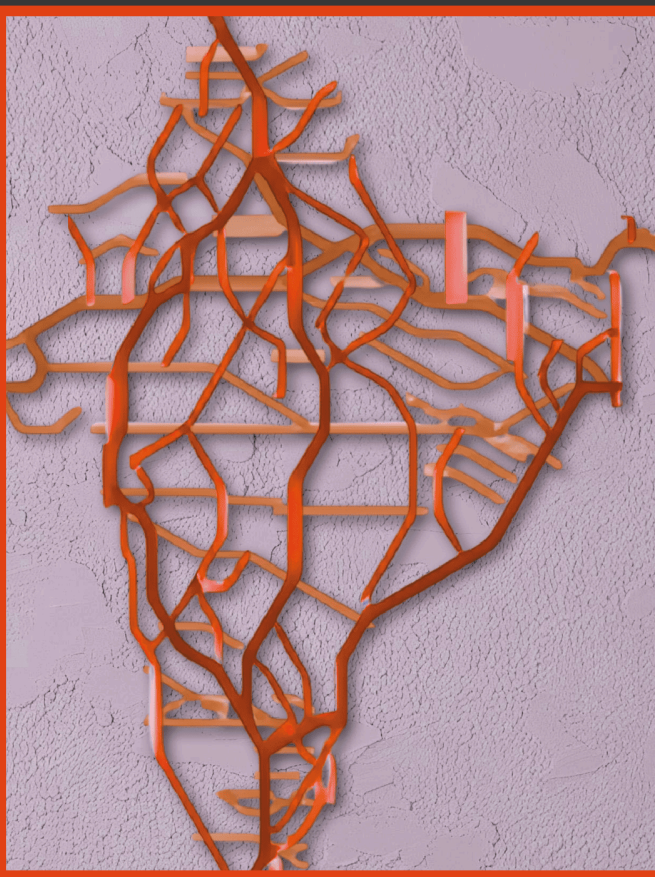
Indian Constitutionalism at Crossroads

2014-2024



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ON MATTERS CONSTITUTIONAL

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Indian Constitutionalism in the Last Decade

Introduction to the Edited Volume

It isn't hard to notice that Indian constitutionalism has been undergoing a phase of churning. Today, the foundational ideas upon which the Indian society was aspired to be reconstituted at the time of independence are under deep strain. While the last decade may not have left many conspicuous signs textually, the soul of India's constitutional system has suffered several dents. The ruling government, along with several of its ideologically affiliated civil and professional organizations, have launched, quite successfully, a project of redefining India, its constitutional identity, and its vision.

Against this backdrop, the decade from 2014 to 2024 has been a crucial period for Indian constitutionalism and those engaged with Indian politics. It has been a rollercoaster, marked by episodes of democratic resilience and hope amid the sustained expansion of the Bharatiya Janata Party (BJP) and its efforts to shape public consciousness and consolidate over institutions.

It would not be wrong to say that the past year is emblematic of the transitions India has undergone over the last decade. In 2024, the Narendra Modi-led BJP completed 10 years at the helm of India's union government and geared to return to power for the third consecutive term as general elections were held during the first half of the year. In the face of the BJP's juggernaut, particularly owing to its organizational skills, strong and deep cadre presence, and Modi's populist standing, the opposition (constituted of both national and state political parties) decided to come together to fight the election as a united opposition bloc. They named themselves INDIA, short for Indian National Developmental Inclusive Alliance. They put up a strong fight and challenged the incumbents significantly. INDIA was able to bring the BJP below the majority mark for the first time since it ascended to power in 2014, ensuring that the BJP's power is checked as it could only form the govern-

ment in coalition with other smaller parties, and creating a sentiment that the juggernaut is indeed defeatable. In hindsight, if one of the BJP's crucial coalition partners – Janata Dal (United) – had stayed together with INDIA and not jumped ship to join the BJP in January 2024,[1] the data says that the BJP, and its coalition called the National Democratic Alliance (NDA), could well have been decisively dethroned.

However, and one must give this to the BJP and its electioneering irrespective of where they stand in terms of their political ideology, the BJP was able to strike cracks in INDIA, expand its reach in the southern and eastern states of India (dislodging the perception that the BJP is just a north-India party), and most importantly, retain its vote share from the 2019 election despite a loss in seats. The loss in seats is indicative of the fact that the non-BJP vote consolidated in favour of the opposition. Therefore, when the leading opposition party, the Indian National Congress, claims a moral victory by finding solace in the fact that Modi's popularity is plummeting as the BJP failed to cross the majority mark, it sounds more like hysteria. Similarly, when the seasoned commentator on Indian politics, Yogendra Yadav, notes in the immediate aftermath of the results that "[Modi] has managed to reclaim the chair he so desperately needed but the public has denied him the *iqbal* (moral authority, prestige, legitimacy) that he so craved", one must take these claims with a pinch of salt.[2] The BJP's popularity and support remain intact.

The recent state elections affirm this. The BJP was able to wrest power from the established state party in Odisha and give the state its first-ever BJP government. In this process, it ousted the sitting Chief Minister, who had held the position continuously for the last 24 years. Similarly, it has been able to form the government in the Union Territory of Delhi after a long wait of 27 years. In Jammu and

Kashmir, where elections were held for the first time since the abrogation of its special constitutional status in 2019, the BJP returned with the highest vote share. In two other states – Haryana and Maharashtra – where INDIA outperformed the BJP during the 2024 national elections, the BJP registered historic and massive wins against all odds and predictions, even surprising its own cadres. If the numbers are anything to go by, the BJP retains the *iqbal* and has a decisive mandate. It may not even be wrong to say that any commentary noting that the BJP is past its peak may have misjudged the moment.

But politics and constitutional governance do not (should not?) hinge solely on numbers. There are certain aspects of governance where the significance of brute numbers fades to give space and primacy to high-order constitutional principles. The Indian Constitution is not majoritarian; it is democratic, as understood in its thicker conception. This book attempts to take that further step of analyzing Indian governance, as witnessed since the ascendency of the BJP since 2014, and mapping it against the values enshrined in the Indian Constitution. It aims to take stock of the constitutional developments in India in the last decade and explain their significance from the lens of India's constitutional identity.

This book originated as a blog symposium on *Verfassungsblog*.[3] In April 2024, on the eve of the Indian national elections, a long list of legal scholars and practitioners came together to reflect upon the developments in particular areas of Indian constitutional law over the last decade. They discussed a number of issues ranging from the health of constitutional institutions to the state of fundamental rights, aiming to present a holistic picture of the state of Indian constitutionalism. The symposium received a wonderful response, and thus, we thought of expanding our efforts and touching on more questions of a pressing nature as

we sat in the post-election phase. It is our sincere hope that this book will make positive contributions to the understanding of and engagement with Indian constitutional law and politics.

Indian constitutionalism at crossroads

The decade from 2014 to 2024 has been a decade of transition. During this period, the Indian democracy and its constitutional system has seen an all-round attack. The BJP has deployed the ancient Indian philosopher Kautilya's concepts of *sāma* (conciliation/alliance), *dāma* (gift), *bheda* (trickery), and *daṇḍa* (punishment) to infiltrate and capture the entire system. Envisaged to conduct their actions independently, institutions like the Election Commission and security agencies, and offices of governors and the speaker are today outrightly functioning in a partisan manner to yield political benefits to the BJP.[4] They have ensured that no space is ceded to the political opposition. Federal investigative bodies have selectively registered numerous cases against members of the opposition political parties.[5] This, along with enticement by way of monetary benefits or a promise of office, has helped them collapse several state governments where the BJP had sufficient numbers to form its government after a few defections. Court cases are regularly either dropped or pushed to the back burner once the accused shifts their alliance to the BJP.[6] In other cases, the government has arrested several sitting ministers and Chief Ministers[7] and froze accounts of political parties on flimsy grounds to crimple state governments and opposition movements, respectively. A similar tactic is used against corporations to seek (extort?[8]) political funding. Institutional capture has reached such levels that it will be very difficult for a non-BJP government to

design and implement any constitutional repair project once it comes to power.

Likewise, the infiltration of the civil space is overall. The BJP has used the artistic, media, and digital space to spread its narratives and capture the minds of the citizenry with its falsehoods and ideology.[9] These channels are used strategically to bolster the image of the Prime Minister and defame and dwarf the opposition (of every form, not only political) in every manner possible. Where *sāma*, *dāma*, and *bheda* don't function, it uses *daṇḍa* (punishment). Intellectuals, academicians, institutions, and student bodies that have challenged the BJP have been attacked,[10] either by state action, a digital campaign against them, or via an instrumentalization of the cinema.[11] The financial support for NGOs, think tanks and civil society organizations is choked; foreign funding licenses are canceled. The space for opposition and civil society is, therefore, shrinking rapidly.

The BJP tolerates no opposition, dissent, or alternative visions for the country. It straightway labels them as *desh virodhi mansikta* (unpatriotic mentality) or anti-nationalism as if there was only a singular vision for the success and development of India. This fits with its attempt to develop an alternative history, vision, and ideological north star for India through various means, (including the rewriting of history schoolbooks) with the hope to overpower the one imagined during the freedom moment and the drafting of the Constitution. Once successful, replacing the constitutional text will remain a mere formality; the society would have already moved on from the ideals inscribed in the 1950 document.

In this process, people have been further removed from constitutional processes. They are less involved in the lawmaking processes, as laws are regularly passed with minimal or no debate. Statistics show that fewer bills are referred to parliamentary com-

mittees as compared to before 2014, which means that there is less space for detailed discussion, scrutiny, and stakeholder consultations.[12] The consequence is that the dynamic of the government-people relationship is being altered. The current government seemingly establishes a regime of one-way communication with very little scope for holding the government accountable. The office of the Prime Minister has been transformed into a king-like position.

The BJP has also attempted to diminish the power of individual states in the federal structure. The most prominent example here was the abrogation of the special status of the state of Jammu and Kashmir (J&K) in 2019.[13] The former state of J&K was divided into two union territories, which, unlike states, have relatively less space for independent governance owing to the presence of a strong Union appointed Lieutenant Governor. To avoid objections and protests, numerous politicians, activists, lawyers, and journalists were arrested and held in preventive detention, and the civil liberties of people living in the region were significantly curtailed: curfews and travel restrictions were issued, and an internet ban was introduced in the region.

Scholars have stated that the BJP government is "killing [the] constitution with a thousand cuts"[14]. Unlike Indira Gandhi's assaults on democratic norms during the Emergency in the 1970s, the Modi government's "mode of operation was subtle, indirect, and incremental, but also systemic". Other commentators speak of an "undeclared emergency"[15] to describe the current systematic attack on constitutional rights and freedoms.

The politics of the Hindu nationalists have hit, in particular, the Muslim population, India's largest minority, constituting 14.2% of the population. Muslims are the targets of legislation that prohibits cow slaughter, places limits on conversion, curbs interfaith rela-

tionships, and provides pathways for Hindus and other non-Muslims who immigrated to India from other states to acquire Indian citizenship.[16] Anti-Muslim legislation also comes in the guise of gender equality, such as in the case of the 2019 Act that punishes the pronouncement of triple *talāq* divorces with imprisonment for up to three years. Against the backdrop of this legal landscape, the societal climate, too, has changed. Anti-Muslim hate speech is on the rise.[17] We regularly read reports about lynchings of Muslims who have been accused of having slaughtered cows.[18]

Amidst all these developments, the performance of the judiciary has remained below par. While during the last decade the High Courts and the Supreme Court have issued several important judgments, for instance, recognizing the right to privacy, decriminalizing homosexuality, and holding the electoral bonds scheme as unconstitutional, it has also delayed deciding on several crucial constitutional matters for a very long time. Several Supreme Court and High Courts justices have functioned as part of the executive more than the government itself.[19]

In summation, a new constitutional understanding is being permeated within the existing constitutional structures, sometimes blatantly and by stealth on other occasions. The government seemingly seeks to establish a regime of control, to decimate the opposition and to foster the supremacy of the BJP's ideology. This creates a sense of fear and insecurity among large parts of the population.

The return of the BJP to power for the third consecutive year at the union level and the fact that it governs the majority of the states as well makes the coming years crucial for India. It is at this critical juncture that we introduce this book. In the following chapters, scholars engage with a range of issues to underscore the impact of the last decade on Indian constitutionalism.

Louise Tillin engages with Indian federalism. Tillin holds that since 2014, when the BJP became the first party in over 25 years to win an outright parliamentary majority, India's dominant party system has coalesced, and the country has entered a phase of centralization. This has meant that core ideas and values associated with federalism (which, according to the Supreme Court, is part of the Constitution's basic structure) have been unsettled.

Farrah Ahmed deals with the topic of citizenship. Ahmed critically analyses the Citizenship (Amendment) Act of 2019, which the BJP oversaw, and which gave Hindu, Sikh, Buddhist, Jain, Parsi, and Christian – but not Muslim – migrants from Afghanistan, Bangladesh, and Pakistan a fast-tracked pathway to Indian citizenship, and argues that the Act is unconstitutional.

Maansi Verma examines the functioning of the Indian Parliament and finds that India is undergoing a "deliberative backsliding". Compared to earlier times, the current Parliament refers significantly fewer Bills to parliamentary standing committees, thereby allowing for less critical discussion before the Acts are passed. Verma states that the danger here is that the executive dominates law-making processes, including those leading to constitutional changes.

Indira Jaising engages with the government's attacks on civil society. Today, NGOs, organised groups of individuals, and cause lawyers find themselves in positions where their funding is cut, they are labelled anti-nationals, or they must defend themselves against criminal charges. Jaising stresses that this is in stark contrast to the Constitution's promise to provide equality to the marginalised.

Anmol Jain explores the concerning problem of declining academic freedom in India. The last decade has witnessed several attempts by the government and emboldened actions by

non-governmental actors that aim to make dents to an environment of critical thinking and independent research. The government has used its power to control academic discourse, change curriculums, and threaten the pursuit of work that could be critical of the BJP or its narratives. A climate of fear persists on campuses. At the same time, the BJP has taken extra steps to support endeavors that coincide with its ideology and beliefs.

Akriti Gaur explores the status of technology regulation in India from the lens of the existing political climate and the struggles that the regulatory state faces from the outside and within. Gaur notes that in the past decade, the relationship between technology and the Indian Constitution has undergone a transformative shift. Technological capability has revolutionised the way we communicate with one another, the way we conduct business, and also how we interact with the state. At the same time, these functionalities have unearthed novel harms to citizens' fundamental rights. Existing constitutional and regulatory arrangements are being fashioned to safeguard individual and societal interests. Many of these efforts have not resulted in tangible protections but rather have incrementally cemented the foundations of digital authoritarianism.

S. Irudaya Rajan and **Anand Sreekumar** discuss migration governance in India and argue that the NDA government retained and, in a few situations, further pushed the discriminatory overtones of the existing governance frameworks. This is particularly on account of the continuation of weak legislative frameworks and implementation modalities, limited availability of data, ignorance of gendered concerns, increasing religious selectivity of refugee governance, and a classist approach by way of a greater focus on skilled labour emigration while showing lesser concern for the migration and protection of unskilled labour.

Abhinav Sekhri reflects upon the status quo of free speech in India. Looking at free speech through the lens of criminal law, Sekhri shows that the thin line between protected and criminalised speech has shifted in the last decade. Today, all three branches of the state are increasingly hesitant to allow for speech that is critical of the state.

Gaurav Mukherjee looks at the right to education. The chapter reminds us that we should not only focus on the erosion of civil and political rights in Modi's India but equally address the effects of the BJP government on social and economic rights. Mukherjee explores the BJP's effort to spread its nationalist view of India through various forms of educational politics: a "saffronization of the educational curriculum", the regulation of learners' public displays of religiosity, and the continuing trend of underinvestment in public goods like education.

Vrinda Narain reflects upon the Indian Supreme Court's essential practices doctrine and notes how the doctrine has traversed into the space of the right to practice religion and other interconnected fundamental rights like the freedom of expression and the right to privacy. Narain notes that the doctrine encourages arbitrary regulation of religion by the state, which is an affront to secularism. To keep theology out of court and check the state's interference with religious freedoms, Narain argues for the adoption of a sincerity-based approach.

Ratna Kapur looks at the topic of gender equality. Kapur states that the Indian higher judiciary has recently produced several landmark decisions on gender equality and sexual rights. Yet, a thorough reading of some of these decisions suggests that the discourse within which rights to gender equality are protected often remains problematically linked to nationalism and anti-minority right-wing politics.

Surbhi Karwa studies gendered constitutionalism by looking at judicial and political discourses on gender-related questions in the last decade. While noting its selectivism, Karwa contrasts the progressive judicial discourse that emphasises the notion of substantive equality with that of the opportunistic political discourse, which attempts to co-opt the language of equality and women's rights to serve its political goals and claim legitimacy. Karwa highlights how the judiciary has failed to live up to its own jurisprudence on substantive equality, particularly on occasions when the state puts up a strong objection.

Saptarshi Mandal deals with the rights of gendered and sexual minorities. On the one hand, states Mandal, the last decade is marked by key milestones in this area. LGBTQ+ rights in India are not under attack as they are in other countries. A closer look, however, reveals that the Hindu right-wing support for LGBTQ+ rights is at best dubbed as tolerance but does not translate into support for substantive legal rights, as became evident during the marriage equality litigation in 2023.

Gauri Pillai reflects upon the developments regarding reproductive rights. Pillai states that several gains have been made at the level of the judiciary: women's rights to privacy, equality, and non-discrimination have been strengthened, and there is an emerging focus on marginalised groups. Yet, of late, we also see a distinct judicial trend of preserving the state's interest in potential foetal life.

Yogendra Yadav, **Shreyas Sardesai**, and **Rahul Shastri** contextualise the results of the 2024 national election and use a pre-poll sample survey to understand what the result means for the future of secularism in India. They note that while the decrease in seats is definitely a big blow to the BJP's vision for India, the poll has produced ambivalent results about the future of democracy and

secularism in India. The poll shows that while Indians prefer regular changes in government and believe in the idea of checks and balances, a near majority still remain majoritarian in their outlook. More importantly, the poll shows that the trust in the government and its processes (including electoral) has gone down over the years.

In addition to his contribution on academic freedom, **Anmol Jain** discusses the significance of the emergence of INDIA, the united opposition bloc constituted to counter the BJP, and how such ideas have played out in other parts of the globe in recent years. According to Jain, scholars of democracy and populism must closely study the approach adopted by INDIA, as it could draw some important lessons for the Indian opposition in the future as well as the parties fighting populist leaders in other countries.

Tom Gerald Daly provides an outsider's account of the scholarship on Indian democracy. Taking a (must we say, *conscious*) step away from analyzing the health of Indian democracy, Daly observes how in the last decade, the Indian scholarship addressed towards the foreign audience has opened up, creating a rich avenue for global scholars to deeply and effectively understand and comprehend the complexities of India. Daly also appreciates two particular changes that have been enabled on account of this. First, it has afforded adequate material to the global scholarly community to look beyond India's elections while measuring its democratic health, and second, it has enabled them to study Indian institutions beyond its judiciary. As more of such scholarship develops, Daly hopes that it would create richer grounds for deeper integration of global scholars with that of India.

Much more could be said, and many more areas could be covered: the legal profession, Kashmir, youth rights, etc. Yet, by providing snapshots of some of the relevant areas, we hope that this book provides a fruitful starting point for a broader discussion that is crucial at this point in time.

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Constitutional Structures, Institutions, Governance, and Actors

Louise Tillin

Reimagining Indian Federalism

As India's new dominant party system coalesced after 2014, the country entered a phase of centralisation. India has always had federalism with a strong centre, but from the late 1980s to the mid-2010s, political and economic regionalism and national coalition governments encompassing national and regional parties produced an appearance of deepening federalisation. Since 2014, when the Bharatiya Janata Party (BJP) became the first party in over 25 years to win an outright parliamentary majority, the twin pillars of political centralisation under a dominant party system and economic concentration, have once again drawn attention to the contested nature of India's federal contract.

In this chapter, I look at why core ideas and values associated with federalism – which is recognised by the Supreme Court as part of the basic structure of India's Constitution – have been unsettled over the last decade and the alternative visions that are surfacing.

In recent history, opposition parties have been protesting in the national capital against the erosion of federalism and complaining of fiscal discrimination against non-BJP ruled states. Chief Ministers from states, including Karnataka, Kerala, Punjab and Delhi, have joined protests at Jantar Mantar – the astrological observatory more typically the site for demonstrations by members of civil society than elected politicians.

Addressing the media during one of these protests, Chief Minister of the southern state of Kerala, Pinarayi Vijayan, said: "We have had to resort to such an unprecedented struggle as it is essential for Kerala's survival and advancement. This agitation is intended to safeguard the Constitutional rights of all States, not merely Kerala's."[1] Echoing complaints of other southern states, he noted that the share of centrally collected taxes received by Kerala has been falling despite the state's contributions to central taxes.

Opposition-ruled states across the country, from Punjab to West Bengal to Tamil Nadu, have also complained about the politicisation of the office of Governor, the centrally appointed nominee of the President in whom executive power is vested. While the Governor is constitutionally bound to act on the advice of the elected Chief Minister and their cabinet, they must provide assent to bills passed by state legislatures. They also play a crucial role in testing a government's strength in the legislature after an election or where there is a question over its majority. In a number of states, Governors and non-BJP Chief Ministers have been at loggerheads over questions ranging from delays in providing legislative assent to intervention in the day-to-day operation of governments.

Federalism as glue for national opposition alliance

Regional parties were weak proponents for strengthening the institutions of federalism when they took part in coalition governments in the 1990s and 2000s. Most were focused on defending the interests of their state or party more than a general defence of federalism. Furthermore, regional parties have been inconsistent defenders of federal principles in recent years. Most regional parties, for instance, supported the 2019 annulment of the autonomous constitutional status of Jammu and Kashmir, India's only Muslim majority state, and its bifurcation into two centrally administered Union Territories. This was a decision taken by the national parliament while the elected assembly in Jammu and Kashmir was in suspended animation.

But, in the face of a dominant national party with centralising proclivities, members of the unwieldy INDIA opposition bloc have found common cause in championing federalism and the defence of states' rights. Key players in the pan-India opposition from the

DMK in Tamil Nadu to Trinamool Congress in West Bengal to the Left Front in Kerala have presented federalism as a critical value that is under threat.

The recent protests have taken shape ahead of India's Lok Sabha elections and presented a platform for opposition parties to take a united stance. They also point to the pending tensions that may be unleashed when India revisits the "delimitation" of its parliamentary constituencies after the election (an exercise that is due to occur after 2026). In February 2024, the Tamil Nadu legislative assembly passed a resolution opposing the anticipated delimitation exercise.[2]

The seemingly technocratic exercise of delimitation has the potential to open up a fundamental set of debates about the character and sustainability of the current model of Indian federalism. If delimitation is carried out based on updated population figures (to date, these have been frozen since the 1971 census), it is expected to see the reallocation of parliamentary seats from southern states whose population has grown less rapidly over the last fifty years to more populous northern states.

The richer southern states, which may see their share of parliamentary seats reduced, have, over the last decade, become a principal bastion of non-BJP opposition parties. They also contribute disproportionately on a population basis to central taxes. Set against the backdrop of far-reaching political centralisation, delimitation has the potential to throw central elements of India's federal bargain, notably its redistributive model of fiscal federalism, into open partisan conflict.

Anticipating this, the Prime Minister has warned the opposition about crafting "new narratives to break the nation", which serve to create a north-south divide.[3] Avoiding the term federalism,

the Prime Minister instead referred to the imperative of national integrity:

> *"The way language is being spoken these days to break the country, these new narratives are being made for political gain [...]. This nation is not just a piece of land for us. It is like the human body, if there is pain somewhere, the hand doesn't say that the thorn is in the foot and it doesn't concern me [...] if there is pain anywhere in this country, pain should be felt by everyone [...]. If any part of the country is left without development, then the country cannot become developed. Therefore we should look at the country as one and not separate parts."*[4]

The physiological metaphor of the country as a human body echoes longer traditions of thinking about India's sacred geography and an organic Hindu social order in Hindu nationalist thought, in which each part is linked integrally to the life of the whole.

Hindu nationalism and unitary imaginaries of India

Prime Minister Narendra Modi came into office in 2014 calling on India's states to work together as a "Team India" to promote a spirit of "cooperative federalism". Modi continues to talk of the need for cooperative federalism, pointing, for instance, to the Union government's decision to spread out meetings for India's recent G20 presidency across cities.[5] After 2014, and especially following the 2019 election, however the Prime Minister has also used a discourse of "one nationism"[6] to combine a more unitary conception of Indian identity with a policy agenda that has sought to increase national coordination in realms that range from tax, electricity supply, and ration cards to the streamlining of elections

to national, state and even potentially local bodies so that they are held simultaneously.

Moving beyond the "one nation" policy agenda, the ascendancy of a civilisational conception of India as a *Hindu Rashtra* (Hindu state) overshadows the rhetoric of cooperative federalism in the imaginary of the ruling party. This conception has been further institutionalised with the inauguration of the Ram Mandir (temple) in Ayodhya in January 2024. On the last working day of the 17th parliament, Lok Sabha speaker Om Birla moved a resolution on behalf of the House on the Ram Mandir's inauguration, in which he said the temple symbolises the sentiment of *Ek Bharat, Shresht Bharat* (one India, ultimate India).[7]

The upholding of the abrogation of Article 370 (the constitutional provision which had provided for a measure of autonomy to Jammu and Kashmir) by the Supreme Court in late 2023 has provided further legitimacy to a view of federalism that prioritises national integration over the recognition and respect of different modes of belonging within a common political union.

