THE 2nd NLIU - INDIA FOUNDATION CONSTITUTIONAL LAW SYMPOSIUM

On March 14 and 15, 2020, the NLIU Law Review, in association with India Foundation, organized the second edition of the NLIU-India Foundation Constitutional Law Symposium. The event was initiated in 2019 to contribute to the literature and enhance the discourse on contemporary issues of constitutional law. Much like the first edition of the event, the second edition saw great participation from law students, academicians, legal practitioners and professionals across the country. The Symposium 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 pertained to topics such as the right to be forgotten, the Citizenship (Amendment) Act, 2019 and transgender rights, 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. Mr. O.P. Rawat, Former Chief Election Commissioner of India, delivered the keynote address in which he discussed the manner in which EVMs have revolutionised elections and emphasized on the importance of constant progress and improvement. He went on state "laws are as good as the individuals who uphold the law". This statement struck a chord with the members of the legal fraternity and the student community present in the audience.

Subsequent to the keynote address, the first plenary session was held on the topic *"Sovereignty in the Digital Age"*. The panel comprised notable speakers from the field of law and academics, such as Ms. Anuradha Shankar, ADGP, Madhya Pradesh Police; Mr. Vinit Goenka, Secretary, Centre for Knowledge Sovereignty and Mr. Bharat Panchal, Chief Risk Officer, FIS Global. This session was chaired by Prof. (Dr.) Ghayur Alam, Dean of Undergraduate Studies, NLIU Bhopal.

The Symposium also saw a second plenary session on *"Rethinking Parliamentary Democracy"* where the panellists addressed the student body in order to facilitate awareness and engage in discussion on key democratic issues in the country. The panel for this session included legal luminaries such as Hon'ble Mr. Justice G. Raghuram (Retd.), Director, NJA Bhopal and Mr. R. Venkatramani, Senior Advocate, Supreme Court of India. This second session was chaired by Prof. (Dr.) V. Vijayakumar, Vice-Chancellor, NLIU Bhopal.

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.

HON'BLE MR. JUSTICE G. RAGHURAM (RETD.) - RETHINKING PARLIAMENTARY DEMOCRACY

Drawing inspiration from the American, Canadian and other constitutions, the Indian Constitution was formulated over a period of three years, involving about three hundred men and women coming from various intellectual, cultural, social, economic traditions. These individuals came out with a document which had the distinction of being the longest Constitution in the world so far. We had a very complex structure for citizenship, allocation of legislative and executive powers, fundamental rights and duties, centre-state

relations, and unclear boundaries for the executive, legislature and judiciary.

There was an initial period where the judiciary romanced the legislature since there was an apparent debt from the efflorescence of the freedom movement, making the courts deferential. However, the legislative branch thought it needed to interfere with some entrenched feudal rights of property, and the tussle began between the two, leading to the first amendment to the Constitution, alongside a series of judgments striking down laws impeding the property rights of the people. Then came the formal declaration of a national emergency in 1975, another landmark era for constitutional law. There have been several seesaw moments in our judicial history henceforth, moments of extreme rectitude and adulation, judicial responsibility and subsequent judicial overreach. There have been moments where the judicial branch assumes it is necessary to right every wrong, or where the judiciary has taken it upon itself to interfere in the functioning of a legislative body.

There have been serious debates regarding whether parliamentary is the right form of democracy and whether we should try other forms of democracy. The problem lies not with the institutions we have, but with the people in them. The legislature is happy with the judiciary picking up the gauntlet to attempt to resolve disputes in its own ill-informed way, as long as they do not have any political implications, such as interstate water disputes. In India, when it touches upon core political interests, the executive wants to have a say. Power is like an aphrodisiac and the judiciary, having tasted the blood of executive functioning, is unable to let go. Though by definition, judges are wise, or at least call themselves so because the legal profession entails such an honourable virtue, sometimes people start believing it about themselves as well. Following these delusions, they start exercising power and begin to tell people what to do. This is a problematic thing but the people are just not concerned. In a democracy in which people

do not participate, law is too serious to be left only to the lawyers and individual reasoning of judges.

