After I joined the Bar, she happily encouraged and supported me in all my endeavours, be it my professional work or elections to the Supreme Court Bar Association. Few people today perhaps know that Dr. Pappu was a great cook apart from being a gifted singer. I remember her beautiful voice and how she readily sang with great enthusiasm at our get-togethers, whether in the Delhi High Court or in the Supreme Court,as recently as in 2015.

As youngsters at the Bar, we observed that Dr. Pappu argued her matters in the Supreme Court with thorough preparation and passion, though always with a smile for the Hon'ble Judges. She belonged to the old school of lawyers who handled almost all categories of cases - constitutional, criminal, civil, matrimonial, trade and corporate. She had strong beliefs that were put forth in her arguments, which I personally witnessed during the hearing of the *Mandal Commission Case* before a nine-judge Bench of the Supreme Court.[1]

Apart from her court practice, Dr. Pappu was involved in various socio-legal activities. She served as a member of the Law Commission of India, 2008-2009, as the Convenor of the Legal Aid Committee of the All India Federation of Lawyers, as the President of the Indian Federation of Women Lawyers, and as the Convenor of the Legal Service Clinics. Dr. Pappu played an important part in drafting the amendment to the Hindu Marriage Act, 1955, which enabled divorce by mutual consent, and has over the years helped many an incompatible couple to part ways amicably.[2] She was an accomplished writer and her book, "Women: Know Your Rights"is aimed at promoting gender justice.[3]

1 Indra Sawhney v. Union of India, 1992 Supp (3) SCC 212.

2 The Marriage Laws (Amendment) Act, 1976, No. 68, Acts of Parliament, 1976 (India).

3 Shyamla Pappu & Kamala Ramji, Women, Know Your Rights: Law Relating to Property, Succession, and Other Allied Matters (Legal Services Clinic for Women & Children, New Delhi 1985).

Dr. Pappu was the Chairperson of the first Lok Adalat for matrimonial cases held on March 9,1986 on the occasion of International Women's Day andwas also a member of the Justice Krishna Iyer Committee on Women Prisoners.

Dr. Pappu was the recipient of several awards and was conferred the Padmashri by the then Hon'ble President of India, Shrimati Pratibha Patil, on March 31, 2009.

Dr. Pappu's professional achievements were not confined to India but extended globally. She visited the United States where she addressed members of the US Senate and also spoke about the Indian Constitution at prestigious American universities. Dr. Pappu was invited to Pakistan as a delegate of SAARC LAW to speak on Indian constitutional law and attended the Special Session of the United Nations in New York on "disarmament". She visited China to promote International Trade as an expert on India's trade policy and intellectual properties.

Dr. Shyamla Pappu is survived by her son, Shri R. Krishnaamorthi. They shared a very special bond and it was heart-warming to see them constantly together. Dr. Pappu was very pleased about Krishnaamorthi's decision to eventually settle down, and could not stop beaming at the wedding reception, which many of us from the Bar attended.

Dr. Pappu will indeed be sorely missed by her family and friends. She will also be missed by all of us in the legal fraternity. May her soul rest in peace.

Remembering R.K.P. Shankardass

(June 9, 1930 to March 10, 2017)

Sarita Kapur†

It has been several months since R.K.P. Shankardass (or as he was fondly called by everyone, Kumar) left us on that fateful morning of 10th March 2017. For two decades, I was fortunate to be his "colleague", as he would introduce me to clients and friends, alike.

The affectionate outpourings from friends, juniors, clients and acquaintances have been overwhelming, and are a tribute to his charming personality and a life well lived. A gentleman counsel of eminence, who was best described as being too humble for his achievements- he was an eternal optimist. A charming, erudite and widely read man, he was full of anecdotes delivered with easy wit and a charming smile.

Born in Kenya in 1930, he studied Economics and Law at Cambridge in company of friends like Amartya Sen, before being called to the Bar at the Lincoln's Inn. After a stint in the corporate world, he learned the ropes in the courts with the then celebrated Attorney General for India, Mr. C.K. Daphtary.

He rose to be a leader of the Indian Bar, and was ever willing to help and guide younger lawyers. He was devoted to the institutional development of the Indian Bar and legal journals. Amongst his most noteworthy contributions, is bringing the Indian legal profession to the international high table with his active work at the International Bar Association ("IBA") since 1976. He was elected as the first and the only Indian as President of IBA in 1986-1988; he was also the

† Advocate, Supreme Court of India.

Vice President of IBA in 1984-86; Council Member, since 1976; and thereafter, he was elected as its Honorary Life Member in 1990.

He remained keenly devoted to the rule of law and judicial reforms, freedom of speech and the fourth estate, as well as the freedom of choice and dignity of women at the workplace. His several notable contributions on issues of Constitutional, Civil, Corporate and International law are now part of the building blocks of our jurisprudence.

His impact internationally can be seen by the fact that he represented the State of Qatar (1988-2001) in a dispute on Maritime Delimitation and Territorial Questions before the International Court of Justice at The Hague.[1] He was appointed as Commissioner and Panel Chairman, United Nations Compensation Commission, Geneva (1996-2005) for adjudicating war claims. He was Counsel to the Government of India (2005-13) in disputes at the Permanent Court of Arbitration (The Hague) between Pakistan and India under the Indus Waters Treaty, 1960 in respect of the Baglihar and Kishenganga Hydroelectric Projects in Kashmir;[2] and between Bangladesh and India on maritime boundary delimitation in the Bay of Bengal.[3] Having served as legal adviser to the High Commissioner of the United Kingdom since 1974, he was bestowed with the Honorary Order of the British Empire (O.B.E.) in July 1996. He was conferred with Doctor of Laws (Honoris Cause) by the North Orissa University in 2012.

Kumar made foundational contributions to the Bar Association of India since 1966, where he held the following positions: Member of Board of Advisors (2016-17), the President (2014-16), Vice-President (1985-2014), Hony. General Secretary (1969-1985) and Enrolment Secretary (1966-69). For long years he was a part of the editorial team of the Supreme Court Reports. Having been associated with the Indian Advocate, the much-admired journal of the Bar Association of India since 1972, he was a Member of its Editorial Board (1972-79), the

1 Qatar v. Bahrain, 1994 ICJ Reports 112.

2 Indus Waters Kishenganga Arbitration (Pakistan v. India), Case No. 2011-01, (Perm. Ct. Arb. 2013).

3 Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Case No. 2010-16, (Perm. Ct. Arb. 2014).

