THE 1ST NLIU - INDIA FOUNDATION CONSTITUTIONAL LAW SYMPOSIUM

On March 16 and 17, 2019, the NLIU Law Review, in collaboration with India Foundation, organised the first edition of the NLIU - India Foundation Constitutional Law Symposium. The event, which aims to provide a platform for discussions on contemporary constitutional law issues in India, saw great participation from students, researchers, faculty members, academicians and legal professionals. The event saw a paper presentation competition on the first day, followed by several panel discussions engaging legal experts on the second day.

The paper presentation competition called for submissions from law students across the country. The NLIU Law Review, through its multi-tier review process, shortlisted submissions, which were subsequently presented at the event. The discussions on the first day covered topics such as the doctrine of essential religious practices, female genital mutilation and reservation in promotions, with the presenters also suggesting novel solutions to address the lacunae in the existing legal framework.

The paper presentation was followed by panel discussions and plenary sessions on the second day. The theme for the first session was "The Aberrations in the Principle of Separation of Powers". The eminent panellists were Justice A.P. Misra, Former Judge, Supreme Court of India and Chairman, Legal Education Committee; Prof. N.L. Mitra, Former Director, National Law School of India University, Bangalore and Founder Vice-Chancellor, National Law University, Jodhpur; Prof. (Dr.) B.N. Pandey, Dean, Adamas University; Prof. (Dr.) V. Vijayakumar, Vice-Chancellor, NLIU, Bhopal and Dr. Manoj Sinha, Director, ILI Delhi. The session was moderated by Mr. Apurv Mishra, Senior Fellow, India Foundation.

The second session for the day was a plenary session on "Faith and the Indian Constitution" where eminent legal scholars and personalities, Prof. V.K. Dixit, Professor of Jurisprudence, NLIU, Bhopal; Mr. Vikramjit Banerjee, Additional Solicitor General, Supreme Court of India and Mr. J. Sai Deepak, Advocate, Supreme Court of India, presented their opinions. Finally, a special plenary session on "Freedom of Speech and Expression in the Age of Social Media" with a panel consisting of Ms. Anuradha Shankar, ADGP of Madhya Pradesh Police; Dr. P. Puneeth, Centre for Study of Law and Governance, JNU, Delhi and Prof. (Dr.) Ghayur Alam, Dean of Undergraduate Studies, NLIU, Bhopal concluded the discussions. This session was moderated by Mr. Guru Prakash, Fellow, India Foundation.

A concise summary of the address delivered by the panellists at the Symposium has been put together by the Editorial Board at the NLIU Law Review.

THE ABERRATIONS IN THE PRINCIPLE OF SEPARATION OF POWERS

JUSTICE A.P. MISRA

The law is required to curb the human tendencies of compromising others' rights for self-interests. In the Treta Yuga, it is said that there was no law and no one to violate it. They only imparted love, cooperation and coordination; the question of law was not necessary. Gradually, man, due to his self-interests, went on to violate rights of others and the law came into being. In any country, where there are more laws, there are more violations. In a country with minimum laws, you will find less instances of violation.

In the earlier days, justice was dispensed by calling upon the divine, that is, God. But the king was also affected by worldly life. Every king had to consult a man who would advise him with equanimity and tranquility in his behaviour, like Dashratha had Vashishtha. Similarly, if we are affected by any of our senses, we will be unable to

administer justice. As things progressed, even the highest sources of authority that dispensed justice became polluted. In a democracy, the government is the authority. The Constitution came into existence to curb and curtail the activities of the authority itself. It laid down fundamental limitations on the actions of the authorities. There are three lists within the ambit of which the government functions.

The judiciary is very important for the functioning of the democratic system; it serves to control it. It is the highest authority- not only the executive, but even if the parliament makes laws, the judiciary can declare such laws to be *ultra vires* if they transgress the ambit of the Constitution. This role is particularly important in the context of the preservation of the rights enshrined in part III of the Constitution. If we look to the Shrutis from ancient times, there were no rights, but there were obligations on the king. Today, the focus is more on rights, which leads to a conflict at times. Dr. Rajendra Prasad in his speech said that although he was responsible for making the Constitution, he was responsible for the mistakes made within it. He said that he admits to committing mistakes in this process because they "*forgot to focus on the corresponding duties which come with the fundamental rights granted by the Constitution*". People today, are demanding rights without carrying forth their duties. Order depends not only on claiming rights but performing obligations that rest on the people.

Part IV of the Constitution talks about obligations on the state, the interpretation of which is important. When you make obligations non-enforceable, they remain in cold storage. There are many provisions in the Constitution that still lie inactivate. One of such provisions is Article 343, which conceived Hindi to be the next official language of the country. It states that English will function as the official language for 15 years subsequent to which, Hindi will take its place. Commissions were to be established to periodically check the development of Hindi across the country. However, this has remained inactive.

