

Policy WATCH

Volume XI, Issue 7
July 2022, New Delhi

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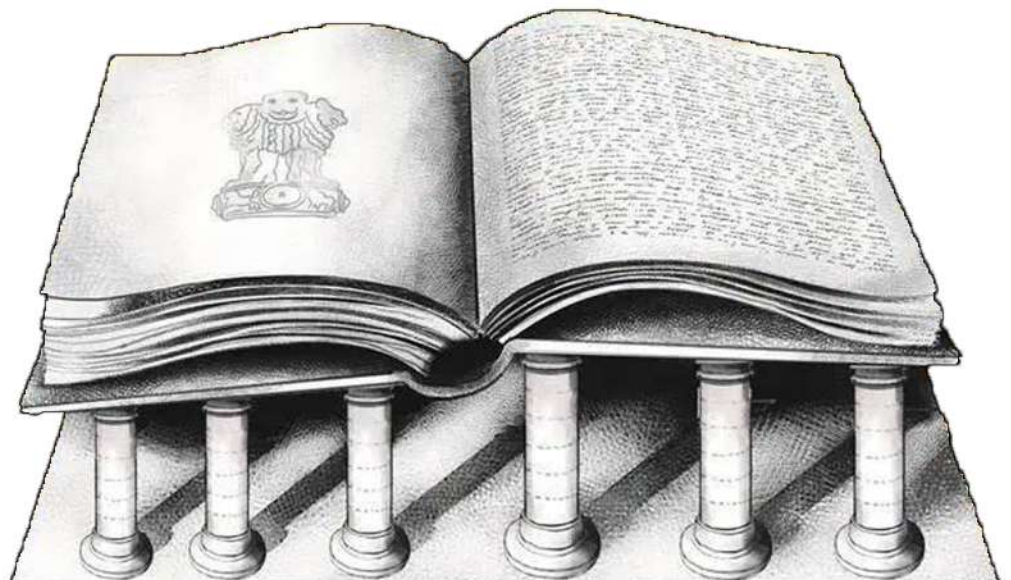
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Constitutional Values and Democratic Institutions



THE CONSTITUTION OF INDIA



WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a **SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC** and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.**

Source: <https://aishwaryasandeeep.files.wordpress.com/2021/07/jpg.jpg>

SIXTH DAY OF NOVEMBER, 1949, DO HEREBY ADOPT,
ENACT AND GIVE TO OURSELVES THIS
CONSTITUTION.

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Editorial

The Rajiv Gandhi Institute for Contemporary Studies (RGICS) is the knowledge affiliate of the Rajiv Gandhi Foundation. RGICS carries out research and analysis as well as policy advocacy on contemporary challenges facing India. RGICS currently undertakes research studies on the following five themes of general public utility including:

- Constitutional Values and Democratic Institutions
- Growth with Employment
- Governance and Development
- Environment, Natural Resources and Sustainability
- India's Place in the World

The July 2022 issue of Policy Watch is on the theme Constitutional Values and Democratic Institutions. It begins by invoking the Preamble of our Constitution, which envisaged India to be a Sovereign, Democratic Republic (to which later the words Socialist and Secular and were added in 1976), promising to all its citizens - Justice, Liberty, Equality and Fraternity.

In our January 2022 issue we had published five articles, one each on the state of Justice, Liberty and Equality and two on Fraternity in India. **In this issue, we publish articles, each examining one of the five words in the Preamble of the Indian Constitution - Sovereign, Socialist, Secular, Democratic, Republic.** All the articles are taken from authoritative reports/articles by various organisations/writers and they are gratefully acknowledged.

The first article excerpted extensively is on Sovereignty by Anshuman Behera and it takes the view that threats to sovereignty can be both internal and external. He identifies four major internal security issues in India: Left-Wing Extremism (LWE), violent conflicts in the Northeastern states, Separatism and terrorism in Jammu and Kashmir (J&K), and Communal violence and religious radicalisation. He summarises the strategy of the Indian state in responding to internal security issues as: a strong security approach; development measures in the affected areas; addressing the grievances by ensuring rights and entitlements; and peace talks with the armed groups. He suggests that in the areas of public perception management and de-radicalisation of indoctrinated people, the state needs to engage more effectively. Similarly, the ongoing peace talks with various militant groups in Northeast need to be expedited to win the trust of the people. The governments of the day should also think of replicating the peace talk models of Northeast in the Maoist affected areas.

The second article excerpted extensively is on the adjective Socialist adopted in the Preamble in 1976. We have made extensive excerpts from a long article by Prof Shruti Rajagopalan in which she asserts that Socialism and Constitutionalism in India are incompatible Institutions. She asserts that the constant clash between socialist planning and the Indian Constitution led Parliament to change the Constitution through several amendments. In the process, rule of law, federalism, property rights, separation of powers and the independence of the Indian judiciary were adversely affected. Socialist policies gradually undermined the Constitution by placing the expediency of the plan at hand above constitutional principles... it changed the fundamental institutions and constitutional provisions in India. The Indian experience serves as a cautionary tale in institutional design and highlights the importance of crafting congruent political and economic institutions.

Offering a different viewpoint, we also carry a brief piece by TN Ninan, where he asserts that India, more an electoral democracy than a system-respecting republic, is moving in the direction of pre-socialist Britain, with powerful billionaires controlling the state.

The fourth article is on the word Secular. It is the summary of the Moffett lecture by Prof Cécile Laborde at the Institute for Advanced Studies, Princeton in May 2018. Laborde argues that In order to adequately assess secularism in countries like India, we need to reframe the questions we ask about secularism and liberal democracy. Rather than asking, “Is this state secular? Does it respect separation between state and religion?”, we should instead ask, “Does the state adequately protect liberal ideals?” Laborde offers the principle of minimal secularism as a framework through which to ask these questions and suggests that in order to better evaluate states like India, we ought to examine their efficacy in upholding three primary ideals: public justification, equal inclusion, and personal liberty.

Importantly, Laborde cautions against “the ethnocentrism of comparison,” or the temptation to judge our own society by its ideals (of religious freedom, democratic equality, human rights), while judging other societies by their practices. “The ideals of Indian secularism might be frustratingly under-realized, but it doesn’t mean they have no purchase on lived reality,” she said. Laborde concluded her talk by highlighting some of the ways in which India strives to uphold these ideals of minimal secularism to confront “inter-religion and intra-religious domination.” Indian secularism may fall short, Laborde concedes, but it is not because it fails to maintain an ideal of separation; rather, it is because efforts to ensure inclusion and liberty have been ineffective.

The fifth article deals with the word Democratic. Sujit Choudhry’s article begins with a review of the book *India’s Founding Moment—The Constitution of a Most Surprising Democracy* by Madhav Khosla. Choudhry states that Khosla makes three claims about the impact of these ideas on choices regarding the text and structure of the Constitution. Codification conceptualized the Constitution as an “instrument of political education” that “was intended to create common meaning and explicate norms that other societies could take for granted”. A “centralized state” would create a platform for a “common politics devoted to social and economic transformation” that would not be “captured by rigid social and cultural bonds and prejudices” and free public policy from the grip of localism. Choudhry in particular picks on the idea of quasi-federalism in the Indian constitution and asserts that it evolved in a dramatically different manner than originally envisioned, mainly due to linguistic reorganisation of states, thereby creating the possibility of regional political parties, which became increasingly significant after the 1970s.

According to Choudhry, there is a relationship among democracy, federalism, political competition, and constitutional resilience that emerged under the Indian constitutional scheme, in a manner that was not part of the founding vision, and which in large part occurred in spite of it. States provided the political infrastructure for the rise of political parties that credibly contended for power and formed state governments, and from these bases became effective opposition parties nationally and competed for power at the center. He goes on to make the hopeful assertion that federalism can save India’s constitutional democracy.

The sixth article on the word Republic. It is an Opinion piece by Rohit Chopra reproduced from the Scroll, cautioning the readers that Indian democracy is marching towards authoritarianism, under the garb of pluralism.

The seventh article also dwells on the current state of the Republic, in particular reference to the Preamble value – Liberty. In it, Justice Madan Lokur suggests that to protect citizens’ liberty against arbitrary arrest, “A starting point can be making some trial judges realise that they need to stop acting as a rubber stamp of the police in matters of arrest. Please apply your mind, dear judges, and please remember, liberty is too precious to be lost. Stand up for the constitutional rights of our citizens.”

We hope this issue around the principles laid down in the Preamble of the Constitution is found useful and interesting by our readers as they celebrate the 75th Independence Day on 15th August, 2022.

**Vijay Mahajan, Director,
Rajiv Gandhi Institute for Contemporary Studies (RGICS)**

SOVEREIGN, India's internal security: Threat perception and way forward (extensive excerpts)

Anshuman Behera¹

Abstract

Contrary to popular discourse, the threats emanating from the internal security issues pose serious security threats to the Indian state and its people. Faced with numerous internal security challenges, the Indian experience of dealing with them has been a mixed experience. Arguably, no other country has ever faced such multiple internal security threats, in various forms and intensity than the Indian state. While the threat perception emanating from the internal security challenges have de-escalated over the last few years, they refuse to die down.

Considering the immediacy of the issue, this paper critically engages with the contemporary internal security challenges that the Indian state encounters. In doing so the paper reflects upon the very process through which each of these internal security threats operates and highlights the nature and the intensity of threat perception. Through providing a conceptual framework, the paper also evaluates the state responses to the internal security issues. The paper limits its scope to four major internal security issues in India: The Left-Wing Extremism (LWE), the violent conflicts in the Northeastern states, Separatism and terrorism in Jammu and Kashmir (J&K), and communal violence and religious radicalisation.

Mapping India's internal security: An introduction

In order to offer a better conceptual framework to 'internal security,' it is important to distinguish it from the ordinary understanding through a 'law-and-order' framework. While scholars find it difficult in coming to a consensus, a widely acceptable definition of internal security was offered by the Commission of Centre-State Relations' report on 'Internal Security, Criminal Justice and Centre-State Co-operation'... According to this report, internal security in India is defined as: "Security against threats faced by a country within its national borders, either caused by inner political turmoil, or provoked, prompted or proxied by an enemy country, perpetrated even by such groups that use a failed, failing or weak state, causing insurgency, terrorism or any other subversive acts that target innocent citizens, cause animosity between and amongst groups of citizens and communities intended to cause or causing violence, destroy or attempt to destroy public and private establishment".

This definition merits a detailed engagement. An important aspect of this definition is about the larger scope of internal security. Contrary to the binary that we often encounter, it engages with both external and internal issues and stakeholders in understanding the internal security discourse. Similarly, it doesn't limit the threats only to the state. Rather the threat perceptions to the citizens and to the communities are very much accommodated.

¹Dr. Anshuman Behera is an Associate Professor at the Conflict Resolution and Peace Research Programme, National Institute of Advanced Studies (NIAS), Bengaluru. The article was published in The CLAWS Journal Vol. 15, No. 2. Winter 2021 <https://www.ssoar.info/ssoar/handle/document/77309>

We gratefully thank Dr Behera and The CLAWS Journal to allow us to reproduce this article to add to its reach.

This definition goes on to distinguish between insurgency and terrorism. The Western scholarship mostly understands terrorism and insurgency from a common platform. The use of 'irregular army' in carrying out militant activities, among many other factors, is considered as commonality between the two. Often used interchangeably, insurgencies and acts of terrorism offer different connotations. Insurgencies are consciously planned violent political movements wherein the non-ruling parties tries to dislodge the ruling regime through acts of violence...

Along with insurgency and terrorism, the subversive acts perpetrated by the communal and criminal groups also pose serious internal security threats. In this context, one would find it difficult to extricate internal security threats either from criminal activities or from the ordinary law-and-order problem... Similarly, it doesn't limit the threats only to the state. Rather the threat perceptions to the citizens and to the communities are very much accommodated. This definition goes on to distinguish between insurgency and terrorism. The Western scholarship mostly understands terrorism and insurgency from a common platform... Often used interchangeably, insurgencies and acts of terrorism offer different connotations. Insurgencies are consciously planned violent political movements wherein the non-ruling parties tries to dislodge the ruling regime through acts of violence.

