PREFACE

The **'FOCUS'** *is published by the Kerala Legislature Secretariat for the use of the members of the Kerala Legislative Assembly. It is a digest containing articles and excerpts from books on subjects of current intellectual, political, social and cultural interest, news, reports of the commissions and committees and reviews of books. The views expressed therein are those of the authors and do not necessarily reflect the views of the Kerala Legislature Secretariat.*

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S.V. UNNIKRISHNAN NAIR ,
SECRETARY ,
KERALA LEGISLATIVE ASSEMBLY.

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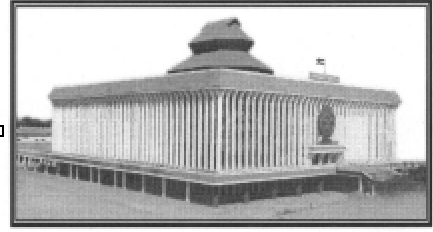


Time to defend India's secularism

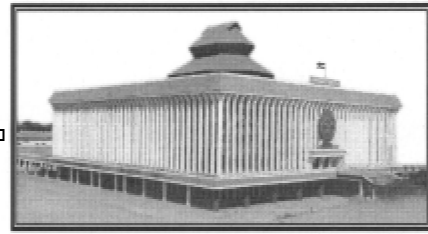
Pinarayi Vijayan

India's secular structure faces a profound crisis. The Citizenship (Amendment) Act, 2019, must be rejected for three reasons. First, it is against the letter and spirit of our Constitution. Second, it is divisive, deeply discriminatory and violative of human rights. Third, it seeks to impose the politics and philosophy of Hindutva, with its vision of a "Hindu nation", on our entire people and on the basic structure of our polity. Our constitutional values are in peril, and no person who has faith in our democracy can afford to be silent and uninvolved in what is happening around us.

Against common citizenship

Let us understand each of these three points. The first is that the Citizenship (Amendment) Act is against the letter and spirit of our Constitution. Articles 5 to 11 of the Constitution deal with citizenship, and the Citizenship Act, 1955, lays down criteria for citizenship based on birth, descent, registration, naturalisation, and citizenship by incorporation of territory. By setting new criteria, the Citizenship (Amendment) Act goes against the premise of common citizenship regardless of differences of caste, creed, gender, ethnicity and culture. Further, Article 14 of the Constitution lays down that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". It bears emphasis that Article 14 applies not only to citizens but to "all persons within the territory of India".

What do we mean by the spirit of the Constitution? We associate the drafting of our Constitution with the rich debates of the Constituent Assembly, and the wisdom of its members, amongst whom Babasaheb Ambedkar stands tall. It is often not recognised, however, that it was the heroism of millions of unsung freedom fighters that made our Constitution a reality. These men and women, who came from the working class, peasantry, and socially marginalised groups- whatever their religious persuasion - challenged the colonial authorities in their struggle for human rights and economic justice. This struggle



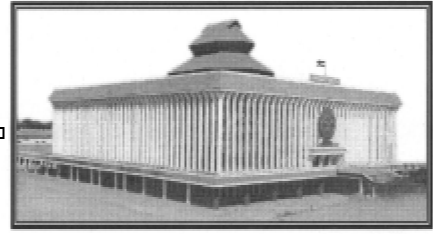
had broader aims than the overthrow of colonial rule. These torchbearers of modern Indian history played a crucial role in creating the demand for social justice, and a Constitution with democratic and secular values in a society in which discrimination and inequality were deeply ingrained. Although the framing of the Constitution did not mark the end of the struggle for civil liberties and for an egalitarian society, it, nevertheless, was a milestone in our history.

Our freedom fighters were also conscious that theirs was a struggle for a society free of caste and religious deprivation and discrimination, and free of the deep social and economic inequalities that characterise Indian society. This was true of the manifestos of the Left from the early 1920s; this aspiration was also reflected in the resolution of the Karachi session of the Indian National Congress in 1931, held after the execution of Bhagat Singh and his comrades. Confronted by the radical mass upsurge of the time, the Congress passed resolutions on the freedom of speech, press, freedom of assembly, freedom of association, and equality before the law.

The national movement in British India was further strengthened by movements in the erstwhile princely States. Our forebears dreamt of an independent India where communal prejudice would be alien to the polity. It is not surprising that the threat to those parts of our Constitution that defend secularism, democracy, social equality, federalism, and individual and social diversity, should come from that section of the polity that did not participate in the freedom struggle. The surrender to British imperialism by the precursors of today's forces of Hindutva, is a chapter of India's history that is cast in stone. No amount of denial can change that unheroic past.

Violative of rights

Our second point is that the Citizenship (Amendment) Act is divisive, deeply discriminatory and violative of human rights. As I have written before, our national unity was won through struggle; the Citizenship (Amendment) Act is one of the many threats to its survival. Our hard-won Constitution recognises individual and social



differences, and that we must weave the cord of unity by creating a sense of belonging and inclusiveness for all.

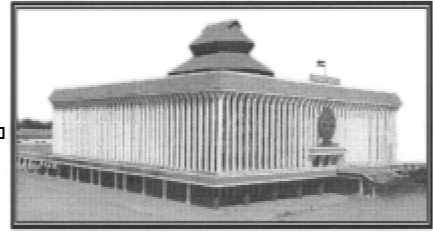
The Citizenship (Amendment) Act attempts to create and deepen communal division and social polarisation in the country. The Act gives eligibility for citizenship to Hindus, Sikhs, Buddhists, jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan who entered India on or before December 31, 2014, and specifically excludes Muslims from that list. In granting citizenship on the basis of religion, it discriminates against Muslims and rejects the basic concept of secularism.

That the Citizenship (Amendment) Act is discriminatory and violative of human rights has been recognised by those who have come out on the streets in many States, in opposition to the Act. It is noteworthy that university and college students figure so prominently in the upsurge against the Act. Though pushed through in the Lok Sabha and the Rajya Sabha by the Bharatiya Janata Party (BJP) and its allies, these young citizens of India have come together much as students did during the anti-colonial struggle to reject the attempt to divide India along religious lines. They have denounced this Act as discriminatory and violative of human rights.

The Right's agenda

Our final point, that the agenda of Hindutva and its ultimate goal of establishing a "Hindu Nation" underlie the Citizenship (Amendment) Act, is well established both by past experience and the present actions of the BJP-Rashtriya Swayamsevak Sangh. We mentioned earlier the absence of the forces of Hindutva from the freedom movement. It was in this period that M.S. Golwalkar propounded his theory of India as a "Hindu Nation," where other religious communities had no right of citizenship. The Citizenship (Amendment) Act is the latest blow by the BJP to the secular nature of our polity.

When the Left has been in Government we have made every effort to use the machinery at our command to reserve communal harmony; elsewhere, we have organised the masses to ensure such harmony.



Notes from Kerala

Kerala's struggle for secularism and social equality has much to teach us. Historically, the different strands of Kerala's social renaissance and subsequently, the forces of the Left and other progressive sections, fought hard against social discrimination and communalism, and for social and economic equality.

All political parties and social groupings of different types in Kerala, other than the parties and organisations of Hindutva, have come together against the Citizenship (Amendment) Act. The peaceful satyagraha held in Thiruvananthapuram on December 16, attended by political parties, religious leaders, and cultural leaders is a symbol of our united determination to uphold constitutional values and basic human rights, and to oppose discrimination.

We cannot postpone our protest and united resistance against this assault on secularism and democracy.

(Pinarayi Vijayan is the Chief Minister of Kerala)

The Hindu,

18 December 2019.

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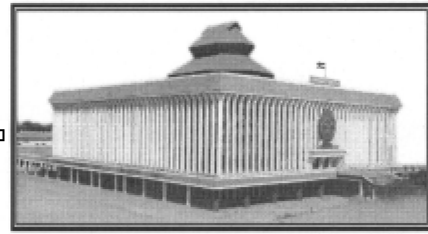


Battling Anti-Microbial Resistance

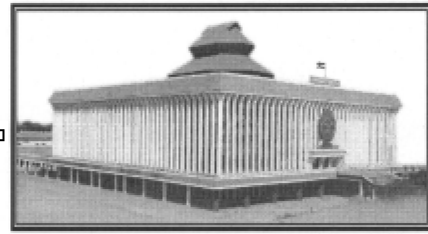
Tomio Shichiri & Rajesh Bhatia

In November, the world observed Antibiotic Awareness Week. In July, in its fight against the growing problem of resistance of antibiotics in disease-causing germs, the Indian Government banned the manufacture, sale and use of colistin in the poultry industry. Colistin is considered the last resort medicine to treat a person with life-threatening infection. The government's move is among numerous steps that will contribute to global efforts to preserve and prolong the efficacy of antibiotics and prevent the world from moving towards dark, post-antibiotics future.