The people's deeper concerns remain untouched and the country has only witnessed a followership masquerading as leadership. We have political complexions of one variety where we vote the same kind of parties with different flags, and we place the same old wine in a new bottle. Contrary to current learned analysis of politics in India, in the first decade after independence when we were still romancing the great freedom movement, there was a coalition government in place. After the first decade there came a coalition of Muslims and Dalits, followed by one of the backward classes. Ever since we have had coalitions, the so-called leadership has been dividing people into more units than each group could have managed.

Political leadership of an institution must lead, mentor and transform obsolete and counter-democratic proclivities of individuals and societies for democracies to progress from a mere structural format to operational reality. There are all shades of representative arrangements in the polity and it is necessary to employ and leverage the sectarian, divisive and obsolete notions of caste, gender, religion and other insularities of the population that negate harmonious co-existence of our immense, complex and polychromatic demography. With their emphasis on the English language, the polity merely amounts to followership, in the hopes of replicating a successful past pathogen. Also, liberal rhetoric cannot substitute assiduous efforts towards eradicating from the popular sphere the toxic elements that are counter-democratic. This the urgent need of the hour but makes merely for occasional rhetoric. We have not yet graduated to the idea of nationhood, and today, sovereignty is on the verge of obsolescence.

Many red flags are clearly visible in our democracy, especially the judiciary. There are hiccups in our judicial trajectory, and judicial discourse digresses from being a symphony to a cacophony; there is no continuity or coherence. The other two branches are said to have

been compromised and imprudent. When justice is so full of scams that there is no hope that it can monitor the power, it becomes a supplicant of wealth and ceases to be an ordinary power. It is not wise to be cynical, but it is also necessary in some aspects, which I call healthy scepticism. Does the operative of Indian society correspond with what was conceived or envisioned by our founding fathers seven decades ago? Do we have an operative value? Do we have any value at all?

MR. R. VENKATRAMANI - REVISITING THE MAKING OF THE CONSTITUTION

When it comes to the rationale behind revisiting the history of the Constitution, it appears that such act is only done when there exists a flaw in the constitutional provisions and a modification is required to suit the changing times. If one happens to revisit the constitutional debates and the drafting history, one will note that every provision in the Constitution has a rationale behind its introduction, and has been made a part of the Constitution by the drafters after various debates and engagements. While interpreting a constitutional provision with the dynamics of time, one must know the rationale behind the provision and the importance that it serves for the people who are affected by it. This would make one realize the difference between the original provision and its interpretation by the judiciary, thereby amounting to a *"judiciary drafted Constitution"*. Thus, the Constitution must not only run by the judiciary; the checks and balances must be levied upon the provisions of the Constitution.

There is a need for *"rational principles"* for the understanding of the constitutional machinery. This refers to the practicality of a constitutional provision. The application of the said principles came into play in the Constituent Assembly while deciding upon the adult suffrage. Since the majority of the Indian population was not literate,

the commonality of the voting procedure seemed to be problematic. Now with diversification, one must ask several questions relevant to the endurance of the Constitution, such as those regarding the socio-cultural ethos and values of a community, which, if overlooked, affect contemporary India. In today's elections, a factor which is relevant for somebody who is being voted to a Panchayat would be hardly relevant for voting somebody to the parliament. This distance between our local interests and national interests is a matter of great importance for parliamentary function.

Further, two-fold notions concern the liberal democracy in the West. It is believed that there is minimum corruption and an accountable government in the West, as well as a widespread education; however, this is contradicted by the deep notions of reality that the voter turnout continues to fall in the US. Similarly, in other western countries, radical governments with extremist propagandas are being voted to power. This raises a question as regards the accountability of a free democracy for the betterment of the country due to "in-built-human-conditions" concerning candidature preferences. These conditions refer to the systems humans create based on their perceptions. With personal preferences in place, it is difficult to have a social order and social system, which is one of the greatest contemporary challenges at hand.

While it is understandable that the constitutional provisions are shaped by the ideas and perceptions of these representatives, it must be taken into account that ideas envisaged under the Constitution are said to be "non-negotiable" unless the systems of the state are not maintained in a healthy condition. Thus, a check must be kept on these institutions from time to time and it should be maintained that they do not exceed the jurisdiction granted to them by the virtue of the Constitution.