The law is a divine profession, and one must not practice it for money. It is important to learn that ethics are the foundation of this profession. If there is no equanimity or tranquility, one can never succeed in this profession; justice cannot be imparted. I would like to quote Aristotle, "*morality strives on rationality and it is this rationality which controls the irrational part of every human being.*" Don't be in a hurry; be like a tortoise. The rabbit was a fast runner, but he lost the battle. I am reminded of what Shakespeare once said- "*a sweet flower takes time to grow, the weeds grow in haste. Do not try to be weeds.*"

PROF. N.L. MITRA

This session is about law and economics. This country needs law in economics. Oftentimes, it can be seen that lawyers are ignorant of economics and economists ignorant of law, but law and economics need to interact. The Reserve Bank of India has seen seventeen different governors, of which nine were IAS officers and three did not have any idea of economics. Such has also been elaborated upon in an article titled "Macroeconomic Management under Constitution of India and the Fiscal Responsibility" published by one of our esteemed panel members. Strangely, in India, no case has ever been filed demanding price stability. Ultimately, maintaining price stability is a state function and should be considered its responsibility. The Central Bank of India does look after price stability and inflation, as do the Banks of England, Germany and America. Yet, no lawyers have not moved the Supreme Court challenging the determination of price stability.

In the Constitution of the Reserve Bank of India, it is said that macroeconomic management is not fiscal responsibility. It is ridiculous that IAS officers who do not know anything about macroeconomic systems of management head the central bank. Our

country has two financial policies. One of them is called short-term financial policy. It is called short-term because it is operative for only five years and changes when our government changes. It is fiscal because it deals with taxation done to balance out the cost of governance. In India, people rarely question the tax whereas it is easy to recall American decisions whereby the court decided that the tax being collected is unnecessary. This is due to the constitutional mechanism of the macroeconomic system.

It is bewildering to see how the Reserve Bank does not have any constitutional role. The same question was also raised in the Narasimham Committee Report. Neither of the two, the Reserve Bank of India and the Central bank of India, have any semblance of a constitutional machinery. In contrast, the Finance Commission is a constitutional machinery. Thus, the Reserve Bank is not a constitutional organ of the State and should not be treated as such. Questions like "whose problem is fiscal responsibility anyway?" or "why are obligations not attached to such banks?" remain unanswered. On consulting the IBA guidelines on Fiscal Responsibility, the World Bank's Guidelines on Fiscal Responsibility and Australia's law on fiscal responsibility, no answer can be found because, surprisingly, this question has never been raised by lawyers. Is it because of the fact that Indians do not question? There still remains a lack of clarity on the main issue in the Indian sphere.

PROF. (DR.) B.N. PANDEY

The Bar Council has done a brilliant job when it comes to improving legal education. It is important to improve the standard of legal education for protection of the Constitution itself. The importance of law and morality cannot be understated, as explained by Justice Deepak Mishra in the *Navtej Singh Johar* case which partly struck down Section 377 of the Indian Penal Code.

National law universities and other institutions imparting legal education judiciously are pertinent for the country's development. Such education must not be confined to "held, upheld, withheld", that is, sticking to what is settled by the Supreme Court, as is the practice in constitutional law classes, but rather must go beyond that. Judges have recognised and advised for the improvement of the poor standard of legal education as the same is a necessity for safeguarding the democratic system, independence of the judiciary and the Constitution. The references made to constitutional morality by the bench in the *Navtej Singh Johar* case, even when it was not necessary for them to do so, shows the need for expanding beyond the notions of "held, upheld, withheld." As political science has the concept not just of state but also deep state, similarly we must reach for a deeper meaning of all the important judgments.

Secondly, there is a need for detailed deliberation on each issue. *State of Bihar v. Kameshwar Singh*, in my opinion, is more important than the *Kesavananda Bharati* case. The case related to land reforms and zamindars, and Dr. Ambedkar, appearing for the zamindars, had first argued that there is a spirit of the Constitution and the same should be implemented, although his submissions were rejected by the court. In cases like *I.R. Coelho v. State of Tamil Nadu*, and later in the *M. Nagraj* case, the Supreme Court has highlighted and reminded the people of India of the various values enshrined in the Constitution. The observation in the *National Judicial Commission* case, that the independence of judiciary is not only physical but meta-physical, highlights the expansive approach.

The abovementioned points do need to be considered in a larger context, especially for developing countries. The morality of the Constitution is conflicted in countries such as Brazil and Pakistan and the day might not be far off where India is at similar crossroads. Such conflict is not impossible, nine judgements of political importance have been given since September 2018 and the message in some has

been disconcerting for both legal practitioners as well as law students. There is, however, a ray of hope when it comes to protecting the values of our Constitution- our creativity. We must highlight the role of creativity in protecting these values.