Becoming ineffective

Antibiotic have saved millions of lives till date. Unfortunately, they are now becoming ineffective as many infectious diseases have ceased to respond to antibiotics. In their quest for survival and propagation, common bugs develop a variety of mechanisms to develop Anti-Microbial Resistance (AMR). The indiscriminate use of antibiotics is the greatest driver in selection and propagation of resistant bugs. It has the potential to make fatal even minor infections. Complex surgeries such as organ transplantaion and cardiac bypass might become difficult to undertake because of untreatable infectious complications that may result post surgery. The pipeline for the discovery, developement and dissemination of new antibiotics has virtually dried out. No new class of antibiotics has been discovered in the past three decades. The reason is simple. Availability of a new antibiotic takes 10-12 years and an investment of $1 billion. Once it comes into the market, its indiscriminate use swiftly results in resistance, rendering it useless.

The resistance to antibiotics in germs is a man-made disaster. Irresponsible use of antibiotics is rampant in human health, animal health, fisheries, and agriculture. While in humans antibiotics are primarily used for treating patients, they are used as growth promoters in animals, often because they offer economic shortcuts that can replace hygenic practices. Globally, use of antibiotics in animals is expected to increase by 67% by 2030 from 2010 levels.



AMR has been recognised world wide as an important public health challenge with serious impact on economy and developement. The Sustainable Development Goals have articulated the importance of containing AMR. Similar articulations have been made by the UN General Assembly, G7, G20, EU, ASEAN and other such economic and political platforms. Earlier, the O'Neill report on AMR warned that inaction in containing AMR is likely to result in annual mortality reaching 10 million people and a 3.5% fall in global GDP by 2050.

Inter-Country developement agencies (WHO, FAO and World Organisation for Animal Health) developed a Global Action Plan on AMR. India developed its National Action Plan on AMR (NAP) in 2017. It is based on the One Health approach, which means that human health, animal health and the environment sectors have equal responsibilities and strategic actions in combating AMR.

A global movement

Implementation of India's NAP needs to be accelerated. The health of humans and animals falls in the domain of State authorities, and this adds complexity to the nationwide response. The magnitude of the problem in India remains unknown. Surveillance networks have been established in human health and animal health. The FAO has assisted India in forging the Indian Network for Fishery and Animals Antimicrobial Resistance for the generation of reliable data on the magnitude of the problem and monitoring trends in response to control activities. It is critical to expand and sustain such surveillance networks. There is an urgent need to augment capacity for regulatory mechanisms, infection control practices and diagnostics support, availability and use of guidelines for therapy, biosecurity in animal rearing practices and understanding the role of the environment and the engagement of communities. For this, the world must launch a global movement to contain AMR.

[Tomio Schichiri is FAO Country Representative/Director and Rajesh Bhatia is FAO Regional Consultant on AMR]

The Hindu,

02 December 2019.

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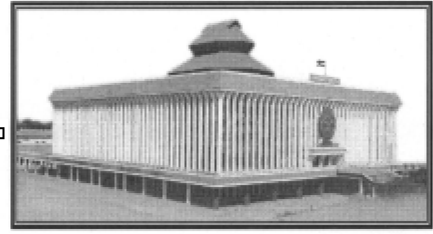


Testing Judicial Reforms

Leah Verghese

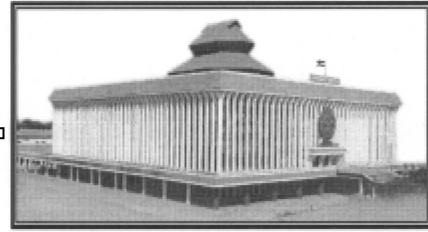
The media has given extensive coverage to experimental research in social sciences in the recent months following the Nobel Committee's decision to award the Economics prize to Abhijit Banerjee, Esther Duflo and Michael Kremer. The three economists' work is premised on evidence from randomised controlled trials (RCTs) designed to isolate the effect of an intervention on an outcome or event by comparing its impact on a 'treatment group' that gets the intervention with a 'control group' that does not get the intervention. Testing interventions in pilot settings thus prevents the state from pursuing ineffective courses of action.

However, there is a conspicuous lack of experimental work in the field of legal research in India. Rigorous RCTs are indeed difficult to carry out in legal settings, given the complexity of the legal system and the need to ensure that any such studies do not hinder people's access to justice. But there is a great opportunity to incorporate some of these methods from RCTs into legal policy- making. The Indian judicial system is plagued with problems of delay and backlog. Currently, 3.5 crore cases are pending across the country's High Courts and District Courts.

The long-term consequence of such high pendency is an erosion of faith in the institution of the judiciary. Justice delivery is the monopoly of the state but delays and the cost of litigation have led to people approaching non-judicial bodies outside the formal court system such as *khap* Panchayats, religious leaders and politicians for dispute resolution. The problem of judicial delay, however, stubbornly persists.

Increasing the number of judges

The most common solution proposed using a simplistic input-output model is to increase the number of judges. This suggestion conveniently masks the deeper systemic flaws in the judicial system that cause such high pendency. Further, despite

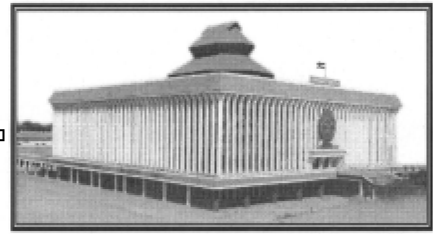


the seriousness of the issue, there has been no empirical study on the effect of increasing the number of judges on judicial pendency. Using the experimental method will allow researchers to test a causal relationship between an independent variable (say increasing judge strength) and possibly dependent variables (say judicial pendency). Experiments such as these will give policymakers insights into how certain interventions work at a smaller scale before deciding on large-scale implementation. One of the most famous controlled experiments in the U.S. was the Manhattan Bail Project, where accused persons applying for bail were put into a control group and a treatment group. Researchers assessed if those in the experimental group should be released without a bail bond, using factors like employment history, local family ties, and prior criminal record. Around 60% of the accused in the experimental group were released without bond, out of which only 1.6% failed to show up for subsequent trials for reasons within their control.

In a study published in 2007, researchers David S. Abrams and Albert H. Yoon studied the random assignment of government attorneys to suspects in felony cases in Las Vegas. They found that on average, those represented by Hispanic attorneys received sentences that were 26% shorter than those received by defendants represented by black or white public defenders.

Resistance in the system

Given the importance of judicial independence, members of the judiciary are resistant to outsiders doing experimental work on their functioning. Though there is widespread acknowledgement of the problem of judicial delay, there is only limited effort within the judiciary to understand through research the nuances of the problems and motivations of the various stakeholders. An exception is the 'Zero Pendency Courts' project in Delhi. The Delhi High Court carried out a pilot project between 2017 and 2018 with the assistance of DAKSH to assess the impact of 'no backlog' on judicial pendency and to devise ideal timelines for different types of cases. Eleven



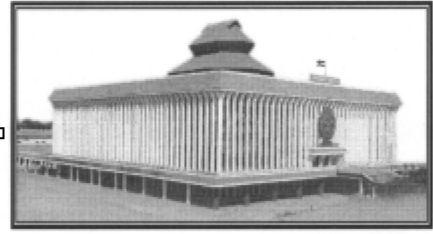
judges with no back-log were compared with 11 judges with the regular backlog. The study found that since pilot courts had fewer cases listed per day, they could spend more time per hearing. On an average, pilot Sessions Judges dealing with murder cases took approximately 16 hours to dispose Sessions cases over 6.5 months, while pilot Fast-Track Judges (dealing with rape cases) took 4.4 hours over three months. Studies such as these provide policymakers with evidence to implement targeted and effective solutions.

Experimental research in the Indian legal system is an idea whose time has come. Judicial reforms are far too important to be implemented without the rigorous backing of such research.