Calls to decolonise constitutional thinking in India are also leading to a wider reimagining of the nature of the Indian state and society, with implications for ideas of federalism. In his 2021 book *India that is Bharat*, J Sai Deepak takes aim at what he describes as a "Western-normative" hegemony that shapes thinking about India.[8] He seeks to recover the idea of *Bharat* as a living civilisational "reality" shaped by an "Indic consciousness". While this is not a book about federalism, its civilisational view of India is relevant for understanding how ideas of India as a civilisational state may inform ideas of federalism.

In defining *Bharat* as a civilisation, Sai Deepak relies on the early twentieth-century writer Radha Kumud Mookerji. Mookerji, like other nationalist writers, argued that the cultural unity of pre-

colonial India or *Bharat* was found in a form of "federal civilisation" with multiple sub-identities that had been culturally bound for millennia. Groups with "non-Indic worldviews" could live alongside *Bharat's* indigenous civilisation as long as they do not "seek to deny or sever the bonds that tie this land to its culture and its adherents".

Sai Deepak takes from Mookerji's writings the idea that law-making should be decentralised and "federalised" to become a more organic process in which law serves to codify the "collective experience of society" rather than being imposed top-down. While *India that is Bharat* does not itself spell this out, the vision of an organic and decentralised conception of an "Indic society" as the basis for law-making at one level appears to sit uncomfortably with the political centralisation that has been seen over the last decade. However, at another level, it is consistent with a vision of federalism in which the states take a back seat as spaces of linguistic and cultural difference, instead viewed as sub-components of an overarching national and predominantly Hindu identity.

The dynamic entanglements of region and nation

The debate about whether India is best seen as a civilisational state, or what political scientists Alfred Stepan, Juan Linz and Yogendra Yadav described as a "state-nation" in which multiple overlapping identities coexist within a single state, is not new.[9] Writing in the late 1980s, Ravinder Kumar observed that the tension between a pan-Indian identity drawing on a civilisational identity, on one hand, and regional cultural and linguistic solidarity, on the other, was an unresolved tension of India's nationalist movement.[10]

The pushes and pulls of regionalisation and centralisation have made themselves felt across India's history. The centralised model of federalism adopted in India's Constitution has not prevented the deepening of regional identities. The coexistence of a centralised federal system with regionalisation was evident with the reorganisation of states along linguistic lines in the 1950s, followed by the rise of regional parties and the fact that for a third of India's post-Independence electoral history, no national party has been able to secure a majority in the national parliament. But the consolidation of a Hindu nationalist imaginary over the last decade under a nationally dominant BJP has the potential to destabilise the compromises that sustain Indian federalism.

Opposition parties in southern states are currently careful to strike a balance between regional assertions and emphasising their support for national unity. The prominent Tamil Nadu politician (and former Finance Minister) P Thiaga Rajan, for instance, wrote recently of the shared concern that redistribution from richer to poorer regions continued to be essential for reducing the (growing) regional inequality.[11] This redistribution was, he argued, in the interests of national unity, even if transfers were not currently achieving the desired results:

> *"It is rooted in the Dravidian ideology of social justice that we must reduce disparity and move towards equity. And we wholeheartedly believe it is in the interest of the unity of the nation that nobody should be left behind. This is why when Tamil Nadu receives only 29 paise for every rupee it contributes to the Union, and Uttar Pradesh gets Rs.2.73 for every rupee it contributes – we do not complain or begrudge it; we only lament that such largesse has not resulted in faster growth or equitable progress."*[12]

Over the next five years, the debates about fiscal redistribution and representation in Parliament are likely to deepen. The clash between opposition parties and the BJP today speaks to tensions and ideas that go to the heart of competing socio-political and political-economic imaginations of India. How these tensions are resolved will be consequential for the future of federalism as both a constitutional value and set of institutions in India.

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Farrah Ahmed

Subordination and Arbitrariness in Citizenship Law

In 2019, the Hindu nationalist Bharatiya Janata Party returned to power in India. Hindu nationalism generally includes a commitment to correct perceived historical injustices to Hindus, end what nationalists see as the "appeasement" of Indian Muslims and turn India into a *Hindu Rashtra* or a homeland for Hindus. The Bharatiya Janata Party oversaw the enactment of the Citizenship (Amendment) Act 2019 (CAA) which gave Hindu, Sikh, Buddhist, Jain, Parsi and Christian (*but not Muslim*) migrants from Afghanistan, Bangladesh and Pakistan a fast-tracked pathway to Indian citizenship. Critics fear that the CAA forms part of a plan to exclude citizens, residents and immigrants the government disfavours (particularly Muslims) from citizenship.

The CAA faced widespread protests across the country, many appealing to constitutional values. This chapter argues that the CAA is unconstitutional, and uses it as an example to clarify two important under-theorised Indian constitutional principles: anti-subordination and arbitrariness.[1]

Background

The Indian Constitution's provisions on citizenship were debated under the shadow of Partition. The Constituent Assembly broadly agreed on the basic principle of *jus soli*, that is citizenship comes from birth or connection to state territory. But the constitutional provisions were focused on the immediate issues facing newly-independent India. So the Constituent Assembly gave Parliament broad powers to enact a more detailed citizenship regime later.

This enactment, the Citizenship Act of 1955, prevents "illegal migrants" from acquiring Indian citizenship. The CAA amends the Citizenship Act of 1955 to provide that Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Bangladesh and

Pakistan are not to count as "illegal migrants" and gives them a fast-tracked pathway to Indian citizenship. The CAA also reduces the residence requirement for these migrants. I have argued in other work that the government's defence of these provisions of the CAA is an instructive instance of the use of strategies of subterfuge (parasitism, camouflage, and pretence). [2]

The CAA is said to be unconstitutional for a number of reasons. Some critics argue that its primary object is to exclude Muslims – both current citizens and immigrants – from citizenship through the roll-out of a nationwide process of verification of citizenship along the lines of the National Register of Citizens (NRC) for Assam. The upcoming National Population Register (NPR) is feared to serve the same purpose. The fear is that the rule-making powers of the central government under the CAA will be (mis)used to "filter out" citizens and immigrants that the government disfavours.

But even putting aside these fears about the NRC and NPR, taking the CAA on its own, others have argued that by drawing distinctions between (supposed) immigrants based on their religious identity and origin, the Act unconstitutionally discriminates and treats people unequally.[3] The Act is also said to breach constitutional protections for religious freedom. Finally, and perhaps most significantly, by basing citizenship on religious identity, the Act is said to unsettle the secular foundations, part of the basic structure, of the Indian constitutional settlement.

I do not mean to downplay any of these reasons. But my argument is that the Act is also unconstitutional for two additional important reasons: it subordinates a class of citizens and it is arbitrary.

The anti-subordination principle

Scholars and commentators describe the CAA as making Indian Muslims second-class citizens. Niraja Jayal notes:

> *"It is a threat to the idea of Indian citizenship per se. It is, in some senses, a body blow to the constitutional ideal of equality of citizenship regardless of caste, creed, gender, language, and so on. [...] [T]he worry is that the introduction of the religious criterion will yield, effectively, a hierarchy of citizens, a kind of two-tiered, graded citizenship."*[4]

Similarly, a former Chief Justice of the Delhi High Court argues:

> *"This law automatically makes Muslim immigrants second class priorities when they are on Indian soil, even though they may have made the long trek to India for the same reasons [...] that drove their Hindu or Christian neighbours out. If you expand the understanding of this law, as the government has overtly done (by linking the NRC to the CAA), it has implications of making all Muslims in India second class citizens."*[5]

But on its face, the CAA does not affect any Indian Muslim's legal status as a citizen, a point made by the Prime Minister.

So, are those who are concerned that the Act creates second-class citizens wrong? I do not think so. But I think that their concern needs unpacking in order to understand it better. And it needs unpacking for us to understand its relevance for the constitutionality of the Act.

The concern about second-class citizenship of Muslims is a concern about social and civic status, not just about formal legal

status. It is important to remember that the law can change not just legal status, but social status as well. And when the law changes social status, it may do so indirectly and implicitly, and not directly and explicitly.

For instance, in the American South, "Jim Crow laws" segregated black and white people on public transport and made it illegal for them to sit together. Even though the law said nothing explicitly about the social and civic status of black people, its implications for that status were impossible to miss. The law demeaned black people.[6]

Here, "demeaning" is what philosophers call a speech act. A speech act, very roughly, does not describe the way things are, but rather makes things a certain way. For instance, when a marriage celebrant pronounces a couple married, they are not describing something; they are giving people a status they did not have before. If a king or queen created knights with special words, those words do not describe something; they are giving someone a new status – of knight. Jim Crow laws similarly demeaned black people, lowering their social and civic status.

We can now be more precise about the concern about second-class citizenship. The concern is that the CAA Act is a speech act which lowers Indian Muslims' social and civic status, relegating them to the status of second-class citizens. This lowering of the social and civic status of groups through speech acts may be described as subordination.

Subordination is legally significant because, as others have argued, the equality protections of the Indian Constitution, including Articles 14, 15, 16 and 17, give effect to what might be described as an "anti-subordination principle". The anti-subordination principle forbids laws and practices that "reduce groups to the position of a

lower or disfavored caste" or "aggravate or perpetuate the subordinate status of a specially disadvantaged group".[7]

The Citizenship Amendment Act is therefore unconstitutional, I would argue, because it breaches this anti-subordination principle and, therefore, Article 14 of the Constitution.

Someone might say at this point: "But how do we know that the CAA, or any Act for that matter, subordinates, and breaches the anti-subordination principle?" Elsewhere, I have proposed a test for subordination, based on scholarly work on speech acts, which allows us to identify subordinating state action.[8]

An important part of the test for whether a law subordinates asks whether the law is recognisable as a subordinating speech act. Take, for instance, Martha Nussbaum's example of subordination from feudal England. She says that "a [literal] slap in the face that a noble gives a vassal [...] both expressed and constitutes a hierarchy of ranks"[9]. What she means is that the slap was able to create or reinforce a social hierarchy where the noble was on top and the vassal was at the bottom. That is, the noble subordinated the vassal through the slap.

But the noble could only do this because in feudal England, people understood that this kind of slap had the aim of subordinating the vassal. Today, if some Lord walked up to some vassal and slapped them, people would not know what that was about!

Similarly, Jim Crow laws were recognisable as speech acts that subordinate black people in the context of the American south. In a completely race-unconscious society, Jim Crow laws might not have been understood in this way, so they might not have succeeded in subordinating.

So, is the Citizenship Amendment Act recognisable as subordinating Muslims? Well, when we say that legislation subordinates,

it is important to appreciate that this subordination may take subtle forms.

Citizenship is the preeminent good distributed by the state. So, when the CAA excludes a major religious group from a pathway to citizenship, which includes all other major religious groups in the country, I would argue that it is recognisable as a subordinating speech act.

It is particularly recognisable as a subordinating speech act against a background nationalist narrative in which the paradigm or central case of a citizen is not Muslim. In this narrative, Indian Muslims may have many of the legal benefits of citizenship, but are only citizens in an attenuated and marginal sense. Against this familiar narrative, the Act is recognisable as a subordinating speech act.

So I argue that since the Citizenship Amendment Act satisfies the test for subordination, it breaches the anti-subordination principle inherent in the Constitution, particularly in Article 14. The CAA, in fact, serves as a good illustration of how legislation might subordinate, in an implicit, indirect way.

The anti-arbitrariness principle

The CAA also offers an illustration of the kind of manifestly arbitrary legislation prohibited by the Constitution. The Supreme Court has recently reconfirmed that "manifestly arbitrary" legislation contravenes Article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws. However, critics of the Supreme Court's "arbitrariness doctrine" have long complained that it is not clear what the court means when it says state action is "arbitrary".

In previous work, I have used the CAA to illustrate an account of arbitrariness.[10] I will not detail my account of arbitrariness in this summary but, very roughly, I think a decision is arbitrary when one of two following things is true.

- First, a decision might be arbitrary when the decision-maker is indifferent to the true reasons that apply for or against a particular decision. For instance, if a judge decides and justifies her decision by picking (at random, by the roll of the dice) a legal argument in one of the briefs, her decision is arbitrary in this way.
- A second way a decision might be arbitrary is when the decision-maker knows or believes that the purported reasons for a decision do not really justify the decision, but she makes the decision anyway. For instance, if a policymaker decides on the policy that brings in the highest bribes instead of the decision that is best justified, then his decision is also arbitrary.

I argue that we can say that legislation is arbitrary if there is no credible way to make sense of it without attributing to Parliament:

- Indifference to the true reasons that apply to questions addressed by the legislation or
- belief or knowledge that the purported reasons for the legal provision do not really justify it.

To put it roughly, arbitrary legislation displays a kind of indifference to the relevant reasons and justifications that apply to the questions that the legislation addresses. Consider the CAA in light of this test for arbitrariness.

According to its statement of objects and reasons, the purpose of the Act is to grant citizenship to persecuted religious minorities from three countries.[11] The relevant paragraph reads:

> *"It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh. Millions of citizens of undivided India belonging to various faiths were staying in the said areas of Pakistan and Bangladesh when India was partitioned in 1947. The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. […] Many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents."*
> (para. 2)

The reasons for skepticism of this justification of the exclusions in the Act are well-known but I am going to rehearse some of them because they are relevant for the question of whether the Act is arbitrary.

If the rationale for the Act is to offer a pathway to citizenship to persecuted religious minorities, then it is hard to see why Bahais, Jews, atheists, members of persecuted Muslim groups such as Ahmadis, Rohingyas, Hazaras and Shias, are excluded.

Also, the purported rationale for favouring migrants from Pakistan, Afghanistan and Bangladesh is that "the constitutions of these states provide for a specific state religion". If the proposed rationale for the Act were taken seriously, it is hard to see why mi-

grants from Sri Lanka and Bhutan – both with persecuted religious minorities and both of whose constitutions have a special place for Buddhism – do not qualify.

In any case, if the Act is concerned with protecting people without religious freedom from persecution, its presupposition that all and only states with established religions persecute minorities is palpably false. A large number of states worldwide with established religions, including the Nordic states and the United Kingdom, have relatively good protections for religious freedoms. It barely needs pointing out that some states, like China, without an established religion, are responsible for serious persecution of religious minorities.

It is also difficult to make sense of the Act's cut-off date of the end of 2014; to state the obvious, people have fled due to religious persecution after that date.

All of this to say that, with reference to the test for arbitrariness, we cannot credibly make sense of the terms of the Citizenship Amendment Act without attributing to the legislature:

- indifference to the equal force of claims of religious persecution from Muslims, Jews, atheists, and those fleeing religious persecution in Sri Lanka, Bhutan or Myanmar; or
- the belief that the purported reasons for the exclusions in the Act do not truly justify it or
- indifference to whether the Act (particularly its exclusions) is, all things considered, justified.

In other words, there is no credible way to make sense of the Act without condemning it as manifestly arbitrary.

Conclusion

The Supreme Court is yet to decide on the many petitions challenging the constitutionality of the Citizenship Amendment Act of 2019. In addition to finding the CAA unconstitutional, this case presents the court with an opportunity to clarify weighty constitutional principles.

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Maansi Verma

Amending the Constitution Without Deliberation

The Contemporary Indian Constitutionalism Experience

India is undergoing a "deliberative backsliding". The data and numbers confirm this. As per analysis undertaken by PRS Legislative Research, a not-for-profit think tank tracking the Indian Parliament, during the previous term of the Modi government (2019-2024), only 13% of all government bills introduced in Parliament were referred to Parliament Committees for detailed study, scrutiny and stakeholder consultations.[1] The track record of the earlier government (under the same Prime Minister) was only slightly better at 28% of all government bills being referred to Parliament Committees. In contrast, the governments before 2014 (under a different Prime Minister) managed to refer 60% of all bills between 2004-09 and 71% of all bills between 2009-14 to Parliament Committees.

While the deliberation deficit is concerning with respect to ordinary government bills, it becomes alarming with respect to bills which seek to amend the Indian Constitution. As per my own analysis, since 2014, the government has proposed seven bills to amend the Indian Constitution, of which only two were referred to Parliament Committees. The earlier government between 2004 and 2014, did only marginally better by introducing sixteen Constitutional Amendment Bills of which only five were referred to Parliament Committees.

In this chapter, I argue that the promise of deliberative democracy in India is coming undone, which sets back the project of constitutionalism in India.

Parliament Committees - a useful metric for deliberative democracy

The reference of Bills to Parliament Committees is intended to achieve several objectives. It ensures that a small group of Members of Parliament (MPs) from different political parties examines the bill closely and in detail, over several sittings, something which is not possible in plenary discussions in Parliament. It also enables MPs to objectively analyse bills in a non-partisan manner whereas in the open discussion in Parliament, MPs tend to tow their party lines. Parliament Committees also provide the only formal mechanism for MPs to require bureaucrats to place data and justification for a particular legislative proposal before the committee and invite comments, testimonies and evidence from and interact with different experts and stakeholders within and outside the government.

Parliament Committees, thus, are avenues for deliberation. As per the rules and procedures of Parliament, it is discretionary to refer bills to Parliament Committees. Therefore, whether a government prefers or avoids sending bills to committees is a relevant metric to determine how central deliberation is to law- and policy-making in the imagination of a democratic society.

Deliberation is central to plenary debates in Parliament as well. But limited in time and scope, these debates do not permit for the kind of detailed, technical deliberation based on perspectives and inputs from multiple stakeholders that usually happen, or at least are supposed to happen, within Parliament Committees. The report and recommendations of Committees also provide scope for improvement in Bills. It continues to be a healthy practice for governments to positively consider and, in many cases, incorporate many

of the recommendations of the Committees in their legislative proposals. For instance, in 2019, three labour codes were referred to the Parliament Standing Committee on Labour, which, after months of deliberations, suggested 233 amendments to the codes, of which the government accepted 174 and redrafted the codes completely.[2]

A government secure in its majority and confident of its ability to push any bill through would be less keen to send Bills to Committees and it would be difficult for MPs in such scenarios to push the government to do so. However, the need for deliberation is much greater under majoritarian governments where dissent and diversity may barely be tolerated, if not actively suppressed. Deliberative backsliding, then, becomes a possible precursor to democratic backsliding.

Deliberative democracy - democracy in action

The authors of an introduction to deliberative democracy in the Oxford Handbook of Deliberative Democracy, define it simply "as any practice of democracy that gives deliberation a central place"[3]. Deliberation itself is defined as "mutual communication that involves *weighing and reflecting on preferences, values and interests regarding matters of common concern*" (emphasis supplied). They acknowledge that while authoritarian and populist leaders across the world would have little interest in advancing deliberation, they also argue that deliberative democracy "constitutes the best response to authoritarian populism and post-truth politics". Deliberation in large, diverse and complex societies may not be easy. This should however not negate its importance, but only reinforces it as a way to accommodate multiple voices and interests.

In her essay on representation and deliberative democracy, Nadia Urbinati, argues that in modern democracies, representation enables political equality and participation.[4] Referring to the concept of representation as creating a "deferred democracy", she argues that beyond the act of voting, it is the existence of public spheres of deliberation and interactions between representatives and their constituents which enable citizens to exercise control over their representatives. In the process, it "stimulates advocacy in society" and empowers citizens to become active citizens. Deliberative democracy is also grounded in the agency of individuals to think, reason and consider arguments and emotions across the board while critically appreciating any law or policy decision. It also provides legitimacy to the government's decisions based on consideration of different opinions and stakeholder perspectives.

However, to what extent deliberation can be a tool to countermajoritarian tendencies and create spaces for multiple voices to exist depends on the form of deliberative democracy institutions. This is where the role of Parliament Committees becomes crucial.

Though there are some recent problematic developments, mostly in the last two decades, Parliament Committees have emerged as accessible avenues for citizens to engage in law- and policy-making via their representatives, even as there is scope for making them much more accessible. Particularly through the conventions of inviting inputs from all interested and affected stakeholders, making study and field visits, interacting with experts and taking testimonies and evidence from citizens, Committees have ensured that a multitude of voices are reflected in their recommendations, which, though not binding on the government, hold immense persuasive value. There have been some recent incidents of Committees not inviting comments from stakeholders before finalizing their report, or undertaking rushed deliberations, which

set dangerous precedents of reducing deliberation to a formality – so far this remains an exception and not the norm. However, what is increasingly becoming a norm, as the data also confirms, is to skip sending bills to Committees altogether, indicating a particular disdain for deliberation.

Constitutionalism and deliberative democracy

The book *Comparative Constitutionalism*, by Norman Dorsen et al. outlines some "principle demands of constitutionalism", which include, particularly relevant for the purpose of this essay, the constitution being accepted as the supreme law, government governing as per the rule of the supreme law and not as per its will, a commitment to ideals of individual rights, limited government, checks and balances and acknowledgement of people as the *locus* of sovereignty.[5] Upendra Baxi argues, in his essay on constitutionalism, that a constitution is not merely the text of a document because it is possible to change or amend the text and thus the identity of the constitution itself.[6] He complicates the idea of constitutionalism by proposing its reading on "three interlocking places" – C1, C2 and C3. C1, as per Baxi, is the text of the constitution and C2 its authoritative interpretation by courts, resulting in the creation of a body of constitutional law. C3 is particularly important for our purpose, which Baxi describes as a "set of ideological sites that provide justification / mystification for constitutional theory and practice".

This reading of the constitution from the perspectives of different ideologies opens up discursive spaces for multiple interpretations of a constitution from the perspective of different stakeholders, especially when juxtaposed with the idea of governments

deriving their legitimacy from the sovereignty of people. And herein lies a central role for deliberation.

The Indian Constitution itself provides a relatively tedious process for amending the Constitution, requiring a recorded vote by a special majority in Parliament and, in some circumstances, ratification by legislative assemblies of at least half of all the states in the Union of India.[7] This process has an in-built requirement for deliberation and reaching across the political aisle to ensure sufficient numbers for carrying out constitutional amendments, but it falls short of what has been termed as "public will formation"[8]. Undertaking deliberations at the pre-legislative stage and also through Parliament Committees could ensure a dialogue between people's representatives and various stakeholders in the process of amending the Constitution. But, as numbers indicate, that happens only infrequently.

Contemporary dangers to the Indian constitutionalism project

In 2023, the current Vice President of India and the *ex-officio* Chairman of the upper chamber of Parliament courted controversy by questioning the landmark "basic structure" judgment of the Supreme Court of India.[9] This judgment, called *Kesavanand Bharati v. State of Kerala* and pronounced in 1973 by a thin majority of 7:6, put limits on the powers of the Parliament to amend the Constitution in a way that alters the basic structure of the Constitution.[10] This did not mean that Parliament could not amend the Constitution at all, a power that the Constitution itself gives to Parliament. However, the judgment laid down that there are certain features of the Constitution considered to be so fundamental or basic to its structure that they will be beyond the power of the Parliament to amend. This ensures, in a way, the coming together of C1, C2 and

C3, where public discourse can continue shaping and amending the Constitution, considered a living document, but bars the government from completely altering the identity of the Constitution.

Though this judgment was a culmination of a long period of tension between co-equal institutions of legislature and judiciary, it has not prevented governments from attempting to test the limits of the doctrine. Not long after the judgment was pronounced, a national emergency was imposed in India by the then Prime Minister and while the emergency was in operation, during which several MPs from the opposition were in jail under preventive detention laws, Parliament passed a bill significantly amending the Constitution, without much deliberation.[11] One such amendment was the addition of the words "secular and socialist" to the Preamble of the Constitution. After the emergency was lifted and a new government was voted to power, most of these amendments were undone through another amendment bill, but the addition of the words "secular and socialist" to the Preamble remained and continues to do till date.

What gives teeth to the basic structure doctrine is the power of judicial review, which itself has been considered to be a basic feature of the Constitution. This makes every amendment of the Constitution by Parliament amenable to judicial review and liable to be struck down if found to be unconstitutional or violative of the basic structure of the Constitution. Though courts have sparingly resorted to this doctrine to strike down constitutional amendments,[12] the attempt by the current government to set up a National Commission for Judicial Appointments, providing a greater role to the executive in appointing judges, was struck down by the Supreme Court in 2015 for attacking the independence of the judiciary and the separation of powers,[13] which are basic features of the Constitution.

Now, the current government seems to have embarked on a project to revert to the "original" Constitution,[14] in which the words secular and socialist, and particularly secular, were not included in the Preamble, arguing that these were inserted during the undemocratic emergency. It has also not minced any words in making clear that it wants greater control and a say in the appointment of judges on the ground that the present system of appointments through a collegium is not explicitly mentioned in the Constitution and is a judicial invention.[15] The basic structure doctrine stands in the way of the government having its way, but it is not certain for how much longer.

Conclusion

Majoritarian governments do not like fetters on their powers to amend the Constitution. In the recent past, the Indian judiciary has also come under much criticism for its "refusal" to live up to the expectation of being a counter-majoritarian institution, particularly on politically sensitive matters.[16] A Parliament reeling under near complete executive takeover,[17] a government not keen on deliberations and a political party confident of mustering enough numbers to amend the Constitution unilaterally present grave danger of the constitutionalism project failing in India.[18]

Post script

The chapter was written in the middle of the 2024 parliamentary election campaign. The incumbent political party, Bharatiya Janata Party (BJP), coined the slogan of "*Ab ki baar, 400 paar*", which can be loosely translated to – "this time, BJP will cross 400 seats in the House of the People" (out of a total of 543 seats for which elections

happened). Therefore, BJP's electoral plank was for an absolute majority so that it can implement its political agenda without any resistance. The opposition, on the other hand, made "saving the Constitution" as its central electoral pitch, arguing that BJP is vying for an absolute majority so that it can amend the Constitution on its own and when that happens, it will do away with reservations, the affirmative action policy for historically marginalised and socially and educationally backward communities in India.