Going by this understanding, the Maoist conflict in India can be called as an insurgency. Similarly, few of the militant groups operating in the Northeastern states also can be called as insurgents. Terrorism, on the other hand, at least in the Indian context, has always been understood and engaged through the prism of external actors/countries. The role of Pakistan indirectly supporting and sustaining the terror activities in India hardly finds a miss in understanding and engaging with the issue of terrorism...

Along with insurgency and terrorism, the subversive acts perpetrated by the communal and criminal groups also pose serious internal security threats. In this context, one would find it difficult to extricate internal security threats either from criminal activities or from the ordinary law-and-order problem. For example, the potential roles of petty cases of bank robbery or an inter-personal fight between two individuals belonging to different religions in contributing to terror financing and communal riots cannot be diluted. In the Indian context, we often tend to overlook converge these issues in addressing the internal security challenges.

A cohesive internal security discourse, therefore, would address the threats as nation-wide, threats to the state as well as to the citizens and should also take in account both the internal and external factors in addressing the threat. It is through the prism of this cohesive internal security discourse; this paper reflects upon the following four major internal security challenges in India.

Left-wing extremism: The largest internal security threat?

The Left-wing Extremism or the Maoist insurgency led by the Communist Party of India-Maoist (CPI-Maoist), is arguably the largest internal security threat in India as once declared by the former Prime Minister of India, Manmohan Singh. Starting from the Naxalbari areas of West Bengal state in 1967, the Maoist insurgency has evolved through various forms and shades.

The Maoist insurgency is mostly engaged through two dominant positions, one supporting the so-called revolutionary violence terming it as a fight by the downtrodden and under-privileged for their rights and entitlements and the other rejects the violent movement terms them as militants. While the Maoists garner substantial support from the first category, the Indian state rejects the violent movement. Influenced by the political thoughts of Karl Marx, Lenin, and Mao (as claimed by the Maoists), the Maoists' objective is to seize political power and herald a 'New Democracy' through a protracted armed struggle. In doing so, the Maoists reject the parliamentary and democratic forms of governance in India and term them as a sham.



Source: <https://www.thestatesman.com/wp-content/uploads/2017/08/1495570890-maoist-fb-517.jpg>

It is through these ideological orientations and the romanticisation of 'revolutionary violence' the Maoists, in their movement in last five decades, have been able to establish their presence over 180 districts in ten states. However, presently, the spread of the Maoists is claimed to be limited to fewer districts. Over more than five decades of their existence, the Maoist insurgency has caused large scale violence in the areas of their presence posing a direct threat to the Indian state and creating an environment of fear in the minds of common people. The following table offers testimony to this... Legitimising violence by non-state actors is another serious threat that the Maoists and their over-ground supporters also pose threats to the Indian society and polity. While the state and the Maoists appear to be the most important stakeholders, the role of a certain section of the intelligentsia in legitimising the Maoists, hence an important stakeholder, should not be overlooked. In terms of responding to the threats posed by the Maoist insurgency, the Indian state has taken multiple measures.

Table 1: Fatalities in Maoist Violence: 2004-22 September 2021

Year	Civilians	SFs	Maoists	Not Specified	Total
2004	89	82	87	22	280
2005	259	147	282	24	712
2006	249	128	343	14	734
2007	218	234	195	25	672
2008	183	214	228	19	644
2009	368	334	299	12	1013
2010	628	267	264	20	1179
2011	259	137	210	0	606
2012	156	96	125	1	378
2013	164	103	151	0	418
2014	127	98	121	4	350
2015	90	56	110	0	256
2016	122	60	250	0	432
2017	109	76	150	0	335
2018	108	73	231	0	412
2019	99	49	154	0	302
2020	61	44	134	0	239
2021*	41	48	75	0	164
Total	3330	2246	3409	141	9126

Source: SATP (2021)⁵

The twin-track approach security and development- has been the dominant response. The security approach derives its rationale from the fact that the Indian state terms the Maoists as an armed group and hence, a counter-insurgency measure has been adopted to minimise the violence and threat perception. The deployment of Central Armed Police Forces (CAPF) in the Maoist affected areas along with the security forces by the respective states have been successful in minimizing the Maoist activities. Similarly, the development response by the Indian state is primarily aimed to win away from the support of the local people from the Maoists.

Arguably, the erstwhile Planning Commission of India's report on 'Development Challenges the Extremist Affected Areas' has been a reference point towards the Indian state's development initiatives. Measures such as Integrated Action Plan (now Central Assistance Scheme) in the worst affected districts, Security Related Expenditure, Road construction initiatives have been initiated with a motive to develop the areas and, secondly to address the grievances of the local people to win them away from the Maoists. Along with the security and development responses, the present regime has also initiated a policy of 'ensuring the rights and entitlements of the local communities' as a response to fighting the Maoists. The long-standing grievances of the local communities in the forms of demands over land and forest rights are addressed.

Considering the protracted nature of the Maoist insurgency and lessons from the history, the state response to this security threat should not take delinquent approach. While the state responses, so far, have been effective against the Maoists, the very presence of the latter highlights the gaps in the policy framework. Along with the abovementioned responses, the government should also think of investing in public perception management which would help in de-legitimising the movement and its supporters in the intellectual circles. The government should also think of engaging in a peace talk and negotiation with the Maoists. Since the ideological contestation is an important factor in this violent conflict, a dialogue between two parties would help dilute the threat perception.

Militancy and ethnic conflict in the Northeast

The long-standing militancy and violent ethnic conflicts in some of the Northeastern states have been a serious internal security concern for the Indian state. Contrary to a dominant position that conceptualises the violence and conflicts as ‘freedom struggle’ against the ‘homogenizing state’, most of these conflicts are often guided by distorted sentiments overshadowing the realistic issues. Rightfully, the Standing Committee of the MHA puts these conflicts in three broad categories: Separatist insurgencies demanding independence; autonomist insurgencies asserting sub-regional aspirations; and intra-ethnic conflicts among dominant and smaller tribal groups.

Among other factors, aggressive assertion of identity and sense of alienation among the dominant as well as the minority ethnic groups in various states have contributed to the long-lasting militancy in some states in Northeast. The historical roots of alienation induced by the failure of the colonial rule to integrate these states with ‘mainland’ India continue to be there in some form or the other. The political elites of the Northeastern states have often integrated the economic backwardness and insufficient political representation with this sense of alienation...

The following table highlights the violent incidents and fatalities in the Northeastern states of the last decade.

**Table 2: Fatalities in Militancy in Northeast
(January 1, 2011-22 September 2021)**

Year	Civilians	SFs	Militants	Not Specified	Total
2011	73	31	138	2	244
2012	99	18	216	1	334
2013	95	21	134	2	252
2014	243	22	204	0	469
2015	64	49	163	3	279
2016	63	20	85	0	168
2017	35	13	58	1	107
2018	20	15	38	0	73
2019	18	5	11	0	34
2020	5	5	17	0	27
2021*	11	3	31	0	45
Total	726	202	1095	09	2032

Source: SATP (2021)¹²

The nature of security threats that emanates from the militancy and ethnic conflict is multi-fold. First, the separatist militant groups like the National Socialist Council of Nagalim (NSCN) in Nagaland-both the factions, Isak Muivah and the Kahplang, challenge the sovereignty of the Indian state. Similarly, the United Liberation Front (UNLF) of Manipur also poses a security threat to the sovereignty and territorial integrity of the Indian state. The sub-regional aspirations leading to violent conflicts among the ethnic groups dilutes the democratic and constitutional ethos of India.

Moreover, the involvement of bordering states like Myanmar and Bangladesh in harbouring the militant groups is also a serious matter of concern. Apart from the violent incidents, several states of Northeast have been vulnerable to drug and human trafficking. The states like Manipur have particularly been badly affected by illicit drug trafficking across the border. Similarly, the dumping of Chinese goods, through Manipur, in the NE states also poses serious security concerns. The militancy and the ungoverned territories in and around the borderlands of Northeast substantially contribute to the threat to the Indian state.

The state response to these threats has been in four distinct yet integrated ways. They are a security approach in dealing with militancy; ensuring local autonomy through the provisions of Sixth Schedule; peace talks and negotiations with the militant groups; and development measures including special economic packages. This integrated policy framework has proved to be a successful to a great extent. However, some of these responses have had unintended and deleterious consequences as well. A security response to the militancy has brought down the violence drastically (refer to Table 2).

Similarly, the sustained peace talks with majority of the prominent militant groups have also yield good results. For example, the National Democratic Front of Bodoland (NDFB) completely disbanded its armed cadres through signing an agreement with the Government in January 2020. Further, in January 2020 hundreds of armed cadres belonging to eight different militant groups including the United Liberation Front of Asom-Independent (ULFA-I) surrendered in Assam. While the peace talks with multiple militant groups offer a good sign, such agreements also create a sense of apprehension and insecurity among the less privileged and minority groups and promote them to take up arms.



Source: <https://qph.cf2.quoracdn.net/main-qimg-586751222a49419d6ad6edd425f00b49-lq>

The emergence of smaller armed groups in the states of Manipur, Nagaland and Assam is a testimony to the sense of growing insecurities. On the other hand, the competition among the ethnic groups to have dominance over territories and resources alike, also contributes to the sustenance of ethnic conflicts and thereby contributing to the security threats. While the successive governments have been successful to some extent in responding to these security threats, the poor implementation of the cease-fire agreements, the involvement of the militants in criminal activities, indeterminate peace talks are some of the drawbacks in governments' policies in effectively handling the issues. On the external front, Myanmar territory continues to offer safe houses to some of these militant groups. A robust bilateral engagement with Myanmar would potentially offer a solution to this problem.

Separatism and Terrorism in Jammu and Kashmir

The issues of separatism and terrorism in the state of J&K blur the distinction between external and internal aspects of security threats. In fact, it is the combination of the external and the internal dimension that contributes to the security challenges in the J&K. The external dimension emanates from the direct involvement of Pakistan in harbouring and supporting the terrorist groups in its territory and supporting terrorist activities in J&K. The internal dimension of the security threats can be linked to the religious radicalisation wrapped with fig leaf of Kashmir nationalism asserting for separate statehood.

This complex interplay of several interconnected issues makes it difficult for the Indian state to deal with the security threats effectively. Some scholars observe that the territorial defensibility of the Indian state, the assertion of Pakistan over the same territory and the aggressive religious-Kashmir nationalism offers a vicious cycle of security challenges for the Indian state. Apart from Pakistan, the role of China in sustaining the conflicts and violence cannot be ruled out. The episodes of the Chinese state issuing loose visas to the people of J&K can be seen as attempts to dilute the sovereignty of India. Scholars argue that a sustained Kashmir conflict serves the best for the Chinese interest. To this extent, the Chinese state is very much a stakeholder in the Kashmir conflicts along with Pakistan and Pakistan supported terrorist groups. The nature of security threats emanating from J&K with the involvement of Pakistan, China and the terrorist groups are multifold. The territorial integrity and sovereignty of the Indian state face a direct threat.

The rising religious radicalisation among the youth in J&K continues to have negative implications on the secular fabrics of India. The assertion of Islamic fundamentalism has been instrumental for the mass exodus of the Kashmir Pandits from their native place. Moreover, decades long militancy and terrorism in Kashmir also poses a serious threat to human security. Though in the last decade the violence-related incidents and killings have been on a declining path (see the table below), J&K continues to be one of the most volatile states in India.

**Table 3: Fatalities in Militancy in J&K
(January 2012 to 22 September 2021)**

Year	Civilians	SFs	Militants	Total
2012	19	18	84	121
2013	19	53	100	172
2014	28	47	114	189
2015	19	41	115	175
2016	14	88	165	267
2017	54	83	220	357
2018	86	95	271	452
2019	42	78	163	283
2020	33	56	232	321
2021	19	25	129	173
Total	333	584	1593	2510

Source: SATP (2021)²¹

In the last five years, the security situation in J&K has improved substantially. One can attribute the improvement in security situation to three important factors; identification and elimination of local and foreign terrorists; abrogation of Articles 370 and 35A putting an end to the special status and privileges of the state and implementation of development activities. The elimination of Hizb-ul-Mujahideen (HuM) leader Burhan Wani on 8 July 2016, is often cited as a reference point in India's strong action against the militancy and its local support in Kashmir. Since then the security forces have been successful in neutralising several terrorists in J&K, especially post-abrogation of Articles 370 and 35A.