Joint Editor (1980-90), the Editor (1991-92), the Chairman & Editor (1992-2011) and finally, the Chairman, Editorial Board (2011-2017). He also presided over the Indian Law Foundation and served as Vice President of the Indian Society of International Law.

His work transcended the courts. He was on the Board of several charitable trusts including, the India Foundation of the Arts, the Talwar Research Foundation, the Nurul Hasan Educational and Research Foundation, and the Pratichi (India) Trust. He was also on the Governing Board of the Centre for Policy Research.

To me personally, he was a father figure, a friend and a mentor. Always ready for a feisty debate on global and domestic issues, he would present a unique perspective in the face of any real or perceived wrong. He remained an eternal idealist with deep faith in the genius of India to reinvent and bounce back after every adversity. His complete lack of pride and ego despite enviable professional and personal success, has taught me that being aggressive is not necessary for success.

He went, as many would like to, quietly, without a fuss, leaving behind many a daffodil in our hearts and a void that can never be filled!

M.N. Krishnamani: Spiritual Savant*
(April 26, 1948 to February 15, 2017)

Gopal Sankaranarayanan†

It is common for high praise and tribute to follow the passing away of anyone. Often, the image that is created is larger than life, and flawless. Such hagiography, while bringing a measure of comfort to the bereaved, does disservice to a life that was lived in full measure. It would be expected then that what follows would be a wart-ridden account of a man. It probably would have been, had that man not been M.N. Krishnamani ("MNK").

For those who have been privy to the video of MNK speaking from his hospital bed a few days before his demise, his stoic acknowledgment of his impending fate and the dignity of his demeanour reflected him in full measure. He would not have been blamed for tears, or an uncharitable word. But he had none. His life, he said, had been a full one without regrets, and he was confident that he had never committed a bad deed. Childlike it may be, but such a sentiment showed the simplicity with which he viewed life till the end.

At least three versions of MNK's biodata would be read out in his Full Court Reference, and I will therefore avoid talking about when he graduated and when he was designated, not least because these would have been irrelevant to him. Uniformly courteous, good-natured and compassionate, MNK's lasting impression at the Supreme Court Bar

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† Advocate, Supreme Court of India.

(which he presided over many times) would be of one who was always available to help a person in need. He made it a point to raise funds and donations for those advocates and their families who were in dire need because of a health or family crisis. He literally harangued the well-heeled seniors to part with donations and to accommodate youngsters looking for chambers. He was always eager to take up pro-bono causes, especially those concerning the indigent and the exploited.

Universally, to those who knew him earliest from the chambers of M.K. Nambyar and later K.K. Venugopal, he was regarded as a spiritual savant. Rohinton Nariman referred to him often as a "saint". To P. Chidambaram, he was a "very good man". Even his senior, K.K. Venugopal referred to him as "my guru", showing how those older to him would consider MNK a moral compass.

For many years, the leaders of the Madras Bar had avoided shifting to practise in the capital, partly due to the cultural gulf and partly due to the uncertainty that such a move wrought. Venugopal was the first, a few years after his designation by the Supreme Court, and with him, C.S. Vaidyanathan. Encouraged by their success, M.N. Krishnamani followed his chamber mates, and in his wake, the two Attorney Generals — K. Parasaran and G. Ramaswamy. Now, with hundreds of young lawyers not only from Chennai but across this great nation flocking to the Supreme Court, there has been a visible fillip to the practice, attributable largely to the pioneering efforts of those like MNK.

My first interaction with MNK can be traced to my early years at the bar, courtesy a chamber dinner where (as is the custom) distinguished alumni made their presence. I had not encountered MNK earlier, mainly because of the low profile he maintained. Even in the years since, I cannot recall a single television appearance of his or a quote to a publication. What I cannot forget was the manner in which he greeted me—warm and deeply affectionate, here was a man who wanted you to know that you *meant* something to him. Why a raw junior would evoke such a sentiment was a mystery, especially when that raw junior was me!

I wondered, as one would, whether this was just politeness on his part. Who would blame him for ignoring me the next day? To the

contrary, not only did he wring my hand vigorously on the morrow (as well as remember my name), but he also gently urged me into a chair in the coffee shop where he plied me with some hot brew while exploring my past.

In those fleeting moments a lifetime ago, I realised why MNK was who he was—he was not flamboyant or larger than life. He was a compassionate soul who treated all others as equals, meriting respect, regardless of age or gown. It was in this that MNK transcended all the various complexes and charades at the bar—he cared none for ego battles and luxury cars and badges of honour, choosing instead a path of spiritual learning, which finally brought him to Satya Sai Baba's embrace. As Senior Advocate K.V. Viswanathan says— "he walked with kings but never lost the common touch".

Later, as a co-trustee on the Supreme Court Lawyers' Welfare Trust, all of us banked on MNK to give guidance on which were the deserving cases of advocates that required our assistance. While some of us discharged the simple task of signing cheques, it was MNK who, of his own volition, visited the bedsides of suffering advocates and held the hands of their family members. He listened with patience as others bemoaned the fate of a loved one, and was swift to reach for his wallet. Those who remember earlier bar functions would recall the slight figure of the late Mr. Gupta on each occasion, his coat pockets swelling with pens of every hue. Once again, as he battled a debilitating disease, it was MNK who was a pillar of support till the end. There are countless such incidents which each member of the bar would recount, but to those who were deprived of his munificence, this account attempts to make modest amends.

I must hasten however to dispel the notion that MNK was soft or non-confrontational. For him, the institution was pre-eminent, and anyone who trifled with it would face his resistance, be it the Chief Justice of India (as the *Sahara* hearings evidenced) or a mere commoner. His rectitude and the high esteem with which the judges regarded him ensured that he would regularly intervene when he felt the bench was being harsh on a junior. Often, he would rise from the third row to object to the manner in which a colleague was being treated, an

attribute sorely absent in others of his ilk.

It is unfortunate that in his final years, his avowed spiritual path lent a saffron hue to how he was perceived. This is why he probably felt the need to point out in that last fateful speech that he was a devotee of all faiths and that he had even composed Bhajans on Allah and Christ.

I have deliberately avoided alluding to MNK's prowess as an advocate, because it would be a great disservice to reduce an understanding of who he was to something as banal as his practice in court. His work outside the courtrooms undoubtedly outshone that of virtually everybody else within them, and it is in that space we find a yawning gap. As the Bard said — "When will we find another?"