PROF. (DR.) V. VIJAYAKUMAR

The very objective or the foundation of the concept of separation of powers is to see that no one branch of the state is able to become all powerful and destroy the established relations among the three branches, which in law is also known as "checks and balances". Therefore, the object of separation of powers is to create these three branches and to make them work together so that not one becomes all powerful.

India and Sri Lanka serve as important examples in understanding the concept of separation of powers. The Sri Lankan representatives said that they would like a parliamentary form of government similar to India because it provides for a check on the arbitrary use of power. However, in both these Constitutions, the concept of checks and balances did not function properly. That is the reason why the President became all powerful in Sri Lanka and in India, the Prime Minister. If only the concept of separation of powers and checks and balances would have worked together, the rights and liberties, benefits and economic complications, could have been realised. At the commencement of the Constitution, in a few decisions like the In *Re Delhi Laws Act*, a seven-judge bench of the Supreme Court held that the Indian Constitution does not provide for strict separation of powers. The Court said that India does not have a rigid separation of powers like that of the United States of America. The American Constitution is very brief and does not mention the term "separation of powers". Therefore, trying to find the meaning of that phrase in the Indian Constitution is obnoxious. In my opinion, when the said

judgment was passed, the Supreme Court was unable to appreciate the text of the Constitution.

For the first time, during the emergency, four out of the thirteen judges mentioned that separation of powers is a basic feature of the Constitution. This was the first time that the judges said anything in this regard. They were seeking to provide ways and means within the Constitution to tame political power. At the same time, they were envisaging the techniques through which power would be a check to other powers, thereby maintaining a constitutional equilibrium in between the elections.

Subsequently, *Minerva Mills* used another phrase – "the Constitution had no rigid separation of powers. But there is a broad demarcation of having reared to the complex nature of governmental functions and certain degree of overlapping is inevitable." That overlapping is what we call as checks and balances. However, the Court did not clarify the meaning of the broad demarcation and the inevitable overlap. If only they had mentioned that it would have possibly been easier for us to understand what they really meant. It can be seen over the course of many subsequent judgments like *Indira Gandhi v. Raj Narain* and *L. Chandrakumar v. Union of India*. In these decisions also, the Court acknowledged the existence of the doctrine of separation of powers in the Constitution.

The constitutional bench in the 2014 decision of *State of Tamil Nadu v State of Kerala* said that even without express provisions for separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution and an essential constituent of the rule of law. The doctrine is not express in the Constitution, but its existence is apparent from the scheme of the Constitution and how it divides the powers between the three organs of the government. The Court in this case also said that the separation of powers between the organs is nothing but a consequence of the principle of equality. Accordingly, the breach of separation of judicial powers may amount

to negation of the equality under Article 14. This case is thus an example where the Court was able to appreciate the doctrine of separation of powers beautifully, highlighting that even without express provisions, separation of powers is ingrained in the Constitution. It is, however, often said that it was ingrained by the Court to substantiate their own powers.

In *I.R. Coelho v State of Tamil Nadu*, a nine-judge bench of the Supreme Court held that the principle of constitutional information requires control over its exercise to ensure that it does not destroy the democratic principles. These principles include the protection of fundamental rights and the principle of constitutionalism. The model of separation of powers requires a diffusion of powers necessitating different independent centres of decision making. Therefore, one can appreciate the semblance of the doctrine of separation of powers that is present in our Constitution. We need to rejuvenate the concept of separation of powers and checks and balances to maintain the democratic values in the country.

DR. MANOJ SINHA

It is a matter of great delight that "separation of powers" has been chosen as one of the topics of this seminar. At the outset, it is pertinent to begin with a brief deliberation on the Universal Declaration of Human Rights (UDHR), which could also be said to have become a part of the Indian Constitution subsequently. Both President Franklin Roosevelt and his wife, Eleanor Roosevelt, played an instrumental role in its drafting. President Roosevelt focused on the four core and essential freedoms, namely, freedom of speech and expression, freedom to worship, freedom from want and freedom from fear and termed them as "fundamental" for a better world with a better future. His vision regarding these freedoms is also reflected in the debate surrounding the UDHR, particularly with respect to civil

and political rights, and economic, social and cultural rights. Various Indians also played an important role in the drafting of the UDHR, including Hansa Mehta and K.C. Neogi. Hansa Mehta was a champion of women's rights and strongly believed in gender equality. At the initial stage of drafting, Article 1 of the UDHR began with "*all men are born free*." She insisted on the word "men" being removed and got it substituted with "human beings". The significant contribution made by Hansa Mehta has also been recently acknowledged by the Secretary General of the United Nations on the occasion of the 70th anniversary of the UDHR.