When the election results were announced on 4 June 2024, BJP was confined to 240 seats, much short of even simple majority. With the support of its allies, it crossed the half-way mark and made a claim to form the government again. As per analysis done by several political commentators, the "danger to the Constitution" narrative seemed to have struck a chord with the voters, particularly among the marginalised communities, who voted against the BJP.[19] This is a potent example of the life that the Constitution seems to have acquired in the imaginations of everyday people, who delivered a resounding message of putting fetters on the power of the government to unilaterally amend the Constitution.

Though it might be too soon to say whether deliberation has firmly found its way back into our democracy due to a return to a coalition era politics, some recent examples lend weight to this hope. One such example is of a controversial bill that the BJP-led coalition government introduced in Parliament in August 2024 to significantly amend the law regulating the *Waqf* properties in India. These are properties donated by followers of Islam for religious or charitable purposes. The very introduction of the Bill was heavily opposed in Parliament by several opposition MPs and even the coalition partners of BJP expressed concerns. After an intense debate, the government agreed to send the Bill to a Joint Parliament Committee for extensive deliberation and stakeholder

consultations. This bill was finally passed by the Parliament in early 2025. It remains to be seen whether deliberative backsliding, which had come to mark the last 10 years of India's parliamentary democracy, will now be arrested and perhaps, even reversed.

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Indira Jaising

Civil Society and its Engagement with the Constitution

Before we understand the role of civil society in present day India, we must understand India at its founding movement. The post-independent State in India has been the creation of the prolonged struggle against colonial rule. Its foundation was in the principles of liberal democracy with an agenda of social change. The Indian Constitution is as much a culmination of the ideas of the freedom movement against colonial powers as it is of the achievement of a social revolution through law. Our Constitution, which was inspired by the Universal Declaration of Human Rights, thus, not only provided for political freedom from foreign rule and established a democratic republic, but it also provided a road map to undo the deeply entrenched hierarchies, inequalities, and social exclusions in our society and therefore for a social transformation. Much of the civil society interventions of the last seven decades have been to work for redeeming the promise of the Constitution inside and outside courts.

The struggle "on the other side of independence"

India's Constitution is unique as no other Constitution in the world attempted this magnitude of social change through constitutional means. It was a direct answer to the demands of women, minorities, Dalits and Adivasis, and other marginalised groups to their demands for equality before the law and equal protection of the laws. Reservations in public employment for Scheduled Castes (SCs) and Scheduled Tribes (STs) became a Fundamental Right on the basic premise that marginalised communities were required to be represented in institutions of state power. It was also a constitutional mechanism to end the oligarchy of Brahminism and its hierarchical philosophy in all organs of state. Drafted as it was at the time of a bloody partition of the country into two nations, Pakistan and In-

dia, India chose to remain a secular country and refused pleasure to be theocratic. It is the Constitution which has been our greatest strength of remaining together as a united nation with so many different linguistic and religious communities living in harmony.

All of India's legal activism by civil society, including its judicial activism, has been a struggle to implement our social and economic rights. It is on this "other side of independence"[1] that much of civil societies' struggles have been located over the last 70 years. The rights were given by the Constitution; the struggle has been to get them implemented.

Though the Constitution of India is no doubt the outcome of a political struggle, it is primarily a legal document which means it enforces accountability through law of all organs of State. This meant that the power of judicial review could be effectively used in the service of the people.

Our political history does indicate that the legitimacy of protest by civil society, which itself was the legacy of non-violent struggle and civil disobedience inherited from the independence movement, was brought to a brutal and abrupt end when the Emergency was declared in June 1975. It made us realise the significance of our civil and political rights. However, our rights were restored when, through an electoral process, Mrs. Indira Gandhi, the incumbent PM who declared the Emergency, was voted out of power. Neither the protesters, nor the ruling party questioned the sanctity of liberal democracy as the governing norm of the country. The struggle against the Emergency was to *restore* our civil and political rights. After the Emergency was withdrawn, the Constitution was amended to ensure that the right to life, which was guaranteed by the Constitution, could not be taken away even during an Emergency. Both Mrs. Indira Gandhi, who was instrumental in imposing the Emergency, and Jayprakash Narayan, who led the

struggle to revoke the Emergency, accused each other of being "dictators" and "fascists" – meaning thereby they saw the other deviating from the path of liberal democratic principles on which the Constitution and Indian polity was founded. Both of them claimed allegiance to it. Speaking of the events which led to the imposition of the Emergency, namely the protests led by Jayprakash Narayan and the students' movements, Bipan Chandra points out in his book *In the Name of Democracy*:

> *"The defense of Indian democracy seems to have been the main justification for both the JP Movement and the Emergency Regime."*[2]

From liberalism to cultural nationalism

It is this that has changed in 2014. The political philosophy of liberalism has been replaced by that of "cultural nationalism", culture being viewed as emanating from the religion of the Hindus, who form the majority of the population of the country. In his book *Modi's India*, political scientist Christophe Jaffrelot writes:

> *"The promotion of Hindu nationalism at the expense of secularism took the form of attacks against liberals (including NGOs, intellectuals, and universities like JNU) and the Saffronization of education. At the same time, minorities were subjected to both physical and symbolic violence by Hindu vigilante groups, which exerted a new form of cultural policing. These groups, usually under the umbrella of the Sangh Parivar, started to form a parallel state – with the tacit approval of the official state – as they launched one campaign after another, such as their fight against love jihad and land jihad, their attempts at reconverting those*

whose forefathers had embraced Islam or Christianity, and their attacks against people accused of slaughtering cows – a very emotional issue that was the root cause of a series of lynchings. Vigilantes were active not only in the street but also online, as evident from the psychological violence exerted by trolls – again with the blessings of the country's rulers."[3]

India is presented as a nation engaged in an anticolonial movement, which began in 2014. This ahistorical view is being propounded by a Hindu Nationalist party which came to power in 2014 with the aim of establishing a Hindu Nation. Liberalism as a political philosophy is being rejected. Secularism, as we know it, is sought to be replaced by a theocracy. All this has grave implications for those of us who believe that democracy, secularism and federalism are basic features of the Constitution as held by the Supreme Court in various judgments, including *S.R. Bomai v. Union of India*[4] and *Kesavananda Bharti v. State of Kerala*[5].

The evidence of the rejection of the liberal secular principles of the Constitution is to be found in the public practice of the heads of State. In 2023, when a new building was inaugurated for our Parliament, a Sengol (symbol of kingship) was installed by Hindu priests in the presence of the Prime Minister.[6] More recently, on 22nd January 2024, a Hindu temple dedicated to Lord Ram was consecrated by the Prime Minister in full view of the citizens of the country,[7] establishing firmly, the transformation of a constitutional democracy into a theocracy, under the garb of revitalizing a supposed civilizational glory. Laws have been introduced in 2019 which enable the grant of fast-track citizenship to Hindu illegal immigrants while denying it to Muslims. Eating beef has been criminalised by banning the slaughter of cows. Interfaith marriages are policed in order to prevent Hindu women from marrying

Muslim men.[8] Hindu Vigilantism stalks the streets to implement a mobocracy.[9]

What has this meant for civil society activism? A majoritarian society cannot tolerate any form of dissent, it needs obedience to maintain its authority. Hence, the first attacks have been on civil society and on organised groups such as the farmers who peacefully protest with their demands. As a child of the freedom movement, all through the 1970s till the regime change of 2014, I took my civil and political rights for granted. I thought they could never be taken away from us. We had a Constitution which guaranteed these rights to us and as a lawyer, I believed my main task was to struggle for social and economic rights of the marginalised as we were still a country defined by poverty and undeserved want. The Constitution promised to the marginalised a life of equality. The work was exciting, and the Constitution proved very useful for our fights against bonded labour, wage workers, pavement dwellers and hawkers. It was much later in life, in the post-2014 state, when a Hindu right-wing political party came to power that I realised that our political and civil rights are a precondition to the realisation of our social and economic rights. The rights are now endangered.

Criminalizing advocacy

Following a series of cases argued in a court of law, which we had argued against leaders of the political party in power, in 2019, I found myself a victim of the criminal justice system with a case registered against the organization we had founded, the Lawyers Collective. We were persecuted for ostensible violations of the Foreign Contributions Regulation Act 1986, a statute that was enacted by a Congress regime to prevent the interference of the "foreign hand" in India's political system. The organization itself had

worked on issues of domestic violence and prevention of discrimination against people living with HIV, for which we had funding from international funding agencies. We were accused of not keeping accounts. We were told that issues of domestic violence and HIV had nothing to do with the objects of our organization, regardless of the fact that its objects included the defense of the Constitution of India. Advocacy in any form for rights was criminalised. This has happened to many organizations in India, including Amnesty India[10], the Center for Policy Research[11], and the Center for Equity Studies[12] founded by Activist Harsh Mander and others. It was then that I once again realised the power of the law of which all ruling parties are afraid.

But there is a contradiction here. Every law can be used as intended to protect human rights and every law can be weaponised with *mala fide* intent in its implementation since implementation is in the hands of the politician in power with no checks and balances or independently fact-checked to decide whether or not a prosecutable case is made out. Hence, what we are seeing in India today is the prosecution and incarceration of anyone who speaks up against the establishment. The right to freedom of speech and expression, the right to life and personal liberty have been reduced to a rope of sand for any person who spoke up against the ruling establishment. There have been cases on academics and Dalit activists in the Bhima Koreagon cases[13], journalists like Siddique Kappan[14], and student activists like Umar Khalid[15] and Shrajeel Imam[16].

Civil society was seen as the actual political opposition outside Parliament. But a time came when not just civil society but political leaders were accused of "money laundering" and put behind bars, all this to ensure that one day we have a single-party state by

the elimination of the largest political party in opposition, the Indian National Congress.

Civil Societies' main contribution has been to insist on the enforcement of rights conferred by the Constitution. It is social activists who have kept the values of the Constitution – liberty, equality, fraternity, and dignity – alive and refused to succumb to the demands of a Hindu fundamentalist state. It has been a hallmark of their activism that they protest with a copy of the Constitution of India in their hands, as if to protect it from majoritarian attack.[17]

In retaliation, the Indian state has labeled all protest movements as "anti-national" and conspiracies to destabilise the Indian State. As a result, the draconian Unlawful Activities (Prevention) Act, 1967, which is an anti-terror statute, has been used to put citizens behind bars to silence their voices.

"Culture" vs constitutionalism

There is, in fact, fundamentally, a breach of the rule of law and it has fallen on the shoulders of civil society to struggle for the return of the rule of law. *Hindutva* is the political manifestation of Hinduism where Hinduism is justified as a "way of life", not a religion. These are demands for cultural nationalism to the exclusion of Constitutionalism as we know it.

A combination of these developments has resulted in a situation in which allegiance to "culture" overrides allegiance to the Constitution, i.e., the touchstone by which the validity of State action is judged. Our courts have paid homage to this form of cultural nationalism denying us the one avenue of recourse against majoritarian rule that the Constitution provides, including judgments which have upheld a ban on hijab,[18] and taking away the special status of Kashmir.[19] Article 13 of the Constitution explicitly says

that all laws inconsistent with fundamental rights will be void. Articles 226 and 32 provide direct access to the High Court and the Supreme Court and yet we find that our courts have chosen to virtually give up on their power of judicial review and endorse every decision of the government. Since 2014, there have been only two major cases where the Court has decided against the Government: the judgment on the National Judicial Appointments Commission,[20] which in effect preserved the power of the Supreme Court to appoint judges, and the Electoral Bonds case[21], which came too late after money had been collected and spent for electoral purposes. It seems almost as if the Courts have repudiated the Constitution of India and in synergy with the current State policy set up a cultural norm above the Constitution as the governing norm of society, as seen in the *Marriage Equality* case[22]. We are in danger to losing a rule of law society, with which we started our journey over 75 years ago.

Defending the constitution

It is in these circumstances that it has fallen on the shoulders of civil society to defend the Constitution through protest movements. In several protest movements, civil society has gone back to its Gandhian tradition of non-violent protest and civil disobedience. What we see in India is the dramatic role reversal. While it is the constitutional duty of elected representatives to bear true faith and allegiance to the Constitution of India, they ignore the Constitution. Instead, civil society steps in to defend the Constitution.

It is worth recalling what Mahatma Gandhi had said about our duties if the rulers are doing wrong. He said:

> *"If our rulers are doing, what, in your opinion, is wrong, and if we feel it our duty to let them hear our voice though it may be considered seditious, I urge upon you to speak sedition – but at your peril. You must be prepared to suffer the consequences."*[23]

We ask the question as to what the role of protests in a democratic society is. Our pre-independence history shows that it was non-violent protest and civil disobedience that ultimately led to the end of colonialism and to independence.

While no law can prevent protests against policies of the government, we are now told that to protest against unjust laws is to attack the sovereignty and integrity of the nation. The tragedy of India is, that the state has equated legitimate protest with being a "terrorist". If Mahatma Gandhi were alive today, he would have joined the protest, for it was he who said in *Young India*, on 29 January 1925:

> *"Real Swaraj [self-governance] will come not by acquisition of authority by few, but by the acquisition of the capacity by all to resist authority when it is abused. In other words, Swaraj is to be obtained by educating the masses to a sense of their capacity to regulate and control authority."*[24]

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Anmol Jain

Concerning State of Academic Freedom in India

In May 2024, writing for *Verfassungsblog*, Zoltán Szente discussed a list of eleven tools that the Hungarian government has employed to stifle academic freedom since the inauguration of Victor Orbán.[1] These tools can largely be understood as falling under three broad categories: (a) actions aimed at intimidating and persecuting researchers and capturing institutions that are producing counter-narratives or works that could politically hurt the party in power; (b) actions aimed at developing alternative science and narratives by challenging the existing scientific consensus and supporting a new set of scholars and institutions that support the regime's ideology, at times using questionable means; and (c) actions aimed at diverting public money to pliable institutions and choking money (both domestic and foreign) for the unpalatable.

The Indian story is no different. Since 2014, free public discourse has received a big blow from the government, and it has impacted all avenues whose legitimacy hinges upon it. Be it the media, think tanks, or academia, a sense of fear prevails in all corners. These institutions have either faced retribution and the heavy hand of the state or have submitted themselves to the BJP's ideological goals. Uncritical voices boosting the BJP, its projects, and the Prime Minister could be heard repetitively, often joined by voices delegitimizing the opposition (of every form, not just political). Apart from the BJP, it is these institutions – though supposed to function as independent and act as conscious keepers of the society – that have helped the Prime Minister transform himself into a godly figure whose ideas and techniques must never be questioned but blindly followed.

At the same time, the BJP has deployed the mighty state and its resources to set the discourse in the manner of its liking. Both media and academia are financially rewarded if they remain pliant, efforts at "correcting" the curricula have been made, and ministries

and institutions have been established to "scientifically" pursue alternative ideas and research.

These are not singular stories or a few random events that have taken place now and then over the course of the last decade. There is a common thread that binds these systemised events taking place across institutions in India: An effort to entrench the supremacy of the BJP way of thinking and functioning, with no healthy space for debate, dissent, or discussion. In the following parts of this chapter, I'll elaborate on this with a particular focus on academic freedom.

Ashoka, a story that repeats

Sabyasachi Das, an economist by training, wrote a blasting paper in 2023 titled "Democratic Backsliding in the World's Largest Democracy"[2]. Das studied 11 closely contested seats during the 2019 general elections in India and found their results disproportionately in favour of the BJP. He noted, "the results point to strategic and targeted electoral discrimination against Muslims, in the form of deletion of names from voter lists and suppression of their votes during the election, in part facilitated by weak monitoring by election observers". He presented detailed evidence and used econometric techniques to unravel this *potential* electoral manipulation and fraud.

The mere existence of the paper would not have upset the government. However, once an SSRN link to the paper was shared on Twitter, it was picked up and discussed extensively by civil society and the opposition. It was unlike other academic scholarship on democratic backsliding in India, which generally circulates and remains merely within a small community of political scientists and legal scholars. Moreover, the paper presented incriminating data

suggesting electoral manipulation on the part of the government. As a result, Das' institution, Ashoka University, distanced itself[3] from the research before reportedly pressuring him to resign from his position.[4] Later, in a concerning turn of events, the federal Intelligence Bureau paid a visit to the Economics Department.[5] Although the Department stood by Das, with a few professors even resigning in protest,[6] the University's Governing Body let its faculty down by failing to provide a safe space for research.

Importantly, Ashoka is the same institution that was embroiled in a similar controversy a few years back upon the exit of noted intellectual Pratap Bhanu Mehta after he became a "political liability" for them.[7] As he wrote in his resignation letter, a copy of which is publicly available:

> *"My public writing in support of a politics that tries to honour constitutional values of freedom and equal respect for all citizens, is perceived to carry risks for the university. In the interests of the University, I resign. [...] A liberal university will need a liberal political and social context to flourish. I hope the university will play a role in securing that environment. Nietzsche once said that 'no living for truth is possible in a university'. I hope that prophecy does not come true."*[8]

Beyond Ashoka: freedom at risk, everywhere

Not many days before this controversy, a school teacher in Pune named Ashok Sopan Dhole was arrested for allegedly making objectionable remarks against Hindu deities and "outraging religious feelings" of the students after a video of his lecture went viral on the internet.[9] Dhole could be heard commenting in the video about the presence of innumerable deities in the Hindu religion in con-

trast to the monotheism of Islam and Christianity. Other incidents have involved the denial of immigration to an academician invited to deliver a lecture quoting her past remarks against the Rashtriya Swayamsevak Sangh, the ideological fountainhead of the BJP,[10] cancellation of lectures discussing the Palestinian cause,[11] crackdown on NGOs and think tanks in the name of foreign funding norms violations,[12] and initiation of disciplinary proceedings against a PhD student who included Noam Chomsky's criticism of Narendra Modi in his research proposal.[13] The crown prince of all remains the 2019 incident when police stormed the campus premises of Jamia Milia Islamia University and beat the students in the aftermath of students' protests against the controversial Citizenship Amendment Act.[14]

In response to the alarming development in Pune, a professor noted: "An incident of this kind shows how we are destroying the spirit of learning and unlearning through questions, counter-questions, dialogues, conversations, and differences. We are destroying what sustains a classroom – the efficacy of mutual trust. And we are destroying the spirit of studentship"[15]. This comment reverberates with my first thoughts upon reading the incident. The direction in which the Indian academia is progressing could not have been described better.

These events support V-Dem Institute's 2024 "Academic Freedom Index".[16] It recorded that over the last decade, there has been a constant decline in academic freedom, and India has been performing poorly on all five factors that they consider while measuring academic freedom – freedom to research and teach, academic exchange and dissemination, institutional autonomy, campus integrity, and academic and cultural expression.

A different report prepared by the Scholars at Risk Network (SRN), titled "Free to Think", confirms V-Dem Institute's

assertions.[17] After detailing 24 incidents of loss of position, detainment, imprisonment, disappearance, cancellation of events, and travel restrictions, which involved numerous students and academicians, SRN reduced India's score from around 0.6 in 2013 to less than 0.2 in 2024, with 1 being the maximum possible score. It ranked India as "completely restricted" and observed that never in the history of independent India has academic freedom been threatened so consistently.

Beyond numbers, personal experiences

I have personally experienced instances where the University administration cancelled lectures and discussions, fearing governmental action. Several accounts have surfaced online in reaction to the Ashoka controversy discussing how the presence of state intelligence units during conferences and discussion sessions is a common phenomenon, particularly in state universities. The state-supported environment of fear around independent and critical thinking is pervasive and, sadly, effective.

During my conversations with a few law professors, one theme emerged as common – the chilling effect of a sense of fear about the potential repercussions of making comments that may sound critical of the incumbent government or its ideology. Teachers have become cautious about what discussions they could organise in their classes. The emergence of the culture of online classes in the pandemic and post-pandemic phases has further aggravated these concerns. Lectures and comments could now easily be recorded and circulated after being removed from their contexts. These small bits, divorced from their context to make the clip sound more controversial, help users catch more eyeballs over social media platforms but work negatively for academic freedom. My own insti-

tution, where I am currently teaching, has been in the limelight, where clips from online lectures were presented on media platforms as "anti-India rhetoric".[18] This has also made hosting our colleagues online an issue, which particularly affects interactions with those situated in foreign countries, as flying them is a costly affair, both financially and bureaucratically.

Politicizing science and research

In terms of research support and funding, India merely spends 0.7% of its GDP on research and development,[19] considerably less than countries like the USA, Germany, and Japan, which spend around 3% of their GDP.[20] To correct this situation, Parliament recently passed the Anusandhan National Research Foundation Act, 2023, to inject about 6 billion USD into the research industry over the next five years.[21] However, instead of keeping the Research Foundation distant from politics to support independent research, the Act creates a Governing Council largely populated by the members of the government. The Council is presided over by the Prime Minister, and its other members include two union ministers, four secretaries from different governmental departments, one member from the government's think tank NITI Aayog, and the Principal Scientific Advisor to the union government. In addition, the Act vests the Prime Minister with the power to nominate field experts to the Governing Council. With such a design, it is highly doubtful that the Research Foundation would support independent research projects that could make findings critical of the BJP. What we may observe rather is more pompous support to areas such as cow urine research[22] or efforts to rewrite history.[23]

A recent controversy with the Director of the International Institute for Population Sciences (IIPS) offers a glimpse of how this will look like. IIPS operates under the Union Ministry of Health and Family Welfare, and in its recent report, it contradicted repeated claims made by the Prime Minister and BJP about the success of its cooking gas-related scheme and about India being open defecation-free.[24] As a reward for these revelations, the government suspended the Director.

Something similar happened in 2019 when multiple members of the National Statistical Commission resigned in protest over, among other things, delays in releasing their findings about the increasing unemployment rate in India.[25] This is at a time when scholars are noting that the Indian statistical system, which used to be one of its crown jewels, is breaking down and is facing a "major crisis".[26]

In another related legal development, Parliament passed the Indian Institutes of Management (Amendment) Act 2023, making the President a "visitor" of every Indian Institute of Management and vesting them with considerable management powers. For instance, one provision provides that "the Visitor may appoint one or more persons to review the work and progress of any Institute and to hold inquiries into the affairs thereof and to report thereon in such manner as the Visitor may direct. [...] Upon receipt of any such report, [..] the Visitor may *take such action and issue such directions as he considered necessary in respect of any of the matters dealt with in the report and the Institute shall be bound to comply with such direction*" (emphasis added). This necessarily subjugates institutional freedom to the government's interest in avoiding any political embarrassment that independent research may result in.

Conclusion

Under the layer of policing power that these actions create, there is a lurking sense of cowardice and fear of losing control over the narrative about the efficacy of the government. The ruling regime fears data and arguments that could make it look weaker. It believes in controlling the public narrative by rhetoric and silencing anyone who attempts to defeat its rhetoric with facts and logic. The regime's minions are out there motivated by fear, expectation of reward, or belief in the BJP's ideology, making every effort to police and suppress independent and critical thinking. A functional democracy values its researchers, introspects when presented with distressing data, and responds with scientific evidence when challenged by works generated with ulterior motives. The first response can never be to humiliate the researchers with its state and political power and suggest that any work critical of the government is motivated by elements directed to "defame India" and is sponsored by "foreign interests".

To those who believe in the Indian Constitution, let's take a relook and read what it says:

> *"51A. Fundamental Duties. – It shall be the duty of every citizen of India – … (h) to develop the scientific temper, humanism and the spirit of inquiry and reform […]."*

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Akriti Gaur

Tech, State, and Social Media

Over the past decade, India's digital governance strategy has included a steady combination of innovation and greater sovereignty over the digital public sphere. Unfortunately, the state's preoccupation with this mandate has decelerated and, in some cases, completely halted the digital transition of constitutional protections on the internet.[1]

In this chapter, I look at the status of technology regulation from the lens of the existing political climate in India, and the struggles that the regulatory state faces from the outside and from within. I specifically look at some recent regulatory initiatives to which help us understand the incentive structures of state actors and the players that they wish to regulate. These initiatives may mimic the broad architecture of digital rights protections and global "best practice" across the world and appear to be seemingly desirable. However, when looked at in the larger context of political incentives of lawmakers and enforcing agencies, they are incrementally cementing the foundations of digital authoritarianism.

Legislative projects of the Indian Government such as the Aadhaar framework[2] and the recently enacted Digital Personal Data Protection Act (2023)[3] point to greater centralization of state power in the garb of administrative efficiency and human rights protections. Similarly, attempts to regulate social media platforms through the contentious intermediary liability framework indicate the state's ambition to entrench censorship and control over citizens' speech. Big-Tech corporations remain equally opaque and unaccountable to their users in India, and in some cases collude with malicious state actors to build symbiotic relationships that guarantee repression, control, and profitability. Despite being the "third largest digitalised country" in the world,[4] India has fared abysmally in global rankings on rights and freedoms on the

internet.[5] It remains the leading country when it comes to internet shutdowns, for six years in a row.[6]

Given that digital regulation is a relatively novel phenomenon, it has been hard to trace the true incentives of the political state that sits behind the repressive internet regime in India. While this in itself is an alarming trend, it becomes worse when coupled with the economic and political role played by Big-Tech players and domestic corporate interests. These platforms are known to have aided genocide and political violence in the Majority World.[7] Jointly, these actors are normalizing an environment of pervasive censorship and surveillance with little recourse for individual rights protection. In the absence of effective public scrutiny, this phenomenon poses a critical threat to India's democracy.