Despite the strong military and police actions against terrorism in J&K, the success against the radicalisation and anti-India sentiment among certain sections of the population needs further actions. So far the radicalisation in Kashmir is concerned, one can witness three threads of narratives: pro-Pakistan, pro-Azadi, and pro-Salafist Islam – with calls for Nizam-e Mustafa, and Khalifat-e Rashida...



Source: <https://cdn.dnaindia.com/sites/default/files/styles/full/public/2020/10/31/934831-militants.jpg>

Considering the change of guard in the neighbourhood, Taliban's takeover in Afghanistan, and the active role of Pakistan in the process, the Indian state should be prepared for any kind of eventualities in the future. The implementation of peoplecentric development measures, sustained dialogue process with the local stakeholders and a strong security approach would help minimise the security threats that emanate from militancy and terrorism in J&K.

Communalism and religious radicalisation

Unlike the above-mentioned issues, identifying the threat perception emanating from communalism is trickier. Communalism, as widely understood, is conflict between two or more religious groups over secular issues. These conflicts between two religious communities often receive certain political and social acceptance. In the Indian context, it is safe to argue that the communal violence is often socially and politically condoned unless it crosses a certain threshold. The involvement of the socio-political elites in initiating, pursuing, and determining the processes of communalism and the role of communalism in furthering the political objectives of respective groups make it trickier to articulate it around the larger discourse of internal security. While the existing literature engages with communalism through the prism of elections, religious intolerance, and social division, the security threats that it poses to the state and to the people have not been adequately understood. It is important to mention that the MHA also does not factor in communalism/communal riots as one of the internal security issues.

However, considering the regular occurrence of communal riots and their implications on religious radicalisation, this paper reflects upon communalism and radicalisation as an internal security issue. The communal violence and riots in India have their deep root in the history of religious division and disharmony. The country has witnessed multiple communal riots, in various forms and scales, for centuries. While the successive governments claim to contain the communal riots, the last five years witnessed as many as 3399 communal riots (2016-869, 2017- 723, 2018-512, 2019-438 and 2020-857) in various parts of India.

The communal riots pose a direct threat to the diversity of India. Further, the communal tensions leading to fuelling religious radicalisation is a major security threat to the Indian state. The indoctrination of extreme religious ideologies leading to the radicalisation often finds its source of legitimacy through the communal divide and riots. It has been observed by the scholars that terrorist organisations have shown an affinity to leveraging violence against a particular religious community to recruit and further their activities. To cite an example, the “Voice of Hind”, a propaganda material released by the Islamic State of Syria and Iraq (ISIS) in 2020 makes attempts to indoctrinate and recruit the Indian Muslims through manufacturing fears and grievances owing to the communal divides in the country.

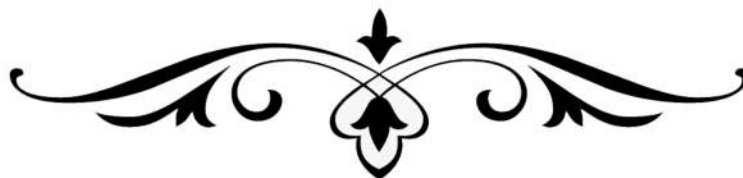
We have also the examples of the Indian Mujahideen (IM) operating through taking the advantage of communal divides and riots in India. In the recent past, the role of external actors in fuelling and taking advantage of the Delhi riot and the Anti-CAA protest was highlighted by the security agencies. While the successive governments have focused more on addressing the communal riots, there is an immediate need to focus more on the security threats that they pose. Merely containing the number of episodes of communal riots offers very limited scope for minimising the security threat. There is a need to investigate how these episodes are used as propaganda in radicalising and recruiting people for terrorism.



Source: <https://images.indianexpress.com/2021/03/Ariz-Khan-1.jpg?w=389>

A de-radicalisation measure directed towards de-legitimising the radical ideologies along with strong police action would address the issue better. Conclusion The internal security threats in India are complex in nature. Considering this complexity and the role of certain external actors in enhancing the threat perception the response from the Indian state, contrary to criticism by some scholars, has been fairly robust. Containing the Maoist violence to a few pockets of central India, the de-escalation of violent related activities in the Northeastern states and actively pursuing peace talks with several militant groups in Northeast, bringing down the levels of militancy and terrorism in J&K offers testimony to effective internal security strategy of the Indian state.

The comprehensive strategy of the Indian state in responding to the internal security issues can be summed up as: a strong security approach; development measures in the affected areas; addressing the grievances by ensuring rights and entitlements; and peace talks with the armed groups. However, in the areas of public perception management and de-radicalisation of indoctrinated people, the state needs to engage effectively. Similarly, the ongoing peace talks with various militant groups in Northeast need to be expedited to win the trust of the people. The governments of the day should also think of replicating the peace talk models of Northeast in the Maoist affected areas.



SOCIALIST, Incompatible institutions: Socialism vs Constitutionalism in India (extensive excerpts)

*Shruti Rajagopalan*²

Scholars have chronicled the gradual decline of constitutionalism in India over the years. Palkhivala (1974) described the amendment process as the systematic defiling and defacing of the Indian Constitution. Singh states that after the constitution was ratified, “over the next 30 years these constituent rules were progressively chipped away” (2006: 305). Subramanian (2007) provides empirical evidence of the decline of Indian the bureaucracy and judiciary...

Why did the rule of law and constitutionalism progressively deteriorate after such a great beginning? While there is a general consensus that institutions in India did deteriorate, no systematic explanation has been put forth specifically for the constitutional decline during the first few decades of post-independence India. The theme of the existing literature is that India was off to a good start under the leadership of Jawaharlal Nehru, but subsequent leaders like Indira Gandhi undermined the Constitution (see Austin 1999: 270, 573; Das 2000: 174; Guha 2007: 518). Much of the literature attributes the bad outcome to specific individuals, cases, or historical events.

I argue that the reason for the constitutional decline in India is that the formal institutions of socialist planning were incompatible with the Constitution. The Indian Republic was founded as a socialist state as well as a constitutional democracy. By concurrently espousing the ideologies of socialism and constitutionalism, the framers set the stage for many inevitable constitutional conflicts, which manifested in India as a battle between the executive and the judiciary. India ranks 87th on the corruption index. In the World Bank’s ‘Ease of Doing Business’ index, India ranks 134th out of 183 countries, scoring particularly badly on enforcing contracts (182nd). Another index, on “Entrepreneurship and Opportunity,” produced by the Legatum Institute, a think tank, puts India 93rd out of 110 countries.

The Indian experience is not merely a case of a judiciary checking the powerful executive branch—but one where the judiciary and executive were pursuing contradictory goals. The executive pursued socialist planning and the judiciary mainly enforced constitutional rules. Constitutionalism prevails when general rules are announced beforehand and apply equally to all individuals in a non-arbitrary manner and when democracy is constrained with adequate checks and balances. However, the impossibility of rational calculation under socialism means that planners must have unlimited discretion, which conflicts with constitutional constraints. In India, in order to implement socialist planning, Parliament gradually removed constitutional constraints on democracy.

² Shruti Rajagopalan shruti.rajagopalan@purchase.edu Department of Economics, Purchase College, State University of New York, Purchase, NY 10577, USA 123 Const Polit Econ (2015) 26:328–355 DOI 10.1007/s10602-015-9188-0 Electronic copy available at: <https://ssrn.com/abstract=2387818> rule of law

My analysis shows that the political actors undermining the constitution were pursuing socialist planning to its logical conclusion. This analysis directly challenges the prevailing view that while socialism and constitutionalism were sound and harmonious, poor execution of core principles undermined the constitution. Scholars view the two institutions as so “interdependent as to be almost synonymous” (Austin 1999: 633). Dhavan states that constitutionalism and socialism are compatible, and that the failure was because the political will to make it work was missing (1992: 60–61).

Dhavan provides a list of requirements for socialism and constitutionalism to work harmoniously; and his formula hinges on selfless political participants. According to Dhavan, four ingredients are necessary for Nehru’s Plan (which espoused socialist planning within a constitutional democracy) to work: First, Parliament must be determined to enact radical legislation. Second, such legislation must be supported by large ideological consensus, even those adversely affected. Third, bureaucrats must be dedicated and incorruptible. Fourth, Indians must not abuse public power.

Socialism versus Constitutionalism

The ideas of India By the time of Indian independence in 1947, the allure of Soviet-style planning had already faded slightly. But the vast majority of intellectuals in the West still thought that socialist economic policies could be combined with democratic politics in a manner that would yield a more rational allocation of resources than capitalism and a more egalitarian distribution of income, thereby creating a more democratic society by transferring power to the powerless. Indian political leaders were inspired by members of Fabian Society, especially Harold Laski. The members of the Fabian Society in London were the first of the British intellectuals to support home rule in India and attracted Indians who were involved in the nationalist movement. They influenced an entire generation of Indian intellectuals educated in England. These Indians were skeptical of capitalism, which they equated to mercantilism, due to India’s historical experience with colonial firms like the British East India Company. They believed that a socialist welfare state would uplift the masses deprived and exploited through 200 years of colonial rule. It was from this colonial past that the idea of an independent India was formed; the Indian independence movement was the coming together of “national” and “social” revolutions.

The most prominent political leader was Jawaharlal Nehru, who while studying law in London, was enormously influenced by Fabian ideas. Nehru believed that capitalism would weaken both political and socioeconomic equality: “Democracy and capitalism grew up together in the nineteenth century, but they were not mutually compatible. There was a basic contradiction between them, for democracy laid stress on the power for many, while capitalism gave real power to the few”. The main thread joining these two ideas—critiquing capitalism and embracing democracy—was that political equality was meaningless unless there was economic equality in India. Sydney and Beatrice Webb, the founders of the Fabian Society, emphatically made this connection between substituting the capitalist order with a socialist democracy. Along with the Webbs, George Bernard Shaw and Harold Laski’s ideas left a mark on Nehru during his time at Harrow, Cambridge, and London...

Like Nehru, others were also inspired by the socialism as a cure for other social evils. The closest to Nehru’s vision was V. K. Krishna Menon, also a student of Harold Laski, and an important member of the Indian National Congress Party. An important grassroots socialist leader in India was Jayaprakash Narayan, who founded the Congress Socialist Party in 1934 (which was the socialist caucus of the Indian National Congress Party).

They attempted to give voice to Nehru's wishes of instilling a commitment to economic equality and social change within the Indian National Congress. The party's goals included more equal status for women, with a women's movement within the party led by Kamaladevi Chattopadhyay and eliminating caste differences by giving preferential treatment to lower castes for a few decades led by Lohia.

These leaders' attribution of equality to socialism was so powerful that within a few years the Congress Socialist Party was more than one-third of the strength of the All India Congress Committee. With the strength of the socialists increasing, in 1938 the party instituted the National Planning Committee with Nehru as its first chairman. Its policies were largely inspired by policies already in place in the USSR. India also had its own taste of central economic planning, in an effort to channel resources to aid the British war effort during World War II.

Outside the Indian National Congress Party, an influential group of businessmen also held strong socialist views. In 1944, with independence on the horizon, a group of leading industrialists published A Brief Memorandum Outlining a Plan of Economic Development for India, popularly known as the Bombay Plan. They called for a strong state economic plan and claimed that "the existing economic organization, based on private enterprise and ownership, has failed to bring about a satisfactory distribution of the national income... We believe that planning is not inconsistent with a democratic organization of society. On the contrary, we consider that its objects will be served more effectively if the controls inherent in it are voluntarily accepted by the community and only enforced with its consent".

In fact, almost all Indian intellectuals at the time of independence were sympathetic to some kind of socialism, mostly influenced by Laski, with critics being few and far between. Austin describes the leaders in New Delhi at the time of independence as "believers in the seamless web: confirmed democrats, advocates of social and economic reforms, and nationalists with broad perspective".