[Leah Verghese is with DAKSH, a non profit based in Bengaluru working on judicial reforms]

The Hindu,

12 December 2019.



Constitutional Justice is non-negotiable

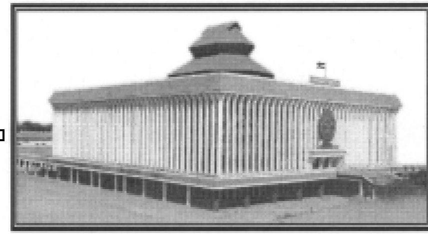
B. Sudarshan Reddy & Kalpana Kannabiran

Last Friday, the country was rudely awakened to the news of the deaths, in an encounter early in the morning, of the four accused in the rape and murder of the young veterinarian in Hyderabad - an incident, which happened on Wednesday, triggering an angry response across the country with demands for speedy justice. Some politicians demanded the public lynching of rapists. Members of the public were justifiably anguished that a gruesome crime such as this was even possible in the heart of a vibrant metropolis. It brought back memories of a similar and gruesome sexual assault on a young woman in Delhi in December 2012. Just before the veterinarians's murder, in Asifabad close to Hyderabad, another woman of about the same age was sexually assaulted and murdered by three men; she belonged to an extremely vulnerabe nomadic community that eked out a living from wage labour and petty vending. These cases are just two in a long list where women across India have been killed and maimed in the most brutal fashion while we have had a stringent, amended rape law in place and also fast track judicial processes.

Sexual assault is pervasive, these incidents tell us, and the response must be systemic, not episodic.

In moments such as this, families react with deep anger and grief. Most times this is exhibited through a demand for instantaneous retribution. For several affectioned families, death is the only answer to rape, It is also a fact that this is not a universal view. Grief at loss and pathways to healing speak through different tongues, and we need to be mindful of this fact.

Public responses that equate judicial outcomes and "justice" to immediate and quick retribution are not universal, nor just. When men accused of causing grievous hurt and loss of life to women through acid attacks are simply killed in police encounters, we may hear popular applause and appreciation of the heroism of the



police; or we may, as we do now, be mere spectators to the showering of rose petals on police personel involved in the encounter. Where does this drawing of blood stop? Is retributive justice the way to go in a democratic country that prides itself in its unprecedented historical legacy of resisiting violence in fundamentally non-retributive ways?

The larger picture in mind

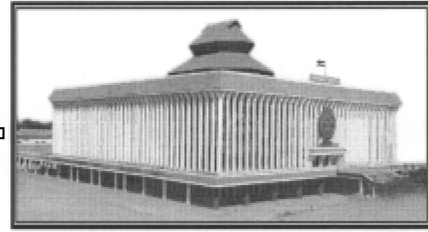
In thinking through the course of justice, it is extremely important for us to rise above the heat of the moment and provide moral reassurance and comfort to families, while keeping sight of the rule of law and constitutional tenets. The ends of justice are not served by wanton killing and retributive blood lust. The course of justice cannot be determined by the grief and grieving of victims' families. Justice lies in supporting them in their moment of grief and pain and insisting on due process that brings suspects and accused to trial through a robust, stringent and competent criminal investigation.

This is the challenge before governments and the criminal justice administration, especially the police.

After the December 2012 incident, in response to the widespread demand for a more stringent law and fast track courts, the law on rape was amended substantially based on the recommendations and deliberations of the justice J.S. Verma Committee. The Criminal Law (Amendment) Act, 2013, or Nirbhaya Act, 2013, as it is christened, is testimony to the possibility of translating public angst into just law. That is a victory for the movement against rape that Nirbhaya's family must celebrate as their own.

A note for the Indian Police

There is a procedure prescribed by the law for criminal investigation, This is a procedure embedded in constitutional principles and honed over decades of thinking on keeping constitutionalism alive and throbbing through the most testing times. Article 21 of the Constitution of India- "No person shall be deprived of his life or personal liberty except according to procedure established by law" - is fundamental and non-derogable. The Police, as officers of government, are bound by the Constitution - there are no exceptions.

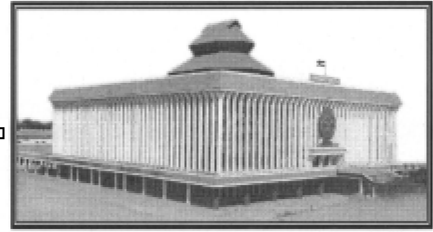


The case at hand: four suspects are apprehended and shot in custody within a week, without the criminal investigation having commenced in any substantive way. They were shot purportedly when they tried to escape during an exercise of reconstruction of crime at the scene of offence - so even that very preliminary step in criminal investigation had not been completed. The Police personnel unnamed, except for a Commissioner of Police- have caused the investigation of the crime of rape and murder to abate by killing the suspects.

Before we examine the problems in this action, let us refresh our memory of a core constitutional precept as set out in the Salwa Judum case in 2011: "Modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate States, violence against anyone, much less its own citizens, unchecked by law, and notions of innate human dignity of every individual". This is the touchstone of the constitutionally prescribed rule of law, which police officers are schooled in as part of their foundational training.

The Supreme Court of India, by resurrecting Justice H.R. Khanna's dissent in Puttaswamy in 2017, has prescribed the interpretation of Article 21: It is non-negotiable, non-derogable, and is not suspended even during conditions of Emergency. We are not living under declaration of Emergency so the duty of care is more onerous on the Police. Any argument on the actions being carried out in 'purported discharge of official duties' especially involving the death of unarmed persons in custody cannot stand the narrowest test of Article 21.

There is no law in force in India that authorises the Police to kill. The plea of self-defence cannot be used to rationalise a targeted, premeditated killing of suspects in custody. This plea is bound to the apprehension of death at the hands of the suspects at the time that the suspects are shot. There is nothing to suggest that the four suspects posed a threat to the lives of the Police personnel since they were admittedly in custody and, therefore, presumably unarmed. The police have confessions of the suspects while in custody, the evidentiary value of which must be evaluated by the court; but we



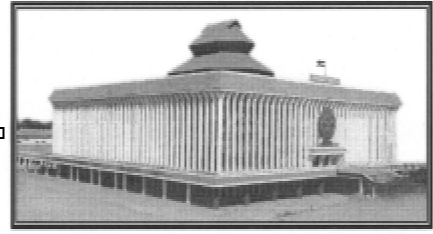
have on the other hand an open declaration by the police of shooting and causing death. As was argued in the Encounters case before the Andhra Pradesh High Court, the discussion on the law 'was never whether there should be indictment and trial when homicide is committed in self-defense'. The debate was on 'whether a plea of self-defense where excessive force is used, should be tried for manslaughter or murder'. We have deliberated on this at length in the High Court of Andhra Pradesh and the full bench decision on encounters can scarely be forgotten especially because these are unarmed commoners in custody.

A part of democracy

Where does that leave us? The case of the rape and murder of the veterinarian abates with the killing of all four suspects. This without giving a chance for the law to operate. However, we now have a fresh case of the murder of four unarmed suspects in custody that must be investigated with police personnel required to stand trial. The pathways of justice are not linear nor without obstacles. But we have , as a people, chosen the route of democracy and the Constitution, so we really have no option but to school ourselves in constitutional mortality. For as Dr. B. R. Ambedkar cautioned in anticipation, constitutional morality must replace public morality. It is not easy, because it is not a natural sentiment. But it is non-negotiable.

[Justice B. Sudarshan Reddy is a former judge, Supreme Court of India
Kalpana Kannabiran is Professor and Director,
Council for Social Development, Hyderabad.]

The Hindu,
09 December 2019.



A growing blot on the criminal justice system

Faizan Mustafa

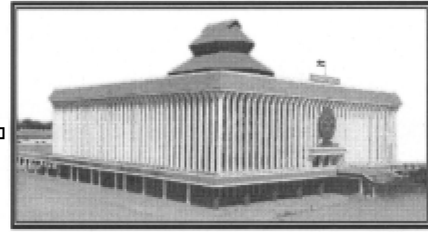
The Indian criminal justice system increasingly reflects the idea of "power" rather than "justice". Since the promise of criminal law as an instrument of safety is matched only by its power to destroy, guarantees of due process were accordingly incorporated in the criminal procedure so that every accused person gets a fair trial.

Winston Churchill said: "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country." We, in India, continue to follow a "culture of control" and a tendency to "govern through crime". There are instances where the police, of late, have become the judge and the media, especially electronic, has started behaving like a court.