As far as the concept of separation of powers in India is concerned, it is not followed here *stricto sensu.* This can be seen in case an ordinance or legislation is challenged in a court of law after it has been adopted. Another instance could be the *Vishakha* judgment wherein the Supreme Court reproved the government for not bringing in a law in line with the Convention on Elimination of Discrimination of All Forms against Women, to which India is also a party. Thereafter, both the executive and legislature acted swiftly, and the Domestic Violence and Sexual Harassment Act was thus formulated. Hence, it is clear that a rigid separation of powers is not accepted in India.

Nilabati Behera v. State of Orissa is yet another important judgment in this respect. At the time of ratification of the International Covenant on Civil and Political Rights (ICCPR) on April 10, 1979, the Government of India decided that Paragraph 5, Article 9 of the ICCPR which relates to victim compensation, shall not be applicable to India. However, in the *Nilabati* case, the Supreme Court relied on the *Vishakha* judgement and reiterated that there should be no difficulty in implementing a treaty which is consistent with the Constitution of India. The Court, thus, identified an obligation under Paragraph 5, Article 9 of the ICCPR to pay compensation to the victims.

Another relevant case to be noted in this regard is *Namgyal Dolkar v. Ministry of External Affairs*, which related to the right of a Tibetan woman born in India to claim Indian citizenship. All the Tibetans in India are provided with an identity certificate that allows them to avail various benefits and also qualifies as a travel document. While applying for a passport, Namgyal Dolkar, who was born on April 30, 1986, indicated Indian nationality instead of mentioning the identity number. The Ministry of External Affairs objected to the same and the matter went to the High Court. The Court found that, pursuant to the Citizenship (Amendment) Act of 1986, Dolkar is entitled to claim Indian citizenship by birth and cannot therefore be denied a passport. Around 30,000 Tibetans were granted Indian citizenship after this decision. Later on, the same matter came before the Karnataka High Court, post which the Tibetans were also given the right to vote in 2013.

FAITH AND THE INDIAN CONSTITUTION

PROF. V.K. DIXIT

Most scholars, premising upon religious sentiments, do not hold religion responsible for creating hurdles in women's liberation. They cite tradition, culture and interference with divine law while justifying "anti-women" practices. Religious people hide behind the facade of "respect" to cover the reality of the bias against women. Most religions originated through patriarchy. Classical Hindu law was especially harsh on women as understood from regressive practices like Sati and female infanticide. Muslim law is also unfair to women. There are discriminatory undertones present throughout the law, on spurious grounds. Whenever progressive reforms take shape, they are opposed under the guise of religion. Generally, religious practices can be saved on the grounds of religious freedom if they do not violate the Constitutional provisions. However, defenders of regressive practices

have argued for these practices on questionable grounds. They often forget that in a multi-religious society, religious practices have to be subordinate to the Constitution.

The Sabarimala temple is dedicated to Lord Ayyappa. Ayyappa is a celibate in the tantric tradition. The temple does not allow women between the ages of 10 and 50 as menstruating women may defile the celibacy of Lord Ayyappa. This restriction was challenged in the Kerala High Court in 2006. However, the court upheld it on the reasoning that the restriction did not apply to all women, but to women of a particular age group. In 2018, a five-judge bench of the Supreme Court heard the case and held that the restriction was unconstitutional in 4:1 majority. The majority opinion held that the practice violated rights to equality, liberty, and freedom of religion guaranteed by Articles 14, 15, 19(1), 21 and 25(1) of the Constitution. The minority opinion delivered by Justice Indu Malhotra reasoned that "matters of deep religious faith and sentiment" must not be interfered in by courts.

The majority held that the exclusion could not be permitted under Article 25(1) of the Constitution. It was further stated that Lord Ayyappa does not have a distinct religious identity and therefore is subject to social reforms under Article 25(2)(b) of the Constitution. Justice Chandrachud even stated that the practice is similar to untouchability. He reasoned that all women are created equal, and this exclusion would place women in a position of subordination. Consequently, Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules of 1965 was struck down. It is difficult to appreciate the logic given by Justice Indu Malhotra. This reasoning allows for the violation of fundamental rights. The patriarchal mindset of the followers may deny fundamental rights to women. She notes that using this argument may have serious consequences; therefore, she draws the line at practices like Sati. However, the distinction between the right to life under Sati, and the

right to dignity and worship in the present case does not have a legal basis. Article 21 protects both such rights. The larger ratification of the line of reasoning adopted by Justice Indu Malhotra is dangerous.

Lord Ayyappa is a celibate. A celibate does not succumb to sexual desires in the presence of women of any age. Celibacy entails the perception of every woman as his daughter, sister or mother. Lord Ayyappa does not have to avoid women's presence; consequently, Ayyapa's followers are belittling the status of the Lord. Tantric celibacy does not allow the contact of blood, semen and urine. Hence, the reasoning behind preventing only women from entering does not make sense. If anything, the authorities can restrict women during their periods; women do not menstruate all year round. Patriarchy imposes reservations on menstruation and holds that they become impure. However, all of us carry urine and excreta, but men are pure. Without menstruation, the human race would cease to exist.