There is a delicate, almost utopian balance that needs to be struck when it comes to public interest, individual rights and freedoms, and the economic independence of private corporations while holding them accountable to the people. The Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules (2021) are an example of how Indian regulators have struggled to strike this balance, at the expense of citizens' right to privacy and free expression online.[8] These Rules are housed in the Information Technology Act (2000) which governs digital regulation in India. In 2023, the IT Rules were amended to set up Fact Checking Units (FCUs) to monitor and order the removal of content related to "any business of the Central Government" that was determined by the FCU to be misleading or fake. As Anmol Jain discussed on *Verfassungsblog*, this "Ministry of Truth" was recently struck down by the Bombay High Court.[9] Government-initiated content moderation, blocking, and removal has attracted criticism because such orders are usually politically motivated, and civil or criminal sanctions or the threat of such sanctions prod platforms

to "self-censor" content. Among other things, the Rules enable the government to trace the originator of contentious or unlawful content shared on a messaging application.[10] This threatens end-to-end encryption on private messaging platforms like WhatsApp and Signal.[11]

India's data protection law enacted last year has also been mired in controversy regarding the substantive privacy protections as well as the law-making process that led up to its enactment. The law was passed within 52 minutes in the lower house of the Parliament of India, and within an hour in the upper house.[12] It provides wide exemptions to state agencies when processing personal data. Section 17 (2) in particular allows government agencies to be exempted from all the provisions of the Act where the processing of personal data is for "maintenance of public order". It is feared that this provision will give a free pass to state actors to conduct misuse of the law, specially when viewed in the context of India's controversial and illegal surveillance regime.[13]

India did not have a fundamental right to privacy up until 2018. It came about when the constitutionality of the Aadhaar Act was considered by the Supreme Court of India in *K.S. Puttaswamy v. Union of India* (2017) and *K.S. Puttaswamy v. Union of India* (2018). While the constitutionality of the Act was upheld by the Court, it recognised the right to privacy as an integral part of the right to life in the Constitution. Since then, the Aadhaar framework has undergone amendments to comply with the Court's directions. However, key concerns associated with the Act such as exclusion of vulnerable populations, data leaks, misuse and fraudulent use remain.

The Digital India Bill which is currently under consideration seeks to replace the governing Information Technology Act enacted in 2000. It proposes to subsume the existing piecemeal regulations

to create a comprehensive framework for accountability and rights protection online. A publicly available concept note on the Bill gives a glimpse of the framework. For instance, it proposes to strengthen online trust and safety, create mechanisms for "adjudicating user harm" in cases involving revenge porn, bullying and doxing.[14] It also proposes to create a new suite of rights such as the "right to be forgotten, right to secured electronic means, right to redressal, right to digital inheritance, rights against discrimination, rights against automated decision-making". While these steps indicate the state's commitment towards protection of citizens online, some other proposed measures have raised concerns about executive overreach and possible centralization of power. For instance, the Act proposes to introduce "discretionary moderation of fake news" by social media platforms. It is unclear if the new framework will weaken existing safe harbour provisions for intermediaries. In the absence of stakeholder and civil society involvement, and the lack of public information on the legislative process, it is not known what shape this imminent law might take.[15]

The above illustrations give a glimpse of the many gaps in internet regulation, often on the part of the lawmakers and their implementers. The situation gets worse when malicious political actors join forces with technology corporations who are not necessarily accountable to their Majority World market. The absence of legislative guardrails and adequate human rights protections in the digital public sphere has prompted both private and political actors to collude for mutual benefit. Private platforms do not have the necessary political or economic incentives to serve the public interest. At the same time, and as seen above, the political state finds itself in a powerful position to centralise power and entrench censorship, surveillance and ideological propaganda. Big-Tech social media platforms are a significant illustration of this. By capturing

the public sphere and forging unprecedented relationships with malicious political actors, platforms pose persistent and evolving threats to a democracy already in decline. This public-private collusion happens behind a dark wall and steers policy conversations away from rights-based reform.

Over four years ago, the former head of Meta's Public Policy team in India was in the news for biased content moderation practices, and favouring certain BJP leaders' activity on the platform. Since then, there have been several instances where the platform has been called out for its lack of independence in moderating political speech.[16] More recently, during the Indian General Elections 2024, Meta-owned WhatsApp was in the news for allegedly giving a free pass to Prime Minister Modi's marketing team to spam millions of WhatsApp users in India and abroad through a WhatsApp Business mass message.[17] This is specially problematic because the WhatsApp Business feature does not host political speech and there are explicit policies against it. It is unclear how the marketing team was able to bypass this policy, and it is not known whether platform officials worked with the BJP behind the scenes.

Aside from social media platforms, there are instances where other private corporations have colluded with political actors in India and other parts of the world. In May 2019, mobile phones of around 300 Indian human rights activists, journalists and lawyers were hacked through a spyware technology called Pegasus.[18] The insidious software exploited a security loophole in WhatsApp to target users and access their videos, phone conversations, and messages. It is feared that the Indian Government purchased the spyware and employed it as a tool for targeted surveillance.[19] This trend is not unique to India. The UAE, Saudi Arabia, Morocco, and Mexico have reportedly relied on NSO Group's software to spy on

citizens and threaten political dissidents.[20] Over 50,000 phone numbers of journalists, activists, scholars and political dissidents have been compromised globally. The corporation admits that its products have led to critical human rights violations but it has done little to mitigate the damage.[21] In the absence of global standards on the use of military grade spyware, the NSO Group's role in licensing Pegasus to authoritarian governments makes it a threat to global democracy and ostensibly, international security. For instance, the Group has consistently rejected Ukraine's requests to use Pegasus to assess national security threats by state and non-state actors in Russia. These requests were made many times in the years preceding the invasion. Reportedly, this denial is not based on an objective rule of law assessment made by the NSO Group but its own fears of alienating Russia and other powerful allies.

There is a legitimate fear in India that state actors have used Pegasus to attack political rivals, dissidents, civil society actors and scholars. The Government has neither confirmed nor denied its involvement in the scandal.[22] It has also failed to launch an independent investigation into these hacks. Further, in the absence of independent judicial oversight structures or review mechanisms, the exact role of the Government is still unknown. The existing national security framework which lays down the procedure of communications interceptions is weak and does not account for technological advancements in state sponsored private surveillance. Currently, an independent technical committee appointed by the Supreme Court of India has initiated an investigation into the Pegasus hack case.[23]

The collusion between private surveillance technology distributors or social media companies, and state actors is more critically felt in authoritarian states of the Majority World. These states are

either unwilling or unable to regulate such use.[24] As a result, private software is being used by authoritarian states in the absence of guardrails in the form of robust data protection laws. This collusion serves mutual interest. Private social media companies are eager to preserve their market dominance in one of the world's largest digital markets. They are reluctant to resist government overreach. Political actors see platforms as important vectors for disseminating propaganda, shaping public opinion, and ultimately stifling dissent. It is becoming hard to pierce the monolithic structure of the state to segregate the well-meaning welfare policymakers from the politically motivated agents of the ruling political forces.

According to Amber Sinha, in the past few years, the Indian Government has also adopted "ad-hoc" measures to threaten Big-Tech platforms with unofficial raids and investigations that have no solid basis in the law.[25]

In all of this, individuals' rights against these dual governors of the Internet are gradually diminishing. Private ordering of speech on social media platforms provides some pathways for recourse but these are hardly effective for users. Further, as seen in the case of the Pegasus hacks where both platforms and state agents should be accountable, the affected individuals do not have direct remedies.

The current landscape of digital regulation in India paints a bleak picture for human rights and constitutional freedoms. Over the past few years, piecemeal regulations and policy prescriptions have been helping the state to exercise greater control over digital communications and the internet in general. Some of these efforts are explicit, such as the wide exemptions from data protection obligations given to the state or the recent efforts to openly use WhatsApp's infrastructure as an electoral campaign tool. Some, however, are more insidious and are often couched in seemingly

well intentioned mandates of the state to combat hate speech or cybercrime, as seen in the case of using social media platforms as censorship proxies.

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S Irudaya Rajan, Anand Sreekumar

Selective, Reactive and Liminal

An Overview of India's Migration Governance Over the Past Decade

Exemplified by an unprecedented section devoted to internal migration, the Economic Survey of 2017-18 brought the issue of migration to the spotlight within government and policy circles.[1] However, almost two years later, in March 2020, the government of India imposed a nation-wide lockdown prefaced by a mere four-hour notice period. As transportation froze and industries shut down abruptly, tens of thousands of migrant workers (and their dependents) were left stranded, forcing them to walk thousands of miles over foot back to their home villages, resulting in severe misery, hardship and even casualties.[2] These events brought into stark relief the contours of migration governance in India over the past decade.

Internal migration: marginal gains and continuing crises

With a staggering 450 million internal migrants (as of the 2011 census), migration has become integral to the political economy of India.[3] India also has the largest diaspora in the world, numbering 18 million people.[4] The modes, institutions, and ideological underpinnings of migration governance vis-à-vis both internal and international migration have witnessed substantial shifts and continuities ever since the ascendance of the NDA (National Democratic Alliance)-led Modi government in 2014. The erstwhile Ministry of Overseas Indian Affairs was dismantled and integrated with the Ministry of External Affairs.

Consider internal migration in the first instance. The annual inter-state labour mobility has seen a steady increase from an average of 5-6 million people (from 2001 to 2011) to approximately 9 million people (from 2011 to 2021).[5] There have indeed been important measures which have improved migrant welfare and streamlined migrant governance. One of the most admirable inter-

ventions in this regard was the "One Nation One Ration Card"-scheme, which has greatly enhanced the portability of social welfare, especially food security. More than 2 million people have benefitted from this scheme.[6] The government has also rationalised a complicated and messy legislative landscape on labour-related issues by constituting four codes, including the Occupational Safety, Health and Working Conditions Codes passed by the Parliament in 2020.

Despite these gains, the internal migration governance has been hindered by a culture of ad-hocness, unsatisfactory policies and implementation as well as the invisibilization of dependents.[7] Consider the legislative landscape in the first instance. The Interstate Migrant Workmen's Act of 1979 is the sole legislation which explicitly tackles the question of internal migration in India. However, this legislation is confined to contractor-driven migration. Informal migrant workers' rights are subsumed under varying labour laws which suffer from weak implementation. These weaknesses continue to persist during the NDA regime as well. This was most evident in the Covid migrant crisis, illustrating the highly inconsistent and reactive nature of India's migration, characterised by knee-jerk reactions and half-measures. For instance, the migrant crisis prompted the government to respond with a slew of measures under the moniker "Atmanirbhar Bharat",[8] including the Pradhan Mantri Garib Kalyan Yojana (PMGKY), "One Nation One Ration"-scheme, The Pradhan Mantri Awas Yojana (PMAY) and increased allocations under the existing MGNREGS (Mahatma Gandhi National Rural Employment Guarantee Scheme) budget. However, such schemes were largely reactive and failed to alleviate the short term financial distress of migrant workers. The government response was also oblivious to the plight of international return migrants. In fact, even well-intentioned schemes like the

"One Nation One Ration"-scheme have often failed to realise their full potential (especially in terms of interstate PDS portability[9]) because of poor financial literacy and education among migrant workers.[10]

Data deficiencies and prioritization of skilled migration

A critical failure of migration governance is the continuing absence of attempts to quantify and measure migration. The most comprehensive sources of national-level data, like The Census of India 2011 and the 64th round National Sample Surveys, are inadequate as they neither cover real-time movements and seasonal migration nor capture the subjective and emotional concerns of migrants. Reliable estimates of data are thus the need of the hour. The Kerala Migration Survey,[11] which provides such data over 5-year-intervals (covering both internal and international migrants), could serve as a model to be emulated across India. There are also increasing calls for the conduct of interpretive-qualitative data collection methods to complement existing surveys, enumerations and quantitative studies.[12]

Ever since India's independence, the class character of the Indian state has been historically characterised by the dominance of the state at the expense of labour and capital. In this regard, the NDA has not fared much better than its predecessors, especially vis-à-vis migrant labour. The process of rationalization of labour codes, for instance, has led to the dilution of several social welfare measures for migrant workers.[13] These have been compounded by the invisibilisation of dependants in contemporary debates on migration. The concerns of dependants like women and children are often ignored, revealing the gendered nature of India's migratory landscape.

Perhaps, the clearest break of the Modi regime vis-à-vis previous regimes has been demonstrated in the landscape of external migration. The number of migration agreements signed between India and other countries has surged dramatically, rising from a mere five agreements signed between 1985 and 2014 to a staggering 17 during the eight-year timeframe of the NDA government from January 2015 to March 2023. These include, for instance, Labour Manpower Agreements signed with Saudi Arabia (2016), Jordan (2018) and UAE (2018). During the NDA years, India also signed Migration and Mobility Partnership Agreements (MMPAs) with France (2018), UK (2021) and Germany (2022). In addition, DOIs (Declaration of Intent), which seek to commence and fast-track negotiations on migration, have been signed with countries like Denmark, Finland, Italy, Portugal, Cyprus, Greece, Germany, Austria, and Australia.[14]

A careful analysis of these interventions highlights the high degree of priority accorded to the mobility and opportunities for skilled migrants. One of the milestones in this regard has been the increasing cooperation between India and Australia, exemplified most recently in the MATES (Mobility Arrangement for Talented Early-professionals Scheme) agreement in 2023, which seeks to enhance the mobility of skilled professionals in seven sectors, including agricultural technology, artificial intelligence (AI), engineering, financial technology (FinTech), information and communication technology (ICT), mining as well as renewable energy.[15] In fact, the restrictions on post-study graduate visas of students in Australia imposed by the new migration strategy of Australia exempted Indian students,[16] owing to the terms of the India-Australia Economic Cooperation and Trade Agreement negotiated in April 2022.

The patronizing state: classist, gendered and religious assumptions

However, the unskilled emigration regime leaves a lot to be desired. Several works have highlighted the colonial, classist and gendered assumptions and biases inherent in India's emigration regime.[17] The Gulf migration from states, especially Kerala in the 1970s following the oil boom, led to the Emigration Act (1983), which forms the legal cornerstone of emigration regulation in India. An ECR (Emigration Clearance Required)/ ECNR (Emigration Clearance Not Required) dichotomy constitutes the fundamental framework underlying this Act; certain classes of lower-class, unskilled and under-educated citizens were granted ECR passports, which required an Emigration Clearance vis-à-vis 18 countries with low levels of labour protection. However, this paradigm of protection, control and regulation violated the principle of equal opportunity resulting in discrimination among citizens. The Modi regime has continued to uphold these classist assumptions of its predecessor governments. The most notable instance in this regard was a proposal to colour code passports mandating orange passports for ECR holders in 2018; this was scrapped after widespread opposition.[18]

Besides this classist character of the migration regime, the regulatory framework has also consistently betrayed the gendered anxieties of the state.[19] For instance, the widespread exploitation of female emigrant domestic workers post the Gulf War resulted in a slew of legislations which progressively curtailed the mobility of unskilled ECR women workers. The patronizing character of the migration regime has been no different under NDA rule, exemplified by the intervention of mandatory emigration clearance for

nurses from May 2015 in response to recruitment frauds, resulting in drastic reductions in ECR clearances granted to women nurses.

There have also been highly spectacular shifts most prominently visible within the external migration governance framework on an ideological level. This corresponds to the increasing securitization of migration; in other words, migration is often framed as a threat to security in terms of "citizens' livelihood, safety, and cultural identity".[20] This was most visible in the Citizen Amendment Act (CAA, 2019), which sought to offer Indian citizenship to Hindus, Jains, Buddhists, Christians, Sikhs and Parsis who fled persecution from Afghanistan, Pakistan and Bangladesh (and arrived by December 2014). This was a momentous intervention which enshrined a religious criterion for Indian citizenship for the very first time, calling into question the secular foundations of India's Constitution. In addition, institutional interventions like the NRC (National Register of Citizens), with a staggering exclusion of 4,070,707 applicants (in the final draft list of 2018), have sparked widespread concerns regarding the challenges to the regularization of citizenship of millions of marginalised people especially Muslim migrants from Bangladesh. In fact, as Samir Kumar Das argues, NRC represents the latest elusive attempt of the anxious Indian nation-state to make the citizen-foreigner binary progressively legible.[21]

These interventions necessitate a word on the shifting contours of India's refugee governance regime. As of January 2020, India had a refugee population as high as 240,000 originating, *inter alia*, from Tibet, Sri Lanka, Myanmar, Afghanistan, and Pakistan.[22] Mostly leading precarious lives, they have always faced severe challenges on the grounds of arbitrariness and indeterminacies inherent in the ambiguous legal contours of refugee governance. For one, India has neither signed the 1951 UN Refugee Convention nor the

1967 Protocol Relating to the Status of Refugees, which constitute the two fundamental instruments of international law. In this hazy and liminal landscape where the Indian state "arrogates to itself the 'sovereign right'" to decide who constitutes a refugee (and, by addition, a repatriate), some scholars have noted a distinct shift within the refugee governance during the NDA regime. The government has progressively made amendments to incorporate refugees within the fold of Indian citizenship (e.g. amendments to the Passport Rules (1950) and the Foreigners Act (1946) and the CAA). However, as hinted earlier, these inclusions are motivated by the religious identities of the refugees. Reflecting a "Hindu nationalist frame"[23], the refugee governance under the NDA regime has been selective along religious (and parochial) axes rather than singularly exclusionary.

Conclusion

Thus, a broad overview of the migration governance during the Modi era reveals quite distinct shifts and continuities from the previous era. While there have been certain policy successes in the internal migration front, it continues to suffer from weaknesses of its predecessors regarding frameworks, implementation, ignorance of gendered concerns and the limited availability of data. While the external migration landscape has been characterised by vigorous and astute negotiations facilitating external skilled migration, many have expressed increasing concerns over the perpetuation of classist and gendered biases, the distinct shift towards the securitization framework of migration and an increasing religious selectivity of refugee governance.

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On Rights

Abhinav Sekhri

The Digital Public Square Meets the Digital Baton

A Ten-Year Retrospective on Free Speech Law in India

We are living through a time of great flux on the aspect of legal regulation of speech. The rules that societies had developed while living in a pre-digital age of newspapers and soapbox orators appear ill-suited to deal with speech and expression in the metaverse. It has prompted states to hyperactively innovate with fresh strategies to regulate speech and expression in the public sphere. And this feeling of standing atop shifting sands has become increasingly acute over the past decade.

India, of course, is no exception to this. The digital transformation of India has been a key plank of government policy at the national level in the new millennium; perhaps most ambitiously seen with the contentious roll-out of a national identity scheme, the "Aadhaar". The conversations around this identity scheme culminated in the legal recognition of a fundamental right to privacy by India's Supreme Court in 2017.[1] At the same time, the past decade witnessed two terms of the Bharatiya Janata Party-led alliance. This pre-existing impetus on making inroads in the digital sphere has met with the trend of states innovating their regulation of speech, culminating in what an author dubbed the building of an "Orwellian Framework" by 2023.[2]

This retrospective cannot undertake a comprehensive review of all the developments in free speech law in India over the past decade. What I propose to do, instead, is focus on developments where free speech intersected with criminal law. Regulation of what the state identifies as problematic speech through administrative penalties or criminal law continues to underline most litigation on aspects of free speech law across time, which makes looking at this slice of the developments in law both exciting and broadly representative of the legal trends.

Operating within this framework, this chapter looks at developments across the three arms of the State – beginning with

Parliament, I turn to the executive, and finally to the courts – in how they have dealt with "hard cases" in the past decade and developed the law on free speech and expression in the process.

Parliament

Article 19 (1) (a) of the Constitution of India guarantees free speech and expression, but at the same time, under Article 19 (2), elaborates the areas of activity in which the government can interfere with this guarantee – allowing laws that place reasonable restrictions, in the interests of maintaining public order, the sovereignty and integrity of the country, friendly relations with foreign states, decency or morality, defamation and contempt of court.

The Indian Parliament has made several important contributions over the past decade in the domain of free speech, with the government ending its second term by passing three new criminal laws to replace the pre-independence criminal codes of India.[3] The new general law of crime (the *Bharatiya Nyaya Sanhita*) does not make any big changes to the earlier position in respect of criminalizing speech by, say, redefining obscenity or creating a new hate speech law as some had sought.

I would argue, though, that far more significant developments on the legislative front have been made outside of Parliament, when the executive utilises existing laws both in terms of enforcing pre-existing legal regimes and creating new ones. The former I will discuss in the next section, so let us focus on the latter here. By the executive creating new regimes, I refer to the delegation of legislative functions to the executive, a common legal practice in most constitutional systems. This routine feature has been utilised to devastating effect to regulate speech and expression especially in

the digital sphere. So, while the parent law, the Information Technology Act (2000), has not been amended as such in the last decade, the rule-making power under this law has witnessed frenetic activity.

Introducing sweeping changes through delegated legislation and not through the floor of the House reduces the legitimacy of the law-making exercise by preventing discussion and debate, besides promoting a sense of uncertainty through all-too-frequent legal changes. These issues are well demonstrated by the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules 2021. The rules replaced a 2011 regime with sweeping changes and sought to bring the digital publication of news under some regulation as well for the first time – notice how such a fundamental shift was not carried out through statute but by delegated legislation. A key change in the 2021 regime has been to widen compliance requirements for intermediaries to not be held liable when it comes to problematic speech, which incentivises take-downs of any potentially problematic speech because the risk of losing protective cover is too great for business.[4] Doing so through delegated legislation meant that Parliament was deprived of opportunity to debate whether such heightened regulation was merited or not. It also meant reduced judicial review as there is a presumption drawn from administrative law that courts are not experts in designing and enforcing rules, which is the domain of the executive.

The 2021 rules have witnessed successive amendments in the past three years, but it is arguable that the full import of these changes has not yet been felt because of legal challenges filed in 2021 itself,[5] which remain pending and forced the government to temporarily halt the roll-out of the new regime. Thus, for instance, the most recent iteration of changes to the rules introduced a "Fact

Check Unit"[6] in a bid to stymie disinformation online. The move sought to compel intermediaries to take down any information about the "business" of the central government labelled misleading by the government itself, where failure to do so would potentially strip the intermediary of its legal protection. Copycat legislation appears to be on its way at the state level as well.

The executive

India's rankings on almost all global indices measuring the protection of free speech have sharply fallen over the past decade. This, in large part, is due to how existing laws, and new ones, have been enforced by the executive. The synergy of old and new is best expressed in how all governments across India have embraced the legal strategy of shutting down the internet to deal with actual or threatened public disorder, drawing their powers to do so from an 1885 statute which was repealed only in December 2023.[7] It has reached a stage where India has been billed as the internet shutdown capital of the world.[8]

Journalists writing stories critical to the establishment, at both state and national levels, have been increasingly targeted for simply doing their job by using broadly worded anti-terror and anti-money laundering statutes, besides other crimes. Students demonstrating and voicing critical opinions have been prohibited from taking to the streets, often prosecuted for doing so. Such steps invite serious scrutiny and debate, not to mention necessarily involving a branch of the state (the courts) to review any acts of the executive. Perhaps this is why the prosecution model for chilling free speech has slowly given way to the widespread use of content takedown powers by the executive, which are not subject to strict judicial review.

The statutory scheme on ordering takedowns essentially empowers the government to order an intermediary to takedown any content, without necessarily giving prior notice to the user, and most certainly without ever making any of these proceedings publicly available. It is not difficult to see why it would appear an attractive tool to deal with problematic speech – in response to a parliamentary question in the Rajya Sabha it was disclosed that between 2018 and October 2023, over 36,000 URLs were taken down under the IT Act (2000).[9]

The courts

Which brings me to the last, and most substantial section of this chapter, evaluating the role of the courts. It is not an overstatement to suggest that the judiciary has been equally responsible for the slow but steady deterioration of free speech protections over the past decade by its repeated failures to respond to issues with the necessary promptitude. The *fait accompli* jurisprudence of evasion, as Gautam Bhatia has called it, is closely followed by the actual jurisprudence itself proving to be a mixed bag for securing free speech in the face of arbitrary executive power.

Countless examples exist to support the first claim. Besides the challenges to the Information Technology 2021 Rules mentioned above, consider the validity of Facial Recognition Technology being used by police. Challenges filed before the High Courts have been pending for months.[10] Besides big-ticket issue-based litigation, there are many smaller cases in the system where litigants have challenged their individual grievances, which requires courts to interpret how the law should be read, but courts simply are not able to decide the petitions in a timely fashion. Thus, petitions were filed before the Supreme Court challenging orders to take down the

BBC series "India: The Modi Question",[11] where important questions of interpreting the takedown regime were raised, but the Court has yet to decide the same one year on from the takedowns. By virtue of no timely court orders, the government can continue to enforce the legal provisions with alacrity, and by the time any meaningful judicial remedy is secured, the damage to free speech is usually done.

In respect of the second claim, there are many examples, but I'll focus on three – two from the Indian Supreme Court and one from the High Court of Karnataka, in that order. In 2016, India's Supreme Court upheld the validity of criminal defamation, concluding that free speech guarantees could not trump a constitutionally protected right to reputation, and a defamation offence balanced these interests appropriately.[12] The Court's reasoning for retaining a crime of defamation with the possibility of imprisonment as against purely civil remedies for what is a private injury was notable in its refusal to engage with the proportionality doctrine – why imprisonment? – as well as its implicit faith in state mechanisms. The possible chilling effect on speech did not trouble the Court, as it felt a need to retain the crime because it viewed civil remedies proving insufficient; without any data to back that claim.

This outcome surprised some as it was preceded by a significant decision of the Court in 2015, which struck down Section 66-A of the Information Technology Act, punishing "offensive" online speech.[13] In *Shreya Singhal v. Union of India*, a public interest litigation, the Indian Supreme Court struck down Section 66-A as being unconstitutionally vague in its proscription of such speech, finding that the phrase "offensive" was a catch-all one which would subsume innocent speech within its folds. The judgment called for a restrictive reading of the limitations upon speech in-built within

the Constitution. Speech that fell short of incitement to public disorder would, for the Court, be speech worthy of constitutional protection.