MS. ANURADHA SHANKAR - PRIVACY IN THE DIGITAL SPACE

It is very important to understand first that after World War II, the world decided that it is necessary to have democracies with capitalist economies. Slowly, the states which did not follow these ideals dissolved, broke up, or converted. The capitalist economy is equivalent to the free market, the actual nature of which can be debated. This established the *"corporate culture"* of today, and the market economy transformed into a surveillance economy. The big behemoths are controlling the world in an astonishing way which cannot be escaped. It is very innocent and rather gullible to think that we can make a national system whereby we can protect data within our nation. There exists a digital world called the *"deep web"*. All sorts of nefarious activities have been transferred onto the deep web, and all of one's data eventually reaches the deep web where it is being mined ambitiously. It is mined not only for illegal and harmful activities but also to undermine properly elected governments and economies of countries. Hence, it is the need of the hour to counter these activities and protect individual data.

The current law we have is nothing but a knee-jerk reaction to rising security issues, and is rather borrowed from countries like Switzerland and the UK. Similar to the physical world, the digital world in India is different due to a difference in socio-cultural norms. The precautions we take in the physical space also need to be taken in the digital space. Therefore, it is high time that good legal brains come up with an organic law to address these problems. The second thing which is really important is, and Europe has made a good start on this front, that one can only ask for a data code when it is legally required. *"Legally required"* means the state will not allow any data to be compromised unless the established law, which is the standards set by the Constitution, permits it, or an individual in their right mind gives consent, to share that information. Otherwise, things are going to be very difficult and dangerous.

The people who make the best protections are actually hackers. For example, a hacker from Indore studying in the 11th grade was caught tipping into all banks of India and siphoning off money, the amount depending on the size of the savings account. Thus, we need very well thought out laws which are targeted at the Indian reality. In modern day India, we have our democracy and our sovereignty that have not been sold to the behemoth companies, and if we want to and decide to, we can protect these ideals.

MR. VINEET GOENKA - DATA PROCESSING AND SOVEREIGNTY

How did the concept of data sovereignty come into play if a person wilfully shares their data and the data is now freely available and processed?

Let me address this with an illustration. There is a place called Chauchala in Haryana where a healthcare centre was built by a big multinational company. One day, four ladies, around the age of fifty, entered the room and there was a member of the staff assisting the medical professionals sitting there. In a very casual manner, he told them that it was a Tuesday and the doctor was running late. He went on to recommend to them a medicine to cure their stomach ailment. In shock, the ladies questioned the boy about the medicine, to which he replied that the ladies were present the previous Tuesday and had the same issue. The ladies reprimanded him in anger. However, when the ladies went inside the doctor's cabin, he prescribed the same medicine that the boy had suggested. Come next Tuesday, the ladies took the medicine directly from the boy. This practice continued for the next few weeks.

At the same time, news of medicines being stolen was received, and an investigation was conducted. The medical officers found a non-medical solution to the problem faced by the ladies every Tuesday. On Mondays, these ladies would go to Shanker Deva temple and

drink the water there. The water was contaminated, thereby causing the stomach ailment. The solution was to clean the temple such that these ladies would not face the problem. It was only because of the patient records maintained by the doctor that the medical officers were able to understand the pattern behind this problem. If a pharma mafia would have entered that system, they would not have shared the records to solve the medical issue with the non-medical solution. Hence, the data could possibly be used in both ways- the medical officers in furtherance of their duty found a non-medical solution to a medical issue but the situation could have had a different outcome in the hands of somebody else.

There is no comprehensive answer to the question asked. If data is so powerful, it can be used by anybody. The answer to this problem is very simple- for data protection, the data has to be inside the country. This is because the owner of the data knows that when their neck is in the noose, the law will take care of them someday.

This situation can be explained with another example of shopping establishments in Delhi. In two supermarkets belonging to the same chain located in different areas in Delhi, the rack of the first shop was remarkedly different in its offerings from the second. An investigation concluded that the company had data on the purchasing patterns of the people. While one area had persons predominantly from Kerala, the other had persons from the southern part of West Bengal. In this way, businesses manipulate the buying capacity of individuals. Thus, the use of data to the prejudice of its owners is a very serious issue in the modern era.