There must be a separation of unholy from holy. The followers, at some point, included anti-women practices. It is the right time to make clear that distinction with reason and logic. A sex that shoulders the primary responsibility of creating the human race cannot be inferior to men.

MR. VIKRAMJIT BANERJEE

There are two broad ways in which the state has handled or conceived faith- the ways of the old pre-Judeo-Christian, followed by Judaism, Christianity and Islam with their differences. The pre-Judeo-Christian conception still prevails in places like China, India and other such countries. The old religions conceived law as natural and faith, society and law as largely inseparable. In many ways, Indian civilization today resonates more with a pre-Christian background and faith, vis-à-vis the law and the state.

In the Indian civilization, a multiplicity of faiths continues to prevail and people follow different faiths like Buddhism, Sanatan Dharma, Jain Dharma and Charvakas. The essence of the conflict that prevails today because of the two different conceptions over how to envisage law and faith in the state can be understood by the rule of Ashoka and Constantine. Both Ashoka and Constantine, while in different parts and times of the world, were faced with the same question of how to handle an increasingly bureaucratic empire in the face of such diversity. Ashoka aimed to bind people and their varying rules through Dharma. On the other hand, Constantine wished to unite the diverse set of people while allowing diverse interpretations of that unity. While Ashoka talked about finding "unity in diversity", Constantine looked for "diversity in unity". Akbar was the first to realise the diversity among the people and lay down a common code, thereby establishing the foundation of the Mughal state. He compromised to find a balance among the diversity in the Mughal state. However, this consensus regarding a compromise soon frayed as the entire world became more invasive with every religion.

When the British came to India, their attempts to change Indian religion through conversion were met by the revolt of 1857. Subsequently, Queen Victoria declared that the British would stay out of religion and treat all faiths in a secular manner. The word "secularism" in the Indian Constitution was finally added by the 42nd Amendment. Presently, the issues being discussed explicitly in the *Triple Talaq* judgment and in the *Sabarimala* judgment have their genesis in the said amendment as, when the word "secular" was inserted, the Western conceptions of religion were brought in.

The Supreme Court has recently adopted two lines of arguments in the aforementioned judgments. In the *Triple Talaq* judgment, it was broadly accepted that faith should be treated on its own terms. Justice Kurian Joseph stated in the judgment, "*what is bad in theology cannot be good in law*" and Justice Rohinton Nariman argued that "*because*

triple talaq could be governed by the Shariat Act, that was law and therefore we could amend it". The Court in the end explicitly or implicitly stayed away from pronouncing whether tenets of faith per se went against the Constitution or not.

However, in the *Sabarimala* case, there were two conceptions of a "transformative Constitution" and "constitutional morality" which were formulated by the Supreme Court. The former signifies that the Constitution erases one's history and starts with a tabula rasa. The latter remains important because it signifies morality as an exception to the right to religion under Article 25. Morality was deemed to be constitutional rather than public morality, that is, morality as interpreted to be against the Constitution by the constitutional court. Hence, faith and culture will be attacked by people with good intentions on the ground of it being violative of constitutional morality. To view constitutional morality as a means for the state to impose its own morality through the judiciary is very oppressive. Justice Malhotra, in her dissenting opinion in the *Sabarimala* judgment, referred to "cultural constitutionalism" whereby you have multiplicity of faiths and you respect all of them.

It is finally concluded by highlighting that this conflict is likely to grow due to growing westernization and connectivity. The cultural centres such as Banaras Hindu University and the Aligarh Muslim University are shifting to Harvard and Cambridge, which are conceived in a completely different cultural background. The more one imposes values, the greater the pushback they get. In conclusion, the conflict seen in the *Sabarimala* case is only an indicator. There is a lot coming, which is not the beginning of the end, but is just, as judges have said, the end of the beginning.

MR. J. SAI DEEPAK

There is a need to emphasize on the remarkable nature of the Constitution. The Constitution is not solely legal or social but possesses a dual quality of being socio legal. This implies that it is a legal document that has social implications but has to nevertheless comply with the rules of interpretation of a legal document. In this day and age, it is so easy to skew a discussion without paying heed to distinction, nuance or logic. Every layman understands buzzwords like patriarchy, gender equality and legal connotations attached to general discussions. However, these discussions do not contribute to the substantive interpretation of the Constitution.