Gandhi was opposed to socialism in theory since for him the means did not justify the ends. Golwalkar believed socialism was not an ideal goal for India since it was not part of Indian tradition but an alien idea imposed from a foreign intellectual movement. Specifically, he viewed it as a movement born out of the hatred and envy of rich capitalists and not out of a higher spiritual need. The real dissent to socialism in an organized manner came much later in the late 1950s from C. Rajagopalachari and the Swatantra Party. The only Indian economist to dissent against central planning was B. R. Shenoy (1969).

Notwithstanding the prevailing support in India for socialism, many could not accept the Soviet Union's restrictions on speech and freedom of press. Guha writes, "condemning [the Soviet Union's] one-party state and its political treatment of political dissidents, the [Congress Socialist Party] stood rather for a marriage of democracy and socialism" (2010: 264). Nehru in particular thought political freedom was too high a price to pay for the economic development promised by Soviet Socialism. He disliked many aspects of Soviet policies including "the ruthless suppression of all contrary opinion, the wholesale regimentation, the unnecessary violence in carrying out various policies" (2004 [1936]: 377). This sentiment against following the Soviet model completely was not unique to Nehru.

Among the leaders at the time, Jawaharlal Nehru was most in favor of instituting a system of governance where all were equal before the law, as being imperative in unifying India. To the founders, a republic meant a constitutional democracy accompanied by a framework of individual rights and checks and balances through separation of powers and federalism.

The idea of an Indian republic not only favored the constitutional democracy of the West, but also opposed its economic imperialism. With such ideals, Nehru led India to create two important institutions, which would define India for the future—the Constitution, which would guarantee the rights that were denied during colonial rule, and the Planning Commission, which would ensure economic equality. Fabians were against violent revolutions and over-regimentation and suppression of the press; and they favored political rights for all citizens. And yet they borrowed the idea of economic egalitarianism from socialism—and the combination worked perfectly, given India's needs.

In many debates in the Constituent Assembly, socialism was used, often interchangeably, to mean two different things. The first was socialist ideals or goals, which was mainly economic egalitarianism. The second was socialist means towards those goals, which was centralized state planning of the economy. “Broadly, it was used synonymously with “social revolution,” meaning national social-economic reform with an equitable society as its goal. In essence, it meant social egalitarianism and political equality. Narrowly, it had a more classical meaning: central government planning, the dominance of the state sector in the economy, and so on”. During the debates, despite these differences of opinion, a great effort was made to find common ground and reach consensus within a constitutional framework.

The Indian Constitution, adopted in 1950, constrained the state in three ways in order to preserve rule of law and protect the individual while allowing for the socialist or welfare agenda. First, the constitution provides for separation of powers and independent judicial review. Therefore, as a parliamentary democracy, the executive was made accountable to the legislature. The legislature was accountable to the electorate and an independent judiciary could review legislation and executive action. Second, the Indian Constitution created a Federal State. Third, the Fundamental Rights in Part III of the Constitution, despite some dilution by the socialists, secured a sphere protecting the individual from arbitrary actions of the state. It called for the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and, most importantly, right to writ remedy through an independent judiciary (Articles 12–32).

In addition to these negative rights, the framers also wanted to add positive rights to further socialist policies. These positive rights were listed under Directive Principles of State Policy in Part IV of the Indian Constitution as guidelines or suggestions “fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” These Principles were not really positive “rights” as they were unenforceable in a court of law. Further, in case of any conflict the Constitution deemed Fundamental Rights, which were enforceable, as the superior provision.

As the Constitution was being crafted carefully, another institution was being created, with far less thought and debate. Preparations were in place to set up a central planning commission. The adoption of Soviet style planning was debated in the Provisional Parliament and the Indian Planning Commission was created in March 1950 by a Resolution of the Government of India. Nehru appointed P. C. Mahalanobis, an Indian statistician, to travel and learn from other economists and central planners, the optimal way to utilize India's economic potential. The Planning Commission was Nehru's brainchild and he was also its first Chairman. The Planning Commission was responsible for drafting Five Year Plans (FYP).

The main goal of the Planning Commission was economic egalitarianism through scientific and industrial development. These plans were supposed to detail the exact amount of the investments to be made by the public and private sectors and how that investment would be allocated across different industries and sectors. It also included targets to be achieved by various industries for the next five years. In the few areas open to the private sector, a highly restrictive industrial licensing regime was formulated to direct private enterprise.

The planning process was put into operation by the Industrial Policy Resolution, 1948, which divided the economy's industries into three broad categories—those on which the state had a monopoly, those where both the private sector and public sector were allowed to operate and those where private sector may operate, but within the purview of state regulation. This command and control style economy was achieved through a “maze of Kafkaesque controls” imposed on India's private sector.

The Planning Commission complemented the newly minted Constitution. The planners would execute the dream for an economically just society, which would strengthen the Indian Republic. While Nehru's dream for a participatory and prosperous democracy was laudable, the institutions he created to achieve the goals were in conflict from the very beginning. Socialism requires social ownership of the means of production and the abolition of private property. Mises argued that without the private ownership of the means of production, there would be no exchange of these means of production. Without market prices emerging from exchange, the planners cannot rationally allocate these goods.

Given the impossibility of rational economic calculation in socialist planning, Hayek (1944) demonstrates the institutional structure that would emerge from the failure of socialist planning to achieve its desired results. Due to the impossibility of rational economic calculation, planners require unlimited discretion to execute the plan. Under the rule of law, not discretion, but rules must prevail, and therefore planning is incompatible with the rule of law. Further, equal treatment before the law will necessarily lead to unequal distribution of resources and distributing the resources equally necessarily implies violating the equality clause. Therefore, one can either have political equality or substantive equality, but cannot have both.

Further, socialist planning strikes at the root of the right to private property, virtually all other political rights are infringed upon, even if this is not the intention of the planners. A central plan, if executed, will infringe on individual rights to equality and property guaranteed by the constitution. Planning not only requires agreement of the citizens about the requirement of a central plan, but also about a particular plan. First, individuals in society must agree on the shared values or goals that are sought. Second, individuals must collectively agree on the specific hierarchy or ranking of the values, in order to determine specific tradeoffs. Therefore, a central plan must be executed outside of a democratic system, since the level of agreement required for executing a particular plan cannot be achieved by democratic consensus. This will compromise constitutional features like separation of powers and federalism, which distribute power and decision-making.

The incompatibility between (1) socialist planning and rule of law; (2) socialist planning and individual rights; and (3) socialist planning and democracy; led to conflicts between the judiciary and the executive in India resulting in the frequent amendment of the constitution. Generally speaking, this incompatibility manifested itself in the following form. (1) The Planning Commission, led by the Prime Minister, created Five Year Plans for the economy. (2) To attain the goals in these FYPs the central and state legislatures passed legislation. (3) This legislation was challenged in courts and was subject to independent judicial review. (4) Often such legislation was struck down as unconstitutional for violating Fundamental Rights of individuals. (5) To give validity to void and unconstitutional legislation, Parliament amended the Constitution. This five-step cycle played out a number of times, and the form and severity changed based on the political and substantive context. Fourteen instances of the incompatibility between Planning and the Indian Constitution are detailed in the following section and in Table I.

Table 1 Consequences of incompatibility between socialist policies and constitutionalism in India (1950–1980)

Socialist policy implemented	Constitution provision violated	Consequential amendment
Land redistribution	Right to equality Right to private property	First Amendment
Price controls	Federalism Right to any occupation, trade or business	Third Amendment
Compensation for acquisition of property	Right to equality Right to private property	Fourth Amendment
Centralization of industry	Federalism	Seventh Amendment
Rent control	Right to equality	Seventeenth Amendment
Tenancy regulation	Right to private property	
Parliamentary Supremacy	Power to amend the constitution	Twenty-fourth Amendment
Centralization of powers		
Bank nationalization	Right to private property Right to carry on any occupation, trade or business Supremacy of fundamental rights	Twenty-fifth Amendment
Abolition of privy purses	Transfer of power	Twenty-sixth Amendment
Land ceiling	Right to private property	Twenty-ninth Amendment
Land redistribution	Right to property Right to equality	Thirty-fourth Amendment
Quantity controls	Federalism	Thirty-ninth Amendment
Price controls	Right to carry on any occupation, trade or business	
Currency controls	Right to carry on any occupation, trade or business	Fortieth Amendment
Restriction of monopolies		
Emergency years	Separation of powers	Forty-second Amendment
Economic reorganization	Judicial review	
Political reorganization	Democratic elections Federalism Fundamental rights	
Nationalization of means of production	Deleted right to private property	Forty-fourth Amendment

Indian Constitution versus Central Planning

The first three decades of central planning in India can be divided into two phases: from 1951 to 1964 and then from 1965 to 1981. The first phase, coinciding with Nehru's tenure as Prime Minister, saw a large role for the public sector in agriculture and the imposition of licensing requirements on the private sector in various industries, but was relatively liberal on international trade. The second phase extended a much greater role to the state—it imposed enormous restrictions on large enterprises and foreign investment, created reservations for small-scale industries, nationalized banks and the insurance, coal and oil industries, and created even greater licensing requirements for industry.

It is well established that, in India, the Fundamental Rights were most frequently and substantively amended from 1951 to 1978. Of the first forty-four amendments to the Constitution, thirteen amendments directly altered the Fundamental Rights. India's constitution was amended these thirteen times during the first five FYPs to advance the objectives of these plans. These amendments were substantive, not administrative, and changed the Fundamental Rights in Part III of the Constitution. These constitutional amendments enabled the planners to retroactively give effect to plan objectives after the Indian judiciary had struck policy down for violating constitutional principles. These constitutional amendments were not merely rhetorical or procedural; they were substantive infringements on individual rights and important aspects of state machinery like federalism and separation of powers. The thirteen instances of amending the constitution to accommodate unconstitutional legislation furthering socialist goals is outlined briefly in Table I and is discussed in detail with historical and political context in the following sections. [Only the First Amendment is discussed here].

The First Amendment

The First FYP called for land reform and industrial development. But these could not be achieved while maintaining generality and certainty in the law. The Constituent Assembly, which transitioned as India's first provisional Parliament while awaiting general elections, had to choose between these goals and they chose plan objectives. India's First FYP expressly stated as its objective, to “reduce disparities in wealth and income, eliminate exploitation, provide security for tenants and workers, and, finally, promise equality of status and opportunity to different sections of the rural population” (Planning Commission 1951: 88).

Toward this goal, Nehru focused on expanding heavy industry, given planners' concern regarding the lack of economic activity in intermediate goods, especially heavy industry. But since a large part of the economy was agrarian and three-fourths of Indians lived in villages, land reform was also crucial. Therefore, the First FYP focused on agricultural output and preparations were underway to give central importance to industry in the First and Second FYPs...



The First FYP tackled the problem of land reform with two objectives: first, increase agricultural production, and second, serve peasants' interests in land. The first target required consolidation of land holdings to increase productivity; while the second target involved breaking up large feudal estates for redistribution among landless peasants. The focus was on abolition of the feudal or zamindari system, which meant imposing agrarian land ceilings, and redistributing surplus land holdings. However, both these goals had to be achieved subject to the overall principle of economic egalitarianism. Toward this end, various states formulated legislation to take land from feudal lords and redistribute it among peasants.

The takings clause of the Constitution originally read: "No person shall be deprived of property without due process of law" and "no property... shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation" (Article 31). State laws implementing land reforms were challenged in courts as unconstitutional. One of these, the Bihar Management of Estates and Tenures Act, 1949, assessed the compensation payable to the owner of property acquired at 20 times the assessment for a poor owner and at 3 times the assessment for a rich owner. In *Kameshwar Singh v The Province of Bihar*, the Patna High Court struck down the legislation as unconstitutional. The Court held that the legislation violated the right to equality under Article 14, as it did not give equal compensation and discriminated against richer zamindars. The state challenged the High Court's ruling in the Supreme Court.