A disturbing norm

The deaths, in an encounter last Friday, of the four accused in the rape and murder of a young veterinarian in Hyderabad (it happened on Wednesday) has revived the debate on the "right to kill", or "extra-judicial killings" or "fake encounters", which is the ugly reality of our country. Earlier, these encounters used to be criticised by the public and media. But in the new and "resurgent" India, we have started celebrating this instant and brutal form of justice. Blood lust has become the norm in preference to due process and constitutional norms. For example, there were many in Hyderabad who were seen showering flower petals on the police officers involved in Friday's encounter. Even the father of the Unnao rape victim has demanded "Hyderabad-like justice". Is India moving from rule of law to rule by gun ?

We have reason to be concerned about delays in rape trials. But a Hyderabad-like solution is absolutely out of the question. The new Chief Justice of India has rightly ruled out the instant justice model in a speech recently.

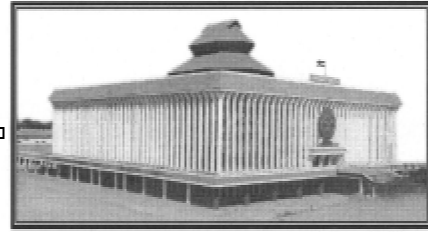


The right thing to do in rape cases is to appoint senior judges in fast track courts; no adjournments should be permitted, and rape courts should be put under the direct control of High Courts; the district judge should not have any power to interfere, and the trial must be completed within three months.

The only consolation is that India is not the only country that uses encounters. A UN working group on “Enforced or Involuntary Disappearances” has noted, with anguish, that guilty officials are generally not punished. India is also bound by Resolution 1989/ 65 of May 24, 1989 which had recommended that the principles on the “Effective Prevention and Investigation of Extra Legal,. Arbitrary and Summary Executions” annexed to the Resolution be honoured by all governments. The UN General Assembly subsequently approved the principles. It resolved that the principles, “shall be taken into account and respected by governments within the framework of their national legislation and practices, and shall be brought to the attention of law enforcement and criminal justice officials, military personnel, lawyers, members of the executive and legislative bodies of the government and the public in general”. We have not done much in disseminating these guidelines and norms among our police and security forces.

Trigger-happy police ?

In the absence of a proper knowledge of international norms, police in India continue to protest against human rights standards in dealing with criminals. Some years ago, in Extra Judicial Execution Victim Families Association – the Supreme Court of India dealing with more than 1,500 cases of such killings in Manipur, Justice Madan B. Lokur said: scrutiny by the courts in such cases leads to complaints by the state of its having to fight militants, insurgents and terrorists with one hand tied behind its back. This is not avalid criticism since and this is important, in such cases it is not encounter or the operation that is under scrutiny but the smoking gun that is under scrutiny. There is a qualitative difference between use of force in an operation and use



of such deadly force that is akin to using a sledgehammer to kill a fly; one is an act of self-defence while the other is an act of retaliation."

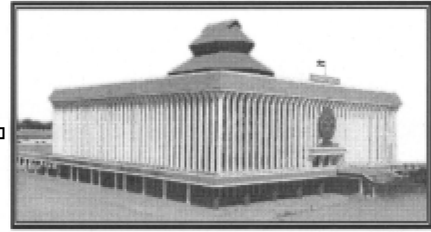
The "Hyderabad encounter" does not look like an act of self defence. It defies common sense and stretches credulity that the police would take accused to the scene of crime at 5.30 a.m. The sun rises a little after 6 a.m. The confession of rape by them to the police is irrelevant under Section 25 in the Indian Evidence Act, 1872. Moreover, our law does permit retraction of confessions by the accused.

The UN Human Rights Committee, in many reports, has said that "encounters are murders". Encounter killings are probably the greatest violation of the most precious of all fundamental rights-the right to live with human dignity. Many a time these killings are fake and are so orchestrated that is difficult to conclusively prove them wrong. These killings always take place with the prior consent of the highest authority, be it either administrative or ministerial. Encounters have indeed become the common phenomenon of our criminal justice system and there are police officers who covet the title "encounter specialists".

Our legal system does not permit police officers to kill an accused merely because he is a dreaded criminal, rapist or terrorist. Undoubtedly, the police have to arrest the accused and make them face trial. The Supreme Court has repeatedly admonished trigger-happy police personnel who liquidate criminals and project the incident as an encounter. The court observed in Om Prakash & Ors vs State Of Jharkhand & Anr on September 26, 2012. "Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to state terrorism."

The Punjab 'model'

During the Punjab insurgency in the 1980s, a large number of suspected militants were eliminated. through the encounter killings. The DGP of the State, the late K.P.S, Gill, even got the Governor of the State transferred on questioning the



police. Gill contemptuously termed those who tried to get justice in encounter matters as, litigation guns". The police tried its best to silence those who wanted due process such as Jaswant Singh Kalra, an activist, who used government crematoria records of just one Punjab district to show that at least 6,000 people were secretly cremated by the police.

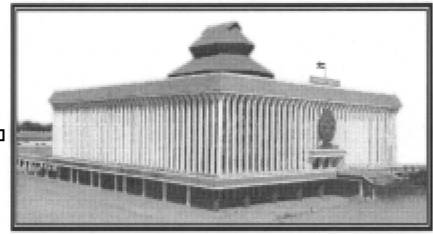
The Government of India itself admitted that as many as 2,097 people had been secretly cremated in Amritsar alone; in spite of the intervention of the National Human Rights Commission (NHRC) and the Supreme Court, just 30 cases were registered by the Central Bureau of Investigation. Punjab's response to terrorism was appreciated all over as a model to be followed by other States.

Similarly, in Kashmir about 8,000 people who were apparently in police custody were eliminated in a similar manner though the government contests this figure and says some may have even crossed the border. Even after the so-called end of insurgency, encounters have not come to an end. In 2000 for the massacre of 36 sikhs in chittisinghpura, five suspected militants were killed in an encounter. Subsequent forensic tests showed them to be innocent local villagers.

NHRC data show that of the almost 2,500 killings in 1993, half turned out to be fake; there were atleast 440 cases of encounters between 2002 to 2008. From 2009 to 2013, another 550 cases in different States were documented.

In Andhra Pradesh

Andhra Pradesh too has been notorious as far as encounter killings are concerned. In February 2009, in its judgement on a writ petition filed by the Andhra Pradesh Civil Liberties Committee in the context of 1,800 encounter deaths (1997-2007), the Andhra Pradesh High Court (of united Andhra Pradesh) recognised that encounter deaths are, prima facie, cases of culpable homicide. Thus in all cases of encounter deaths a first information report must be registered, and an independent and impartial investigation ensured. The state's plea of self-defence has to be established



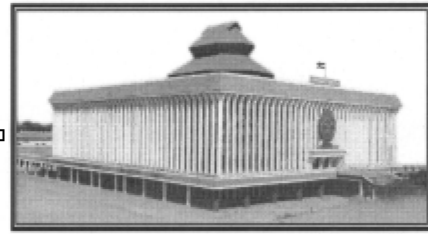
at the stage of trial, and not during the stage of investigation. The Supreme Court gave an ex parte stay on the judgement. The High Court in Hyderabad has shown its displeasure over this killing and will hear the matter on Thursday. It has ordered that the bodies of the Hyderabad encounter be preserved till it hears the matter.

One hopes the top court of the land will now find the time to finally hear this important matter and uphold this progressive High Court judgment.

[Faizan Mustafa is a Vice-Chancellor,
NALSAR University of Law, Hydrabad]

The Hindu,

10 December 2019.



Guarantee Internet rights

Jayna Kothari

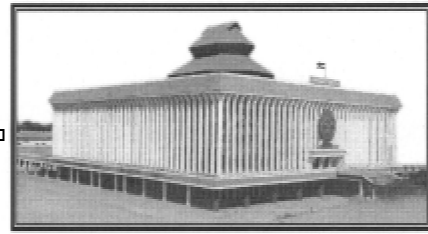
The Software Freedom Law Centre data says there have been more than a 100 Internet shutdowns in different parts of India in 2019 alone. In Kashmir, the government imposed a complete Internet shutdown on August 4, which still continues, The enactment of the Citizenship (Amendment) Act led to protests all over the country and State governments responded by suspending the Internet. Assam witnessed a suspension of mobile and broadband Internet services in many places, including in Guwahati for 10 days. There were Internet bans in Mangaluru, Delhi and Uttar Pradesh.

These bans are being imposed under different provisions of the law - some are imposed under Section 144 of the Criminal Procedure Code (CrPC), some under Section 5(2) of the Indian Telegraph Act, 1885 and some without any legal provisions at all.