In terms of understanding the complex situation that is the *Sabarimala* case, juxtaposed with religious beliefs and fundamental freedoms, nuance is the name of the game. The concept of "equality" varies with the exigencies of a situation and the dynamics of time. For example, in the judgment concerning the abrogation of Section 377 of the IPC, the phrase "the doctrine of progressive realization of rights" was used. This gave a new direction to the approach of the Supreme Court and this distinction was applied to multiple cases that followed, with the *Sabarimala* judgment being one prominent example. However, despite the positives, multiple negative perceptions could also be drawn from this. The interpretation of our Constitution is vested in the hands of individuals who get to be a part of a particular collegium and the direction adopted by the collegium changes with new appointments.

Based on the principles of evidence, the contention concerning equality in the *Sabarimala* case cannot be built upon "menstruation" but rather religious beliefs. If anyone questions the observance of these rules, they forget that a temple is not their home, it is the deity's home. It is neither a place of prayer nor of congregation; at least as far as Sanatana Dharma is concerned, it is a place of worship. The deity, according to the Sanatana Dharma, is not a figment of imagination but

a living creature. The reason why a woman is not supposed to enter that particular place, especially a woman of a procreative age group, is centred around the belief in Tantrayoga and Sabarimala is a tantric temple. In Tantrayoga, three fluids, one of which is blood, plays an important role. Hence, the belief dictates any man or woman bleeding cannot enter the temple.

Further, it is believed that is that the powerful energy of a Naishtika Brahmachari is harmful to the energy of a woman of a procreative age and thus, affects her uterus and her childbearing abilities. One might claim that these are mere superstitions. However, in response to that, it can be argued that it is not fair to apply secular logic to a place of faith and worship. It is for the believers and stakeholders of the temple to decide such matters. The problem is when persons do not understand the sentiment behind the place of worship, the concept of desecration and consecration which the believer puts faith in.

As a concluding remark, it is necessary to highlight the shift in the dimensions of secularism in India. There is a difference in the secularism that was brought by the British to that of enlightenment in India. With this, one can question whether secularism even forms a part of the basic structure of the Constitution; it was not initially a part of the Preamble, rather, was introduced as part of 42nd amendment in 1976, three years after the *Kesavananda Bharati* judgment which established the basic structure doctrine. The true understanding of secularism also remains questionable because states had in the past and even now continue to exercise control over the financial and other operations of temples.

FREEDOM OF SPEECH & EXPRESSION IN THE AGE OF SOCIAL MEDIA

MS. ANURADHA SHANKAR

A young man who was born two years after the worldwide web was invented, decided that people from other countries are invading his part of the world, and his part of the world is the whole world. He was ignorant of the history and how his ancestors invaded Australia and New Zealand. Nonetheless, he entered a place of worship and killed women, children or anybody who came inside and continued to stream it live. He also posted a link on Twitter, the video on YouTube and some pictures on Instagram. Nine minutes before that, he drafted a deranged manifesto and mailed it to the Prime Minister of New Zealand. This is when freedom of speech and expression goes to its completely sick or, rather, deranged limits.

When we look at the Constitution of India, especially Article 19, we must recall that the western idea of freedom is what actually guided the framers of our Constitution, particularly Dr. Babasaheb Ambedkar. The western idea of freedom is two pronged, that is, there are two schools: the negative idea of freedom of Locke and Mill and the positive idea of freedom of Rousseau and Hegel. The negative idea of freedom of Locke does not recognize authority, and the individual has enough choice to decide their own freedom. Whereas in the positive idea of freedom, somebody else decides how free you shall be. According to Rousseau, that somebody else is the society and in Hegel's viewpoint, it is mostly the authority of the state. Between these ideas of freedom, our Constitution decided to enshrine certain fundamental rights along with reasonable restrictions, "reasonable" being the important word. In very simplistic terms, the Indian ethos was to think of rights as flowing from duties or as conjoined with duties.

The need of human beings to be connected has actually pushed our civilization to all the corners of the world. The internet has given us

the freedom to migrate without physically going anywhere, to actually connect with each other, and in fact, without any identity. The anonymity gives a lot of power within the internet. That you can sit in Bhopal and connect with someone in Venezuela while telling them that you are from Moscow. The most important idea is that social media is very different from communications, networks or the press. One of the most problematic issues within social media are issues of privacy and the algorithms that fuel the social media platform. Algorithms push the content which they think one would be interested in. That is very problematic because there is no sense of choice, there is no understanding of what you actually want to see.