One of the main problems faced by the state was to provide just compensation required under Article 31. The Indian state could not provide compensation for the extensive land redistribution and also fulfill the objectives of the First FYP. Many policies pursued to fulfill the First FYP and give meaning to the socialist principles in Part IV of the Constitution, violated other parts of the Constitution. Nehru described this tension as one between the policies of the state "which represent dynamic movement towards a certain objective" and Fundamental Rights which "represent something static, to preserve certain rights". While the challenge in *Kameshwar Singh v The Province of Bihar* was pending in the Supreme Court, the Constituent Assembly which, at the time, was the Provisional Parliament (pending elections), passed the Constitution (First Amendment) Act, 1951, diluting the eminent domain clause and the right to private property to enable policies giving effect to the First FYP. However, not all Courts ruled like the Patna High Court. In *Surya Pal Singh v State of UP* the Allahabad High Court upheld the validity of the United Province land reform legislation. These decisions were challenged and pending appeal to the Supreme Court.



Members of the Provisional Parliament in 1951 were members of the Constituent Assembly that drafted the constitution. With the exception of a handful of members, these framers believed in socialist planning. With a clever legal innovation, they by-passed judicial review for legislation concerning agrarian reform and enabled legislation previously declared invalid by the Courts to become valid retrospectively.

The First Amendment created the Ninth Schedule, a list of legislation not subject to judicial review, and the Amendment passed in Parliament with a majority of 228 to 20... The First Amendment created a list of preferred legislation called the Ninth Schedule, placed within the Constitution to supersede the Constitution. Article 31B stated that laws to be listed in the Ninth Schedule could not become void on the ground that they violated any Fundamental Right; the government proposed to protect all land reform legislation by including such legislation in the Ninth Schedule. The legislation was fully protected against any challenge in a court of law. The “few minor amendments to other articles in order to remove difficulties” essentially defeated the purpose of the constitutional constraint.

The main question before the Supreme Court was once again the power of the Parliament to amend the Constitution. The majority opinion of the Supreme Court held that the Parliament had the power to amend the constitution, and as long as the procedure laid down for amendment of the Constitution in Article 368 was followed, amendments would be considered constitutional.

Commanding Heights

After Nehru’s death, the Indian National Congress Party elected Lal Bahadur Shastri as Prime Minister... Shastri died in 1966 and when the question of succession arose again, the Indian National Congress Party president, K. Kamaraj, and the party “Syndicate” unreservedly supported Indira Gandhi, who served as Prime Minister for the rest of the term. In the 1967 elections, also Indira Gandhi’s first general election, she intended to create a place for herself and identified herself as a socialist, following her father Jawaharlal Nehru. Indira Gandhi on the other hand wanted “to go farther left in her policies” and take an ideological stand that was different from the Syndicate and yet popular enough to hold her position as Prime Minister. In May 1967, she announced the Ten-Point Program, which included policies to seize what she called the commanding heights of the economy, like nationalization of banks and insurance, curbing monopolies, land reforms, urban land ceiling, rural housing, and abolition of privy purses—which was a hugely popular agenda... Armed with this Soviet style socialism, Indira Gandhi set out to nationalize important sectors of the economy.

Before the government could launch and execute this Ten-Point program, the eminent domain power of the state and the power of Parliament to amend the Constitution was again raised before the Supreme Court in a challenge to one of the entries in the Ninth Schedule, the Punjab Security of Land Tenures Act, 1953, on the ground that it deprived individuals of their right to private property. In *Golak Nath v State of Punjab* case the question of the power of the Parliament to amend the Constitution and the Fundamental Rights was heard by an eleven-judge bench. The majority opinion stated that though prior amendments would not be affected, in future Parliament could not amend the Constitution to abridge any of the Fundamental Rights. In other words, constitutional amendment could not be used to give unconstitutional laws validity. This was the beginning of what would become routine clashes between the government and the judiciary, in the attempt to control means of production.

In 1969, the government nationalized 14 banks with assets over 500 million rupees and brought 54 % of India’s bank branches into the public sector. This was done first by the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 promulgated on July 19, 1969, which was followed by the government passing the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, which had retroactive effect from July 19, 1969.

Though the Keshavananda Bharati decision was in 1973, it has become a strong precedent and it still holds on the issue of amendment to the Constitution. The Supreme Court's post-Emergency rulings in *Minerva Mills v Union of India* and *Waman Rao v Union of India*, the Court held that the basic structure of the Constitution could not be amended. The Court did not provide an exhaustive list of articles that formed the basic structure and therefore rendered un-amendable. The Court had also ruled that the question of whether an amendment violated the basic structure was to be judicially determined. All amendments post 1973 are now subject to the Basic Structure Test. In *IR Coelho v State of Tamil Nadu* the Court clarified that the basic Structure test applied to constitutional amendments post-1973 also applies to the Ninth Schedule. If a law is deemed to have violated Fundamental Rights, and was included in the Ninth Schedule after April 24, 1973, it may be challenged in court on the grounds that it destroys or damages the basic structure of the Constitution...

The Constitution (Forty-Second Amendment) Act, 1976 stated as its Object and Reasons, "The democratic institutions provided in the Constitution have been subjected to considerable stresses and strains and that vested interest have been trying to promote their selfish ends to the great detriment of public good. ... It is, therefore, proposed to amend the Constitution ... to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles." The Amendment declared the supremacy of the Parliament, both above the Constitution and the judiciary. The Fundamental Rights in the Constitution, which expressly protected the individual from the excesses of the State, became subject to Directive Principles..

The Janata Party was formed under the leadership of Morarji Desai and supported by Jayaprakash Narayan. Desai was a staunch socialist, in the Nehruvian mould and, Narayan had proposed a 14-point program in 1952 eerily similar to Indira Gandhi's Ten-point program. Indira Gandhi lost in the 1977 election. Both Desai and Narayan were confirmed democrats, and they campaigned on the promise of restoring democracy, reversing the Forty-Second Amendment, and pursuing socialist policies. In 1978, the Forty-Fourth Amendment to the Constitution was passed in the Parliament. This amendment undid most of the emergency powers of the Indira Gandhi government, but retained the socialist features. The government retained Article 31C and Fundamental Rights, which expressly protected the individual from the excesses of the State, were subject to Directive Principles.

The Forty-Fourth Amendment also deleted the right to private property and removed all restrictions on the power of eminent domain. The Constitution (Forty-Fourth Amendment) Act, 1978 stated as its object and reasons, "the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right." Even though Indira Gandhi's government lost the election, the ideological consensus was towards a socialist society. The excesses of the Emergency as well as the weakening of institutions were blamed on some individuals like Indira Gandhi, and socialism was still embraced by the state and citizens. The problem was not one of individuals or specific instances, but an overall incompatibility between socialist goals and individual rights.

Concluding Remarks

The constant clash between socialist planning and the Indian Constitution led Parliament to change the Constitution through several amendments. In the process, rule of law, federalism, property rights, separation of powers and the independence of the Indian judiciary were adversely affected. The contradictory mixture of socialism and rule of law led to economic and political deprivations, which were never intended by the framers. Socialist policies gradually undermined the Constitution by placing the expediency of the plan at hand above constitutional principles... Socialist planning led India into decades of an anemic rate of growth and alarming levels of poverty and starvation. While both these consequences have been well documented, this is a third, important, and long lasting, consequence of the conflict between socialist planning and the Constitution: it changed the fundamental institutions and constitutional provisions in India. The Indian experience serves as a cautionary tale in institutional design and highlights the importance of crafting congruent political and economic institutions.

What India must do to be a functioning social democracy — stop practising state capitalism by TN Ninan³

Does India practise social democracy, or democratic socialism? That might sound like wordplay, but the two are very different creatures. The first system is democratic and functions broadly within a regulated capitalist framework. Budgets in such a system are instruments for funding universal social security provisions that benefit the poor more than the rich, such as for elderly care, a public school system, state-provided or state-paid medical services, along with provisions for the disadvantaged, like unemployment benefits. Democratic socialism is different: It emphasises state ownership or control of production, but within a democratic polity (therefore different from communist regimes, which typically call themselves “people’s republics”).

France does both. It has a massive public sector because of waves of nationalisation, and liberal social benefits. The system has worked surprisingly well, unlike India’s similar straddling of the two political-economic systems. We have a large public sector that burns taxpayer money, even as we have slowly opened up the second burner — that is the social welfare system: The right to employment in rural areas, cash pay-outs and free medical insurance, quite apart from the longstanding government school and medicare programmes. This package has been steadily expanded, with some now proposing that the government provide a universal basic income. This, when the social democracies of Western Europe have found their welfare packages unaffordable and moved to limit them — even France, under President Emmanuel Macron.

Affordability is not yet a debate here, despite our double-burner problem. Of course, some state enterprises have proved to be systemic strengths as well as profitable: State Bank of India, Indian Oil and Life Insurance Corporation, though even these have struggled against private sector competition. The real problem was Indira Gandhi’s belief that if you couldn’t run a market properly, you should simply take it over (foodgrain procurement, mandatory state trading for imports), and that saving jobs in the tiny organised sector was more important than the efficient use of scarce capital. Hence, the state takeover of hundreds of textile, engineering and other firms. These were mostly unable to perform, despite or even because of the change of ownership, while Air India, the two sick telecom firms and the nationalised banks have continued to burn cash.

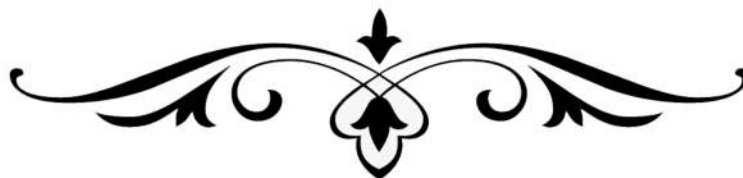
³ This article first appeared in the Business Standard and then in The Print

The choice is clear: If even a modest but a growing social welfare package is to be affordable, the public sector has to perform or be disbanded so that the government can shut down one burner. The test is what economists call a hard budget constraint: Public sector managements in banks or airlines should not get soft bail-outs.

A proper social democracy also needs a high tax-GDP ratio, which for India's level of per capita income is par for the course (16-17 per cent). But it is stagnant or declining, and in any case, nowhere near enough to fund serious social welfare. The heart of the problem is evasion of both the goods and services tax and income tax. Only a third of the eight million estimated to earn more than a pre-tax income of Rs 1 lakh per month pay the tax due from them.

The last leg of the stool is of course equality. France has a strong sense of it, having beheaded its nobility in the late 18th century. That's unlike Britain, where even in the late 19th century fewer than 11,000 families owned two-thirds of all land. As D.H. Lawrence noted, if you were wealthier than your neighbour in Britain, you thought yourself better than him, whereas in Australia, you were merely better off. The chief executive officer of a French energy company in India once explained that if you bought a car that stood out from the others on your street in France, someone was likely to use a car key to scratch a long line of paint off a side panel — just to give you the message. India, more an electoral democracy than a system-respecting republic, is moving in the direction of pre-socialist Britain, with powerful billionaires controlling the state.

These present the basic challenges worth dwelling on at Budget-preparation time. If India is to be a functioning social democracy, it has to stop practising state capitalism while creating a disciplined tax system and reining in corporate power.



SECULAR,

Who needs secularism?

India, Liberalism, and Comparative Secularism

Cécile Laborde



See Moffett lecture at the Institute for Advanced Studies, Princeton [here](#).

Summary of the lecture by Prof Cécile Laborde, by Julie Clack, May 2019⁴

Laborde began the lecture by acknowledging that academic liberal political theory has the propensity to hail the American separationist model as “the paradigm of liberal democracy.” However, this assumption implies — unfairly — that “the rest of the world tragically falls short of liberal standards.”

Within the last 30 years, the field of comparative secularism emerged as a response to this question, aiming to help scholars better think about different kinds of secularism, and what kind of secularism is required for a liberal democracy. Yet while comparative secularism has successfully put to rest the idea that a state’s status as a liberal democracy should be measured using the U.S. separationist model as the benchmark, it has not provided criteria by which scholars can assess the normative adequacy of such diverse secular arrangements.

As her lecture title indicates, Laborde offers post-1947 India as an example of non-U.S. secularism. According to Laborde, India is the largest secular democracy in the world. While the great majority of its population are Hindu, 14 percent are Muslim, making India the third-largest Muslim country in the world.

“Following the end of British rule and the trauma of partition, the founders of the newly independent nation sought to reassure Muslims that India would not be a Hindu state. They converged on a rejection of what was pejoratively called ‘communalism,’ championing instead a secular national identity that both recognized and transcended religious identities.”