And yet, there was a catch. While *Shreya Singhal* struck down Section 66-A, at the same time, it upheld the validity of statutory provisions and delegated legislation enabling the takedown of online content, concluding that the legal regime offered sufficient opportunities for aggrieved persons to review takedown orders. And it is this takedown regime which was then used to devastating effect by governments to censor swathes of critical speech online without publishing orders or data. In a remarkable turn of events, Twitter (now X Corp) approached the Karnataka High Court in July 2022 to challenge how the national government had been exercising its powers to block content on the platform.[14]

If *Shreya Singhal* upheld the online takedown regime as an abstraction on an assumption that it held enough opportunities for legal review, the Karnataka High Court went ahead and upheld the regime after being shown that the opportunities for review were chimerical in nature. While Twitter has challenged this 2022 decision, the reasons offered by the High Court while dismissing its petition (with costs) warrant discussion as they show how courts have applied the Constitution's rights-restrictions matrix. The court noted that the Constitution permitted restricting speech where it was a reasonable restriction for the grounds mentioned earlier in this chapter, and concluded that in context of online speech anything short of a blanket power to the executive to takedown content, was simply too risky considering how inflammable online speech could be. And, after all, a court could not second-guess the executive's call on whether the speech was inflammable or a threat to national security in the first place. So, the takedown of posts, accounts, and even hashtags was legal. In terms of proced-

ural reasonableness for exercising this power the court again advocated for an approach appropriately deferential to the executive because of the nebulous nature of speech online. Sticking to notice and objections was just too clunky where a new dummy account could be created in seconds to re-agitate the same problematic speech.

Conclusion

The value a society and its laws place on protecting free speech is arguably most keenly felt where that speech takes a critical turn. Which is why the history of this field is littered with prosecutions and penalties being levied against problematic speech, inviting courts to draw the lines between what is protected and what is not. The past ten years in India demonstrate that when faced with speech that is critical of government policy or state action, the state has become increasingly hesitant to let it remain on air. What is perhaps most alarming for the health of democracy is that, in most cases, there is a consensus across the three arms of the State that curbing problematic speech is the best course of action to follow.

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Gaurav Mukherjee

The Right to Education and Democratic Backsliding in India

Since the election of the Bharatiya Janata Party (BJP) to power in the federal elections in India in 2014, the country's performance in key indicators of democratic quality has suffered.[1] Over its two terms in power, the party has sought to subvert key institutions for accountability,[2] enact an ethno-cultural majoritarian electoral agenda,[3] and use federal law enforcement agencies against their political opponents.[4] While there is extensive literature on the erosion of civil-political rights in the past ten years,[5] I ask how the BJP's policies have reshaped the Indian school classroom.

To respond to this question, in this chapter, I explore three striking dimensions of primary educational policy under the BJP government: a) the continuing trend of underinvestment in public goods like education, with a concurrent expansion of social protection, b) the saffronization of the educational curriculum, and c) the regulation of learners' public displays of religiosity. I will argue that over the past ten years, the BJP has sought to mobilise a legal, social, and political discourse that seeks to control what students learn and the classroom atmosphere in which such learning takes place – all in service of an ethno-nationalist vision for Indian democracy. While doing so, it has reshaped the Indian welfare state in fundamental ways by prioritising social protection spending without concomitant outlays toward public goods like education and healthcare.

Whittling away the promise of the right to education

India is often described as a welfare state with extensive social protection but desperately inadequate investment in public goods.[6] Modern nation states invest public finances into public goods like education, public health, housing, and other amenities like roads. Social protection, on the other hand, is a set of public programs

designed to mitigate or cope with the adverse effects of risks to income security and physical well-being. These include measures like health insurance schemes, income guarantee, and employment guarantee schemes. The creation of, and investments in – both social protection and public goods – are influenced by the pressures and cyclical demands of ordinary electoral politics. State investment in public goods generally yield fewer short term electoral benefits than social protection measures, which may help explain several Global South jurisdictions' chronic underinvestment in these areas.

In the last decade, India has grappled with the challenge of adequately funding primary education, a public good that is crucial for the development of human capital and the long-term growth of the nation. India's private and public schools perform poorly when it comes to high dropout rates, secondary education completion rates, teacher deployment and in-school availability, the exclusion of children belonging to different communities, castes, and religions, as well as gender equality.[7] Despite incremental increases in education spending, India has not yet reached the target set by the National Education Policy (NEP) 2020, which calls for public investment in education to be 6% of the GDP. The expenditure on education as a percentage of the GDP was approximately 2.8% in 2019-20 and increased marginally to around 3.1% in 2022. Contrasting the spending on education, social protection schemes in India have seen substantial investment. These schemes, conceptualised differently from public goods, are intended to provide safety nets for the vulnerable and are often targeted at specific populations. While social protection is a pivotal aspect of the government's welfare initiatives, the disparity in spending highlights a prioritisation that will detrimentally affect the quality and accessibility of public education in the long term. This disparity is not ac-

cidental, but part of a strategy to reshape the system of Indian welfare away from a rights-based understanding that had begun to emerge in the early 2000s with the enactment of India's right to education law, rural employment guarantee, and food security legislation. The rise of the BJP as the dominant pole in Indian politics has paved the way for a return to a discretionary, charity-based welfare and social protection regime.

India's chronic underinvestment in education has been accompanied by a steady erosion of the legal architecture that enables its constitutional guarantee of free and compulsory primary education. In 2009, India enacted the "Right to Education law" that sought to provide uniform curricular, infrastructural, and pedagogic standards for both private and public schools. It also contained an affirmative action requirement: All schools were to reserve 25% of their class size for economically weaker students. The last decade has seen a steady stream of litigation and state-level policy changes (primarily in BJP-ruled states) that resulted in exemptions for minority-run and most private educational institutions from the ambit of this obligation.

The twin moves of chronic underinvestment and the dilution of India's educational law have resulted in a significant erosion of the integrative promise of public education as a crucial vehicle for creating an engaged, active citizenry.

The saffronization of school curricula

School textbooks play a crucial role in the construction of civilizational narratives and national memory.[8] It is therefore hardly surprising that what students learn, lends itself to co-optation as a medium of political communication. Revising school curricula to reflect a majoritarian ethos can also help shape a political "other",

laying the groundwork for political actors to be able to draw the Manichean distinction between insiders and outsiders that is crucial to populist ethnonationalist politics.

Over the last ten years, significant changes in school textbooks have been made to reflect a more Hindu-centric curriculum,[9] downplay the contributions of non-Hindus to the historical trajectory of the Indian state,[10] and eliminate incidents of communal conflict like the 2002 Gujarat anti-Muslim pogroms from the syllabus.[11] BJP-led state governments have introduced elements of Hindu scripture and philosophy into the school curriculum, like the Bhagavad Gita and teachings from Hindu epics. A recent investigation found further removal of content in 2024 that previously highlighted Mahatma Gandhi's disagreements with Hindu fundamentalists during India's freedom movement, the Indian government's 1948 ban of the Rashtriya Swayamsevak Sangh (a Hindu nationalist, paramilitary volunteer organization that is considered the parent organization of the BJP, said to have significant influence on its policies), and references to Gandhi's assassin's ties with the organization.

All of this suggests a concerted effort to rewrite Indian history in a way that aligns with the party's Hindu nationalist worldview that contributes to a monocultural bias at the expense of India's multiculturalism. All of this has happened under the guise of "syllabus rationalization" – a term that has not been fully explained by public officials; nor has this exercise demonstrated how these specific deletions reduce the curricular burden on students, which is a justification that is often offered in response to criticism from academics and schools themselves.[12]

This is not the first time that the BJP has tried to alter what is taught in public school classrooms. Similar changes were sought to be introduced in its previous terms in power in the early 2000s, but

faced strong pushback from its coalition partners. Yet, armed with its parliamentary supermajority since 2019, these recent moves by the ethnonationalist party have received little censure in Parliament despite strong opposition among civil society and grassroots organizations.

The Indian government's approach to education policy, especially the recent changes to the school textbooks and curriculum, raises important constitutional questions. It challenges the balance between promoting a uniform national identity and upholding the constitutionally protected rights of religious and cultural minorities to receive an education that respects their heritage and identity. The law is often ineffective against these discursive and pedagogic challenges; and it is only through a strong citizen and grassroots mobilization that can help stem the tide of rising ethnonationalism and restore a sense of inclusivity in the educational sphere. This requires a collaborative effort to ensure that educational content fosters respect, understanding, and appreciation for India's diverse cultural and religious landscape, thus contributing to a more harmonious and inclusive society.

Religiosity in the classroom

In addition to introducing significant changes in what is taught in Indian public schools, several BJP-ruled states have sought to control the classroom atmosphere in which it is taught. The public display of students' religiosity has been an arena for fierce legal contestation in jurisdictions like the United States[13] and South Africa[14]. Courts in these instances look to balance students' rights to freedom of expression and religion, while also recognizing the State's interest in enforcing neutral standards on their uniform. A recent ban on religious symbols in classrooms in the Southern In-

dian state of Karnataka has sparked a significant debate on religious freedom and secularism in educational spaces. This move, seen by many as a direct affront to Muslim identity, has raised questions about the balance between a state's secular policy and the individual's right to religious expression.

The legal dispute arose from a facially neutral government order issued in February 2022 directing all government schools in the State to abide by their official uniforms (hereinafter "hijab ban"). Yet unsurprisingly, the government school in question barred female Muslim students in hijabs from attending classes, leading to many dropping out or missing critical examinations. Worse, other institutions in the state followed suit; and other states began to draw up similar orders. Taken together, this seemingly neutral policy has had a disparate harmful impact on not only the freedom of expression and religion but crucially the right to education of thousands of female Muslim students across India.[15]

The imposition of the hijab ban in classrooms, while aimed at upholding secularism and ensuring uniformity across educational settings, intersects with and challenges fundamental constitutional rights. This includes the safeguard against discrimination based on religion or gender as outlined in Article 15, the assurance of personal privacy, dignity, and autonomy under Article 21, the protection of free expression granted by Article 19 (1) (a), and the right to education for children as enshrined in Article 21 A.

This, however, was not apparent to judges. After the Karnataka High Court unanimously upheld the law, the case reached the Supreme Court, where a two-judge bench, unable to agree on its constitutionality, issued a split verdict.[16] One of the two judges, Justice Dhulia, while striking down the ban, held that the ban not only exceeds the powers granted by the Karnataka Education Act but also discriminates against Muslim women by denying them access to

education based on their religious and gender identity. Justice Gupta on the other hand, upheld the ban, arguing that a neutral dress code in a secular country did not violate the impugned rights, while also disapplying the right to education in this context since the petitioners were over fourteen years of age. Due to the split, the matter has been referred to larger bench, and the Supreme Court's forthcoming decision on this matter is pivotal, offering a moment for the judiciary to reaffirm the principles of tolerance, pluralism, and the accommodation of diversity as essential to sustaining a vibrant democracy.

The constitutional law scholar Faiza Rahman suggests that the normatively and doctrinally desirable way forward is to subject the hijab ban to a structured proportionality analysis to investigate if it violates the freedom of speech and expression and the right to privacy.[17] She also draws attention to the indirect discrimination that Muslim students face as a result of the ban's disparate impact on them.

The hijab ban serves as a litmus test for India's constitutional democracy, challenging the balance between uniform educational policies and the protection of individual freedoms. The issue transcends legal debates, touching upon the essence of what it means to be a democratic society in an era of rising authoritarianism and ethno-nationalism. The resolution of this controversy will not only determine the fate of religious expression in educational settings but also signal the trajectory of India's commitment to its foundational values in the face of political pressures.

Conclusion

The ban on the hijab in educational institutions in Karnataka encapsulates the tension between state policies and constitutional

freedoms. The ban's enforcement is a deliberate attempt to invisibilise Muslims from public spaces and classrooms, resonating with the BJP's ethnonationalist agenda. Concurrently, the party's attempts to revise curricular policy is symptomatic of its broader aim to control the national narrative. These curricular revisions should not be viewed in isolation, but as part of a concerted effort to reshape India's educational landscape. In conclusion, the state of education under the BJP reflects a complex interplay of ideological influence, rights reconfiguration, and fiscal prioritisation. The Supreme Court's decisions in the hijab ban will not only decide individual educational policies but will also symbolise the direction of India's adherence to its constitutional commitments in the face of the BJP's governance. As the country navigates these issues, the enduring question remains: How will India balance its rich diversity with the desire for a unified national identity, and at what cost to its democratic and secular fabric?

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Vrinda Narain

The End of a Dream?

The Rise and Fall of India's Secular Constitutionalism

"I do not expect India of my dream to develop one religion, i.e., to be wholly Hindu, or wholly Christian, or wholly Musalman, but I want it to be wholly tolerant, with its religions working side by side with one another."[1]

The Bharatiya Janata Party (BJP) may have officially declared war on the hijab in 2022, but the Hindu right's battle strategy has been set in place since at least 2014 when the BJP rose to power under the leadership of Narendra Modi. A tenacious master of populism, the BJP has successfully altered the mainstream Hindu perception of the Muslim as a threat to secularism. Within this imaginary, Muslims are believed to constantly seek exemptions from the secular regulations constraining the Hindu community. The strategy is uncreative at best, tired at worst, but its efficiency speaks for itself. Consider the 2022 hijab controversy, which concerned a decision by a college in Udupi, Karnataka, to ban the hijab in the classroom.[2] In the following weeks, Muslim students staged protests across the state, demanding access to education and respect for their religious freedom. In response, federal and state right-wing groups incited counter-protests by Hindu students donning saffron scarves to decry the alleged differential benefits granted to Muslims. The unrest culminated in the government issuing an Order requiring State public schools to adhere to the established uniform, effectively validating the hijab ban. In schools that did not have a uniform, the Order mandated the implementation of a code that "does not threaten equality, unity, and public order".[3]

Several Muslim students petitioned the Karnataka High Court to declare the ban unconstitutional for violating religious freedom per Article 25 of the Constitution. Relying on the Essential Practices Doctrine (EDP), in *Aishat Shifa v. State of Karnataka & Ors*.

(*Aishat Shifa*), the High Court upheld the ban, concluding that, as the hijab is not an essential religious practice, the protections provided in Article 25 do not apply.[4] The matter was appealed to the Supreme Court where Justices Gupta and Dhulia delivered a split verdict.[5] India's apex court maintained the ban while the Chief Justice referred the matter to a larger Bench.[6] In a twist of events, in May 2023, the BJP lost the state elections to the Congress Party, which announced, in December of that year, its intention to overturn the hijab Order.[7] The saga is far from over, however, as India remains embroiled in political unrest over religious differences and an increasing rollback of minority rights. In any case, the Supreme Court decision reveals a bigger problem. If the BJP has destroyed India's secularism, so too has the Essential Practices Doctrine (EPD).

Though I am sympathetic to the initial rationale behind the adoption of the EPD as a tool to mediate religious differences in the newly formed Indian state, the doctrine is so patently anti-secular that its present application by the courts is indefensible. The test enables the judiciary to adjudicate theological matters in a State defined as secular precisely because it is held to be agnostic to theological matters. The upholding of the hijab ban based on the EPD by the High Court and by Justice Gupta drives this point home. Courts limit constitutional protections to such beliefs and practices that they consider essential to the faith, rather than protecting those which are sincerely held. In a secular system, a court's authority to interpret religion is antithetical to the principle of secularism itself.[8] Where courts privilege one religious interpretation over another, the effect is to render religious freedom rights tautological; a claimant has no right to State-granted protections because the practice they seek to protect is non-essential, and such practice is non-essential because the State argued so.

For the judiciary to be the arbiter of religious dogma is certainly not secular. When a protection is sought under the constitutional right to freedom of religion, "it is not required for an individual to establish that what he or she asserts is an [essential religious practice]" (para. 17). Drawing from Canadian jurisprudence, I argue for a sincerity-based approach, where questions of essentiality are best left to the believer herself, keeping courts out of theology and theology out of courts.

The essential practice doctrine

Guaranteeing minority rights and religious freedom were necessary conditions for postcolonial India's pluralist democracy. At the same time, India's transformatory Constitution empowered the state to reform the worst excesses of religion. Article 25 entrenches religious freedom, simultaneously establishing a "principled distance"[9] between the State and religion and mandating religious reform of Hindu institutions. Though the right provided in Article 25 is subject to public order, morality and health and to the other provisions of the Constitution, the extent to which it permitted the State to reform and regulate religion was left to the judiciary who developed the Essential Practice Doctrine.[10] This doctrine allowed courts to distinguish between those aspects of religion that are to be protected by constitutional guarantees of religious freedom, "essential", and those that are subject to state regulation, "non-essential".[11]

The need for this distinction was first invoked by B. R. Ambedkar during the Constituent Assembly Debates, to enjoin the legislature to "reform our social system which is so full of inequities, so full of inequalities, discriminations, and other things which conflict with our fundamental rights".[12] The EPD first appeared in

jurisprudence in the 1954 Supreme Court case, *Shirur Mutt*.[13] The Court held that "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself". Further, a religious denomination "enjoys complete autonomy in deciding which rites and ceremonies are essential [...] and no outside authority has the jurisdiction to interfere with their decision in such matters". However, subsequently, this test was modified, limiting religious denominations' autonomy to determine the essential practices of their religion, adopting instead an active judicial investigatory role into the question.[14]

A crisis of secularism

The distinction between essential and non-essential aspects of religion was intended to permit the courts "to cleanse religion of practices which were derogatory to individual dignity"[15]. Yet, by appropriating the authority to distinguish between the two, courts have necessarily adopted a theological mantle.[16] "[A]djudicating on what does or does not form an essential part of religion blurs the distinction between the religious-secular divide and the essential/inessential approach."[17] This inherently contradictory dynamic has been challenged, most notably by Chief Justice Chandrachud in *Sabarimala* where he questioned the theological role expected of the judiciary by virtue of the EPD. He argued that since the EPD test renders State-intervention contingent on the essentiality of a religious practice, the limits imposed on Article 25 by competing fundamental rights are largely ignored (para. 49). As judges are preoccupied with arbitrarily settling theological questions, the courts' duty to "ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality" is forgotten. The constitutional

primacy granted to "dignity, liberty and equality" is rendered moot as Article 25 fixates on the essentiality of practices to determine their legitimacy rather than on whether they "detract from these foundational values".

Most recently, on appeal, in *Aishat Shifa*, Justice Dhulia's judgment highlighted the EPD's transgressive nature in a secular system by revealing the questions it obscures. Consider, for example, Justice Gupta's opposing opinion that the hijab ban must be upheld since "religious belief cannot be carried to a secular school maintained out of State funds" (para. 123). The problem with this reasoning is that it discharges the State from its obligation to substantiate the link between the wearing of the hijab and the erosion of secular education. Since the EPD does not consider the sincerity of the claimant's beliefs, where a religious practice is found non-essential, the EPD preempts any inquiry on rational nexus between the purpose of the law and its means and on proportionality, minimal impairment and relatedly the state's duty of reasonable accommodation.

In contrast, Justice Dhulia finds the question of the essential nature, or lack thereof, of the veil completely irrelevant, arguing that "wearing a hijab should be simply a matter of choice. It may or may not be a matter of essential religious practice, but it still is a matter of conscience, belief, and expression" (para. 80). This finding obliges the State to justify restraints on constitutional rights under the permissible exceptions, such as demonstrating that the presence of the hijab in the classroom is a threat to public order, morality or health (para. 67). These interrogations are basic tenets of the checks-and-balances mechanism. It puts the onus on the State seeking to legislate dress restrictions to establish a rational nexus with the object of the law and deems any arbitrary "constraint imposed on the appearance of Muslim women and their

choice of self-presentment" constitutionally impermissible (para. 81). It is this notion of choice or sincerely-held belief that animates Justice Dhulia's argument on the doctrinally indefensible nature of the EPD.

As the narrative of Muslims receiving special treatment through constitutional religious freedom exemptions is a key aspect of the Hindu nationalist project, the EPD unintentionally obfuscates constitutional issues that are common to all Indians. The right to dress, for example, cannot be disassociated from the rights to privacy, dignity, and education (para. 83). Highlighting the interconnectedness of religious freedom, freedom of expression, gender equality, and access to education may have optimised these rights for the Hindu community as well.

Salvaging secularism: lessons from Canada

If the EPD has no place in a secular system, the question remains what analytical approach best complements Article 25? Indian courts have erred in rejecting the sincerity-based test. Fears of potential abuse or the normalization of existing oppressive practices do not constitute valid grounds since, as the Canadian experiment demonstrates, sincerely undertaken practices must still be balanced against competing constitutional rights.[18] Here, India's Supreme Court missed an opportunity to develop a robust jurisprudence on proportionality. Rather than providing guidelines on the balancing of competing interests, the Court focused on "judicially interpreting and determining a subjective understanding of a religious requirement, custom or ritual" (para. 50).

It is useful to draw on the Supreme Court of Canada's decision in *Amselem*, where the Court established that a sincerity-based test was the only suitable approach to religious freedom guarantees

(paras. 47-49). If the argument is radical, it is nonetheless difficult to refute. In a secular, democratic society where a constitution provides protections against State abusive intervention, religious freedom must be defined as the freedom to undertake practices and hold beliefs which have a nexus with religion and "which an individual demonstrates he or she sincerely believes or is sincerely undertaking [...] irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials" (para. 46). Only such an approach preempts "an intrusive government inquiry into the nature of a claimant's beliefs", which "would in itself threaten the values of religious liberty".[19]

Conclusion

The EPD negates the essence of India's Constitution. Upholding secularism necessitates a robust understanding of the right to religious freedom read in conjunction with other fundamental rights. Any attempts to limit it must be reasonably and demonstrably justified by the State.[20] The "secularism" preached by the BJP – a euphemism for non-Hindu erasure – deviates from the Gandhian understanding of secularism as whole tolerance and not whole identity.[21] Paradoxically, as the courts failed to inquire as to how the presence of the hijab in public spaces threatens secularism, the prohibition of the hijab in classrooms constituted an arbitrary regulation of religion by the State, and, hence, an affront to secularism. The EDP and its normalisation of the secularism-versus-minority rights binary indicate that so-called secularism in India has been weaponised to usher in a nightmarish ethnostate.

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Ratna Kapur

Gender, Equality, and the Predicaments of Faith

In the context of the rise of the global right, feminist debates on gender and sexual rights can and have at times slipped into a left and right ideological divide. In reflecting on the ways in which gender equality has been addressed in the context of Indian constitutional law over the past two decades, a more complex picture emerges. Issues of gender and sexuality have been enmeshed in the legacies of colonial interventions, including liberal imperial feminism, as well as anti-colonial nationalist movements, where they have been central to the articulation of national identity. This backdrop continues to inform the ways in which women's rights are taken up and addressed in Indian constitutional law. In the contemporary moment, the predicaments of faith have become central in the context of Hindu Right wing nationalism that has advanced its agenda in and through rights discourse, including gender equality, rather than in opposition to them.[1]

Landmark decisions on gender equality

In recent times, an avalanche of landmark decisions on gender equality and sexual rights have been cascading off the benches of the higher judiciary in India.[2] The Indian Supreme Court has recognised the right to sexual autonomy by setting out the guidelines for sexual harassment in the workplace;[3] recognised a sex worker's right to be free from sexual violence;[4] decriminalised adultery and all consensual sex between adults,[5] including same-sex couples;[6] recognised the rights of trans-persons;[7] held that sex with child brides is rape;[8] expanded women's reproductive rights;[9] and upheld the right to equal entitlements between female and male army officers.[10]

A further set of cases reveals the central role that gender and gender equality play in shaping the content and contours of faith

in law. Allowing women access to temples[11] and *dargahs* (Sufi shrines),[12] upholding interreligious marriage,[13] and holding that divorce via "triple *talāq*" is unconstitutional[14] are among the historic decisions by the courts affecting women's rights. These decisions are providing feminists and progressives alike with a sense of achievement and forward movement. Women's rights seem to be emerging from the long shadow of a colonial past partly characterised by oppressive male dominance.

Normative limits

Nevertheless, a close reading of some of these decisions reveals how gender equality does not emerge as an unequivocally progressive ideal. Instead, the decisions suggest that gender equality is being shaped against a normative ideal of gender as well as Hindu majoritarianism that limits the progressive impact of these decisions. At one level, there has been a sea change in the approach to gender discrimination over the past three decades. The cases reflect how women's rights have been increasingly framed within the discourse of gender justice and dignity. The differences between women and men – so significant in earlier jurisprudence dismissing equality claims – do not come into play. The protectionist approach that once seemed so entrenched in the judicial decisions has at times given way to a more substantive vision of women's equality. Courts have repeatedly disavowed the idea of women as frail and in need of protection, a vision that was used to justify differential – and discriminatory – treatment.

At another level, the struggles around gender and gender equality in postcolonial India remain caught within the complex histories of anti-colonial nationalism and contemporary hypermasculine, anti-minority, right-wing politics. Despite the judicial

promotion of women's rights, the discourse within which these rights have been protected often remains problematic. The judicial approach to questions of gender remains, at best, divided; the shift to a more substantive vision is anything but unanimous. This division was glaringly evident in a split verdict in the Delhi High Court on whether the marital rape exception in Indian law violated the constitutional right to equality and to life or if marital sex is distinct to non-marital sex on the grounds that the former carries a legitimate expectation of sex. The decision reproduced the very gendered norms that gender equality challenges and addresses.[15]

On a darker note, the Supreme Court itself refused to follow the guidelines and principles it had set out for workplace harassment when one of its own stood accused of sexual harassment. The case involved a sitting Chief Justice of the Indian Supreme Court, Ranjan Gogoi, who alleged that the complaint against him was part of a "larger conspiracy to destabilise the judiciary"[16]. He was exonerated in a closed-door proceeding by a three-judge panel without according the complainant due process and in the process impugning her character. The two cases attest to the intransigence of dominant gender and cultural norms, the persistence of the myth that women are not to be believed, and the social construction of women as less legible, less entitled subjects of law.