Farewell, dear MNK—remember us to the angels with whom you share a table at the Great Coffee Shop in the sky.

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Remembering Anil Divan*

(May 15, 1930 to March 20, 2017)

MURLIDHAR C. BHANDARE†

I was in my first year at Government Law College, Mumbai. The country was newly independent, and a 67-year-old friendship was about to begin. Somebody had taken my usual spot in the front row of the classroom. I was miffed, but on the last row was a vacant spot. I quickly took it and found myself seated next to Anil Divan.

His friends knew that he was destined for great things. He came first in the examinations and bagged the gold medal in jurisprudence. On January 26, 1950, when India became a republic, the two of us walked for hours around the Victoria Terminus railway station, gazing at the brightly lit building. We wondered if the light of freedom and democracy could dispel the darkness of poverty and ignorance that engulfed our country. It was only appropriate that Anil would go on to defend and fight for our most cherished constitutional principles.

I. An illustrious family

The principles of justice and the law were embedded in Anil's DNA. Once, while flipping through the pages of a book in our college library, I stumbled upon a photograph of a young Anil with his maternal grandfather, Sir Chimanlal Setalvad, an eminent lawyer who had later served as Vice-Chancellor of Bombay University. Anil's

* A version of this article was first published as Murlidhar C. Bhandare, *Remembering Anil Divan*, THE HINDU, March 23, 2017, http://www.thehindu.com/opinion/op-ed/remembering-anil-divan/article17588626.ece.

† Senior advocate, former Member of Parliament (Rajya Sabha) and former Governor, Odisha.

paternal grandfather was no less accomplished. Jivanlal Divan founded the famous Proprietary High School in Ahmedabad and marched with Gandhiji to Dandi in 1930. Sharda, Anil's mother, was the first woman registrar who would go on to become Vice-Chancellor of the SNDT Women's University in Mumbai. There were so many other family members who rose to eminence: M.C. Setalvad, his maternal uncle, was the first and longest serving Attorney General for India, for 13 years; Bipinchandra J. Divan, his paternal uncle, was Chief Justice of the Gujarat High Court. Yet, I never heard Anil boast about his lineage or drop names to get ahead.

All of us who knew him could vouch for his absolute integrity. He was appointed *amicus curiae* (friend of the court) on several occasions, including in the *Jain hawala diary* case[1] where he appeared against his brother-in-law, his wife Smita's elder brother, Ashok Desai, who was then India's Attorney General. Both men of unimpeachable honesty, what counted was the pride they took in being defenders of the law.

Anil was tall in body and mind. Never one to mince words, he was bold and fearless and never worried about the consequences of his actions. He was an extraordinary scholar. A staunch believer in the independence of the judiciary, he made signal contributions to the legal profession, which will go a long way in strengthening freedom, dignity and democracy in the country.

His great pillar of strength was his wife Smita. In her independent capacity, Smita has worked for the empowerment of women and was President of the Maharashtra State Women's Council.

II. The last reunion

On December 10 last year, my 88th birthday, Anil perhaps inadvertently gave me the most special birthday gift ever: the launch of the second edition of his book, *On the Front Foot*.[2] Seated in the front row were so many of our law college friends who had gone on to accomplish great things: Fali Nariman, Soli Sorabjee and Ashok Desai.

[1] CBI v. V.C. Shukla, (1998) 3 SCC 410.

[2] Anil Divan, On the Front Foot- Writings of Anil Divan on Courts, Press and Personalities (Universal Law Publishing, 2nd ed., 2016) (2013).

We ended up with a college reunion without really intending it or planning it to be one.

Well over half a century ago when the Republic was still nascent, we had left Mumbai and shifted to New Delhi with a dream in our hearts to practise in the Supreme Court as defenders and champions of the Constitution. Now, Anil had brought us together again on that winter evening.

I never realised then that my best friend was preparing to embark on his next journey. I only know that wherever he is, he will continue to fight for the voiceless, coming to the aid of justice and inspiring future generations of lawyers.

Tehmtan Andhyarujina: An Epitome Of Decency And Uprightness*

(November 17, 1933 to March 28, 2017)

Dr. Venkat Iyer†

A cliché that is often employed when marking the demise of an eminent personality is that the event represents "the end of an era". In many cases the use of such language is symptomatic of unimaginative, even lazy, journalism. But there are occasions when the phrase acquires an undeniable aptness and resonance. One such occasion is the passing on, in quick succession, of two of the stalwarts of the Indian Bar, Anil Divan and Tehmtan Andhyarujina on 20 and 28 March respectively. With their departure, the diminishing band of lawyers who had entered the Indian legal profession in the 1950s, when standards of competence and integrity were still very high, has been depleted so decisively that fewer than half a dozen of that generation remain in our midst.

Andhyarujina stood out as an epitome of decency and uprightness. An essentially self-effacing man, he never acquired the popularity– particularly among the chattering classes– that some of his flashy contemporaries did. He seldom appeared on television or frequented

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† Barrister and legal academic based in Northern Ireland.

the cocktail circuit. The attractions of sycophantic courtiers that are the status-symbol of many an 'eminent jurist' today simply passed him by.

I consider myself extraordinarily fortunate in getting to know this remarkable man at close quarters for over three decades. When I joined his chambers as a novice lawyer in 1981, he had already begun making his mark– albeit in a relatively low-key manner– as a solid exponent of constitutional and administrative law. A protégé of the redoubtable H.M. Seervai, Andhyarujina had had a supporting role in many of the leading constitutional battles of the 1960s and 1970s, including, notably, *the Fundamental Rights case* (*Kesavananda Bharati v. State of Kerala*) where he appeared alongside Seervai in a valiant but largely unsuccessful attempt to assert the supremacy of Parliament.[1]

His unshakable adherence to the doctrine of Parliamentary supremacy – subject to constitutional constraints in the case of India – made him a slightly lonely figure in those times and to stand out from the likes of Nani Palkhivala during the epic constitutional battles of the Indira Gandhi era. It is a testament to Andhyarujina's sterling personal qualities that, despite the deep polarisation that those skirmishes engendered, he was held in the highest esteem by Palkhivala (whose rather fractious relationship with Seervai became the subject of many stories). In his turn, Andhyarujina bore no ill-will towards those who were passionate in their denunciation of the Seervai line of argument (it is a delicious irony, of course, that, in his later years, Seervai himself underwent a change of heart in relation to many of the issues that he had espoused with fervour up until the late-1970s).