However, formal disestablishment – US separationism – was rejected so as not to stand in the way of reform of the most illiberal practices associated with Hinduism – notably around the status of women and the lower castes. In parallel, rights of religious collective autonomy were granted to Muslims – in particular the preservation of Islamic personal law (Sharia) – as a way to recognize their status as a constituent group of the new nation.

As is the case with any government, India’s efficacy as a secular state has been, and continues to be, subject to scrutiny. Some of this scrutiny, Laborde and others argue, stems from the lack of normative criteria that are not based in Protestant conceptions of religion or the Western history of secularism.

In order to adequately assess secularism in countries like India, Laborde argues that we need to reframe the questions we ask about secularism and liberal democracy. Rather than asking, “Is this state secular? Does it respect separation between state and religion?”, we should instead ask, “Does the state adequately protect liberal ideals?”

Laborde offers the principle of minimal secularism as a framework through which to ask these questions and suggests that in order to better evaluate states like India, we ought to examine their efficacy in upholding three primary ideals: public justification, equal inclusion, and personal liberty.

Laborde noted that while minimal secularism maintains that “entanglement of state and religion is problematic for liberal legitimacy, it remains agnostic as to whether a wall of separation is in practice the best way to achieve its ideals.” Because minimal secularism “does not make a fetish of Western style of state and religion,” Laborde added, it “therefore allows a variety of permissible arrangements,” including India’s non-U.S. secularism.

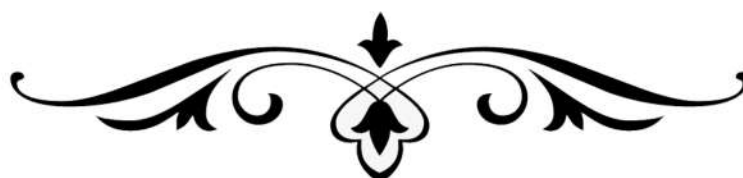
Importantly, Laborde cautions against “the ethnocentrism of comparison,” or the temptation to judge our own society by its ideals (of religious freedom, democratic equality, human rights), while judging other societies by their practices. “The ideals of Indian secularism might be frustratingly under-realized, but it doesn’t mean they have no purchase on lived reality,” she said.

Laborde concluded her talk by highlighting some of the ways in which India strives to uphold these ideals of minimal secularism to confront “inter-religion and intra-religious domination.” Indian secularism may fall short, Laborde concedes, but it is not because it fails to maintain an ideal of separation; rather, it is because efforts to ensure equal inclusion and personal liberty have been ineffective or mistargeted.

The Indian case holds broader lessons for western secularism too. Well-known constitutional decisions, such as Shah Bano, epitomize the inherent tension between the two secular ideals of equal inclusion and personal liberty, as well as the difficulties involved, for secular courts, in abstaining from defining what is and what is not ‘religious’.

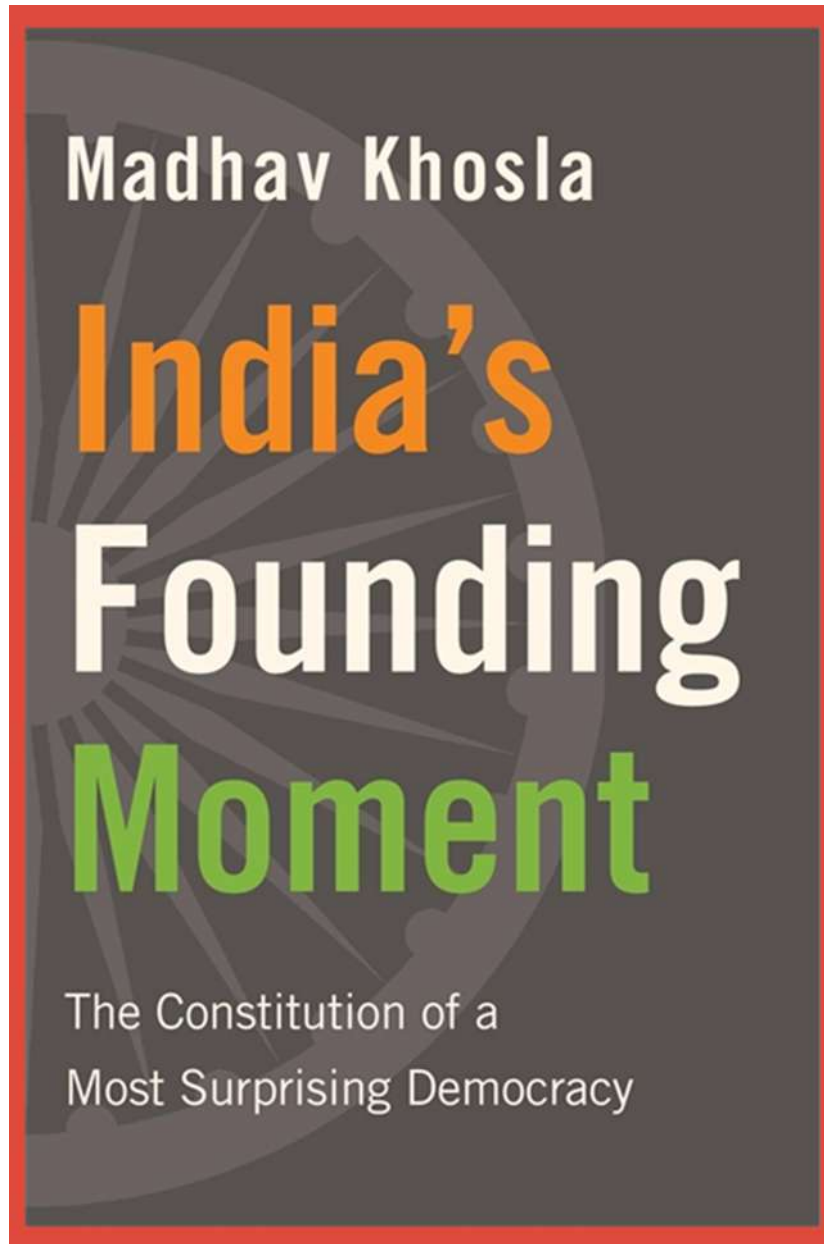
Ultimately, Laborde hopes that the principle of minimal secularism can provide a transnational framework of normative comparison, or at least normative dialogue, that will help scholars compare different forms of secularism more constructively.

⁴ <https://uchv.princeton.edu/news/laborde-moffett-lecture-summary>



DEMOCRATIC, Can federalism save India's constitutional democracy?

*Sujit Choudhry*⁵



Source: <https://www.hup.harvard.edu/catalog.php?isbn=9780674980877>

⁵Choudhry, S. Can Federalism Save India's Constitutional Democracy?. *Jus Cogens* 4, 69–77 (2022Source:2). <https://doi.org/10.1007/s42439-021-00054-1>
<https://link.springer.com/article/10.1007/s42439-021-00054-1#citeas>

A review by Sujit Choudhry of India’s Founding Moment—The Constitution of a most surprising democracy by Madhav Khosla

This brilliant book is self-consciously a work on the history of ideas. As Khosla puts it, *India’s Founding Moment* is “a study of certain traditions of thought about democracy and constitutionalism at the moment of India’s creation” (at 24)—that is, “the founding approach toward democratization”. His concern is not “with the working of Indian democracy” but “rather ... the decision to be democratic.” India’s poverty, illiteracy, and staggering diversity—combined with the necessity of adopting both constitutionalism and democracy simultaneously and instantaneously—made the success of constitutional democracy extremely unlikely. Why it has endured is a question answered by “historical studies of India’s postcolonial life” and scholarship in political science that has “investigated the inexplicable survival of Indian democracy” in the absence of the cultural, economic, and social preconditions prevailing in Western Europe and North America, i.e., “the missing foundations on which self-government was widely thought to be predicated” as well as the historical sequencing of constitutionalism followed by democracy through the gradual expansion of the suffrage. This is not Khosla’s project.

Nonetheless, the subtitle of *India’s Founding Moment—The Constitution of a Most Surprising Democracy*—implies that Khosla draws a connection between the ideas that shaped the creation of constitutional democracy in India and its endurance. Indeed, the publication of *India’s Founding Moment* coincided with a period of unprecedented strain for India’s constitutional democracy. Khosla has been a brave voice in these debates, writing for global audiences in *The Guardian*, *Time*, *The Atlantic*, *Foreign Affairs*, and *The Journal of Democracy* to criticize the decisions that Prime Minister Narendra Modi’s Bhartiya Janata Party (BJP) government has taken to erode and dismantle the founding vision of India’s constitutional democracy, after its landslide re-election victory in May 2019. For Khosla, the two central pillars of the post-2019 Modi agenda are the Citizenship (Amendment) Act (CAA), which would offer citizenship to non-Muslims from neighboring countries fleeing persecution but not to Muslims, and the repeal of Article 370 of the Indian Constitution, which guaranteed the special autonomy of Muslim-majority Jammu and Kashmir. He shares the fear of many that these measures will be followed by others that will lead to the gradual replacement of India’s secular democracy with a regime of electoral authoritarianism and Hindu majoritarianism.

For Khosla, it is significant that the Constitution has played a role in the resistance to Modi. Protests against the CAA often featured the assembled reading the preamble to the Constitution, which defines India as a secular state. Khosla calls this role “symbolic,” but surely he would agree that this understates the role of the Constitution in these contexts. As Khosla insightfully argues in *India’s Founding Moment*, the Constitution codified a constitutional morality, that created a shared frame of reference for political discourse in a new constitutional democracy. The anti-CAA protests, invoking the preamble, show how the constitution has provided a platform for political mobilization in its own defense by serving as a coordinating device, thereby enabling a constitutional practice of self-enforcement.

But I want to pose a different question, motivated by Khosla’s own public interventions on the contemporary state of Indian democracy: whether the *design* of the Constitution can be a source of constitutional resilience against the rising threat of authoritarianism and Hindu majoritarianism. In *India’s Founding Moment*, Khosla says that the constitutional vision underlying the Constitution has three components: “the explication of rules through codification; the existence of an overarching state; and representation centred on individuals”. But he does more than set out a history of these ideas in Indian constitutional thought.

In addition, he makes three claims about the impact of these ideas on choices regarding the text and structure of the Constitution. Codification conceptualized the Constitution as an “instrument of political education” that “was intended to create common meaning and explicate norms that other societies could take for granted”. A “centralized state” would create a platform for a “common politics devoted to social and economic transformation” that would not be “captured by rigid social and cultural bonds and prejudices” and free public policy from the grip of localism. India’s system of political representation rejected the communal representation of the pre-Independence period under the *Government of India Act, 1935* in favor of “a conception of citizenship that was free from the power of predefined identities” and builds on “the affirmation of the individual”.

Of these three pillars of the constitutional vision of the Indian founders, I want to focus on federalism, because it evolved in a dramatically different manner than originally envisioned. Scholars of comparative federalism have long viewed India’s federal arrangements as highly centralized, with K.C. Wheare famously terming them “quasi-federal.” This assessment has been rooted in a number of features of the Constitution, including the power of Parliament through simple majority to alter state boundaries or create states, without the consent of the states involved; the supremacy of federal over state law in areas of concurrent jurisdiction, and the power of Parliament to legislate in areas of state jurisdiction (albeit subject to substantive and procedural checks); and the power of President’s Rule under Article 356, which enables the central government to dismiss state governments, rule directly, and trigger new elections.

But the Constitution provides an incomplete picture of the original scheme of Indian federalism. A crucial decision of the Constituent Assembly was to reject drawing provincial boundaries on linguistic lines. Congress had been committed to linguistic provinces since the 1920s, to enable politics in the vernacular. It abandoned this stance in the wake of the catastrophe of Partition, out of the fear that linguistic federalism would be the stepping stone to secession. This was a crucial implication of the centralized vision of federalism that Khosla describes. However, the rejection of linguistic province unraveled before Independence. In response to demands for a separate Telugu state, Andhra state was created out of Madras state in 1953, which in turn impelled the creation of the States Reorganization Commission. The Commission issued a series of specific recommendations that were largely based on language. In 1956, and again in 1960 and 1966, Parliament redrew state boundaries to create linguistic states across India.