Gender equality and the predicaments of faith

The judicial approach to women's rights also remains deeply problematic in the intersectional context of gender equality and religion. In several cases, equality has been pitted against religion; yet the way in which this plays out depends in part on the religion at issue: Hindu or Muslim. The discourse of equality has played an important role in the discourse of the Hindu Right that heads the

current government and its understanding of secularism through which it seeks to advance its vision of India as a Hindu Nation. It embraces a formal approach to equality. In this approach all women are treated the same. Any difference in treatment between women of different faiths is regarded as a violation of the constitutional doctrine of formal equality. This position translates into treating all Muslim women the same as Hindu women, with the majority used as the (Hindu) norm against which others (Muslims) are judged.[17] Secularism, understood as the equal treatment of all religions, requires that all religious communities be treated the same, but once again, the norm against which others are judged is the majority Hindu norm.[18] Any special treatment of religious minorities – such as accommodating their personal laws – is seen as a form of appeasement and a violation of the constitutional guarantees of equality and secularism.

This vision of formal equality and secularism has played out with the judiciary all too willing to wade into the rights of Muslim women. In these cases, religion is immediately suspect, with Islam cast as oppressive and barbaric, particularly in its treatment of women. Most recently, this opposition played out in the "triple *talāq"*-decision. In 2017, a constitutional challenge was brought by a Muslim woman to the divorce practice of "triple *talāq*", which immediately brings an end to the marriage. The petitioner argued that the law violated her constitutional rights to equality, life and liberty. The Supreme Court considered whether the practice of "triple *talāq*" was essential to Islam and thereby protected by the fundamental right to freedom of religion enshrined in the Constitution. In short, the majority of the Court said no, "triple *talāq*" was not essential to religion and therefore not protected by the freedom of religion, and yes, it violated the right to equality of Muslim women. Many hailed the judgment as a decisive victory for Muslim

women's rights.[19] Others have expressed concerns about the way in which the decision plays into the political agenda and discourse of the Hindu Right. Throughout the judgment, the Muslim woman is repeatedly referred to in protectionist language, represented as a long-suffering victim who needs to be rescued either by the courts or the legislature. There are repeated references to the "plight" and "suffering" of Muslim women who experience a worse fate compared to women of other faiths. While in some contexts, the courts have moved away from the protectionist discourse, in relation to Muslim women and the opposition between equality and religion it has not.

The "triple *talāq*"-case suggests that these equality "wins" need to be seen within the broader context of the court's willingness to intervene in the sphere of religion when the particular religion (read Islam) is itself suspect. Consider the intermarriage case. While upholding the right of a woman to marry whomsoever she chooses, the Supreme Court subjected the right and choice of a Hindu woman who converted to Islam to marry a Muslim man to intense scrutiny.[20] She was subjected to surveillance by the National Intelligence Agency to investigate fears that the woman could be recruited by ISIS in Syria and become a threat to the nation. In subjecting the rights of a Muslim woman to such strict surveillance, the Court not only comprised her equality rights, but it also positioned her at the lower end of a gender hierarchy and determination of who constitutes a legitimate, loyal citizen-subject deserving of rights. The paternalism that manifests in this decision remains present in many cases addressing women's rights, and the shadow figure of the liberal – now Hindu – saviour continues to loom large in cases dealing with women's rights.

Contrast the cases involving Muslim women with those involving Hindu women. The Supreme Court struck down a ban on a

menstruating woman's right to worship at the Sabarimala shrine in the southern state of Kerala.[21] In the case, the equality rights of women were seen through the lens of freedom of religion – not in contrast to it. The Supreme Court ultimately vindicated the rights of women to access the temple, but it did so without denigrating religion. It overruled a lower court decision that held there was no discrimination because women were "different" and that when religion and equality clash, religion should be protected: "the deity does not like young ladies entering the precincts of the temple". The majority ruling struck down the ban on several grounds, including that it violated the right to equality of women and undermined Hindu women's rights to worship at the shrine, contrary to their right to freedom of religion under the Constitution (Article 25). "Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practise and profess one's religion (…) Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality" (para. 3). But, in its judgments, the Court did not so much oppose equality and religion as read equality into religion. The then Chief Justice, Dipak Misra, for example, wrote: "In no scenario, can it be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple" (para. 122). Equality is not opposed to the Hindu religion; rather it is part of it, reflected in separate decisions in the same case that similarly approach the issue as the equal access of women to the fundamental right of freedom of religion. This position is not a pitting against, but a reading of the right of freedom of religion as equally guaranteed.

On one hand, the case is a victory for Hindu women that did not reinforce the opposition between equality and religion. In multiple opinions, the Court avoided the conflict between gender equality and the majority religion. But it is important to keep in mind the distinction the Court draws in the treatment between Hindu and Muslim women and their respective religions. By reiterating the exemplariness of Hinduism in not discriminating against women's rights to worship, the Hindu faith comes out unscathed, rather unlike the Court's treatment of Islam. The case also produced a significant backlash, with a storm of protests against the local state government's attempt to enforce the decision; protests supported by the Hindu Right. While the Hindu Right favours equal treatment of Muslim women with Hindu women, they are not equally enthusiastic about treating Hindu women the same as Hindu men.

Upon closer analysis, each case remains embedded in dominant gender sexual and religious arrangements that reproduce rather than challenge the existing normative order. Thus, their transformative impact is limited. The normative content of gender equality is shown to reflect characteristics of Hindu male majoritarianism including monogamy, heteronormativity, chastity or purity and gender dualism. Furthermore, the judiciary's approach to secularism sets up gender equality in opposition to religion, an opposition that is particularly evident when the religion in question is Islam. The conception also triggers anxiety when gender equality is posited as an antidote to gender discrimination within the majority religion.

The cases speak to how the deeper structural and systemic issues that impact gender equality remain tethered to normative understandings of gender, sex, religion and the very identity of the postcolonial nation. They also indicate how intersectional politics

in relation to the religious "Other" woman can itself become a technique of gender discrimination and Hindu majoritarianism, replicating the very violence this concept was intended to remedy. There remains an urgent need for constitutional advocacy and judicial interventions to be better informed by the historical legacies as well as current discourses of right-wing nationalism that structure gender equality. This requires tracing out and understanding the work that gender does and that is being done through gender in law in the context of the colonial encounter and the current discourses of right-wing nationalism. Such an understanding would generate greater awareness about the perils and promises of a rights-focused agenda and help to more cautiously navigate the interlocking systems of power, politics and histories that structure this agenda.

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Surbhi Karwa

Growing Authoritarianism and Gender Constitutionalism in India: 2014-2024

After the election of the Hindu nationalist BJP government in 2014, Indian democracy entered a new chapter, one marked by a downward trend in all indexes of freedom and democratic process.[1] While the challenges of democracy in India have been long-standing, during Prime Minister Modi's two terms, the country saw a systemic dismantling of all the institutions of accountability (parliament, judiciary, civil society, and academia).[2] Commentators even declared that India is under an "undeclared emergency".[3]

This piece analyses gender constitutionalism in India in this political backdrop and argues that the last decade has been marked by two trends: *First*, renewed but inconsistent articulation of substantive equality and agency in judicial discourse, and *second*, selective deployment of women's rights and formal equality in political discourse. The combined effect of these two trends is that while women's rights have found judicial and political legitimacy yet, the substantive rights, particularly for Indian women of the lowest strata, remain unfulfilled.

It is important to clarify here that the purpose of this piece is limited to presenting broader trends in gender constitutionalism in the last decade. This by no means is a comprehensive account of all legislative and judicial developments vis-à-vis gender equality and justice in these years. A lot can be said further.

Judicial discourse of substantive equality and agency

Let us first begin with judicial discourse.

In the last seventy-five years of its existence, the Indian Supreme Court has largely followed a formal model of equality.[4] Formal equality originates in the Aristotelian concept of "treating likes alike" and envisions equality as sameness. If the state can

prove that those it is treating differently are not the same, then differential treatment is allowed. The formal standard has consequences for women as it allows the state to prioritise biological differences and stereotypical notions of women's roles and argue that since women are "naturally" different from men, differential treatment can be permitted.[5] Under this formal conception, the Supreme Court rarely undertook a systemic inquiry into structural and intersectional subordination of women under Indian law.[6]

In the last decade, the judicial discourse saw a shift. In a series of judgments, the Supreme Court re-articulated its equality jurisprudence and supported substantive equality as a standard for anti-discrimination claims. The court held that equality cannot be confined to a mere legal formalism of what constitutes reasonable classification.[7] Instead, it has to be given a "substantive content", which includes not only the form of the provision but the substance of it. Equality has to be "true equality" – one that questions "prevailing notions of dominance of sexes and genders".[8]

Based on this new vision, the court decriminalised homosexuality,[9] declared restrictions on women's roles in the Army as unconstitutional,[10] expanded access to abortion for unmarried women, trans persons, young and adolescent persons in consensual sexual relationships,[11] and found erstwhile adultery provision in Indian Penal code as unconstitutional for treating women as a chattel between two men. The court, for the first time, also recognised indirect discrimination and declared that a seemingly neutral provision can be found unconstitutional if it disproportionately impacts a protected group.[12]

This understanding of substantive rights was further anchored by unanimous recognition of the right to privacy as part of life and liberty under Article 21 of the Constitution.[13] Historically, the right to privacy was used for protecting the interest of male propertied

classes from state interference in their homes.[14] In *Justice KS Puttaswamy v. UOI*, however, the court conceptualised privacy as individual autonomy which includes bodily and mental integrity, decisional autonomy, and informational privacy, amongst others. The court found that privacy cannot be a veneer for patriarchy.[15] Subsequently, the court also declared right to choose a partner,[16] and right to sexual agency as part of privacy.

How does one understand these progressive judgments in the face of a growing authoritarian government? Scholars working on authoritarianism and gender argue that anti-gender politics and authoritarianism are connected.[17] Drawing on the examples in the US and Europe, scholars have argued that misogyny and anti-feminism play a "central" role in the exercise of authoritarian power.[18] Do the progressive judgments of the Supreme Court then imply that the court is willing to stand up for women's rights even if faced with a political backlash?

To understand answer to this question, let us look at the political discourse on gender equality and rights.

Selective deployment of language of women's rights

While the US is facing a growing conservative contestation over abortion, India is seeing a different pattern. On 27 June 2022, three days after the US Supreme Court delivered the *Dobbs v. Jackson* judgment, overturning *Roe v. Wade*, the then Minister of Women and Child Development, Smirti Irani, wrote an op-ed in a popular Indian newspaper, arguing that India's instance on termination of pregnancy is proof that while the "west" is curtailing abortion rights, India is "showing the way". India, she continued, deserves to be in the "highest echelons of countries that safeguard reproductive autonomy".[19] Nevermind that abortion in

India works under a framework of criminalization rather than a right-based framework, and women are regularly denied access to abortion based on patriarchal notions of acceptable and unacceptable sex by doctors and courts. [20]

The boast of the minister is part of a larger pattern of instrumentalization of the language of rights while simultaneously hollowing them out of their actual substance. This, however, is not entirely unprecedented. In the face of Hindutava politics in 1990s, Ratna Kapur and Brenda Cossman had warned that language of equality can be used by reactionary groups to advance their agenda. They demonstrated that Hindu right-wing "engages in discursive struggle" to legitimise their dominant and hegemonic understanding of equality.[21]

The Hindutava understanding of equality is based on formal conceptions of equal treatment whereby any acknowledgment of difference is seen as a threat to a unified "Hindu" identity. In the early discourse of Hindutava, the equality of women was not envisioned. Slowly, however, women's equality came to be redefined within the traditional framework of nation's mothers and daughters in the discourse of the Hindu right.[22] The last decade saw a further developed version of this co-option.

Thus, while the government presented itself as a protector of women's reproductive autonomy, it also brought so-called "love jihad" laws in various Indian states based on right-wing conspiracy theories of Muslim men "luring" Hindu women.[23] Through a vaguely defined concept of "conversion by marriage", these laws criminalised women's autonomy and choice of partner and disproportionately harmed inter-faith couples.

The second example of this tendency is the discourse of equality in reference to the women's reservation bill.

Reservation of 33% seats for women in Parliament and state assemblies has been a contested issue within women's movement(s).[24] The first bill for women's reservation was introduced in 1996. While a set of feminist organizations supported the bill, there was an equally strong opposition to the bill from an intersectional perspective.[25] The opposing voices feared that the bill would replace lower caste men with upper caste women who had found some space in the Parliament post-Mandal commission report. Descriptive representation have been seen as a double-edged sword in feminist literature. On the one hand, they may lead to gender-responsive policy-making, especially if a critical mass of women occupy the decision-making body, but they may also lead to mere tokenism or, worse, a cover for weakening democratic institutions.[26]

Ignoring these long-standing debates, the women's reservation (constitutional amendment) bill was passed last year in a "special session" of Parliament. There was no prior notice or consultation with women's organizations. The cabinet approved the bill just one evening before the parliamentary session. In the initial ten minutes of the debate, the members of the house struggled to even find a copy of the bill.

Further, the act contained no provision for the reservation of seats for Other Backward Classes (OBC) and Muslim women.[27] Muslim women are one of the most underrepresented groups in the lower House of the Parliament.[28] Reservations for Muslim women were the long-standing demand of the dissenting voices on the bill.[29]

An analysis of the parliamentary debates shows that the debate was marked with distinctively Hindutava references to "Indian womanhood" and the "ancient Indian tradition of respect for women" and "honour". The speakers of the ruling party placed the act as

"Modi's guarantee", a political rhetoric which positions the Prime Minister as committed guardian of women's rights in India.[30] The Statement of Object and Reason did not cite constitutional equality, instead listed the government schemes for women. The implication seemed that the generosity of government, not rights as rights-bearing citizens, are the source of the act. The title of the act further confirmed the imagery of women's honour.[31]

The bill's co-option of women's rights is further reflected by the fact that the bill is not likely to be implemented any time soon and will come into effect only after a census and delimitation exercise.[32] The act will have its own life and impact in future, but for now it tactfully fits in the ruling party's aggressive strategy for winning women's vote while keeping the conceptions of both equality and democracy thin.[33] Government also won international appreciation without much discussion on these issues.[34]

A third example of selective invocation of women's rights is visible in the ruling party's push for a uniform civil code (UCC). In the name of ensuring women's rights, various BJP-ruled states have passed or are in the process of passing a uniform civil code.

The uniform civil code was initially demanded by women leaders of the Indian Constituent Assembly for ensuring that women's rights are protected irrespective of their religious identity and religious personal laws. However, by 1980s, the position of women's movement(s)' started shifting. As the BJP was trying to find its feet in 1990s, it pushed for UCC on the ground that while Hindu laws are codified and hence progressive, it is Muslim law that needs reform. In the demand for UCC, the BJP invokes a formal understanding of equality (equality understood as equal treatment) and dismisses any demand for separate or special laws for minorities as "Muslim appeasement".

While there has been some support for uniform laws in women's movement(s), women's movement(s) as a whole has resisted the dichotomous posing of women's rights in opposition to minority rights. Flavia Agnes, for example, argues that equality does not mean mere uniform or equal treatment. It cannot be presumed that top-down state laws are better protectors of women's rights than community-led, agency-centric, bottom-up approaches.[35]

The UCC passed by the BJP government in Uttarakhand in 2024 presents a cautionary tale. While the complete account of the act is beyond the scope of this piece, however, the provision on the "registration process" for live-in relationships in the act demonstrates the point. The Uttarakhand UCC introduced a "registration process" for live-in relationships, invoking the need of "protecting" women from violence in relationships. The "registration process", however, was a euphemism for an essentially summary trial process. The provision allowed the registrar the power to summon the parties, inform the police, invite objection from any third party, and refuse registration of live-in relationship if deemed fit. Failure from registration invited criminal liability. There is no precedent for such a process for live-in relationships. Yet, the language of women's right was deployed to criminalise choice and discourage inter-caste/inter-religious relationships.

The political discourse on women's rights in the last decade in India shows that the connection between authoritarianism and gender constitutionalism depends on the context. There is growing evidence that authoritarian regimes have developed well-planned strategies of engaging with gender rights. Paradoxically, along with outright misogyny, they use language of gender rights, particularly descriptive representation and formal equality to legitimise their rule in front of internal and external audiences. Women's rights are

coopted to operate as a "window dressing" or a "façade" to further their authoritarian agenda.[36]

Women's rights: not a threat?

Let us now contextualise the substantive equality vision of the Supreme Court in this political setting and ask whether the court has followed its substantive vision consistently. The evidence suggests that the Supreme Court has been unwilling or incapable of applying its progressive jurisprudence, where it faced a direct clash with the government's ideology or voter base.

Thus, for instance, despite developing jurisprudence of indirect discrimination, the Supreme Court did not apply it to the petitions challenging the ban on wearing religious symbols in educational institutions in Karnataka.[37] The Government of Karnataka brought a facially neutral order imposing a uniform dress code and restricting wearing of any religious symbols which impact "unity and order". This seemingly "neutral" order disproportionately harmed Hijab-wearing Muslim women. Multiple accounts showed that they were denied entry into schools, entrance exams for university, faced suspension, and many altogether dropped out.[38] The court delivered a divided opinion on the case. While Justice Dhulia struck down the provision, Justice Hemant Gupta found the order valid (without any mention of indirect discrimination).

Similarly, in reference to the rights of sexual minorities, the Supreme Court in *Navtej Johar* decriminalised homosexuality where the government had not opposed the petition.[39] However, in *Supriyo v. UOI*, in the face of government opposition, the court acknowledged that the provisions excluding homosexual couples from solemnizing marriage are discriminatory but did not conduct an anti-discrimination inquiry and make a finding on

unconstitutionality.[40] Instead, it relied on an under-developed doctrine of institutional incapacity and left the matter to be decided by a government committee. Further, the court also did not hear the challenge to the notice requirement under section 5-9 of the Special Marriage Act (SMA), 1954. The SMA is a secular law on marriage in India and allows parties to register marriage irrespective of caste and religion. Section 5-9 requires parties solemnizing marriage under the act to give a notice for 30 days and allow objection from any third party. These provisions violate privacy and restrict rights to choice.[41] Investigative research suggests that these provisions have been used to harass inter-caste and inter-religious couples by right-wings groups associated with the ruling party. These provisions expose any couple solemnizing marriage under SMA to harassment by the government, yet, however they were not substantially heard.

Finally, the challenge to various "love jihad laws" is pending in the Supreme Court for four years now, even while states continue to prosecute and propose higher punishments. The court had refused to stay the laws.[42]

One way of explaining these inconsistencies is the polyvocal nature of the Supreme Court whereby the court does not sit *en banc* and, instead, sits in various two or three judges' benches, which leads to multiple voices and confusing jurisprudence on the same issue. The inconsistencies of the court, however, should not be normalised. It raises a question about the Supreme Court's ability to act as a progressive authority on women's rights if smaller benches are unwilling to apply the substantive vision of constitutional/bigger benches. Further, the delay in listing the petition should also not be accepted as fated, given the overburdened docket of the court. The Chief Justice of India (CJI) exercises the power to form benches and schedule hearings for matters of consti-

tutional importance.[43] If there is delay in deciding matters of rights, it is a question on CJI and the institution as a whole.

Overall, this implies that the progressive jurisprudence of the Indian Supreme Court is patchy. It exists, not despite the government, but because the government does not see the language of women's rights as a threat. Instead, the government willingly co-opts the language of rights to further its own agenda. This does not imply that women's status has improved in a substantive sense. The data on violence against women, health rights, and job-security speak for themselves.[44] As I write this chapter, thousands of female health workers are protesting in Maharashtra against the government's failure to pay salaries and ensure suitable working conditions.[45]

The one takeaway of the last decade for scholars, activists and concerned citizens is that gender constitutionalism requires us to move beyond the formal assertions of rights. Instead, it requires us to demand substantive, intersectional, and democracy-furthering approaches to gender justice both in outcome, and discourse.[46]

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Saptarshi Mandal

The Fabulous and the Fascist

LGBT Rights in Modi's India

The last decade, from 2014 to 2024, has witnessed the gradual collapse of democracy and constitutionalism in India. In its first term (2014-19), the Narendra Modi-government went about incrementally dismantling each institution meant for establishing executive accountability, thereby killing the Constitution with a thousand cuts.[1] Indeed, given the spate of censorship, preventive detentions, internet bans, invocation of sedition and terrorism charges against all forms of dissent and the general climate of curtailed liberty that India has witnessed in the last decade, it is not an exaggeration to say that it is going through an "undeclared emergency".[2] And while it is true that Modi's authoritarianism has deep roots in India's constitutional order that favours the concentration of power and facilitates its use by the executive,[3] it is equally true that under Modi, the targeted exclusion of Muslims from all spheres of public life has confirmed India's status as a majoritarian ethnic democracy.[4]

Where do LGBT rights figure in all this? There is some basis for asking this question. Illiberal and autocratic governments in different parts of the world have been making attacks on LGBT rights "a central pillar of their political agendas".[5] The Williams Institute, a US-based LGBT think tank, points at correlations between the erosion of democratic norms and institutions and anti-LGBT sentiments.[6] Similarly, Human Rights Watch, the eminent human rights organization, notes how targeting LGBT rights can be seen everywhere as part of the "authoritarian playbook".[7] So, if India exemplifies the "global democratic recession",[8] and if the undermining of LGBT rights by authoritarian governments is also a global trend, then does India belong to the latter as well? What gives further reason to pursue this question is that in October 2023, the Supreme Court of India turned down a plea for legal recognition of same-sex marriage – something that the union government had

opposed.[9] The Supreme Court has aided the Modi government's consolidation of autocratic power by evading crucial constitutional questions and allowing itself to be used by the government to sanctify its majoritarian agenda.[10] Was the marriage equality verdict yet another example of the Court's deference to the Modi government?

Rainbow decade

The last decade is marked by key milestones in the history of LGBT rights mobilization in India: The Supreme Court's 2014 judgment in *National Legal Services Authority v. Union of India* (*NALSA*)[11], which declared transgender people's right to legal identity; the Court's 2018 judgment in *Navtej Johar and Others v. Union of India* (*Navtej*)[12], where it decriminalised sodomy; the enactment of the Transgender Persons Protection of Rights Act, 2019 (TG Act) which provided mechanisms for state recognition of trans identities and non-discrimination in various spheres; and the above-mentioned marriage equality judgment in *Supriyo Chakraborty and Others v. Union of India* (*Supriyo*)[13] in 2023. But in between these "milestones", there have also been other legal developments: the exclusion of LGBT people from new laws regulating surrogacy and assisted reproductive technologies (2021);[14] the Telangana High Court striking down the colonial era Telangana Eunuchs Act (2023);[15] and numerous instances of different High Courts upholding adult LGBT couples' right to live together, free from interference from their families or the police.[16]

As this cursory survey shows, there have been both legal wins and losses. But as I hope to show below, whether positive or negative, LGBT experiences with the state in the last decade are peripheral to the crisis of constitutionalism sketched above. Below, I contextualise the wins and the losses and discuss why LGBT rights

in India are not "under attack" as they have been under authoritarian governments elsewhere.

Low-hanging fruits

Exactly a month before Modi came to power, in April 2014, a two-judge bench of the Supreme Court delivered an unexpectedly positive judgment in *NALSA*. The Court held that *hijras* (a traditional male-to-female transgender category) had the right to identify as the "third gender" for all official purposes and that all transgender persons had the right to choose how they wanted to be identified.[17] The judges directed the government to make provisions for the legal recognition of trans persons in official documents and recognise the group as a "socially and economically backward class" for purposes of reservation to government education and employment for their social advancement. This was a surprising verdict since just four months earlier, in *Koushal v. Naz Foundation*, a different bench of the Court had reinstated the criminalization of sodomy by overturning a 2009 Delhi High Court judgment.[18]

NALSA, in contrast, showed the judges' willingness to use their constitutional authority to name and remedy the marginalization of transgender persons. And yet, beyond the façade of progressiveness, the judgment revealed the judges' lack of understanding of who the "transgender" was and confusion over how to remedy their marginalization. It contradicted its own much-hyped preference for "self-identification" by shoving *hijras* into the third gender category (many of them identify as women) and introducing a psychological test for the state to confirm their identification. The judgment has been rightly criticised for its implicit pathologization of trans-ness.[19] But equally, *NALSA* exemplifies all that is wrong with the Indian Supreme Court's style of adjudication: issuing orders

that are so general that it is impossible to establish accountability for their implementation; flouting separation of powers by issuing orders that are legislative in character; endorsing the executive's proposals even without knowing what they were.[20] These, as many have noted, are signs of a populist court that is eager to be seen as doing justice to the downtrodden rather than guarding against executive excesses, arguably the main role of a constitutional court.[21]

Populism mars the Court's celebrated *Navtej* judgment of September 2018 as well. In a wordy judgment of 500 pages, a five-judge bench of the Court found the blanket criminalization of sodomy by section 377 of the Indian Penal Code to be unconstitutional and read it down to exclude adult consensual sex in private from its scope. While the verdict was sound and much overdue, once again, it was not the best example of a constitutional court doing its job. For one, the government had not opposed the petition for decriminalization, just as the United Progressive Alliance government before it had not appealed the Delhi High Court's 2009 decriminalization verdict. As lawyer Nizam Pasha astutely noted: "Section 377 was just a low-hanging fruit waiting to be plucked by a court increasingly conscious of its public image and the media reportage of its proceedings".[22] Pasha goes on to list other cases decided by the Court during this period, which involved more contentious legal and constitutional questions, and where the Court repeatedly failed to hold the executive accountable.