Another issue on which Andhyarujina ploughed a somewhat lonely furrow – at least among many of his peers – was judicial activism. His principled stand against judges straying into territory that did not belong to them did not win him the applause of the liberal elite. Nor did it fetch him any of the glittering prizes that are reserved for those who are in the vanguard of activist politics. His arguments for judicial restraint were made with conviction, courtesy and clarity in the many newspaper articles he wrote over at least the past two decades. Some

[1] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

of those articles – and other writings which, though not marked by literary flourishes, exuded erudition of a high order – are likely to be republished in a book being lovingly put together by a young member of his chambers in Delhi.

It is worth noting that Andhyarujina's disapproval of judicial activism did not signal an indifference to some of the injustices that were sought to be remedied through this controversial method of grievance redressal. Quite the contrary. As anyone who has known him will testify, Andhyarujina's deep sense of compassion– and his genuine concern for the underdog– was legendary. It probably arose from his own humble origin – and from the even humbler origins of his parents on whom he doted. Like many people of his generation, he never wore his heart on his sleeve, but those who were at the receiving end of his kindnesses and generosity could not have failed to notice his essential humaneness.

That quality also made him reticent about criticising others. Although he enjoyed his share of gossip– and I plead guilty to being a frequent conduit for tittle-tattle from various parts of the world which kept both of us amused for hours on end during our frequent meetings – I have seldom seen him excoriating anyone, even where excoriation was called for. This is one of the areas where I sometimes had disagreements with him. An example which comes readily to mind was his response to the fairly serious cloud that fell over the former Attorney General for India, Goolam Vahanvati, in the aftermath of the revelations of corruption made against him by the Communist Party of India MP, Gurudas Dasgupta, in 2013. Given that the allegations were backed by detailed information that was prima facie plausible, that they were made with due responsibility, and that they elicited no credible rebuttal from Vahanvati (except for a ham-fisted attempt at threatening Dasgupta with a legal notice), I thought that Andhyarujina could have done better than remain silent in the matter, especially in the face of his shining track-record of fighting corruption in public life.

Another instance where I had reservations about his reluctance to cause offence came when he decided, on second thoughts, to pull some of his punches in his illuminating account of the behind-the-scenes

manoeuvres in the *Fundamental Rights case*.[2] In particular, he had initially intended to include a piece of information (from his personal knowledge) which would have shown one of the judges involved in the case in bad light; after some agonising, he chose to exclude any reference to the matter on the grounds that publication was likely to offend a living relative of the judge in question. I was not convinced that such deference was justified, and told him so (to his credit, he took my criticism in good grace and never let his friendship with me be affected by such expressions of dissent).

A matter that troubled him quite intensely towards the end of his life was what he perceived to be a precipitous decline in the stature of the Supreme Court of India. There were two broad aspects to his concern: firstly, the falling standards of the Court's proceedings and output (which also implicates the increasingly poor intellectual quality of its judges) and, secondly, the runaway expansion in the role of the court (from what the founding fathers of the Constitution had envisaged as a constitutional court to an all-purpose court of appeal). For at least five years preceding his demise he lamented these developments with all the vigour he could muster, and it became a constant topic of my discussions with him.

While I could not disagree with his observations, I had some difficulty accepting his analysis of the root causes of the problem. In particular, I thought that, like many others in India whose exposure to the wider legal world had reduced significantly from around the late-1970s, he had not paid sufficient attention to such matters as the parlous state of legal education and vocational training, the absence of adequate quality assurance mechanisms (e.g. a rigorous Bar examination and a system of pupillage), and highly corrupt and weak regulatory processes currently in place. The way I saw it was that, unless a root-and-branch overhaul of the system is undertaken (including a ruthless cull of at least 80 per cent of what passes for the current advocate population), any attempt at superficial reform is foredoomed to failure.

[2] T.R. Andhyarujina, The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament (Universal Law Publishing Co. Pvt. Ltd., 2011).

For many years now I had urged Andhyarujina to step back from his practice and to embark on a writing career which would enable him to more constructively channel his ideas for the betterment of India's sclerotic legal system. While expressing thanks for this piece of gratuitous advice, he would turn the tables back on me, urging me to undertake the task instead. At last, when, sadly, his recent illness compelled him to quit court work, he finally relented and agreed to devote some time to writing, and in one of my last conversations with him, we even spoke about doing some work together in July when I expected to spend a length of time in India. That, alas, will now remain an unfulfilled dream.

The other dream that Andhyarujina could not live to realise was the prospect of his beloved son, Zal, being designated a Senior Advocate. His devotion to Zal – and to other members of his family – was palpable, and it must surely have been a matter of some comfort for Andhyarujina to know, as he bade farewell to this world, that Zal was beginning to make his mark in a profession with which his family has had such intimate connections for at least three generations. The challenge now facing Zal is, of course, to live up to the high standards that his doting father achieved in his lifetime, and to carry the flame lit so luminously by him.

I will miss a dear friend who had stood like an immutable rock for all those years I had known him and to whom I could turn at any time for instruction, amusement or just an invigorating chat of no great importance. Fortuitously or otherwise, I had an opportunity to see him, in fairly good spirits despite the toll that his illness had taken on his body, some ten days before his passing when I made an impromptu decision to divert myself to Bombay en route to an engagement in Australia and spend a few precious moments with him. It is a measure of his kindness that one of the first things he said on seeing me was that Zal had, the previous evening, read out to him my article on Justice Gautam Patel which he said he had thoroughly enjoyed.[3] Grateful though I was for his compliments, what mattered to me more was

[3] Dr. Venkat Iyer, *The Perils of Judicial Impulsiveness*, LiveLaw, March 14, 2017, http://www.livelaw.in/perils-judicial-impulsiveness/.

Andhyarujina's reassurance that I had been fair in the way I had put my case.

The coming days and weeks will, I am sure, see numerous tributes flowing in from various corners of the world, and a common thread in all of them will, it is safe to assume, be that Tehmtan was, more than anything else, a very decent human being.