It is time that we recognise the right to Internet access as a fundamental right. Internet broadband and mobile Internet services are a lifeline to people in India from all walks of life. While the Internet is certainly a main source of information and communication and access to social media, it is so much more than that.

People working in the technology-based gig economy-like the thousands of delivery workers for Swiggy, Dunzo and Amazon and the cab drivers of Uber and Ola - depend on the Internet for their livelihoods. It is a mode of access to education for students who do courses and take exams online. Access to the Internet is important to facilitate the promotion and enjoyment of the right to education.

The Internet provides access to transport for millions of urban and rural people; it is also a mode to access to health care for those who avail of health services online. More than anything, it is a means for business and occupation for thousands of small



and individual-owned enterprises which sell their products and services online, especially those staffed by women and home-based workers.

Thus, the access to the Internet is a right that is very similar to what the Supreme Court held with respect to the right to privacy in the justice K.S. Puttaswamy judgment, a right that is located through all our fundamental rights and freedoms - the right to freedom of speech and expression; freedom of peaceful assembly and association; freedom of trade and occupation and the right to life under Article 21 which includes within its ambit the right to education, health, the right to livelihood, the right to dignity and the right to privacy.

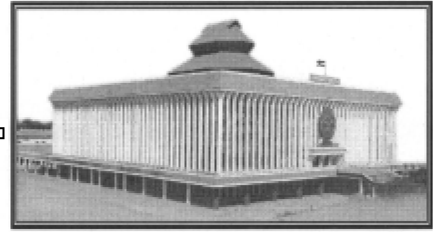
Internationally, the right to access to the Internet can be rooted in Article 19 of the Universal Declaration of Human Rights which states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The Human Rights Council of the United Nations Resolution dated July 2, 2018, on the promotion, protection and enjoyment of human rights on the Internet, made important declarations. It noted with concern the various forms of undue restriction on freedom of opinion and expression online, including where countries have manipulated or suppressed online expression in violation of international law.

The resolution affirmed that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice and includes the Internet.

The Kerala case

The High Court of Kerala made a start to the domestic recognition of the right to Internet access with its judgment in Faheema Shirin R.K. v. State of Kerala & Others, holding that, "When the Human Rights Council of the UN have found that the right to access to Internet is a fundamental freedom and a tool to ensure the right to education,



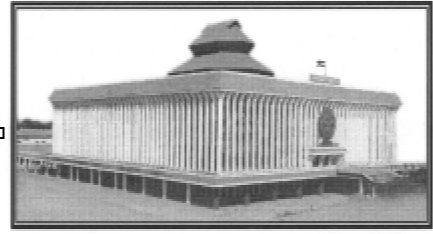
a rule or instruction which impairs the said right of the students cannot be permitted to stand in the eye of the law." As the Kerala case notes, mobile and broadband Internet shutdowns impact women, girls and marginalised communities more disproportionately than others.

It is time that we recognise that the right to access to the Internet is indeed a fundamental right within our constitutional guarantees.

[Jayna Kothari is Senionr Advocate and Executive Director, Centre for Law and Policy Research, Bengaluru]

The Hindu,

31 December 2019.



Setting the clock back on intersex human rights

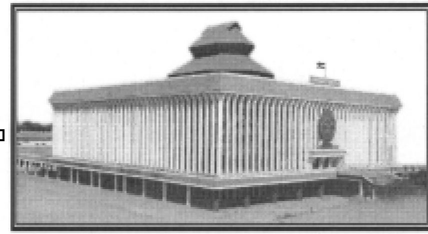
Prashant Singh

The Transgender Persons (Protection of Rights) Bill, 2019, has continued to trigger protests across the country. Without addressing the concerns of the LGBTQ community and considering any amendment to the draft Bill, the Rajya Sabha has passed the same version of the draft law that was passed by the Lok Sabha.

Journey of intersex human rights

In April 2019, the Madurai Bench of the Madras High Court delivered a historic judgment in Arunkumar v. The Inspector General of Registration. This judgment marks the beginning of a normative journey of intersex human rights in India. The court took up the issue of validity of consent given on behalf of intersex infants for undergoing sex selective surgeries. It held that the consent of the parent cannot be considered as the consent of the child. Hence, such surgeries should be prohibited. This is a momentous judgment as it recognises the consent rights of intersex children and the right to bodily' integrity. The judgment declared a prohibition on sex selective surgeries on intersex children in Tamil Nadu. Complying with the directions of the court, Tamil Nadu banned sex reassignment surgeries on intersex infants and children. As the Transgender Bill also deals with issues related to human rights protection of intersex persons, it needs to be examined in light of the developments of intersex human rights.

However, the title of the Bill itself is exclusionary as it does not accommodate all persons whose legal protection it seeks to recognise. It is instructive for the legislature to appreciate the nuances when it comes to distinguishing between transgender and intersex persons. Transgenders have a different gender identity than what was assigned to them at birth, while intersex indicates diversity of gender based on biological characteristics at birth. There are also multiple variations in intersex



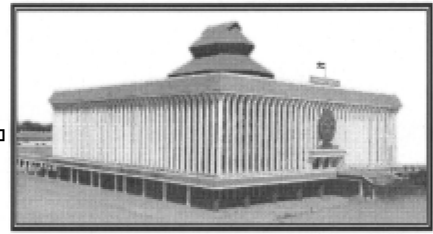
itself. The Bill is not in alignment with the evolving international human rights framework. Parliament will be well-advised to consider changing the title of the Bill to Gender Identity, Gender Expression and Sex Characteristics (Protection of Rights) Bill, 2019. The Bill also conflates the condition of intersex persons with transgender persons. Barring a few-overlaps, the legal and welfare needs of intersex persons are different from those of transgender persons.

Therefore, the definition should highlight this distinction betwfen transgender persons and intersex persons enabling them to exercise the rights which they are entitled to. Some persons born or living With intersex traits can' live with a non-binary identity or may choose to live as gender fluid persons. The Bill fails to account for these possibilities. Neither does it provide for the definition of terms such as gender identity, gender expression and sex characteristics.

The Bill doesn't say much about discrimination against intersex persons. Intersex conditions are termed in derogatory terms even by medical professionals. To address this, the Bill should have included a provision directing medical professionals to ensure that intersex traits are not characterised as "disorders of sex development". Intersex traits should not be considered as genetic defects/ disorders, and terms like 'gender dysphoria' should be used to characterise them.

Unnecessary medical procedures

As per court-based jurisprudence, medical procedures are 'not a necessity for self-identification. Still, the Union Health Ministry has admitted that medical procedure including sex reassignment surgeries are being performed on intersex children. The Ministry has given the justification that this is only done after a thorough assessment of the child, with the help of appropriate diagnostic tests and only after taking a written consent of the patient/guardian. When this response was presented before the Madras High Court in Arunkumar, the court slammed the Health Ministry for its poor understanding of consent rights and imposed a ban on the practice of sex



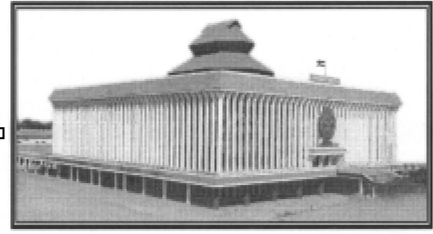
reassignment surgeries on intersex infants/children. The Bill fails to protect intersex persons from unnecessary medical intervention.

World over, the discourse around gender and sexuality has evolved a great deal in the last decade. However, the current legislative discourse on this issue suffers from lack of foundational understanding. Intersex persons are particularly vulnerable and experience barriers in access to education, employment, marriage, etc. In its current form, the Bill turns back the clock on decades of positive change brought about by intersex activists .

[Prashanth Singh is an advocate at the Supreme Court of India]

The Hindu,

04 December 2019.



The Data Protection Bill only weakens user right

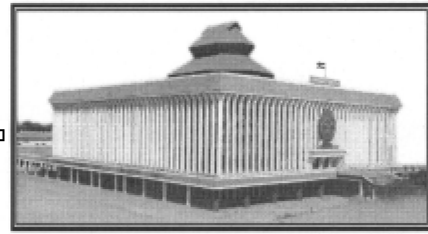
Apar Gupta

In the continuing social churn and widespread citizen protests, it would seem out of place to direct thought towards issues such as data protection. The Personal Data Protection Bill, 2019, which was introduced in the Lok Sabha this month, is a revolutionary piece of legislation that promises to return power and control to people in our digital society. Pending deliberation before a Joint Parliamentary Committee, it is intimately connected to the very same fundamental rights and constitutional principles that are being defended today on the streets and in the fields.