MR. BHARAT PANCHAL - EVOLUTION OF TECHNOLOGY AND ANTITRUST CONCERNS

People living in the twenty-first century are fortunate. This century has seen two of the biggest revolutions, which I consider myself lucky

to have been a part of. The first revolution began in 2002 in the telecom sector. While in the earlier days, it could take years for a mobile connection, today it only takes minutes. A new slogan was introduced in 2002 when I was the chief of the testing team of Reliance Communications – '*karlo duniya mutthi mein*'. This is a reality today; everything is truly at one's fingertips. The next revolution that ushered in was the digital age, or the age of digital transformation. When you are in the digital age, you are putting your fingerprints, your footsteps and your footprints on every activity of yours. Till the time it is used in the right manner, technology can help you, but the minute one gains control of your data, it becomes dangerous. India has 1.3 billion people, out of which one billion have mobile connections, and 450 million of them are smart phone connections. Thanks to *Jio*, data has become a commodity here. Imagine 450 million smart phones generating terabyte of data every day and night.

Hence, it is necessary to understand why data sovereignty is important for a country like ours. Any foreign investment, for example, depends on multiple factors, all of which are realized through data mining. Another example of disadvantageous data usage is Cambridge Analytica, the mastermind behind the previous US elections. They strongly influenced the mindset of the voters. When it comes to large scale cybercrimes, there exist two issues- either people are ignorant about the sharing of their data or they are aware of it and their action has backfired. In every cyberattack that has happened, we know what went wrong and how it happened but we cannot trace the culprit. This is because cybercrimes entail data flowing across the border, and thus, one does not have any control on the act.

The infrastructure needed to manage search engines as huge as Google and Yahoo is equivalent to entire budgets of states. A part of the revenue necessary for this purpose comes from selling individuals' data. Therefore, data sovereignty becomes important, and

is especially important when the issue is related to the national security. If that data is misused, our sovereignty stands threatened. Today, there is no law to protect individuals or the establishment from breaches of data security. Neither is there any law to protect data as a whole. One can no longer turn a blind eye to this issue because detachment from usage and sharing of data is impossible in this day and age. Therefore, the need of the hour is educating people on the importance of data as well as on measures to be taken to prevent its misuse.

PROF. (DR.) GHAYUR ALAM - THE CONSTITUTIONALITY OF THE AADHAAR ACT

Aadhaar or Unique Identification Number was introduced in India through an executive order without any specific statutory framework. The narrative for Aadhaar was constructed to make a point – convincing or otherwise. The Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (*hereinafter* the Aadhaar Act) has been enacted to *"provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, . . ., to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto"*.

One of the contentious issues has been the introduction of the Aadhaar Bill as a money bill in the Lok Sabha. The constitutional validity of the Aadhar Act was challenged in the Supreme Court. The matter was heard by a bench of five judges. The judgment was not unanimous. Four judges upheld the constitutional validity of the Aadhaar Act and one judge delivered a dissenting opinion holding the process of introduction of Aadhaar Bill as a money bill a fraud on the Constitution. The history of *ADM Jabalpur v. Shivkant Shukla* was perhaps repeating itself. For all legal practical purposes, the majority

view is the law declared by the Supreme Court and has the binding effect. The minority view, however, cannot be brushed aside and thrown to the wind. It is quite possible that a later larger bench may overrule the Aadhaar judgment. In the alternative, a review bench may refer the matter to a larger bench for reconsideration. It has happened before. The majority opinion in *ADM Jabalpur v. Shivkant Shukla* held the field for more than forty years which has been overruled in the right to privacy judgment and the minority opinion of Justice H. R. Khanna was not only appreciated but has also been declared as the right opinion.

Minority opinions by and large reflect the true spirit of judicial review – a counter majoritarian device. Truth and justice are not truth and justice because they are accepted or supported by the majority or by all. Truth and justice are truth and justice because they are truth and justice – they stand on their own. It is quite possible that the Supreme Court sooner or later upholds the dissenting opinion of Justice D. Y. Chandrachud and may declare that his opinion reflected the correct position of law. Whether my personal data including my biometric data is my property or whether the state has the power to acquire my personal data and make it accessible to private players, our aim is not to support or oppose a particular view. As members of the legal community, our aim is to find and explain the truth.