Today, we have become a state which we never wanted to become. This is true for even India, which is one of the most thriving democracies in the world. We have a scenario that almost mirrors the one in 1984 by George Orwell. The book is an anthem of our times. Drawing back to our fundamental freedoms, it is necessary to note when the Constituent Assembly sent Mahatma Gandhi a draft of the Constitution, he said that they needed to include responsibility in the same. He was of the opinion that each individual has to emancipate oneself instead of taking on heavy burdens such as emancipating the country. If each one of us emancipates ourselves and puts reasonable restrictions on ourselves, this problem is going to be solved. No country is a healthy country if it has to be policed constantly. A democracy is not a democracy if it has to be restrained, restricted, regulated and policed constantly. I will end with a quote about liberty from Mahatma Gandhi-

"*Liberty cannot be secured merely by proclaiming it. An atmosphere of liberty must be created within us. Liberty is one thing, license another. Many a time we confuse license for liberty and lose the latter. License leaves one to selfishness whereas liberty guides one to supreme good. License destroys society, liberty gives it life. In license, proprietary is sacrificed, in liberty it is fully cherished. Under slavery*

we practised several virtues out of fear, when liberated we practiced them out of our own free will. Are we slaves or are we free?"

DR. P. PUNEETH

Freedom of speech and expression has been accorded the sacrosanct status of being a fundamental right by all democracies, including India. The recognition of freedom of speech in the Indian Constitution was in accord with the contemporary democratic and humanitarian temper of constitutional practices all over the world. What freedom of speech signifies can be understood from Idi Amin's quote, "*there may be freedom of speech but there may not be freedom after speech*." The real issue is the threat of possible curtailment of freedom after speech, which thereby deters free speech. Thus, the ultimate purpose is to accord protection of freedom after speech, provided your speech or any other form of expression is within the defined legal limits.

In the Indian Constitution, the framers did explicitly define such limitations under Article 19 (2). Originally, this clause had four grounds on the basis of which restrictions could be imposed, namely, defamation, libel and slander, contempt of court, decency or morality, and the security of state. This was criticized for restricting the right too much. References to the US Constitution were made and it was said that this was a deception as the exceptions had actually eaten up the right altogether. Dr. B.R. Ambedkar called this criticism misplaced as firstly, it is incorrect to say that fundamental rights are absolute while non-fundamental rights are not, and secondly, the differences between the US Constitution and the draft Constitution of India are that of form and not substance. Fundamental rights in the US are not absolute and for every limitation, a judgment of the US Supreme Court can be found wherein all of these grounds have been recognized based on "compelling state interest". Instead, by explicitly recognizing the grounds of restriction, the Indian Constitution has in

fact limited the power of the State to curtail the freedom. This logic follows the rule of *expressio unius est exclusio alterius* as now, it is impossible for the state to impose restrictions on these freedoms on any ground other than the enumerated ones. This was stated by Justice Chelameshwar in the famous *Puttuswamy* judgment.

It needs to be noted that the Constitution of India also mandates that the restrictions are reasonable and must have a direct and proximate nexus with the specified grounds. Further, these restrictions can only be imposed by a law. Soon after commencement, the restrictions were found to be inadequate and two new grounds were added as per the judgment *Romesh Thappar v. the State of Madras* and later, the 16th Amendment added another ground. There are now eight grounds on the basis of which freedom of speech and expression can be restricted. It may be noted that these are not exhaustive, and speech can be restricted if it comes in conflict with other provisions of the Constitution, for instance, breach of parliamentary privileges. Since *M.S.M. Sharma*, the Supreme Court has considered committing contempt of the Houses of Parliament as a reasonable restriction. As per Article 358 of the Constitution, Article 19 can be suspended under Article 352. But that is not the case for other fundamental rights as per the 44th Amendment, the *R.C. Cooper* case, and the *Maneka Gandhi* case. Thus, even if there is automatic suspension of Article 19 due to the proclamation of emergency, it does not stand denuded of all constitutional protection.

Though the grounds under Article 19(2) are very wide, there are certain things which cannot be regulated based on those grounds. For instance, falsehood *per se* cannot be a ground of restriction unless it has direct nexus with the grounds that are mentioned in the provision itself. Due to this, the state can neither regulate nor authorize the intermediaries or service providers to regulate. Perhaps on the basis of "compelling state interest", the state could have recognized falsehood as a ground but in India, for this, the Constitution has to be amended.

Next, regulation of this freedom is difficult. Under Article 19(2), the state has power to regulate the content of speech and expression but the volume of content that is generated by social media makes it impossible to regulate the same. That is why, in certain exigencies, the state often resorts to internet shutdowns if social media results in public disorder, riot, violence of any kind, etc.

Such shutdown, if challenged before the court, shall be judged on the basis of the proportionality test. The proportionality test requires that there be a tailor-made response to the situation at hand because shutting down of the internet may have several other consequences, thereby rendering it unjustified in some cases. Thus, the biggest challenge in regulating the freedom of speech and expression in the age of social media is to strike a proper balance between individual freedom and the legitimate interest of the state and society.