Subtle charms of symbolic harms

But instead of getting sidetracked into the structural problems ailing the Indian Supreme Court, let us stay with the main concern of this piece: LGBT rights. What is it about this issue that made it a "low-hanging fruit" for a populist court? Relatedly, why are LGBT

rights not under attack in India as they are elsewhere, despite there being an authoritarian government in power that professes a socially conservative ideology? Part of the answer lies in the nature of demands made on the state. Since its inception in the early 1990s, LGBT activism pursued the singular goal of decriminalization of sodomy. Towards that goal, it drew attention to how the criminalization of sexual acts that were "against the order of nature" demeaned homosexual personhood. To be sure, "being" gay or lesbian had never been a crime, the way membership to certain ethnic groups had been under the now-repealed Criminal Tribes Act, 1871.[23] Nor was the anti-sodomy provision actively and systematically enforced, the way similar laws had been used against the "vice of homosexuality" in other parts of the world.[24] Nonetheless, by foregrounding the symbolic harms suffered by the homosexual subject by the very existence of this legal provision, the activists succeeded in making a case against it.

Symbolic harms can be easier to remedy when compared to structural ones. Often, just some affirming words or even a lapel pin can do the job. Consider what Ritu Dalmia, a famous chef and co-petitioner in *Navtej*, wrote about her case: "We are not asking to be treated as a minority; we're not asking for quotas and reservations; only dignity and privacy to be who we are".[25] Here, Dalmia distinguishes her cause from that of the other marginalised groups in India: the Dalits (former "untouchables"), the Adivasis (indigenous people), the disabled, and so on – the ones that demand "quotas and reservations". Although she disclaims the tag of an activist, her personal reflections bear all the activist tropes and capture very accurately the thrust of the long campaign for decriminalization. Legal cases are characteristically of narrow scope. But in this case, the wider activism that supported the court case also had a narrow focus. Thus, in public perception, the cause of LGBT

rights was not identified with protest against police excesses or for democratising access to public spaces or even for sexual freedom! It was simply a plea for recognition. The fact that the issue allowed the elites to be "victims" who, in turn, could loftily abjure "special treatment", was why it garnered massive support from the mainstream media and the intelligentsia. The fact that it did not involve demands for any structural change was why the state did not have any problem with it.

Incidentally, the section of the LGBT population that did seek "quotas and reservations", those outside the elite milieu – the transgender people – has not been successful. Despite the *NALSA* judges directing the government to provide the transgender category with reservation in education and employment, the law that the Modi government enacted in 2019, in the face of opposition from the trans community, did not provide for the same. The rules to operationalise the law were released during the pandemic, amidst a nationwide lockdown, when the prospects of consultation with the community were restricted. And while a petition challenging several provisions of the TG Act is currently pending before the Supreme Court,[26] in another case, the union government has informed the Court that it has no plans to introduce separate reservations for the transgender category.[27] Undoubtedly, the Act is an important, though limited, achievement for the trans community. Modi recently took credit for giving trans people an identity by enacting the law, demonstrating, once again, that the government has no problem with LGBT recognition claims.[28]

Saffron rainbow

A second reason why LGBT rights are not under attack in India the way they are in other backsliding democracies is because of the

considerable uptake of the nationalist politics of the Hindu Right among a significant section of the LGBT population.[29] From dreaming about a uniform civil code,[30] an idea which the Bharatiya Janata Party (BJP) uses periodically to delegitimise Muslim family law, to celebrating the Modi government's unilateral ending of Jammu & Kashmir's autonomous status within the Indian union[31] to supporting the construction of the Ram temple in Ayodhya where a Hindu mob had demolished the Babri Mosque in 1992[32] to pride march organisers collaborating with the police to identify attendees raising slogans against the anti-Muslim Citizenship Amendment Act,[33] a substantial section of the LGBT population has proved itself to be a useful ally of the Hindu Right. The government's decision not to oppose decriminalization in court, a decision backed by the Rashtriya Swayamsevak Sangh (RSS, the BJP's ideological parent organization),[34] and the latter's public support for LGBT people have further cemented that bond.[35] This support, however, is best dubbed as tolerance, for it does not translate into support for substantive legal rights as became evident during the marriage equality litigation in 2023.

The union government (and the BJP[36] and the RSS[37]) opposed the plea for marriage equality before the Supreme Court, though the primary disappointment of the LGBT community seems to be with the judges, who turned it down. The judges held in this case that it was not open to them to creatively interpret the Special Marriage Act, 1954 – a civil marriage legislation – to extend legal recognition to same-sex marriage. As I had shown at the beginning of the hearing, there were genuine challenges to a favourable statutory interpretation in this case that the petitioners did not seem to have paid attention to.[38] The judges also dismissed the petitioners' argument that the statute itself was discriminatory and, hence, unconstitutional.[39] But more importantly, they held that Indians

did not have the fundamental right to marry and, therefore, any marriage statute was not subject to a fundamental rights analysis. Troubling as they may seem, these conclusions are consistent with the Court's previous holdings and its general approach to family law. In its seventy-year history, the Court has never intervened in substantive family law by striking down discriminatory laws. The High Courts, in fact, have a better record in this respect, but that is a story for another day. In other words, marriage equality did not succeed at the Supreme Court because (a) the government opposed the idea, (b) the petitioners did not have a realistic strategy, and most importantly, (c) the issue was not a low-hanging fruit.

I believe that there is hope for marriage equality in the "New India". Paola Bachhetta, who has tracked the Hindu Right's shifting responses to LGBT visibility in India since the 1990s, urges us "to complicate the current binary in which queer acceptance is imagined as always already a good thing and is systematically associated with the left, while queer repression is assigned to the right".[40] Bachhetta continues, now zooming out beyond India: "In fact, in many places across the globe queer acceptance to date has been conditional upon the violence of queer-normativisation, in which queer-normativity is upheld to construct ever more unacceptable others". Which means, that we should not be surprised if in the coming years, the RSS and the BJP turn around and support the cause of marriage equality just to portray Muslims as obscurantist and intolerant. After all, the Hindu Right's popular refrain through which it justifies its politics is *Hindu khatre mein hai* (Hindu is in danger) and not *hetero khatre mein hai*.

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Gauri Pillai

India's Push-and-Pull on Reproductive Rights

For a piece mapping India's push-and-pull on reproductive rights – the expanse of its protection and the edges it comes up against – history is a good place to start. Rights in the reproductive sphere are relatively new to India. While India enacted a seemingly liberal abortion legislation as early as 1971, concerns about women's rights were hardly the drivers behind it. Rather, the Medical Termination of Pregnancy Act, 1971 (MTPA) was motivated by fears about population growth in India and part of a host of measures (including forcible sterilisation) targeted at reducing the population growth rate. Women's bodies were thus, at least partially, a means to achieve the State's end of population control. To the extent that women's own concerns were part of the assessment, the State was alarmed at the number of women who died trying to access abortion from backstreet providers. Legalisation of abortion in India was, thus, also motivated by concerns about preserving the lives of women. Yet, here too, rights were not the frame used. Rather than centering women as competent decision-makers whose reproductive decisions ought to be respected and enabled, including by providing access to safe abortions, the State benevolently stepped in to protect women from unscrupulous medical providers. Underlying this measure was, thus, a discernable protectionist intent, difficult to justify if women were truly seen as rights-holders.

The early 90s saw a shift in the international imagination of reproductive rights. For the first time, at the International Conference of Population Development (ICPD) in 1994, the global community vowed to move away from prioritising State interests to guaranteeing women's rights in the reproductive sphere. Post the ICPD, rights language on reproduction rippled through domestic contexts. Its arrival in India took 15 years. It was only in 2009 that the Indian Supreme Court, in *Suchitra Srivastava*, issued a landmark

declaration: "a woman's right to make reproductive choices is a dimension of personal liberty [...] under Article 21 of the Constitution of India. [...] [R]eproductive choices can be exercised to procreate as well as to abstain from procreating". Drawing on the rights to "privacy, dignity and bodily integrity", the Court recognised a disabled pregnant woman's reproductive right to resist being forced to abort her pregnancy.[1] Parallelly, the Delhi High Court decided *Laxmi Mandal*, the first case in the world to hold that maternal mortality is a violation of human rights.[2] Assuming landmark status in the years to come, the High Court affirmed that the "inalienable survival rights" under Article 21 include the "reproductive rights of the mother".

The law's expanse

Suchitra Srivastava and *Laxmi Mandal* formed the bedrock of India's reproductive rights jurisprudence. From the nascent, bare-bones recognition in these cases, the state of the law has now flourished. The last decade has seen advancements in the constitutional underpinning of reproductive rights, their scope, the duties they impose on States and their role in shaping statutory interpretation.

The privacy right at the heart of reproductive rights has evolved. From facial references to privacy in *Suchitra Srivastava*, the Supreme Court in *Puttaswamy* developed privacy as decisional autonomy, protecting for the individual a "zone of choice and self-determination" and recognising the ability of each individual to "make choices [...] governing matters intimate and personal" including "whether to bear a child or abort her pregnancy", a "crucial aspect of personhood".[3] This is a significant advancement. Privacy has been critiqued by feminist scholars for shielding coercive and exploitative private spaces (like the home, family and marriage)

from State intervention. The right to privacy, for MacKinnon, is thus simply an "injury got up as a gift" for women.[4] In rejecting privacy as a "spatial" construct because it serves as a "veneer for patriarchal domination and abuse of women", the Indian Supreme Court instead embraced privacy as the right "to exercise intimate personal choices and control over the vital aspects of their body and life".[5] Endorsing this foundational shift, other cases have affirmed women's "exclusive and inalienable" choice about "whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to deliver the child", a choice that "she, and she alone, can make".[6]

In a second major development, the body has found its place within constitutional accounts of reproductive rights in India. The recognition exists not only at the level of protecting the right to "bodily autonomy": A "[w]oman owns her body and has [a] right over it [...] and [the] woman alone should be the choice maker".[7] It is also driven by a keen appreciation of the bodily burdens of an unwanted pregnancy, a facet that is typically ignored and treated as routine, something all pregnant persons go through:

> *"The consequences of an unwanted pregnancy on a woman's body [...] cannot be understated. The foetus relies on the pregnant woman's body for sustenance and nourishment until it is born. The biological process of pregnancy transforms the woman's body to permit this. The woman may experience swelling, body ache, contractions, morning sickness, and restricted mobility, to name a few of a host of side effects. Further, complications may arise which pose a risk to the life of the woman."*[8]

Third, the right to equality and non-discrimination has gradually become part of the constitutional framing of reproductive rights in

India. Privacy and equality play two distinct roles in underpinning reproductive rights. While privacy recognises that reproductive decision-making is intimate, a reflection of individual identity, equality foregrounds that members of certain disadvantaged groups have been (and are being) denied reproductive rights because of their group identity. For a long time, "[Indian] courts primarily addressed [reproductive] rights as a matter of life and personal liberty", failing to "robustly address [it] as an issue of equality and non-discrimination".[9] A shift, however small, is visible in *Devika Biswas*, where the Supreme Court condemned State policies compelling women from marginalised groups to undergo sterilisation as mirroring prevalent "systemic discrimination" and impacting the "reproductive freedoms of the most vulnerable groups of society".[10] Going further, the Supreme Court in *X v. NCT* affirmed that reproduction is not just "biological" – as "physical bodies reproduce" – but also "political", with the decision to reproduce being bound to broader social structures: "[A] woman's role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive generations".[11] Here, the Court showed a keener appreciation of the role of group membership in mediating access to, and denial of reproductive rights, characteristic of an equality-framing. While there is a long way to go to fully develop this framing, the beginnings are evident and deserve appreciation.

Equality's introduction ushered in a fourth concrete dimension within constitutional reproductive rights in India: the emerging focus on marginalised groups. *Snehalatha Singh* is an excellent example.[12] Shocked by "poor, shabby and inadequate" public healthcare institutions in Uttar Pradesh, the Allahabad High Court remarked: this "negligence and apathy" simply proves that at the highest level of State "nobody is sensitive enough to look into the

plight of poor, needy, infirm and sick people for whose benefit State medical services are run". The Court, in turn, held the State to account to fill vacancies, supply medicines, guarantee infrastructure, and prepare an Action Plan so that "quality medical treatment is available to poor people in the same manner as it is available to resourceful high officials and rich people, and people may not suffer in the matter of medical care merely on account of their poverty". Similarly, in *X v. NCT*, recognising the heightened vulnerability of pregnancy outside marriage, especially in a context where pre-marital sex is a social taboo, the Supreme Court extended the reach of India's abortion legislation to unmarried pregnant women.[13]

As a fifth facet, constitutional reproductive rights in India require positive duties of the State to "remove obstacles for an autonomous shaping of individual identities",[14] with the Supreme Court acknowledging that it is "meaningless to speak of" negative duties "in the absence of" positive duties, thus mandating that the State "undertake active steps to help increase access to healthcare (including reproductive healthcare such as abortion)".[15] Once again, this interpretation responds well to feminist concerns about common pitfalls of the privacy right, which typically requires State non-intervention alone. This is however of limited use to members of marginalised groups who often require State action to meaningfully access rights.

Finally, expanding conceptions of reproductive rights have, in turn, enabled expansive readings of the MTPA, with rights serving as tools to push interpretations of the MTPA beyond the literal. Take the example of Section 5 of the MTPA, which allows abortions outside of gestational limits if termination of pregnancy is "immediately necessary" to save the "life" of the pregnant woman. Initially, "life" was interpreted literally, to mean avoiding death, with

abortions being granted when women would die without them.[16] However, with expanding reproductive rights, "life" took a wider meaning, bringing within its ambit cases of harm to physical and mental health. This interpretative shift was driven by reasoning that "life" under the Constitution is not restricted to "animal existence or mere survival": "The expression cannot be confined to the integrity of the physical body alone but will comprehend one's being in its fullest sense. That which facilitates fulfilment of life [is] as much within the protection of the guarantee of life."[17] The increasing instances of judicial expansion of the MTPA, in turn, motivated its legislative amendment in 2021, widening the grounds on which abortion can be accessed and extending relevant timelines.[18] Of course, the statutory framework still has significant limitations, especially in its prominent focus on medical professionals as primary decision-makers. Yet, the role of constitutional reproductive rights in prompting the law's evolution so far is noteworthy.

The law's edges

In spite of these gains, all is not well (as it never is). Of late, a distinct judicial trend of preserving the State's interest in potential foetal life is emerging. In the landmark *Suchitra Srivastava*[19], citing the US Supreme Court in *Roe v. Wade*[20], the Indian Supreme Court held that the State has a "compelling interest" in protecting the "prospective child", placing "reasonable restrictions" on the reproductive rights of the woman. However, unlike the US, where the foetus has always occupied a prominent position in the abortion debate, the foetus has largely been absent from legal and public discourse on abortion in India.[21] In the 1971 legislative assembly debates on the MTPA, only two members of the Parliament objec-

ted to liberalising abortion on the grounds of threats to foetal life. Accordingly, the Act was passed, and the objections were set aside, affirming that "there is no violation of [the right to life] in any manner".

Despite this history, the foetal figure is growing in importance within constitutional accounts of reproductive rights in India. While some High Courts have held that the foetus does not possess a constitutional right to life,[22] others have simply deflected this question by focusing on the woman's right to life.[23] Yet others have held that post-viability, the "potential child" becomes a part of the determination,[24] with the "right to life of the foetus" outweighing the "mental trauma" of the mother,[25] and one court has rejected a termination request at 20 weeks on hearing "the voice of the unheard foetus […] a human being which too is alive, though yet to be born"[26] (this decision was later set aside). In 2022, a petition was filed before the Supreme Court claiming that India's abortion law authorises "foeticide".[27] In 2023, the Supreme Court disallowed an abortion at 26 weeks, refusing to exercise its power to do "complete justice" because it could not "stop the [foetal] heartbeat".[28] In 2024, despite the Delhi High Court allowing abortion, the doctors refused, claiming that it was "foeticide".[29]

At this stage, it is hard to deny the foetus' presence as a prominent edge reproductive rights in India routinely come up against. While it may have been marginal previously, with this development possibly reflecting tensions within abortion law globally, the foetal figure in India is no longer a shadow, lurking in the background. It is, rather, an entity with a rapidly evolving form, and if global trends are even minimally indicative, a force that can drastically alter the constitutional guarantee of reproductive rights.

In this context, protecting reproductive rights requires careful legal and constitutional engagement with foetal interests, starting

with whether they are, at all, a legitimate aim for the State to pursue. Even if they are, taking foetal interests into account need not mean the annihilation of women's reproductive rights. As recent South Korean[30] and Colombian[31] examples remind us, even if the State were to persevere in protecting the foetus, restricting abortion is both ineffective and unnecessary to achieve the aim. Foetal interests are better preserved through State policies which support women in their pregnancies, including ensuring comprehensive sex education, access to temporary contraception, clamping down on violence against women, and providing forms of childcare support, reducing the overall rate of abortions.

Reproductive rights in India are at a moment of serious reckoning, set against a global climate of fraught contestation around laws regulating reproduction. The path India takes will determine if, as the Supreme Court promised in 2022, women actually have access to the full "constellation of freedoms and entitlements" enabling them to "decide freely on all matters relating to [their] sexual and reproductive health".[32]

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2024 General Elections

Yogendra Yadav, Shreyas Sardesai, Rahul Shastri

A Mandate for a Democratic and Secular India?

The Results of the 2024 General Elections

Was the 2024 election result a mandate for democratic and secular India? In one sense, the answer is an obvious yes. This election was a referendum on the supreme leader. Narendra Modi had asked for an unqualified public endorsement for his authoritarian rule of the last ten years and for the dismantling of the republic in the next five. The people of India refused to put their stamp of approval on this design. Despite Modi's desperate anti-Muslim vitriolic, the communal appeal did not trump over everything else in the heartland of Hindu majoritarian politics. This outcome is a personal defeat for the Prime Minister that punctures his image of invincibility.

Some consequences are obvious: India's democratic backsliding, from a competitive authoritarian rule to a pure authoritarian state, has been halted. Democratic spaces have opened up – both within the BJP, and inside and outside the Parliament. Brakes have been applied to decelerate the ideological project of mutilating the constitutional vision of secularism in favour of a Hindu majoritarian state.

All this is critical, but not sufficient to call this a mandate for a democratic and secular India. That is because these are the *consequences* of the verdict, not necessarily the *intentions* of the voters. Much of the analysis of the 2024 election is based upon inferences drawn from the overall outcome. We don't know how valid these inferences are until we can read the voters' mind.

Fortunately, we have a direct way to verify this. The Lokniti-CSDS released the findings of their post-poll survey (based on face-to-face interviews of a random sample of nearly 20,000 voters after polling, but before counting) soon after the election results came out, something they have done for every Lok Sabha election in the last thirty years.[1]

[Disclosure: Two of us have been part of the Lokniti-CSDS team in the past, but have no association with this survey.]

(Note that for all the survey questions, we have included only those respondents who have expressed an opinion and excluded the "no response" and "don't know" from the analysis.)

Democratic habits of mind

Turning first to democracy, one thing is clear: Seven decades of functioning democracy have inculcated democratic habits of mind that are not easy to bulldoze.

Citizens' Opinion on Questions Related to Democracy

Statements	Agree	Disagree
In a democracy, people should have the right to oppose a decision taken by the leader	77	23
Once leaders are elected, there is a need for courts and constitutional institutions to check the powers of an elected government	68	32
In a democracy, citizens should have the right to ask leaders to do certain things	77	23
Regular change of government/ruling party promotes development	64	36
We should have a strong leader who does not have to bother about elections	38 (-10)*	9 (–)*

Table 1: Democratic sentiment remains robust, people dislike unfettered rule.

Source: Lokniti-CSDS Post-Poll Study 2024[2] and The Print.[3]

Note: All figures rounded off. Percentages calculated from among respondents who gave their opinion. "No Opinion" set as missing. Figures are only for "Fully Agree" and "Fully Disagree" categories. Figures in parentheses denote percentage point change since 2019.[4] Question was also asked back then.

A plurality of Indians (64%) identify the essence of democracy in its most basic form – the opportunity to change a government through free and fair elections.[5] Given the context of this survey, it is noteworthy that almost two out of three people who express an opinion believe that regular change of government is more conducive to development rather than a single party continuing for a long time. Yet, support for democracy is not limited to the ability to change the government through elections. A large proportion of Indian voters also support an idea which is anathema to the Modi government – checks on democratically elected rulers. An overwhelming majority of the voters, 77%, uphold the idea that in a democracy, people have the right to influence and even interfere in their leaders' decision-making.[6] In what can be construed as an indictment of the present government, the same proportion supports peoples' right to dissent if the government's decisions are not to their liking. No less important is the endorsement of the idea of constitutional checks and balances: 68% believe it is necessary for courts and constitutional institutions to check the powers of an elected government.[7] Indian voters may not possess the language of liberal democracy, but they are certainly not willing to accept arbitrary, unaccountable, and unchecked rule.

While celebrating this democratic inclination, we must not forget that just one out of four respondents reject a classic soft-authoritarian suggestion, "We should have a strong leader who does not have to bother about elections"; more than a third "fully agree" with it and another third "somewhat agree".[8] But, we can take solace that compared to 2019, the proportion of people who "fully agree" has decreased by 10 percentage points (pp) and those who overall "disagree" has increased by 2 pp.[9] While the Modi government turned towards authoritarianism, the people moved in the opposite direction.

The last five years have also accentuated democratic anxiety. Only 67% of people said their vote makes a difference.[10] This is the lowest-ever recorded level of democratic efficacy in the last five decades of survey research in India. The high level of trust needed in the electoral process has also come down. Compared to 2019, the proportion of those who report high levels of trust in the Election Commission of India is down from 57% to 47%; similarly, the proportion of people with a "lot of trust in the EVM" is down from 57% to 34%.[11] We can only hope that the 2024 election outcome has enhanced citizens' sense of efficacy in their vote and restored their trust in the working of the EVMs.

Citizens' Belief in Procedural Democracy and Electoral Institutions

Statements	2019	2024
Belief in efficacy of one's vote	83	67*
Great deal of interest in the election campaign	19	31
A lot of trust in EVM	57	34
Great deal of trust in Election Commission	57^	47

Table 2: Faith in the electoral process and institutions has declined.

Source: Lokniti-CSDS Post Poll Studies 2019[12] and 2024[13], Pre-Poll Study 2024[14], and The Print.[15]

*Note: All figures rounded off. Percentages calculated from among respondents who gave their opinion. "No Opinion" set as missing. *Unlike 2019, CSDS asked the efficacy of vote question in their pre-poll study this time. ^In 2019, the question on trust in the Election Commission was worded slightly differently. It was about trust in its "fairness in conducting elections".*

We do not yet know if the people held the Modi government responsible for the violation of these basic democratic norms and punished it. Sadly, the survey does not probe this angle very much. We do know, however, that people disapproved of the arrest of opposition leaders just before elections. For every one person who claimed that these politicians had been arrested because they were more corrupt than their BJP counterparts, almost two believed that corruption was not the issue: The leaders had been arrested for purely political reasons.[16]

When asked to name the things people dislike about Modi's BJP government, 0.8% mentioned "dictatorial government". When asked to name why they would not want to give his government another chance, 1.1% mentioned "intolerance, curtailment of civil liberties". These might be small numbers, but we have already shown that this election was decided by small numbers.[17]

Cooling down of majoritarianism

Unlike democracy, the evidence is mixed on attitudes toward secularism. This is hardly surprising. Suhas Palshikar has repeatedly illustrated how the BJP has managed to shift the entire spectrum of public opinion in favour of majoritarianism.[18] One should not expect a pendulum swing in an election where the Supreme Leader launched an unbridled assault on the idea of minority rights. But this survey registers subtle shifts that puncture the claims and hopes of the BJP and the RSS. While 22% mentioned the consecration of the Ram temple in Ayodhya as the action they liked the most about the Modi government, only 5% of all voters singled this out as the reason to give the BJP another chance.[19] In all likelihood, the Ram temple gave BJP faithfuls a reason to stay with the party

and rationalise their political choice. But it does not appear to have shifted votes toward the BJP.

We know from the pre-poll survey by Lokniti-CSDS that there is near unanimity about the abstract idea of an inclusive India; contrary to the *ghuspaithia* (infiltrator) narrative unleashed by the Prime Minister. For every one person who agrees with the statement "India belongs only to Hindus", there are more than seven who agree that "India belongs to citizens of all religions equally, not just Hindus".[20]

The post-poll survey records a small but critical shift away from majoritarianism in its concrete manifestations. Compared to 2019, more voters "fully disagree" with the classic majoritarian statement: "In a democracy, the will of the majority community should prevail". To be sure, the proportion of people who agree with the statement is much higher than it was in 2004 or 2009, but a more recent comparison can be 2014. In 2014, on the back of the "Modi wave", the proportion of those who "fully agreed" with this statement was 40%.[21] It came down to 29% in 2019,[22] and has cooled down to 21% this time.[23]

Citizens' Opinions on Minorities

Statements	2019	2024
In a democracy, the will of the majority community should prevail		
Fully Agree	29	21
Fully Disagree	20	22
Even if it is not liked by the majority, the government must protect the interests of the minorities		
Fully Agree	47	38
Fully Disagree	7	6
Giving equal treatment is not enough, the government should give special treatment to minorities		
Fully Agree	34	27
Fully Disagree	15	12
Minorities should adopt the customs of the majority		
Fully Agree	16	23
Fully Disagree	35	21

Table 3: Anti-minority rhetoric did not work as majoritarian sentiment has weakened.