Linguistic federalism had profound implications for the structure of the Indian political party system and the rise of political competition. As Pradeep Chhibber and Rahul Verma have recently argued, India’s party system has gone through four phases: first, Congress hegemony from Independence to 1967, with the only opposition coming from the socialist left and the Hindu nationalist right, neither credibly contending for power; second, the rise of political competition at the state level through new regional and caste-based political parties, leading to opposition victories in nine states, and prompting Indira Gandhi to delink state assembly and national elections from 1971 in order to preserve Congress rule at the center, which was largely successful; third, from 1989, which marked the end of majority governments at the center and the rise of coalition government, with the balance of power held by caste-based and regional parties; and fourth, since 2014, the dominance of the Bhartiya Janata Party.

Two forces contributed to the rise of new political parties, which challenged the Congress Party’s hegemony first in the states and later at the center. First, linguistic federalism created new states which adopted regional languages as the official language of politics and public administration. New external state boundaries, in other words, led to the linguistic reconfiguration of internal state-level institutions, which in turn provided a hospitable environment for the rise of new regional parties built around recast state-level identities, especially in the South (e.g., Telugu Desam, Dravida Munnetra Kazhagam, and All-India Anna Dravida Munnetra Kazhagam) but also in the North (e.g., the National Conference in Kashmir and the Akali Dal).

Second, new caste-based parties arose in states in the Hindi heartland that had not been reorganized and were therefore untouched by linguistic reorganization, such as Bihar and Uttar Pradesh. After the 1967 elections, these parties formed governing coalitions under the umbrella of the Samyukta Vidhayak Dal. They later gave way to a multiplicity of parties, such as the Bahujan Samaj Party, the Rashtriya Janata Dal, and the Samajwadi Party. As Chhibber and Verma demonstrate, one of the main factors driving the rise of caste-based political parties was political mobilization on the basis of caste for the extension of reservations in public sector employment to the Other Backward Classes (OBCs).

The Congress Party resisted implementing reservations for OBCs at the national level, whose elites then turned their efforts to the state level, with OBC led governments taking power in Bihar and Uttar Pradesh in 1967. The Congress Party responded by splitting, with the left-wing led by Indira Gandhi and pursuing broader poverty alleviation policies, in an attempt to outflank OBC elites. She also severed the link between state and national elections, in order to nationalize politics and diminish the electoral impact of opposition-controlled state governments. This strategy paid off for the Congress Party, with a massive victory in the 1971 elections.

The next chapter of this story came in 1975, when Indira Gandhi was found guilty of committing electoral fraud arising out of the 1971 election. Had it stood, Gandhi's conviction would have stripped her of a seat in Parliament and barred her from seeking election to Parliament for 6 years. The judgment threatened to end Gandhi's political career. Gandhi's first response was to declare a state of emergency within weeks of the handing down of the judgment, imprison opposition leaders and political opponents, restrict press freedom, suspend habeas corpus, and direct the Congress Party majority in Parliament to adopt the infamous 42nd amendment.

The Supreme Court pushed back, by striking down the 39th Amendment and firmly establishing that multi-party democracy was an element of the basic structure of the Indian Constitution. In addition, Gandhi was constitutionally obliged to hold national elections in 1977, and shortly before doing so, ended the Emergency. She suffered a decisive, and surprising, defeat by an unlikely coalition, bringing together right-wing parties with caste-based parties in the Hindi belt who were dissatisfied with the Congress Party's stance on OBCs.

This is a highly simplified and stylized account of a complex story—more of an analytic narrative than history, let alone a history of ideas, as Khosla has provided. But it illustrates that Indian federalism, as a consequence of both its original structure and fundamental reform, provided institutional resources for the rise of new political parties, which challenged the Congress Party. Linguistic federalism led to the creation of regional political parties, who at first seized power at the state level from the Congress Party, and then contended for power at the center. Their coalition partners at the national level were caste-based parties in Bihar and Uttar Pradesh, led by OBC elites, who also first challenged Congress in states in the Hindi heartland whose borders were not changed by states reorganization, and then at the center.

And so there is a relationship among democracy, federalism, political competition, and constitutional resilience that emerged under the Indian constitutional scheme, in a manner that was not part of the founding vision, and which in large part occurred in spite of it. States provided the political infrastructure for the rise of political parties that credibly contended for power and formed state governments, and from these bases became effective opposition parties nationally and competed for power at the center. They displaced Congress from 1989 to 1991, became coalition partners for Congress from 1991 to 1999, for the BJP from 1999 to 2004, and for Congress again from 2004 to 2014. And crucially, they saved India at its moment of greatest peril in 1977 by defeating Indira Gandhi at the polls.

What insights do these constitutional dynamics shed on *India's Founding Moment*? To the extent that Khosla, *sotto voce*, attributes the endurance the success of India's constitutional democracy to a set of initial choices and the ideas behind them, his argument needs to be qualified. One of basic goals of any constitution is to provide a framework for bounded, partisan, pluralist contestation among political parties that track and major economic and social cleavages of a political community, through regular, periodic elections with universal adult suffrage in which these parties compete for power. Political parties consider it to be to their mutual advantage to compete for power within a constitutional system, rather than stepping outside of it and seizing power through force or fraud. The process of institutionalized competition within which political conflict occurs does not undermine constitutional stability; rather, it reinforces it through iteration.

Khosla does not discuss the place of political competition and multi-party democracy in pre-Independence Indian constitutional thought. As Aradhya Sethia accounts, those issues were debated in the Constituent Assembly on only a few occasions, in relation to proposals for multi-party, power-sharing cabinets, and the constitutionalization of the office of the Leader of the Opposition. Both proposals were rejected. As well, Sethia identifies misgivings in Constituent Assembly about the partisan abuse of Article 356, on occasions where different political parties controlled the center and a state. But the idea of recognizing and regulating parties as institutions of constitutional government in order to preserve multi-party democracy and political competition was not discussed. And so the Constitution itself does not contain provisions on these issues at all.

Sethia attributes the silence of the Constituent Assembly, and of the Constitution itself, on political parties to three factors: (a) the Congress System of internal party democracy, which shifted political competition among parties to competition within the Congress Party among party factions and obviated the need to constitutionalize internal party democracy; (b) the fear of legitimizing communal parties, rooted in the experience of the provincial assembly elections in 1946 under the Government of India Act, 1935, when the Muslim League obtained sufficient support to take power in Punjab and Sind and push for Partition; and (c) anti-partyism, based on the concern that political parties would not govern in the broader public interest, and therefore should not be constitutionally entrenched.

The constitutional recognition and regulation of political parties can go beyond guaranteeing their status, to potentially conferring powers on them in relation to the electoral and legislative processes, and regulating their goals and activities (militant democracy) and internal governance (internal democracy). Underlying and uniting these particulars of constitutional design is the very notion of multi-party democracy itself as a constitutive element of any constitutional democracy. The likely reason for silence of the Constitution on this basic idea is the impact of Partition on India's nascent political party system. After Partition, the Muslim League withdrew from the Constituent Assembly, leaving the Congress Party with an overwhelming majority (approximately 275 out of 303 members). No doubt, Congress presupposed its ongoing political dominance through sustained electoral victories both centrally and in the states for the foreseeable future. It therefore neither saw the desirability of empowering potential competitors, nor the necessity of insuring itself against the possibility of future electoral losses—both of which might have led it to constitutionally entrench measures to protect multi-party democracy and political competition.

Indian federalism ended up fulfilling this function, through the medium of political parties. As I have previously argued, federalism may enhance political competition and multi-party democracy, because it multiplies the opportunities for electoral choice, by increasing the number of governments that must be democratically elected, and by creating different political majorities empowered to elect different governments.

The proliferation of opportunities to wield power allows political parties that lose at the national level to win at the state level through the support of a different political majority. Moreover, states provide important political resources to parties that strengthen their ability to compete nationally. The possibility of wielding power enhances the ability of parties to recruit and train political elites. The expertise developed from political mobilization at the state level can be transferred to national elections. Finally, governing at the state level provides parties with the advantages of incumbency, such as greater public profile and the ability to shape public policy to enhance their base of political support.

In framing the constitution of a new democracy, protecting and promoting political competition in the service of constitutional resilience is a crucial goal. Political competition, let alone through federalism, was not part of the vision of the framers, as set out in India's Founding Moment. In this respect, the framers of the Indian constitution came up seriously short. The constitutional infrastructure for political competition arose through other means. One was the Supreme Court of India, under the influence of the German emigré Dieter Conrad, who foresaw the dangers of Congress Party dominance through the lens of the tragedy of Weimar.⁶

The Supreme Court used elements of Article 79(3) of the Grundgesetz to fashion the basic structure doctrine, which includes democracy, in *Kesavananda Bharati v. State of Kerala*. The basic structure doctrine operates defensively, as a check on attempts to dismember or destroy constitutional democracy. However, it does not itself encourage political competition to occur. That role has been served by federalism, through constitutional politics subsequent to Independence—in part through the Constitution as originally designed, in part as a consequence of linguistic reorganization, which the framers opposed. And so much of the success of the Constitution happened in opposition to the animating ideas of the Indian founding.

As Modi concentrates power after two successive national electoral victories, the question is whether federalism can serve again as a source of constitutional resilience, by providing institutional resources for Modi's opponents to arrest India's slide into electoral authoritarianism. Yogendra Yadav has argued, for example, that the states should defer or undermine the implementation of the National Register of Citizens, because of the fear that Muslims excluded from it will not be able to claim citizenship through the CAA, whereas non-Muslims will. However, the equivalent of non-cooperation by state governments does not provide a structural solution to the BJP's growing electoral dominance, except as a tool for political mobilization. Modi's stunning decision to abrogate Kashmir's special autonomy, and to abolish Kashmir's status as a state and convert it into two union territories, is a sober reminder (putting to one side the distinct constitutional issues arising from Article 370) that Parliament has the unilateral power, unparalleled in other federations, to create, adjust the boundaries of, and abolish states. Indian federalism is remarkably constitutionally fragile. Indeed, it is worth remembering states reorganization occurred through simple majority votes in Parliament, without the need for state consent, which made it possible to occur.

⁶ We recommend the readers look up Sanctity of the Constitution *Dieter Conrad—The man behind the 'basic structure' doctrine by A.G. Noorani. It deals with the evolution of the 'basic structure' doctrine, which states that any part of the Constitution may be amended by following the procedure prescribed in Article 368, but no part may be so amended as to 'alter the basic structure' of the Constitution. The arguments related to limitation on amending powers in the *Golak Nath Case* and the *Kesavananda Case* are examined. It then considers the contributions of German jurist and scholar, Professor Dietrich Conrad, to the theory of 'implied limitations' on amending power. It suggests that it was no coincidence that a German jurist had thought of implied limitations on the amending power. The Germans learnt from the bitter experience of the Nazi era.

<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780195678291.001.0001/acprof-9780195678291-chapter-1>

Whether India continues on the path to electoral authoritarianism and Hindu majoritarianism remains unclear in the balance. India might be saved by an alliance between the Supreme Court and opposition-controlled states, mediated through the institutional mechanisms of state-level electoral process and court rulings protecting federalism and democracy under the basic structure doctrine. These mechanisms that evolved after India's founding to preserve its constitutional democracy. They fall outside and compromise the vision described so beautifully in India's Founding Vision. However, by protecting political competition, they preserve the very idea of India as a constitutional democracy.



Source: <https://www.legalbites.in/wp-content/uploads/2019/02/Supreme-Court-of-India.jpg>



Opinion: Indian democracy is marching towards authoritarianism, under the garb of pluralism

Rohit Chopra⁷



Almost every other day now, the spokesperson of the Ministry of External Affairs seems to issue a statement condemning some international body or the other that criticises the unjust actions of the Indian state. The latest of these are the arrests of activist Teesta Setalvad and journalist Mohammed Zubair.

Arindam Bagchi puts forth the usual bromides: India “strongly objects...”, India “rejects...”, India is a pluralistic, diverse society committed to rights. (Many of these statements come up if you do a Google search for India + Bagchi + rejects).