The Bill has seen serpentine movement, passing expert committees, central ministries and then the Lok Sabha in the winter session. Before focusing on the nuances and finer details which merit deliberation we must take a step back to look at the broader politics of personal data protection. This would help contextualise the legislative proposal and understand the degree of protection which is limited by overboard exceptions in favour of security and revenue interests.

Securitisation and revenue

The rise of the national security narrative has not been gone unnoticed by seasoned political observers. What is novel is its intersection with technology. This is central to several policy and political pronouncements by the present government. In many ways, it is a continuation of the politics of securitisation of the government from its previous term. For instance, the Bharatiya Janata Party's manifesto (sankalp patra) released before the general election 2019 provides useful insight where it states appropriate technological interventions centred around Aadhaar. This shrugs off any recognition of its contested legality before the Supreme Court which ruled on the



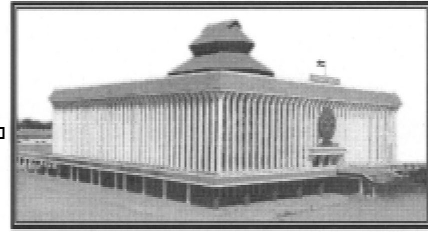
fundamental right to privacy. Privacy is mentioned just once in this voluminous document — 49 mentions of 'security' and 56 mentions of 'technology'.

This is a trend which continues. The President of India's address to Joint Sitting of Parliament on June 20, 2019 — fresh from the results of the general election — proclaimed that "my government is committed to that very idea of nation-building, the foundation for which was laid in 2014". The priorities of the government are clearly charted out with zero mention of privacy or data protection; there are 18 mentions of 'security' and eight of 'technology'. This familiar template is again found in the Prime Minister's Independence day speech on August 15, 2019 which focussed on dramatic social change. He noted: "I believe that there should be change in the system, but at the same time there should be a change in the social fabric." There is zero mention of 'privacy' or 'data protection'; however there are seven mentions of 'security', six on 'technology' and five for 'digital'. There may be government policy documents that may emphasise or contradict these assertions. However these statements made by high public officials at historic times when they may be widely viewed by large number of Indians are deserving of primacy. They reveal, at the very least, a pecking order in terms of viewing both technology and security as high priorities in governance objectives.

As Edward Snowden explains in his *Permanent Record,* there is a symbiotic relationship between the financial model of large online platforms and security interest. They both feed off personal data and the attention economy, where platforms gather this data and the government then seeks access to it. In India this is being taken a step further. The government is seeking to not only access data but also collect it and then exploit it — making it an active data trader for the generation of revenue to meet its fiscal goals.

Principles in conflict

First, the scale of data collection is ambitious and broadly contained in the 'Digital India' programme; on its website it says: "to transform the entire ecosystem

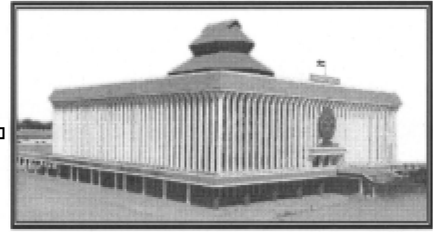


of public services through the use of information technology…”. Here, all elements of a citizen-state interaction are being data-fied. In the view of some technologists, this also fulfils geostrategic goals when personal data is viewed as strategic state resource. However, this poses grave risks to the right to privacy. These become evident from a casual reading of the national Economic Survey of 2019, which in Chapter 4 devotes an entire chapter on the fiscal approach towards personal data. In a “Chapter at a glance” it says: “In thinking about data as a public good, care must also be taken to not impose the elite’s preference of privacy on the poor, who care for a better quality of living the most.”

Two tangible examples show the operation of this policy framework. The first is with respect to the recent sale of vehicular registration data and driving licences by the Ministry of Road Transport and Highways. Here, quite often, the principles of a data protection law would conflict with these uses as it would break the fundamental premise of purpose limitation. This principle broadly holds that personal data which is gathered for a specific purpose cannot be put to any other distinct use without consent of the person from whom it was acquired. The second is an expert committee (headed by Kris Gopalakrishnan, Chairperson, Infosys) on what is termed “community data”. While the definition of such, “community data” is contested, as per the note it is plainly obvious this is again to serve fiscal interests of the state and technology businesses when it states that such data “is critical for economic advantage”.

Muddled formulation

The existing draft of the Data Protection Bill is reflective of a political economy that is motivated towards ensuring minimal levels of protection for personal data. It has a muddled formulation in terms of its aims and objectives, contains broad exemptions in favour of security and fiscal interests, including elements of data nationalism by requiring the compulsory storage of personal data on servers located within India.



From its very preamble it seeks to place the privacy interests of individuals on the same footing as those of businesses and the state. Here, by placing competing interests on the same plane, two natural consequences visit the drafting choices within it. First, the principle of data protection to actualise the fundamental right to privacy is not fulfilled as a primary goal but is conditioned from the very outset. Second, by placing competing goals — which contradict each other — any balancing is clumsy, since no primary objectives are set. This results in a muddy articulation that would ultimately ensure a weak data protection law.

This present draft of the Bill comes as a disappointment especially after the emphatic judgment by the nine-judge Bench of the Supreme Court on the Right to Privacy. The judgment contains categorical language that the Bill is a measure to actualise the fundamental right. However, this draft serves a political economy which at first blush appears attractive in its promise of taking us away from the dull maxims of constitutionalism and delivering us a digital utopia. Again, this was best phrased by the Prime Minister when he stated at the Digital India dinner on September 26, 2015, at San Jose, California: "... technology is advancing citizen empowerment and democracy that once drew their strength from Constitutions."

Hence, on a broader read, the Data Protection Bill is not a leaky oil barrel with large exceptions, but it is a perfect one. It will refine, store and then trade the personal information of Indians without their control; open for sale or open for appropriation to the interests of securitisation or revenue maximisation, with minimal levels of protection. For this to change, we have to only focus on red-lining the finer text of this draft but also reframing large parts of its intents and objectives.

(Apar Gupta, Executive Director of the Internet Freedom Foundation;
He is Delhi based lawyer)

The Hindu,
04 December 2019.

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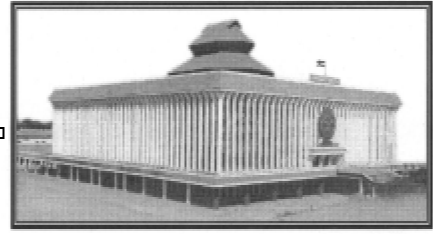


The dubious legal case for an NRIC

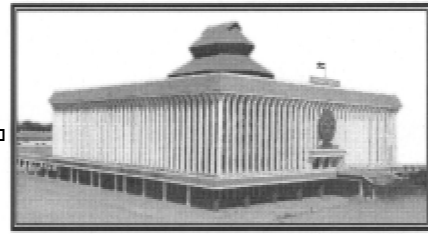
Jairam Ramesh & Mohammad Khan

On November 20, 2019 the Union Home Minister, Mr. Amit Shah, answered a starred question in the Rajya Sabha thus: “Preparation of National Register of Indian Citizens (NRIC) is governed by the provisions of Section 14A of The Citizenship Act, 1955 and The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003. Section 14A of the Citizenship Act, 1955 provides for compulsory registration of every citizen of India and maintenance of NRIC. The procedure to prepare and maintain NRIC is specified in The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003.”This answer is mischievously misleading inasmuch as it suggests that a nationwide NRIC is mandated by law. Section 14A in the Citizenship Act of 1955 provides in sub-section (1) that “The Central Government may compulsorily register every citizen of India and issue national identity card to him”. The word “may” implies a discretion contingent on other factors that is at odds with the supposed “compulsory” nature envisaged immediately thereafter. A statute which issues a compulsory command must necessarily use the word “shall” and not the suggestive “may”. It may be worthwhile to note that this section was introduced in January 2004 in the last days of the National Democratic Alliance (NDA) government.

Rules that authorise an NRIC

Let us now examine the 2003 Rules cited by the Home Minister in the response given. Three Rules are of particular interest, Rules 11, 6 and 4, which seem to grant some vague sort of authority for a nationwide NRIC.