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A few years ago, the Harvard Law School organised a Symposium on the "Freedom of Speech in the Age of Social Media". Two foundational decisions of the US Supreme Court - one decided in 1964, *New York Times Company v. Sullivan* and the other, *New York Times v. United States* decided in 1971 were the focus of the Symposium. *Sullivan* has been described by commentators as "an occasion for dancing in the streets". The decision of 1971 related to the leaking of the Pentagon paper and the question was whether the newspaper can claim protection of speech and expression. The US Supreme Court reaffirming the principle against prior restraint said "yes" and observed that freedom of speech and expression can be restricted only if there is an immediate and direct threat to the nation or to its people. In other words, remote or indirect threat to the nation or to its people cannot be a reasonable ground for restricting speech and expression.

It is freedom of speech and expression which is paramount and fundamental and not the restraint. A reporting in The Hindu, a leading newspaper has given birth to a political controversy. The newspaper has reported leakage of confidential papers, relating to Rafale Deal, from the Ministry of Defence, Government of India. One of the questions which should be addressed is whether the disclosure of the price of the Rafale fighter jet by a newspaper or otherwise is an immediate and direct threat to the nation or its people, especially in the age of social media. The moment something is published in a newspaper, the next moment it is on Facebook and other internet sites. More often than not, internet is the first to report a news in real time and print media publishes the same only on the next day.

Virtual world is described by the CEOs of social media corporations as global town squares where people meet, discuss, plan and execute things, both social and anti-social. When anybody opens a Twitter account, Facebook account or WhatsApp, nobody reads the terms of use before agreeing. Traditionally, the only regulator was the government, that is, the state. However, in the age of social media, it is the private companies who have and are increasingly becoming the regulators. Google is a powerful entity which decides what we read and what we access. It is deciding whether a particular content is or is not offensive. Digital world, in a sense, has minimized the control of the State. There is a shift of power. It is necessary to understand this shift when we are talking about the freedom of speech and expression in the age of social media. Every type of power including digital power cannot be allowed to be plenary, unfettered and unlimited. There has to be reasonable check in place. Law alone seems to be ill equipped to deal with all the problems of digital age. Whether we like it or not, the fact is we are not only used to it but have become dependent on the digital world. Law and digital technology, therefore, must join hands to protect and promote social good. The fact of the matter is that as a country, we are dependent on the technology produced and distributed by other countries. We are neither producers

nor distributors of new knowledge and new technology. At best, we are importers and consumers of new knowledge and new technology produced by others. As a nation we cannot be free and independent in the real sense of the term, until we become producers of new knowledge and new technology. To become producers, we must invest in education, research and development.

When we talk about speech and expression, we are also talking about the right to offend. George Orwell said, "*If liberty means anything at all, it means the right to tell people what they do not want to hear*". That, however, does not mean that one can hurl abuses because one wishes to. The Constitution of India and other constitutions of the world do recognize "reasonable" restrictions on freedom of speech and expression. A famous poem by Faiz Ahmed Faiz, "*Bol ki Lab Azaad hain Terey (Speak that your lips are free)*" beautifully captures the idea of free speech. The freedom is about speaking the truth without fear or favour even if it is against the most powerful, including the state or its functionaries. This freedom cannot be realized unless the powerful has the courage to listen the speech without any bias. If I am speaking the truth with honesty, I should have no fear whatsoever. As I understand it, as humans we all have the innate right to speak the truth, but we do not have the right, in any sense of the term, to speak lies.

A democratic and liberal country must be able to protect and promote free speech. If it cannot do so, it must consult its dignity. I do not think that there should be any type of restriction, reasonable or unreasonable, on speaking one's mind. However, law permits application of reasonable restrictions on freedom of speech. Reasonableness is more about proportionality, fairness and justice and not merely about efficiency. The question then is - how can reasonable restrictions be imposed on hate speech and other types of low speech in the age of social media?

Speech may be either low value speech (contempt of court, obscenity, etc.) or high value speech. Law seeks to protect and promote high value speech, which is necessary for the development and progress of individuals and nations. History is a witness to the fact that the higher the degree of freedom of speech and expression, the higher is the scientific and technological development. A mind which cannot think without fear is a sterile mind. A pen which cannot write without fear is useless. A nation will always remain intellectually colonized, if its laws cannot protect and promote free speech and expression. Freedom of mind to me is the most precious of the freedoms.

I will conclude by saying: when we involve ourselves in any discourse, we must keep in mind the words of Aristotle, "*It is the mark of an educated mind to entertain a thought without accepting it*". Discussion and debate are central to the existence of a free and equal society. Freedom, on the one hand, must mean absence of all restraints, if not all, then at least absence of unreasonable restraints. On the other hand, freedom must mean the capacity of each and every member of the society to fully and actually realize themselves. Equality must mean that every member of the society is equal to each other and one another. Every member has respect and dignity. As a member of a free and equal society, we, the people of India and the people of the world, must learn to respect the alternative and opposite views; as Voltaire once said, "*I may disapprove of that you say, but I will defend to death your right to say it*.