These statements harmonise quite beautifully with the platitudes about the importance of free speech, Gandhian values, the robust nature of Indian democracy, and the like, that are routinely uttered by Prime Minister Narendra Modi on his frequent international jaunts.

Back home, though, Indian authorities routinely violate the basic constitutional rights of citizens, arresting journalists, activists, opposition leaders, and ordinary citizens on ludicrous charges and then conjuring up absurd reasons to keep them incarcerated.

Whether it is the Central Bureau of Investigation, the Enforcement Directorate or the police in Bharatiya Janata Party-ruled states, there is now not even a half-hearted attempt by these institutions to pretend to be autonomous any more. In effect, they serve to put into action the orders of the BJP, at hand to quash anyone who is considered a threat – or just a mere annoyance.

The arrests of Setalvad and Zubair are another move in the long endgame of settling scores that Modi and Shah set in motion a while ago. Their goal was not hard to discern: it was to get even with every individual that they considered to have been responsible for Modi’s political exile in the aftermath of the Gujarat riots of 2002 and Shah’s incarceration in the Sohrabuddin Sheikh fake encounter case.

⁵ Rohit Chopra is an Associate Professor of Communication at Santa Clara University and the author most recently of *The Gita for a Global World: Ethical Action in an Age of Flux*. Reproduced from *The Scroll.in* Jul 07, 2022

<https://scroll.in/article/1027566/opinion-indian-democracy-is-marching-towards-authoritarianism-under-the-garb-of-pluralism>

We gratefully thank him and Scroll to allow us to reproduce this article to add to its reach.

Having grabbed the Indian mainstream media by the scruff of its neck soon after 2014, Modi and Shah, through various proxies, quite quickly rendered ineffectual a whole host of Indian celebrity television journalists, all of whom figure prominently in the Hindutva imagination as Congress sympathisers given their apparent support for liberal and secular values.

The next target has been the whistleblowers and human rights activists who sought to hold Modi and Shah accountable for the Gujarat model of communalisation-conflict-and carnage. Former Gujarat police officers Sanjiv Bhatt and RB Sreekumar, and Setalvad are now all in jail, while journalist Rana Ayyub has been relentlessly harassed and on occasion prevented from leaving the country. The Setalvad and Zubair arrests are also a significant step on the part of the BJP towards completely dominating the flow of information, a crucial aspect of what activist-politician Yogendra Yadav recently described as the modality of total politics. In this model, there is no space for an independent or autonomous media, nor for any consensus about truth norms, nor, indeed, for inconvenient facts.

In German political and legal theorist Carl Schmitt's argument about political theology as the governing principle of modern political order, all power ultimately flows from the sovereign. It follows, then, that all truth is also determined by the sovereign as are the criteria for what counts as truth. Control of the arenas where truths are contested – which necessarily include legacy and new media, given their centrality to present-day life – accordingly become essential to the exercise of modern political sovereignty. The immediate provocation for Zubair's arrest may have been payback for highlighting the comments made by BJP spokesperson Nupur Sharma about Islam; remarks that resulted in considerable international embarrassment for the Modi government.

The larger purpose, though, is to signal that the BJP will now not brook anyone or any organisation that questions its version of the truth, whether that concerns the scores of destroyed temples that allegedly lie submerged beneath mosques, the grand successes of the Tughlaquesque folly of demonetisation or India's valiant response to China's incursions into national territory.

The retribution meted out to social media organisations such as Twitter and Facebook over the last few years by the Indian government for occasionally daring to hold Hindutva voices and BJP officials accountable for spreading fake news or engaging in abusive behaviour reflects the same imperative. So does the exhaustively documented program of the BJP to implement a revisionist, Hindu nationalist account of Indian history at every level of the national educational system and even in universities abroad through its Hindutva affiliates in the US and elsewhere.

Questioning the BJP's version of any event, past or present – and of Modi's grand proclamations about India's future under his stewardship – is now blasphemy of the same order as “hurting religious sentiments”. Finally, the act of arresting Setalvad and Zubair, covered avidly by television channels, is pure totalitarian theatre.

Like his kindred authoritarian spirit, former US President Donald Trump, Modi has an intuitive sense of the histrionic. Like Trump, Modi is given to elaborate bouts of self-pity, often reducing himself to tears in front of an audience at the memory of his own struggles.

Like many a strongman, Modi meets several criteria that Peter York, author of *Dictator Style: Lifestyles of the World's Most Colorful Despots*, describes in this article, whether it involves wearing ostentatious brands on his person or destroying historical monuments to replace them with buildings that many consider to be monstrosities.

Central to the aesthetics of authoritarianism is the public disciplining and humiliation of enemies. The Income Tax department's needling of actor Sonu Sood, the repeated summoning of Congress leader Rahul Gandhi by the Enforcement Directorate, the made-for-television arrests of Modi critics fall within this category. But in the Indian context they are be cloaked in the language of democracy, constitutionality and rule of law.

India's refutations of international criticism bring to mind the efforts of the late Iraqi President Saddam Hussein's information minister, Mohammed Saeed Al-Sahaf, who boldly claimed on television that there were no American tanks in Baghdad, even as said non-existent tanks could be seen rolling in the background.

In much the same manner, there is no censorship in India, no violations of minority rights, no unconstitutional arrests, and no quashing of religious freedom. India just needs to be a little more convincing in letting the world know.

Liberty is too precious to be lost: The decay in the criminal justice system, by Retd Justice Madan B Lokur⁸

"What's going on?" a young lady asks quizzically in a television advertisement. The same question must be asked of criminal justice and India's prisons.

Bail, not jail has been reduced to a mere slogan to be whispered once in a while. The reality is jail, not bail. Another reality is that innocent until proven guilty has been transformed to guilty until proven innocent.

Are we doing anything about reversing these realities? Those who suffer these realities are undertrial prisoners who live in conditions that will never improve or so it seems, despite more than 40 years of efforts by the Supreme Court.

Getting the facts

For a start, we need to get facts correct. During the conference of the State Legal Services Authorities in Jaipur on July 17, Law Minister Kiren Rijiju stated that there were 3.5 lakh undertrial prisoners in the country. In his speech, Chief Justice of India NV Ramana said that 80% of the six lakh prisoners in the country are undertrial prisoners, making it more than 4.5 lakh undertrial prisoners. Whatever the number, it is important to know how many undertrial prisoners there are.

Improving physical conditions

What also needs remedying is the dismal, tragic and dehumanising state of affairs in prisons primarily caused by indifferent prison officials. Consider the case of activist and Jesuit priest Stan Swamy and his request for a sipper or a straw to enable him to drink water. The jail staff denied his request and he had to approach a court for relief. Ultimately, he met a tragic end in judicial custody – Swamy died on July 5 last year.

⁸ Reproduced from the Scroll 22nd July 2022

<https://scroll.in/article/1028775/liberty-is-too-precious-to-be-lost-a-former-sc-judge-on-the-decay-in-the-criminal-justice-system>

Poet-activist Varavara Rao is being treated in an equally inhuman manner. His request for bail for medical reasons is opposed on the ground that his medical condition is not so unsatisfactory that he cannot be treated in jail. Maybe so, but please remember, he has been an undertrial prisoner for almost four years and is 82 years old. Guilty until proven innocent? Is that what's going on?

Swamy and Rao were among the activists and academicians arrested and jailed in connection with Elgar Parishad case. Remarks at the conclave allegedly sparked the violence at Bhima Koregaon near Pune on January 1, 2018.

Unnecessary arrests

Arresting persons for sedition was the flavour of the month until the Supreme Court said enough is enough. So, our ingenious authorities found other devious ways to arrest persons. Journalist and fact-checker Mohammed Zubair has been arrested in Delhi and Uttar Pradesh for harmless tweets and he has a long way to go before being released. At the time of being published, the Supreme Court on July 20 had granted Zubair bail in all six cases filed against him in Uttar Pradesh. He was released the same day.

Actor Ketaki Chitale spent more than a month in jail for a derogatory tweet, obliquely referring to a senior and respected politician who was perhaps not even bothered by that tweet.

Gujarat legislator Jignesh Mevani was arrested on trumped up charges in Assam in April. Barshashree Buragohain, a college student, spent two months in jail in Assam for an allegedly anti-national poem. Politicians are arrested for threatening to recite the Hanuman Chalisa. Every week an arrested rabbit is pulled out of the penal code hat. This adds to the prison population, which is already bursting at its seams.

Prisoners wait in queue after they were released on parole at the Sabarmati Central Jail during the nationwide lockdown in Ahmedabad in March 2020. Credit: Reuters.

On the other hand, consider the case of Sukesh Chandrashekhar, an undertrial prisoner in Tihar Jail in Delhi. In a first information report lodged against him, it is alleged that he "was paying Rs 1.5 crore every month for getting facilities to use mobile phones and a separate barrack without any hindrance". Stan Swamy had to go to court for a straw that perhaps costs a rupee or two. Is that what's going on?

These examples indicate that persons are sought to be imprisoned for the most frivolous of reasons and made to suffer pathetic conditions of our jails, while the influential, powerful and the moneyed enjoy state guest status. Most unfortunately, our judiciary denies bail or facilities for irrelevant reasons thereby putting a stamp of approval on the extra-legal machinations of the police and prosecution. This is what's going on.

Communication facilities

More than a decade ago, landline telephone facilities were provided to prisoners in Tihar Jail, amid much fanfare. I know, because I inaugurated that facility as the Acting Chief Justice of Delhi High Court. Thereafter, a similar facility was provided in several jails including in Haryana, Karnataka and Uttar Pradesh. But in Taloja Jail in Maharashtra landline facilities are denied to some prisoners.

On the other hand, some undertrial prisoners like Suresh Chandrashekhar enjoy the illegal facility of a mobile phone, though at a cost. The availability of mobile phones in jails appears rampant and, in several States, such as Punjab, Uttar Pradesh and Karnataka jammers were requisitioned to block these phones. In Kerala, jammers were found ineffective and drones have been thought of for surveillance. A legally permissible facility has seamlessly given way to an illegal facility. Is this what's going on?

Role of judges

What is the way out of this morass? A starting point can be making some trial judges realise that they need to stop acting as a rubber stamp of the police in matters of arrest. Please apply your mind, dear judges, and please remember, liberty is too precious to be lost. Stand up for the constitutional rights of our citizens.

Yes, you may have the fear of being transferred overnight, but how many of you can actually be transferred without waking up a sleeping giant? Acche din will come someday. Meanwhile, please appreciate that keeping an undertrial prisoner in judicial custody for several years effectively means keeping an innocent person in jail for several years. Does that make any sense to anybody? Please also think of the hardships that the family, including children, may be undergoing. Is this justice or injustice? It is not a difficult question to answer.

Requirement of an audit

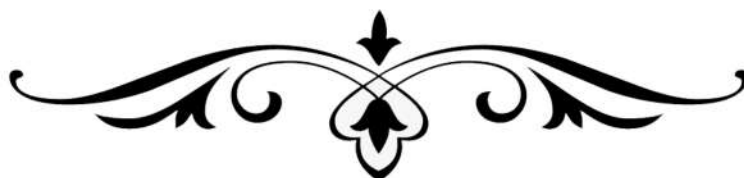
Every district in the country has an undertrial review committee as mentioned by the Law Minister in the Jaipur conference. However, given the overcrowding in prisons across the country, they appear to be ineffective. Let us conduct an audit to ascertain how much they have achieved and if they need better assistance.

The Legal Services Authorities should be liberal with legal aid to undertrial prisoners. That the National Legal Services Authority and State Legal Services Authorities have provided free legal assistance to thousands of undertrial prisoners is not an answer – quality matters, not quantity and I am afraid, there is plenty of criticism about the quality of legal aid being provided. Again, an audit is necessary. I am sure it will reveal several deficiencies.

Open prisons

Think out of the box. How about encouraging open prisons? There are so many successful models that need to be studied and replicated. Shimla has a wonderful scheme in operation, Rajasthan is encouraging open prisons. West Bengal is open to suggestions. Let us try it out and give meaning to liberty.

So much can be done but we need to kick start reforms rather than only talk about them in conferences. Let us start now.





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