Rule 11 states that the “Registrar General of Citizen Registration shall cause to maintain the National Register of Indian Citizen in electronic or some other form which shall entail its continuous updating on the basis of extracts from various registers

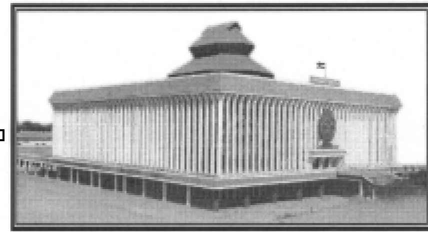


specified under the Registration of Births and Deaths Act, 1969 and the [Citizenship] Act [1955].” It, therefore, confines the Registrar General’s responsibility to a periodic revision of the National Register by updating it with the information available with the Registrar of Births and Deaths. No action or duty is enjoined upon the citizens to apply for (or prove) their citizenship afresh.

However, Rule 4 places the responsibility to carry out a census-like exercise on the Central government and not on citizens. This deals with the “Preparation of the National Register of Indian Citizens” which provides that the Central Government shall carry out a “house-to-house enumeration for collection for particulars related to each family and Individual including the citizenship status”. This is a distinctly passive process compared to the gruelling exercise that was forced upon citizens in Assam. In fact, the Assam exercise of making “residents” register vis-à-vis a specific cut-off date (in the form in which it was done) was an explicit exception, inserted by amendment through Rule 4A in 2009, and not the norm.

In direct conflict with both the above rules, Rule 6 provides that every individual must get himself/herself registered with the Local Registrar of Citizen Registrations during the period of initialisation (the period specified as the start date of the NRIC). Note that this does not begin with a non-obstante clause or words that give it overriding effect over all other clauses. What this means is that this rule is circumscribed by the other clauses in the Act.

Herein arises the dilemma, as a direct consequence of contradictory provisions in the Rules. We have Rule 11, which says that updating the NRIC entails updating the information available with ‘Registrar of Births and Deaths’ with no de novo process envisaged. Then, we have Rule 4, which says that a census-like exercise shall be carried out and, if the Central government wants to exclude a citizen, it will give him/her a hearing. And then, we have Rule 6, which says that a citizen shall have to get himself/



herself registered once a start period is specified. These Rules are in direct contradiction with one another, and smack of non-application of mind and arbitrariness.

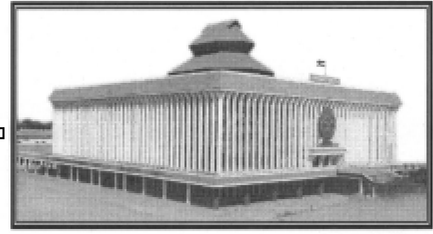
Not mandatory

To conclude, the blunt answer as to whether the NRIC exercise is mandatory and inescapable is ‘no’. The rules, as currently drafted, do envisage other less destructive scenarios to register “citizens” (not “residents”) which, one can argue, are redundant in the wake of the Aadhaar Act and not mandatory. This ambiguity is also clear from the answer given in Parliament which, in a typically too-clever-by-half fashion, does not cite the exact rules that empower the Central government to carry out this exercise. However, under the Act, the Centre continues to enjoy rule-making powers and could issue rules which could make it mandatory in the Assam format.

There are other questions as well. Under the Foreigners Act of 1946, the burden of proving whether an individual is a citizen or not, lies upon the individual applicant and not on the state (Section 9). Will the proposed NRIC strip bona fide citizens of basic legal protections by inverting the burden of proof just to satisfy the nefarious political agenda of the ruling establishment?

The last time the Central government tried to make an identity enrolment mandatory was the Aadhaar project and this was struck down as excessive (except in limited and justifiable cases). The NRIC scheme, as proposed, would thus be directly in violation of the K.S. Puttaswamy judgment. Furthermore, not acquiring an Aadhaar number does not subject a citizen to the serious penal consequences envisaged in the case of an NRIC, i.e., the loss of citizenship. Can a piece of delegated legislation do so? The short answer is no. Not without violating Articles 14 and 21 of the Constitution.

The NRIC exercise promises to inflict a long period of insecurity on well over a billion people. The individuals most likely to suffer are those at the very margins of poverty, who risk being rendered stateless and worse, being incarcerated in detention camps which are truly a blot on our democracy. But what is all this in aid of? What

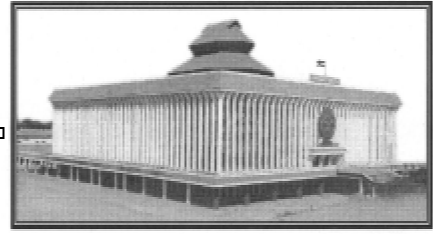


public interest is sought to be achieved? Such a register (NRC) has existed since 1951 only in Assam, as a special case. Incidentally, that NRC — implemented under Bharatiya Janata Party (BJP)-ruled Central and State governments — has debunked hugely the BJP's own exaggerated numbers regarding the extent of such 'illegal migration'. Now, the clamour is for a new NRC in Assam. It appears that facts must be made to fit prejudices and propaganda. The truth of the matter is that the Prime Minister and the Home Minister are always in search of divisive issues which have little relevance to day-to-day concerns of livelihoods. Their abject failures in economic management are being sought to be covered up by constantly harping on NRIC and citizenship issues.

[Jairam Ramesh is Rajya Sabha MP; Mohammad Khan is an advocate]

The Hindu,

03 December 2019.



A potential seedbed for private profits

R.Ramakumar

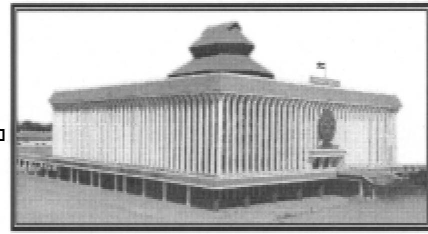
After passing through at least two versions, Seeds Bill 2019 is now under Parliament's consideration. The earlier versions of the Bill, in 2004 and 2010, had generated heated debates. The present version promises to be no different.

In 1994, India signed the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In 2002, India also joined the International Union for the Protection of New Varieties of Plants (UPOV) Convention. Both TRIPS and UPOV led to the introduction of some form of Intellectual Property Rights (IPR) over plant varieties. Member countries had to introduce restrictions on the free use and exchange of seeds by farmers unless the "breeders" were remunerated.

Balancing conflicting aims

TRIPS and UPOV, however, ran counter to other international conventions. In 1992, the Convention on Biological Diversity (CBD) provided for "prior informed consent" of farmers before the use of genetic resources and "fair and equitable sharing of benefits" arising out of their use. In 2001, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) recognised farmers' rights as the rights to save, use, exchange and sell farm-saved seeds. National governments had the responsibility to protect such farmers' rights

As India was a signatory to TRIPS and UPOV (that gave priority to breeders' rights) as well as CBD and ITPGRFA (that emphasised farmers' rights), any Indian legislation had to be in line with all. It was this delicate balance that the Protection of Plant Varieties and Farmers' Rights (PPVFR) Act of 2001 sought to achieve. The PPVFR Act retained the main spirit of TRIPS viz., IPRs as an incentive for technological innovation. However, the Act also had strong provisions to protect farmers' rights. It recognised three roles for the farmer: cultivator, breeder and conserver. As cultivators, farmers were entitled to plant-back rights. As breeders, farmers were held equivalent to plant breeders. As conservers, farmers were entitled to rewards from a National Gene Fund.

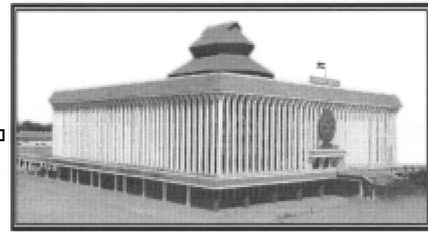


According to the government, a new Seeds Bill is necessary to enhance seed replacement rates in Indian agriculture, specify standards for registration of seed varieties and enforce registration from seed producers to seed retailers. While these goals are indeed worthy, any such legislation is expected to be in alignment with the spirit of the PPVFR Act.

For instance, a shift from farm-saved seeds to certified seeds, which would raise seed replacement rates, is desirable. Certified seeds have higher and more stable yields than farm-saved seeds. However, such a shift should be achieved not through policing, but through an enabling atmosphere. Private seed companies prefer policing because their low-volume, high-value business model is crucially dependent on forcing farmers to buy their seeds every season. On the other hand, an enabling atmosphere is generated by the strong presence of public institutions in seed research and production. When public institutions, not motivated by profits, are ready to supply quality seeds at affordable prices, policing becomes redundant.