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P.P. Rao: The True Karma Yogi
(July 1, 1933 to September 13, 2017)

P.S. Narasimha[†]

First impressions, they say, are lasting ones. In the case of the late Mr. P.P. Rao, I formed an impression of him even before I met him. In fact, minutes before I set my eyes on him. The impression was based on his jottings in the margins of Supreme Court Reports (SCR). I stumbled on them around 1990, when as a rookie lawyer I was waiting in the lobby of his Noida office to consult him on my careerplans.

From his room, I could hear the firm voice of Mr. Rao as he was quizzing the lawyers who had come to brief him. While waiting, I picked up a volume of SCR from a shelf in front of me to flip through it. That was when I noticed his copious notes, page after page. I wondered though if this volume was of exceptional interest to him, for the particular judgments contained in it. It didn't take long for me to realize that the state of the volume I saw first was representative of his library. For the other volumes of SCR that I had checked at random displayed equally extensive notes, with a sharp pencil.

It was clear that this legendary lawyer had ploughed through the entire case law, right from the advent of the Constitution in 1950. This filled me with awe for Mr. Rao. At the same time, it scared me for, with professional experience of barely two years, I was aspiring then to shift to the Supreme Court bar. But if such was the level of engagement with case law that was expected of Supreme Court lawyers, I thought I might as well pack up and return to courts that were less

[†] Senior Advocate, Supreme Court of India and Assistant Solicitor General for India.

demanding. If I have survived to tell this tale, it is because I resisted the temptation of abandoning the challenge of practising in the apex court. More importantly, it is because that intimidating experience turned Mr. Rao in my head as a benchmark for diligence and rigour at the bar. As a senior lawyer aptly said about Mr. Rao, "[W]henever I see him, I only think of his industry and, I must add, with a capital 'I'." So much so that the opinions tendered by Mr. Rao on a range of issues would hardly seem to need further research.

Among the things he told me about himself was that he would not have joined the Bar in 1967 had it not been for prodding from senior advocate, N.C. Chatterjee, father of former Lok Sabha speaker Somnath Chatterjee. Mr. Chatterjee had just then been made a permanent lecturer at the Delhi University's Faculty of Law. Through a common friend, Mr. Rao had already been associated with Mr Chatterjee as his constitutional law researcher. Besides assisting Mr. Chatterjee in landmark cases such as *Keshav Singh*[1] dealing with Parliamentary privileges, Mr. Rao had co-authored with him in 1966, a prescient book on "*Emergency and Law*".[2] For that book, brought out by the prestigious Asia Publishing House, New York, the two authors had even received a letter of appreciation from no less than Lord Denning (Master of Rolls). It was against this backdrop that Mr Chatterjee urged Mr Rao in 1967 to give up his teaching engagement and join him full-time in his chamber.

For someone born in a remote village called Mogalicherala in the Prakasam district of Andhra Pradesh, this offer from a big lawyer was a dream come true. It was after all, with the ambition of becoming a lawyer that he had done LLB and LLM from Osmania University in Hyderabad. But the timing of Mr Chatterjee's offer really tested his resolve. After working for six years as an adhoc lecturer, he had just been chosen to join the faculty on a permanent basis. In preference to other candidates including products of the same university, he had been

[1] Powers, Privileges and Immunities of State Legislatures, Re v. Special Reference No. 1 of 1964, (1965) 1 SCR 413.

[2] N.C. Chatterjee and P.P. Rao, Emergency and Law (Asia Publishing House, 1966).

picked by a selection committee chaired by Mr. C.D. Deshmukh, who was then the Vice Chancellor of Delhi University.

I vividly remember him recalling more than once that his wife was in tears when he made up his mind about joining the bar. Given their precarious financial condition, she apparently felt that he was being reckless in sacrificing a settled career for an uncertain future. She could not have foreseen then that he was going to become one of the most illustrious lawyers in our country, as evident from the Padma Bhushan he was awarded in 2006.

He was so public-spirited that he would prepare thoroughly even in cases where he had no role. On being asked about this unusual quality, he would simply say, "[W]e have a duty to assist the Court. If the judges need some help, we can't be wanting as members of the bar." Those who had the fortune of working with him emerged from his chambers with two big Bs: *Bhaya* and *Bhakti*. *Bhaya* was by no means in the sense of fearing him, as he was a loving and tender person. It was rather in the sense of the awe he commanded due to his sheer industry, dedication and sincerity. And this *Bhaya* naturally lead to *Bhakti* or reverence for his selflessness. He would put in the same amount of work whether he was being paid for the matter or he was appearing pro-bono. He would say, "[P]aying clients are our *annadaata* but pro-bono clients are our *bhagyavidhata*".

Despite his towering personality, Mr. Rao was truly imbued with humility. He honoured every social engagement irrespective of his work schedule and the stature of the host. Even if he was working on an urgent matter, which was not a rarity, he would suspend it for a while and go out of his way to attend the function, like the birthday party of his clerk's or driver's child, and bring great joy with such warm gestures. Thus, his life was a veritable demonstration of the value of equanimity and fraternity.

BAR EVENTS

Report By Yakesh Anand

Bar Association of India Events

The last year saw the Bar Association of India (hereinafter also referred to as "BAI"/"the Association") playing a very crucial role on significant issues such as judicial appointments, accountability and reforms, corruption and governance of the legal profession. The Association gave its inputs and opinions to the Government and the Parliamentary Committees on different legislations. It also hosted various seminars, symposiums, conferences and conventions.

Office bearers of the Association were invited as speakers to various conferences organized by international bodies like International Bar Association (IBA), Inter-Pacific Bar Association (IPBA), Lawasia, the Union Internationale des Avocats (UIA), and American Bar Association (ABA). Following is a list of events that took place in 2017.

1. **Ceremonial Opening of Legal Year 2017 in Hong Kong - 9th January, 2017**

   On behalf of The Bar Association of India Mr. Prashant Kumar, President – Elect, Ms. Pinky Anand, Vice President & Mr. Uday Prkash Warunjikar, Vice President attended the Ceremonial Opening of Legal Year organized by Law Society of Hong Kong on 9th January, 2017. On January, 9th 2017, a Memorandum of Understanding was signed between the office bearers of Law Society of Hong Kong and The Bar Association of India.

2. **Interactive Session on Sexual Harassment Act – Compliance and**

Redressal in Industries - 10th January, 2017

Interactive Session on Sexual Harassment Act – Compliance and Redressal in Industries was held on 10th January, 2017, organised by PHD Chamber of Commerce and Industry. The event was co-sponsored by The Bar Association of India. Dr. Lalit Bhasin and some members of the BAI attended the said event.