Source: Lokniti-CSDS Post Poll Studies in 2019[24] and 2024[25], and The Print.[26]

Note: All figures rounded off. Percentages calculated from among respondents who gave their opinion. "No Opinion" set as missing; figures for moderate agreement and disagreement with the statements not shown here.

At the same time, we do not see a proportionate increase in the support for minority rights. The PM's move to raise the temper on this issue may have had some impact here. Two decades ago, 67% fully agreed with the statement: "Even if it is not liked by the majority, the government must protect the interests of the minorities".[27] This proportion has steadily dropped after 2014 and has now declined to 38%.[28] (However, if we include those who "somewhat agree" with this statement, the proportion who overall agree is still well above three-fourths: the sensibility is yet widespread but the conviction has decreased).

In a similar vein, the proportion who "fully agree" that the government should give not just equal treatment but special treatment to minorities has decreased from 34% in 2019[29] to 27% in 2024;[30] on this, the proportion who "fully disagree" has also decreased a bit. This moderation of opinions is not inconsequential in the context of attempts to polarise.

While there is moderation in the political dimension of majoritarianism, the pressure for cultural assimilation has increased. Between 2019 and now, the proportion of those who "fully agree" that "Minorities should adopt the customs of the majority" has gone up by 7 percentage points.[31] For the first time since 2004, when this question was first posed, has the proportion of Indians who "fully agree" or "somewhat agree" with this statement exceeded those who "fully disagree" or "somewhat disagree" with it.

All things considered, this may not amount to a ringing endorsement of the ideal of secularism. It would be a mistake to read back the political impact of the 2024 verdict into the minds of the voters. But it is fair to conclude that the Indian voters have not been blown off their feet by the strongest majoritarian storm yet.

The evidence presented above is by no means a guarantee for the future of a democratic and secular India, but it does provide enough ground to build a politics to reclaim the spirit of our republic. You cannot expect more than that from one election, especially not from the one designed to dismantle the idea of India.

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Anmol Jain

Uniting the Indian Opposition

The Indian political space is unique in terms of the spread of dominant political parties in society. While the two biggest parties – the Bharatiya Janata Party (BJP) and the Indian National Congress (INC) – register their presence nearly throughout the country, they are not the sole contenders for state power. Different regional parties dominate the electoral space in several states, and at times, their influence is limited to to those states. In some states, regional parties are strong but not dominant, and they play a crucial role in government formation by ensuring that the dominant parties remain short of the majority without their support. This results in triangular and quadrangular contests on several seats, which, in the first-past-the-post system, necessarily helps candidates win seats despite remaining short of the majority mark by a significant margin. Over the last decade, the BJP has performed remarkably well in seats that witnessed multi-party contests as the non-BJP vote gets split among several opposition candidates.

To counter this phenomenon, more than 35 parties came together to form a big-tent united opposition bloc called the "Indian National Developmental Inclusive Alliance" (INDIA) to jointly fight the BJP in the 2024 General Elections and challenge Narendra Modi's claim to the prime ministerial post for the third consecutive term.[1] They believed that if the opposition could field a single common candidate against every BJP candidate, they could potentially defeat the BJP or at least challenge its ambitious goal of winning a supermajority.

The strategy of uniting the opposition against an electorally strong and populist leader is not uncommon, both for India and globally. In the following paragraphs, I will discuss how this strategy has played out in the recent past and what lessons INDIA could learn from such a global experience.

United opposition: opportunities and challenges

The strategy of fielding a common candidate and forming broad opposition alliances, at times with parties believing in conflicting ideologies, to defeat populist leaders has been commonly adopted in multi-party democracies. Evidence of this abounds from Hungary, Türkiye, Israel, Bulgaria, Slovenia, Brazil, the Gambia, and the Czech Republic in the recent past.[2] While this strategy has been proven successful for the opposition in many of these states,[3] the unification of the opposition cannot be termed the magic wand against populism, as the cases of Hungary[4] and Türkiye[5] show. Defeating leaders while they remain popular among the masses requires more than mere unification of the opposition for the sake of the votes. As Lührmann puts it, it would demand "a unified and creative opposition" to effectively dethrone the populists from power.[6]

Some of the critical elements that the united opposition needs to inculcate in their campaign and operations are as follows. The united front must be broad enough to counter any chances of vote-splitting, and it must enter the electoral battle with a sense of genuineness and promise that it will offer a sustainable government to the people once elected to power. It would be extremely difficult for them to succeed electorally if their campaign revolves solely around defeating the incumbents. An alternative agenda that is inclusive in its approach and takes stock of the fundamental needs of the citizenry needs to be developed. An alternative vision of governance and a substantive manifesto of realistically achievable possibilities need to be presented. If the people perceive the united front merely as the opposition coming together against a common enemy rather than as a representation of an alternative developmental vision, the idea of a united front could instead turn

into a weapon in the hands of the populists to further their narrative about institutional attempts to deny power to the common people.

Along with this, it needs to be ensured that the common minimum program developed by the united opposition does not become toothless owing to the accommodation of diverse and, at times, conflicting ideologies. One of the fundamental causes for the rise of anti-democratic populist leaders is the declining trust of the people in state capabilities; a non-substantial and non-promising common minimum program would only feed the original problem.

While winning an election against a populist leader/party may sound daunting, the real test for the united opposition comes once they are voted into power. A government constituted of leaders holding diverse viewpoints will need to consistently come out with a common voice and, thus, enter compromises and hard bargains on a regular basis for the sustenance of the government. The cost of the failure to run the government effectively without substantial infighting is severely high – the gains made may disappear quickly, and the populist may again rise to power.

United opposition in the 2024 Indian General Election

Numerically speaking and under the existing conditions, the idea of a unified opposition to counter the BJP is realistic and feasible in India. If the dominant regional parties and non-BJP national parties come together and field common candidates strategically, the opposition will be able to better the vote share secured by the BJP and potentially win the electoral battle as the BJP's vote share has remained below 40% since it rose to power in 2014.

The results of the 2024 elections are a testament to this. Despite securing a nearly similar vote percentage when compared to the last election – 36.56% – BJP's seat share fell drastically. It could win only 240, thus falling below the majority mark of 272 for the first time since 2014. Though it could still form the government riding on the seats secured by other parties of the pre-electoral coalition – the National Democratic Alliance (NDA) – the total vote share of the alliance lingered very close to that of INDIA. While NDA secured 42.5% votes, INDIA secured 40.6% and won 234 seats. It shows how, in a first-past-the-post system, a united opposition could successfully challenge BJP's juggernaut if it could come together and fight the election as a united bloc. The resultant consolidation of votes would affect the BJP's seat share even if it could repeat its performance from previous years.

Beyond these numbers, the story underlying the performance of INDIA needs to be discussed. The 2024 Indian election provides us with important insights for a comparative analysis of how united opposition blocs can come together to challenge populist autocrats. It also presents us with an opportunity to think more deeply about the potential benefits and challenges that such approaches may present for the long-term survival and strengthening of democracies.

INC, having its presence across India and being one of the biggest national parties in the INDIA bloc, assumed a central position in the formation and operation of the INDIA bloc. As a significant portion of the TV media seems to have shifted right, INC has made significant strides in voter outreach by resorting to both traditional and new-age means. Over the last year and a half, it undertook two nationwide marches, the *Bharat Jodo Yatra* (Unite India March) and the *Bharat Jodo Nyay Yatra* (Unite India Justice March), and has been collaborating with social media influencers

with an aim to re-establish its connection with the people, target the first-time voters and the youths, and take its ideology among the masses.

An analysis of the speeches delivered by its leaders would show that the INDIA bloc has adopted an approach similar to İmamoğlu's "Radical Love" campaign.[7] Rahul Gandhi, the ex-president of INC and the fourth-generation heir of the Nehru family, could be regularly seen using the phrase *hum nafrat kai bazaar mein mohabaat ki dukaan kholna chahte hai* ("we wish to spread love amidst the hatred being spread in the society") and focusing on the ideological battle being fought in India. There is a constant push and emphasis on the ideas of justice, love, and cordial fraternity. This is also visible in the policy proposals released by the INC. It promised to deliver "5 *nyay"* (five types of justice) by way of 25 guarantees upon being voted to power. These *nyay* guarantees aim to address the needs of the five most vulnerable sections of society: youths, women, workers, farmers, and marginalised sections.[8]

Moreover, in nearly every political rally and voter outreach program, its leaders delivered provocative and educative speeches aiming to explain the importance of democracy and the factum of democratic decay and institutional capture in India. Active efforts were made to widely share the ideas underlying the Indian Constitution and why they matter to the Indian society, with an aim to awaken the masses to fight for the protection of its constitutional identity. Apart from mass gatherings, opposition leaders regularly organised small group conversations with students, labourers, farmers, gig workers, etc., to hear and understand the needs, complaints, and perspectives of every section of society and, at the same time, shared with them their ideas and ideologies as an al-

ternative to that of the BJP's. Such discussions were recorded and shared over social media to capture a wider audience.

Nevertheless, several problems persisted in the approach and politics of the INDIA bloc. For instance, INDIA didn't release its official alliance manifesto. The participating political parties released their individual manifestos, which both align and contradict other parties of the bloc on several prominent issues, raising doubts about the strength and efficacy of the possible government that they would have formed had they won the election. It is also important to note that the performance of a united bloc as part of the government and as part of the opposition may be starkly different. It is easier for the parties of a united bloc to retain independent identities while sitting in the opposition, as they could still independently challenge governmental actions and take slightly different, if not contrasting, positions without major risks. In cases of intense disagreement, a few parties may choose to cushion their disagreement without severe implications in terms of the continued influence over their voter base. But, once in government, the implications of non-unison are high, and they become multi-fold given that the new opposition would still be headed by a populist leader.

Moreover, being a big-tent electoral coalition composed of diverse parties that have been arch-rivals for years, it remains difficult for the bloc to generate confidence among the people that it could produce a stable government. Regular occasions of infighting were captured, a sense that the purpose of the bloc is merely to oust Modi lingered (and still persists), and reaching a mutual seat-sharing arrangement proved to be a major tussle. A few important regional parties had even left the bloc to either fight the election independently or support the BJP. Interestingly, if one such regional party – the Janata Dal (United) of the state of Bihar – had

not left the bloc, NDA could have been defeated. Another political party, the Aam Aadmi Party, which emerged in the aftermath of the nationwide 2011 protests against the then union government, chose to fight the elections independently in the state of Punjab, but as part of INDIA on the seven seats of Delhi.

Further, as no common minimum program was released by the INDIA bloc, its electoral rallies revolved largely around the atrocities of the Modi government and the policy measures it will adopt to pacify the concerns emerging from the actions of the Modi government. In other words, a comprehensive independent alternative vision of development and growth was not concretely launched, if not totally absent.

Concluding remarks

The 2024 national elections were crucial for India. The health of India's democracy is deteriorating, and a repeat of the BJP government for another term, as a part of a coalition, brings the possibility of substantial changes to the legal system. The emergence of a united opposition coalition is an important development in this regard. Though it failed to win the election and form the government, it has substantially bettered its seat share in the newly constituted Lok Sabha. The opposition is considerably stronger in this term, and the bloc has continued to work together for the upcoming state elections as well, though a few exceptions still remain. Only the future can tell how successful the bloc will be and to what extent it will challenge BJP's anti-democratic endeavours. Nevertheless, we must closely study the approaches and strategies that INDIA adopts. It promises to be a critical case study for the scholars of democracy and populism.

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Scholarship

Tom Gerald Daly

Towards a Broader Constitutionalism

External Perceptions of Indian Democracy, 2014-2024

In 2016 I was invited to write a piece for an international collection on democratic backsliding. Having submitted a piece including India as a case study, I received an editorial request to write a substitute case study on the basis that insufficient evidence existed for democratic regression. This was understandable: It was in the early years of the first Modi government after the Bharatiya Janata Party's (BJP) entry into government in 2014 with the first single-party parliamentary majority in the Lok Sabha since 1984. It was four years before the publication of Tarun Khaitan's landmark article forensically assessing democratic backsliding under Modi, discussed below, and a full five years before India was downgraded by two key democracy indices (Freedom House and V-Dem) due to the precipitous decline in institutional safeguards and rights protections.

The evidence base for backsliding has greatly expanded now that Prime Minister Modi has been in power for a full decade – albeit now in coalition since the 2024 elections. This important collection makes a signal contribution to the literature, given the quality and richness of its analysis, covering everything from federalism to feminism, with citizenship, education, free speech, reproductive rights, migration, courts, parliamentary process, and party-political action all addressed. Laying bare the diverse dimensions of backsliding in India is vital given that outsiders often struggle to grasp how acute the Modi threat truly is. One possible reason is that, where democracy is equated to elections,[1] a ready retort to claims and concerns about democratic decline has been that India's electoral democracy is in robust health, insofar as turnout and vibrancy puts that of many Western states to shame. This evidently elides the fact that democratic constitutionalism worthy of the name requires much more than majoritarian control. More broadly, outside observers, and especially those in the Global

North, have long tended to approach India with a rather gauzy intuition of its importance as the world's largest democracy. However, in the face of its sheer size and diversity, they often tend to treat it rather reductively as a mirror for reflecting on Western preoccupations about constitutionalism and democracy, rather than understanding it on its own terms.

Given Western anxieties about backsliding, and obsession with the legitimacy of judicial power, discussing how the health of India's democracy has been perceived beyond its borders over the past decade could all too easily become exclusively a story of backsliding, with Prime Minister Modi and the failures of the Supreme Court as a constitutional guardian at its centre. However, this would overlook the more complex story, at least to this outsider's eyes, of how executive aggrandisement has been met with resistance, resilience and creativity not only by opposition forces and scholars, but also by civil society and citizens, all of which speaks to the endurance and evolution of a broader constitutionalism whose animating spirit cannot easily be snuffed out. As the introduction to this collection provides such an effective summary of the collection as a whole, in this short contribution I aim to place the edited volume within the wider literature and celebrate the evolution of Indian scholarship on constitutionalism, not only explaining the changes India's constitutional order has experienced since 2014, but also crafting new frameworks for understanding, critiquing and reimagining democratic constitutionalism.

External perceptions of Indian constitutionalism in 2014

In 2014, it might be offered that external perceptions of Indian democracy – at least within comparative constitutional law – tended to focus on the outsized power of the Supreme Court. This

provided fodder for what was by then a decades-old and rather circular debate, mainly across the United Kingdom and the USA, about the perils of "judicial activism" and of the arrogation of power by unelected judicial elites. Or, for proponents of judicial power within and beyond this debate, the capacity of robust adjudication to address multiple axes of inequality and render social and economic rights a reality rather than mere paper promises, which some characterised as "constitutionalism of the Global South"[2] or "transformative constitutionalism"[3] linking India with young democracies such as Brazil, Colombia and South Africa. Whatever side one favoured in these debates, this focus on the Supreme Court presented a rather limited view of the true nature of Indian governance, especially if one conflated the expansion of judicial power with the health of the democratic system, insofar as it indicated that political powers were willing to acquiesce to, and be constrained by, any independent institution.

In 2014, the "Southern turn"[4], aimed at dethroning West-centrism in comparative constitutional law, was not yet in full swing, and while India was emerging as one of the "usual suspects" for comparative analysis, its constitutional democracy more broadly was still not a focus of fuller international attention commensurate with its size, democratic achievements, and growing geopolitical importance. In 2014, for instance, one finds only fleeting mentions of India across the four issues of the *International Journal of Constitutional Law*, in an article on "comparative constitutional common law"[5] and two book reviews, one being on constitutional judges' citation of foreign judgments.[6] On *HeinOnline*'s enormous database, for all of 2014 a mere 389 results mention India, with key results relating – rather tellingly – to topics such as "judicial activism"[7] and "judicial iconography"[8], although one also finds treatments of the "paper-thin" safeguards against mass

surveillance,[9] reminding us that India's democratic challenges did not all start with Modi: Like most autocratic leaders, he has capitalised on existing weaknesses.

These treatments tended to be published in Indian journals devoted to a domestic audience, and there were fewer dedicated fora for Indian scholars to publish their work for a broader international audience: For instance, the now-prominent *Indian Law Review* did not publish its first issue until 2017. Lawyers seeking a better understanding of democratic constitutionalism in India often had to source books aimed at a domestic Indian audience or read beyond law's disciplinary confines, relying on publications such as the *Journal of Democracy*. That assessment of Indian law and democracy is becoming more accessible to international audiences is reflected in the (admittedly merely indicative) appearance of 1,409 results concerning India on *HeinOnline* for 2023.

Backsliding and changing perceptions of Indian democracy

Democratic backsliding in India since 2014 has generated a new entry point for external observers, linking the state to backsliding challenges worldwide, from the USA to Poland, Brazil, Indonesia and beyond, and slowly changing international understanding of the health of Indian democracy. However, external observers have tended to be wrong-footed by looking for similar dynamics to other backsliding states; whether judging Modi favourably against Trump's irrationality, or seeing little evidence of court takeovers or distortion resonant with the US, Hungarian or Polish experiences. At times, episodes such as the Supreme Court's striking down of a constitutional amendment seeking to change the judicial appointment process have given the impression that institutional resilience has been robust and effective.

Since 2014, external analysts have struggled with multiple perspectives, weighing Eswaran Sridharan's view that the first BJP victory was merely a vote for more effective governance and did not present a fundamental shift,[10] against the external democracy scholar Alfred Stepan's concerns about "increasingly assertive" Hindu nationalism,[11] the "majoritarian danger" arising from relatively weak constraints on the BJP's power, in a context of then-growing international recognition that democratic erosion could affect even consolidated democracies. Public lawyers and political scientists have played central roles by providing granular accounts of how successive Modi governments have not only wrought extensive damage upon the constitutional order by diminishing the opposition in Parliament and undermining independent institutions, but also pushing a shift from a secular to a Hindu-supremacist state where the divisions between the state and the BJP party itself have been increasingly elided and blurred, and power has been increasingly concentrated in Modi's hands.

Importantly, landmark analyses have often been published in international fora. This includes Mate's chapter on "constitutional erosion" in the international collection, *Constitutional Democracy in Crisis?*[12], and Khaitan's seminal work providing a granular and systematic picture of how Modi was killing the Constitution by a thousand cuts[13], presented at an international conference and published in the international journal *Law and Ethics of Human Rights*. That article has, to date, been cited by key scholars in other states facing backsliding such as the Hungarian scholar Renáta Uitz[14], the Polish scholar Maciej Bernatt[15], and the Brazilian scholar Fabio de Sa e Silva, as well as scholars taking a broader comparative approach such as the UK scholar Matt Qvortrup[16]. De Sa e Silva, for instance, shows the shift from hopeful comparative analysis of "transformative constitutionalism", discussed above, to fearful

analysis of "regressive political change" in Brazil, India, and South Africa, viewing Modi's actions a form of "regime change" undermining not only the political system but also liberal imaginaries concerning the true nature and purpose of the state.[17]

Khaitan has characterised the threat as fundamentally one of "executive aggrandisement"[18], which appeared to intensify during the Covid-19 pandemic, as analysed by Thulasi Raj at a 2020 roundtable for the International Association of Constitutional Law,[19] and more broadly in John Keane and Debashish Choudhury's analysis of India's descent into "despotism", published in 2021.[20] Additional analysis, such as Arun Thiruvengadam's examination of the "intertwining" of liberalism and illiberalism[21] in the 2021 *Routledge Handbook of Illiberalism*, has emphasised the "monumental" challenge of entrenching liberal principles in a polity with deep historical roots of autocratic governance, which might include: the contemporary abuse of sedition laws[22] enacted during the colonial era; the broader strains of unitary and Hindu-supremacist imaginaries of the state illuminated by Tillin, Kapur, Mandal, Rajan, Sreekumar and Narain in this collection; and the allied questions of who ultimately belongs in, and "owns", the Indian state and its political future, raised by Ahmed.

An aspect of the shifts in Indian democracy that remains generally under-appreciated by external observers, who still suffer from rather romantic views of its operation, is the stark decline of the Supreme Court. As wider background to Abhinav Sekhri's analysis of the Court's failures on free speech in this collection, in recent years scholars such as Bhuwania[23], Bhatia[24] and Khaitan[25] have set out in detail how the Court has abjectly failed to effectively play its role as constitutional guardian in the face of Modi's excesses, failing to adjudicate on major issues concerning civil liberties and making something of a mockery of its international

perception as one of the world's most powerful courts. While this may be partly rooted in how the Court has allowed its appellate function to cannibalise its constitutional adjudication function[26], other indicators of how this quiescence has arisen remain little known to international observers: A 2018 episode[27] in which four Supreme Court judges convened the first press conference in the Court's history to denounce the Chief Justice and warn of irregularities in the Court's functioning, suggests executive interference via the Chief Justice's unusually wide powers of case management and allocation.

Importantly, in this expanding literature Indian scholars have taken pains to analyse institutions beyond the courts, including Maansi Verma's concept of "deliberative backsliding" in this volume, and ground-breaking scholarship by Gaurav Mukherjee[28] and Mouli Banerjee[29] on the Modi government's abuse of money bills, and the Speaker's role in Parliament, to fast-track legislation. Anmol Jain has provided perceptive analyses of developments such as alterations to the appointment and composition of the Indian Electoral Commission[30] raising concerns about executive dominance.

Expanding understandings of Indian constitutionalism

While backsliding has become the dominant meta-theme of much Indian scholarship in recent years, recalibrating external understandings of Indian constitutionalism, this collection reflects how a range of other strains of literature have provided additional windows into India's system, and frameworks for reflecting on democratic constitutionalism more generally.

At the 2024 World Comparative Law conference in Berlin, a range of rising scholars all looked beyond courts: Surbhi Karwa

contemplating the role of parliamentary processes in pursuing gender equality and a "feminist constitutionalism"; while Anmol Jain examined the importance of adequate deliberation and due process in the legislative process. In this collection, Jain's illuminating account of the opposition alliance – Indian National Developmental Inclusive Alliance (INDIA) – that mounted such a strong showing in the 2024 elections can be read against Aradhya Sethia's leading work[31] on the place of political parties in constitutional theory. Cementing his standing as one of the most prominent and thoughtful connectors between India and the wider world, Khaitan's work on guarantor institutions as important institutional actors has found ready interlocutors[32] within South Asia, including the leading Sri Lankan scholar Dinesha Samararatne, and further afield, the eminent US scholar Mark Tushnet.

An array of scholars have also expanded the frontiers of comparative constitutional law by taking the people seriously as constitutional actors, with new debates emerging. For example, in a new edited collection on *Constitutional Resilience in South Asia*, for instance, Sindhu and Narayan explore the possibility of constitutional patriotism in combatting "constitutional erosion driven by an ethnonational, exclusionary ideology" in India, while Sethi in a recent international collection on constitutional literacy argues that, for immediate democratic survival, focus is better spent on political parties and civil society organisations, which in turn links to Jaising's focus in this collection on the role of civil society returning to the Gandhian tradition of nonviolent protest action to defend the Constitution. The *World Comparative Law* journal has become an important platform for discussion, publishing special issues on the Supreme Court's crisis and on "constitutional resilience and the laws of democracy" in 2018 and 2020, respectively. Sahgal, in the latter issue, considers "participation rights" as a means to

empower marginalised adivasi communities[33] and foster a more deliberative democracy beyond a framework for negotiating competing interests.

Chiming with Choudhry's observation in 2016 that the Indian Constitution has long been criticised for its "distance from Indian society",[34] this emerging strain of literature is a welcome corrective to the more top-down analysis of judicial and political power, incorporating a sensibility of genuine grassroots empowerment that could achieve a more participatory and deliberative constitutional practice. At the launch of the *Indian Law Review* in 2017, Baxi offered that Indian constitutionalism contains three intertwined "prudences"[35]: legisprudence, jurisprudence, and demosprudence. This collection, in its sensitivity to everything from federalism to mediating institutions to grassroots action, reflects the wider trends in Indian scholarship in demonstrating, and furthering a welcome shift to a more balanced focus on all three.

Contemplating the next decade

If the USA is the world's "indispensable nation", India is the world's indispensable democracy: Globally, every third person living in a democracy is Indian. Looking back on the past decade, much has changed both regarding the trajectories of India's constitutional democracy, the scholarly and social reactions to those changes, and the ways these have shaped and complicated external understandings of Indian democracy and constitutionalism. It seems rather impossible to contemplate the next decade: How might coalition government temper Modi's excesses? Can the opposition INDIA coalition manage to win the next national elections, due to be held by May 2029? What will the Constitution look like at its eightieth anniversary in 2030? What will Indian democracy look like in 2034?

Will the Supreme Court's decline and passivity continue? In the midst of such uncertainty, one thing seems certain: as Thiruvengadam has offered, the consolidation of a broad-based community of resistance offers "signs of hope"[36] . The growing voices of Indian scholars will provide ongoing pushback and help to ensure that external constitutional scholars are much better informed than they have been in the past about both positive and negative trends, and by turn, better able to collaborate with Indian scholars in analysing these challenges and thinking creatively about solutions. In particular, the appearance of exciting new voices who have so much to offer both India and the world, is further strengthening and enriching the field. I have been very fortunate to get to know many of these rising scholars and consider them dear colleagues. As India's democrats face into the future, they, and Indian scholars more generally, have many friends who stand in solidarity with them.

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