3. **Opening of the Legal year 2017 in Kuala Lumpur, Malaysia (Malaysian Bar) - 12th – 13th January, 2017**

   On behalf of The Bar Association of India Mr. Prashant Kumar, President–Elect & Ms. Pinky Anand, Vice President attended the Ceremonial Opening of Legal Year organized by Malaysian Bar Association on 12th - 13th January, 2017.

4. **Meeting with the Law Minister - 23rd January, 2017**

   At the initiative of Dr. Lalit Bhasin, President, BAI & SILF, a meeting was arranged and Hon'ble Shri Ravi Shankar Prasad, Union Minister for Law with Justice and Information Technology was invited to meet the members of the Association & SILF on 23rd January, 2017 at New Delhi. The Hon'ble Minister addressed the members on many legal issues which were brought up during the discussion.

5. **Deliberations on The Union Budget 2017 - 10th February, 2017**

   Indo-American Chamber of Commerce, North India Council in association with Society of Indian Law Firms (SILF) and The Bar Association of India had organized a seminar on "The Union Budget 2017 : Bringing Stability & Growth" at PHD House, New Delhi. Ms. Vanaja N. Sarna, Special Secretary & Members (Admn.) CBEC, Deptt. of Revenue Ministry of Finance was the Chief Guest. Dr. Bhasin also spoke at the event.

6. **IBA 5th Asia Pacific Regional Forum Biennial Conference in Mumbai, India - 15th – 17th February, 2017**

   IBA 5th Asia Pacific Regional Forum Biennial Conference was held in Mumbai. The Bar Association of India & Society of Indian Law Firms (SILF) supported the Conference. Mr. Martin Solc

new IBA President inaugurated the conference. Dr. Lalit Bhasin, President BAI & SILF, Mr. Prashant Kumar, President – Elect, Mr. Yakesh Anand, Hony. General Secretary & Ms. Triveni S. Poteker, Treasurer attended the conference. Dr. Bhasin had a one-to-one meeting with Mr. Martin Solc.

7. **10th LAWASIA Employment Law Conference in Chennai, India - 11th – 12th March, 2017**

   10th Lawasia Employment Law Conference was organized by The Bar Association of India in Chennai from March 11-12, 2017. A Large number of foreign and Indian delegates participated in the Conference. Prashant Kumar, V. Shekhar, Triveni Potekar, Dr. Jai Prakash Gupta, Yakesh Anand and Madan Gopal attended the Conference. Many important topics in the field of Employment were discussed by speakers from India and abroad. The Association hosted a lunch for all the delegates attending the Conference. After the Conference, the delegates were taken for a city tour organized by Prashant Kumar and Triveni Potekar and Madanagopal.

8. **Talk on GST - 25th March, 2017**

   A talk on Goods and Services Tax (GST) by Mr. V. Lakshmikumaran, Managing Partner, Lakshmikumaran and Sridharan was organised by Dr. Lalit Bhasin at Hotel Lalit, New Delhi on behalf of BAI & SILF. The event was well attended by members of both the associations.

9. **Condolence Meeting to remember Late Shri R.K.P. Shankardass and Shri Anil B. Divan, both former Presidents of The Bar Association of India - 18th April, 2017**

   A Condolence meeting was held in the memory of Late Shri R.K.P. Shankardass, and Late Shri Anil B. Divan. In the month of March 2017 Association lost two of its esteemed members both among most renowned lawyers of the country.

   Mr. RKP Shankardass who passed away on 10th March 2017 was a pillar of strength for the BAI and served it in various positions as an office-bearer. He was the immediate former President of BAI. He was the only Indian and first Asian to be elected as President of

International Bar Association (IBA).

Mr. Anil Divan, a goliath in the field of law passed away on 20th March 2017. Mr. Divan or Anil Bhai as he was fondly called contributed enormously in the development and evolution of constitutional law in the country. His contribution is recognised in scores of judgments of the Apex Court dealing with constitutional issues. He was a firm believer in strengthening Rule of Law and democratic institutions of the country. He was President of LAWASIA and predecessor of Mr. Shankardass as President of BAI

10. BAI - SILF delegation to Washington D.C and New York from 25th April 2017 till 2nd May 2017 at the Invitation of American Bar Association - Section of International Law being led by Dr. Lalit Bhasin - 25th April – 2nd May 2017

Under the leadership of Dr. Lalit Bhasin, President, The Bar Association of India & SILF a delegation of lawyer members of BAI & SILF went to Washington D.C. & New York from 25th April-1st May 2017. The following were the members of the delegation.

(i) Dr. Lalit Bhasin

(ii) Shri V. Lakshmikumaran

(iii) Shri Yakesh Anand

(iv) Sh. Uday Warunjikar

(v) Dr. Jai Prakash Gupta

(vi) Ms. Rachna Srivastava

(vii) Ms. Mona Bhide

(viii) Shri Shikil Suri

(ix) Ms. Priti Suri

(x) Mr. Percival Billimoria

(xi) Shri Hardeep Sachdeva

(xii) Shri B.C. Thiruvengadam

(xiii) Shri Rahul Chadha

(xiv) Shri Pratap Shanker

(xv) Ms Surichi Suri

11. Workshop on Constitutional Litigation at Bolgatty Palace, Kochi - 2nd – 4th June, 2017

A Continuing Legal Education Programme was Organised by Bar Council of Kerala M.K. Nambyar Academy, Kochi in association with The Bar Association of India. A professional development training programme on Constitutional Litigation was organised from 2nd to 4th June, 2017 at Bolgatty Palace, Kochi. This Conference was organized by Prof. (Dr.) N.R.Madhava Menon, Honorary Director, BCK-MKN Academy for Continuing Legal Education. Dr. Lalit Bhasin, President, BAI and Mr. Amarjit Singh Chandhiok, Senior Advocate & Vice President, BAI and some other members attended the Conference.

12. BRICS and Developing Countries Legal Expert Forum in Ekaterinburg, Russia - 7th – 10th June, 2017

The BRICS Legal Forum is an important high level dialogue platform for the legal professionals of the BRICS countries. The Bar Association of India is a part of the BRICS Legal Forum.

Mr. Prashant Kumar, President – Elect, BAI & Mr. Amarjit Singh Chandhiok, Vice President, BAI had attended the Conference on 7th – 10th June, 2017 at Ekaterinbug, Russia. Spade work was done for holding the main BRICS Conference in Russia in November – December, 2017.

13. 6th Lala Amarchand Sood Memorial Lecture in Shimla - 23rd June, 2017

The 6th Lala Amarchand Sood Memorial Lecture was delivered at H.P. High Court New Auditorium, Shimla, Himachal Pradesh.

The topic was "UNIQUENESS OF RECENT TAX REFORMS IN INDIA". The lecture was delivered by eminent Jurist and Internationally renowned Tax Expert Shri V. Lakshmikumaran, Managing Partner, Lakshmikumaran and Sridharan. The Hon'ble Mr. Justice Sanjay Karol, Acting Chief Justice, High Court Himachal Pradesh presided over the function which was amongst others attended by several sitting and former judges of Himachal

Pradesh High Court and the local leaders of the Bar including the Advocate General and the President and office bearers of Himachal Pradesh High Court Bar Association. Dr. Lalit Bhasin, President, BAI, also made presentation on the topic.

Mr. Kapil Dev Sood, Senior Advocate, Mr. B.P. Sharma, President, High Court Bar Association, Shri Sharwan Dogra, Advocate General, Himachal Pradesh and Mr. Yakesh Anand, Hony. General Secretary, BAI also made presentations.

14. 28th POLA Conference, at Colombo, Sri Lanka - 22nd to 24th July, 2017

28th POLA Conference organised by Bar Association of Sri Lanka at Colombo was attended by Dr. Lalit Bhasin, President, BAI, Mr. Prashant Kumar, President, LAWASIA & President-Elect, BAI, Mr. Amarjit Singh Chandhiok, Vice President, BAI & Ms. Pinky Anand, Vice President, BAI.

15. Bar Association of India had organized a three day seminar in Ranchi from 25th – 27th August, 2017. The topics discussed were Recent developments in Commercial Laws in India like, Goods and Service Tax 2017, Insolvency and Bankruptcy Code, 2016 (IBC) & The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015, and Arbitration and Conciliation Act, 1996 as amended in 2016, and Alternative Dispute Resolution - 25th to 27th August, 2017

On 25th August the programme was organized by Institute of Management Studies, Ranchi University in association with Ranchi University, Ranchi. Dr. Lalit Bhasin, President, BAI was the Chief Guest. Prof. Dr. Ramesh Kumar Pandey, Vice Chancellor, Ranchi University presided over the function. Opening remarks were made by Dr. Jai Prakash Gupta. Mr. Mathivanan, Partner, V. Lakshmikumaran & Sridharan, made a detailed presentation on GST Laws – Giant Steps in Tax Reforms. Dr. Mukund Chandra, Director-in-Charge, Institute of Management Studies made conducting remarks.

On 26th August, 2017 a National Symposium was organised by Chotanagpur Law College, Nyay Vihar Campus Ranchi in Collaboration with Barrister S.K. Sahay Lecture Series, 2017 and The Bar Association of India. Hon'ble Mr. Justice H.C. Mishra, Judge, Jharkhand High Court Ranchi Inaugurated the symposium. Dr. Lalit Bhasin, President, BAI was the Chief Guest. Mr. Abu Imran, IAS, Director Higher Education, Govt. of Jharkhand & Proprietor.

On 27th August, 2017, a half day programme followed by Lunch was organised by at Vivekanand Auditorium at Vinoba Bhave University, Hajaribagh, Ranchi,(Jharkhand), on Development in Commercial Laws, GST & Legal Education.

Hon'ble Mr. Justice A.B. Singh, Judge, Jharkhand High Court, Ranchi was the Chief Guest. Dr. Ramesh Sharan, Vice Chancellor, Vinoba Bhave University, Prof. Banni Dhar, Registrar, Mr. Suresh Seraphin

Mr. Hemant Sihariwar, Secretary, Jharkhand High Court Bar Association, Mr. Yakesh Anand, Hony. General Secretary, BAI and Mr. Karan Sachdeva made brief presentations. Prof. Jaydip Sanyal, Principal, University Law college, Vinoba Bhave University, Hajaribagh made the concluding remarks.

The Seminar at Ranchi was organized with the active participation of Dr. Jai Prakash Gupta, Executive Committee Member of BAI, Mr. Surjit Choudhary, Joint General Secretary of BAI and MR. T.N. Mishra, Member Governing Council of BAI.

Dr. Bhasin, President, BAI, Mr. Rajiv Dutta, Senior Advocate & Secretary Delhi, BAI, Mr. Yakesh Anand, Hony. General Secretary, BAI, Mr. M.P. Singh, Member Governing Council, BAI (from Indore), Mr. C. Madanagopal, Executive Committee Member, BAI (from Chennai) and Ms. Rachana Srivastava, Former Hony. General Secretary, BAI had attended the seminar.

16. Lecture on GST Implications, Industry Perspective at PHD Chamber of Commerce, Delhi - 4th September, 2017

The Indo-American Chambers of Commerce, NIC in association

with Society of Indian Law Firms (SILF), PHD Chamber of Commerce & Bar Association of India (BAI), had organized an Interactive Session on GST Implications, Industry Perspective ; Gearing up for the Change. Mr. V. Lakshmikumaran, Managing Partners, Lakshmikumaran & Sridharan, Eminent Tax Law Expert had made his presentation.

17. Pooja Ceremony on BAI Plot - 4th September, 2017

Pooja Ceremony by breaking of Coconut (Nariyal) was held on the plot No. 31-32, D.D.U. Marg, New Delhi in the presence Mr. Lalit Kumar, Proprietor, Arihanta Construction alongwith his team symbolising the beginning of construction work.

Pooja was performed by Dr. Lalit Bhasin, Ms. Nina Gupta Bhasin, Mr. Prashant Kumar, Mr. Yakesh Anand, Ms. Triveni S. Poteker, Ms. Nandini Gore, and Mr. A.K. Chattopadhya, members of the Executive Committee of BAI and Mr. S.D. Sharma, Administrative Manager, BAI and other staff members of BAI.

18. 12th Sustainability Summit - 6th – 7th September, 2017

Confederation of Indian Industry (CII) had organised a Sustainability Summit on 2030. Agenda : Driving Inclusive Growth at Hotel Le. Meridien, New Delhi.

The Bar Association of India supported the event.

19. Visit of President of American Bar Association & its members - 18th – 19th September, 2017

Ms. Hilarie Bass, President of American Bar Association (ABA), Mr. Koji Fukumara, the Chair of Section of Litigation, Mr. Gene Vance, Vice Chair of Section of Litigation) and Mr. Ashish Joshi, Editor-in-Chief of India Law News, visited New Delhi and Mumbai. They met Hon'ble Judges of the Supreme Court of India and Delhi High Court in Delhi and members of the Bar Association in New Delhi and Mumbai.

20. 30th LAWASIA Conference, Tokyo, Japan - 18th – 21st September, 2017

30th LAWASIA Conference was held in Tokyo, Japan. The Bar

Association of India has always been strong supporter of LAWASIA. BAI has worked closely with LAWASIA to support the activities and promotes the goals and aims of the organisation. BAI is a member organisation of LAWASIA. It has appointed Councillors and Alternate Councillors to the LAWASIA Council Meeting.

Over 1600 delegates from various countries participated in the Conference. Over 40 lawyers from India including some members of BAI attended the Conference. Mr. Prashant Kumar had presided over the Conference as President, LAWASIA. The inaugural of the conference was done by Crown Prince of Japan duly accompanied by his wife. The Conference was a great success. The Conference was attended by Mr. Shyam Divan, Vice President, BAI, and Country Councilor, LAWASIA, Ms. Madhavi Divan, Editor, Indian Advocate, Ms. Pinky Anand, Vice President, BAI and Alternative Councilor, LAWASIA, Mr. Yakesh Anad, Hony. General Secretary, BAI, Ms. Geeta Luthra, Executive Committee Member, BAI, BAI, Mr. B.P. Todi, Executive Committee Member, BAI, Dr. Jai Prakash Gupta, Executive Committee Member, BAI, Mr. T.N. Mishra, Governing Council Member, Mr. Arush Khanna, Governing Council Member, BAI, and Mr. Paurush Kumar, and Ms. Priyanka Mathur Sardana, Members, BAI

21. IBA Annual Conference - 8th – 13th October, 2017

Mr. V. Lakshmikumaran, Member Executive Committee, BAI , Mr. Rajiv Dutta, Senior Advocate & Secretary Delhi, BAI and some other members of BAI had attended the IBA Annual Conference in Sydney, Australia from 8th – 13th October, 2017. Ms. Triveni S. Poteker, Treasurer, BAI accompanied by six scholar young lawyers selected by IBA Committee had also attended the Conference.

22. SIAC India Conference - 12th October, 2017

Singapore International Arbitration Center had organised a one day Seminar on International Arbitration in India on 12th October, 2017 at Hotel Imperial Hotel, New Delhi.

The event was co-sponsored by The Bar Association of India & Society of Indian Law Firms. Many members of BAI had attended

& participated in the event.

23. Moot Court Competition - 24th – 26th November, 2017

G.D. Goenka Education City, Sohna, Gurgaon, Haryana had organised G.D. Goenka - ClArb International Commercial Arbitration Competition, 2017 in their campus Law College on 25th & 26th November, 2017. Inaugural Ceremony was held on 24th November, 2017 at Hotel Hyatt, New Delhi. Dr. Lalit Bhasin was the Chief Guest. About 36 Law Colleges and Law Universities from India, Nepal & Bangaldesh had participated in Moot Court Competition.

In the final round of Moot Court Competition, Dr. Lalit Bhasin, President, BAI & SILF, Mr. Rajeev Dutta, Senior Advocate and Secretary, BAI – Delhi & Mr. Yakesh Anand, Hony. General Secretary, BAI were the judges. Dr. M.L. Sharma (Retd.) Judge, Supreme Court of India was the Chief Guest during the Valedictory function. Presentation of Awards to the winners and to the participating teams in the Moot Court competition was done by the Hon'ble Justice Dr. M.L. Sharma, Dr. Bhasin & other judges who had presided during the Moot Court Competition. The Moot Court Competition was duly supported by The Bar Association of India.

24. Fourth BRICS Legal Forum - 29th November – 1st December, 2017

Fourth BRICS Legal Forum is being organised in Moscow, Russia from 29th November, to 1st December, 2017. The Hon'ble Prime Minister of Russia, who also happens to be a Lawyer addressed the Forum. Mr. Prashant Kumar, President Elect, BAI Dr. Pinky Anand, Vice President, BAI, Mr. Amarjit Singh Chandhiok, Vice President, BAI, Mr. Uday Prakash Warunjikar, Vice President, BAI, Mr. V. Lakshmikumaran, Member Executive Committee, BAI, and Mr. Dhanraj Ranoji Gavali, Member Executive Committee, BAI, and Ms. Rachana Srivastava, Former Hony. Secretary, BAI have attended the Form on behalf of The Bar Association of India.

25. Lawyers of India Day - 3rd December, 2017

The Bar Association of India celebrated "Lawyers of India Day" on 3rd December, 2017 (Sunday) by felicitating and honouring eminent members of the Bar.

It happens to be the Birth Day of Dr. Rajendra Prasad, the First President of the Republic of India. He was an eminent lawyer as well. More importantly Dr. Rajendra Prasad inaugurated the Bar Association of India in 1960. BAI plans to observe 3rd December every year as "Lawyers of India Day" to give recognition to the continuing role of legal profession in the socio-economic and political development of India. This is a unique initiative where the role of the legal profession will be highlighted every year.

On 3rd December 2016, BAI celebrated "Lawyers of India Day" by felicitating and honouring The Board of Advisors of the Bar Association.

The List of Awardees for 2017 are as follows:

Shri B.V. Acharya, Senior Advocate, Shri N.K. Anand, Advocate, Shri Murlidhar C. Bhandare, Senior Advocate, Shri Iqbal M. Chagla, Senior Advocate, Shri Nilay Ananda Dutta, Senior Advocate, Shri Naranarayan Gooptu, Senior Advocate, Shri R.N. Jhunjhunwala, Senior Solicitor, Shri U.R. Lalit, Senior Advocate, Shri Gopal Subramanium, Senior Advocate, Shri M.S. Usgaocar, Senior Advocate and Prof. (Dr.) Mool Chand Sharma, Former Member, Law Commission of India.

YAKESH ANAND
Honorary General Secretary

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I, SD Sharma, Superintendent, The Bar Association of India, New Delhi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/- SD Sharma
Publisher

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