But this has not been the case in India. From the late-1980s, Indian policy has consciously encouraged the growth of private seed companies, including companies with majority foreign equity. Today, more than 50% of India's seed production is undertaken in the private sector. These firms have been demanding favourable changes in seed laws and deregulation of seed prices, free import and export of germplasm, freedom to self-certify seeds and restrictions on the use by farmers of saved seeds from previous seasons. Through the various versions between 2004 and 2019, private sector interests have guided the formulation of the Seeds Bill. As a result, even desirable objectives, such as raising the seed replacement rates, have been mixed up with an urge to encourage and protect the business interests of private companies. Not absence, they feel, seed companies may be able to fix seed prices as they deem fit, leading to sharp rises in costs of cultivation.

Fifth, according to the PPVFR Act, if a registered variety fails in its promise of performance, farmers can claim compensation before a PPVFR Authority. This



provision is diluted in the Seeds Bill, where disputes on compensation have to be decided as per the Consumer Protection Act 1986. Consumer courts are hardly ideal and friendly institutions that farmers can approach.

Sixth, according to the Seeds Bill, farmers become eligible for compensation if a plant variety fails to give expected results under "given conditions". "Given conditions" is almost impossible to define in agriculture. Seed companies would always claim that "given conditions" were not ensured, which will be difficult to be disputed with evidence in a consumer court.

The way ahead

Given the inherent nature of seeds, farmer-friendly pieces of seed legislation are difficult to frame and execute. This is particularly so as the clout of the private sector grows and technological advances shift seed research towards hybrids rather than varieties. In hybrids, reuse of seeds is technically constrained.

The private sector, thus, has a natural incentive to focus on hybrids. In such a world of hybrids, even progressive seed laws become a weak defence. On the other hand, strong public agricultural research systems ensure that the choices between hybrids, varieties and farm-saved seeds remain open, and are not based on private profit concerns. Even if hybrids are the appropriate technological choice, seed prices can be kept affordable. For the seed sector and its laws to be truly farmer-friendly, the public sector has to recapture its lost space.

(R. Ramkumar is NABARD Chair Professor

at the Tata Institute of Social Sciences, Mumbai.)

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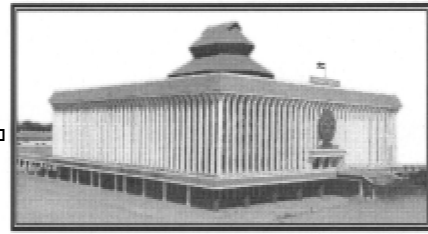


A Patently unconstitutional piece of legislation

Shadan Farasat

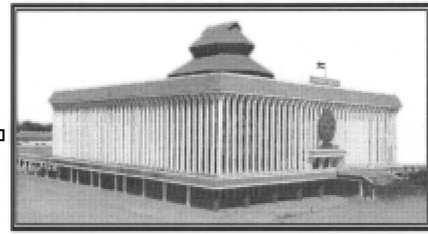
How a country defines who can become its citizens defines what that country is, because citizenship is really the right to have rights. For India, the choice was inexplicably made in 1950 when the Constitution was adopted, and Part II (concerning citizenship) provided citizenship based on domicile in the territory of India. In fact, under Article 6 of the Constitution, migrants from Pakistani territory to Indian territory were also given citizenship rights. Religion was conspicuous in this constitutional scheme, in its absence. The Constitution also recognises the power of Parliament to make provisions with respect to "acquisition and termination of citizenship". Pursuant to this, Parliament had enacted the Citizenship Act, 1955; again, religion is not a relevant criteria under the 1955 Act.

This position is now sought to be changed through the proposed Citizenship Amendment Bill, 2019 (CAB) that seeks to amend certain provisions of the 1955 Act.

The obvious question on which much of the debate has so far focused on is whether in a country such as India, with a secular Constitution, certain religious groups can be preferred in acquisition of citizenship. Especially when secularism has been declared to be a basic feature of the Constitution in a multitude of judgments. But in addition to this basic question, a look at the proposed CAB shows that it is peppered with unconstitutionalities. The classification of countries and communities in the CAB is constitutionally suspect.

Country classification

First to the countries. The basis of clubbing Afghanistan, Pakistan and Bangladesh together and thereby excluding other (neighbouring) countries is unclear.

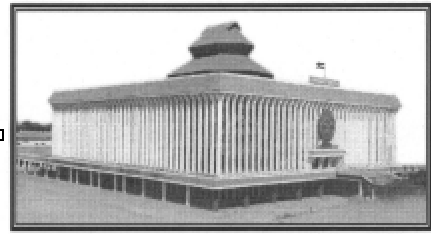


A common history is not a ground as Afghanistan was never a part of British India and always a separate country. Being a neighbour, geographically, is no ground too as Afghanistan does not share an actual land border with India. More importantly, why have countries such as Nepal, Bhutan and Myanmar, which share a land border with India, been excluded?

The reason stated in the 'Statement of Objects and Reasons' of the Bill is that these three countries constitutionally provide for a "state religion"; thus, the Bill is to protect "religious minorities" in these theocratic states. This reason does not hold water. Why then is Bhutan, which is a neighbour and constitutionally a religious state — the official religion being Vajrayana Buddhism — excluded from the list? In fact, Christians in Bhutan can only pray privately inside their homes. Many Bhutanese Christians in the border areas travel to India to pray in a church. Yet, they are not beneficiaries under CAB. Further, if religious persecution of "religious minorities" in the neighbourhood is the concern, then why has Sri Lanka, which is Buddhist majority and has a history where Tamil Hindus have been persecuted, been excluded? Why is also Myanmar, which has conducted a genocide against Muslim Rohingyas, many of who have been forced to take refuge in India, not been included? The CAB selection of only these three countries is manifestly arbitrary.

Focus on certain groups

On the classification of individuals, the Bill provides benefits to sufferers of only one kind of persecution, i.e. religious persecution. This itself is a suspect category. Undoubtedly, the world abounds in religious persecution but it abounds equally, if not more, in political persecution. If the intent is to protect victims of persecution, there is no logic to restrict it only to religious persecution. Further, the assumption that religious persecution does not operate against co-religionists is also false. Taslima Nasreen of Bangladesh is a case in point. She or similarly placed persons will not get

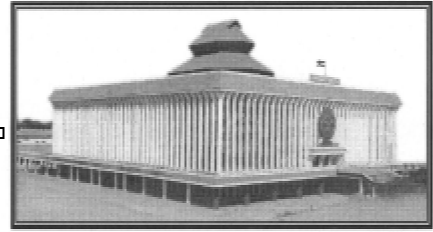


the benefit of the proposed amendment, even though she may have personally faced more religious persecution than many Bangladeshi Hindus. Similarly, Shias in Pakistan, a different sect of the same religion, also face severe persecution in Pakistan. The fact that atheists are missing from the list of beneficiaries is shocking.

Restricting the benefits of "religious minority" to six religious groups (Hindus, Sikhs, Buddhists, Jains, Parsis and Christians) is equally questionable. Ahmadiyas in Pakistan are not recognised as Muslims there and are treated as belonging to a separate religion. In fact, because they are seen as a religion that has tried to change the meaning of Islam, they are more persecuted than even Christians or Hindus. If the avowed objective of CAB is to grant citizenship to migrants on the basis of religious persecution in their country of origin, the absence of Ahmadiyas from the list makes things clear.

Article 14 of the Constitution of India, prevents the State from denying any "person" (as opposed to citizen) "equality before the law" or "equal protection of the laws" within the territory of India. From the serious incongruities of CAB, as explained above, it is not difficult to imagine, how it will not just deny equal protection of laws to similarly placed persons who come to India as "illegal migrants" but in fact grant citizenship to the less deserving at the cost of the more deserving.

How else does one explain how a Rohingya who has saved himself from harm in Myanmar by crossing into India will not be entitled to be considered for citizenship, while a Hindu from Bangladesh, who is primarily an economic migrant and who may not have not faced any direct persecution in his life, will be entitled to be considered apparently on the ground of religious persecution? Similarly, why a Tamil from Jaffna who took a boat to escape the atrocities in Sri Lanka will continue be an "illegal migrant" and never be entitled to apply for citizenship by naturalisation? It is not difficult to imagine many other examples of this kind that reveal the manifestly arbitrary nature of CAB. There is also the reduction in the residential requirement for naturalisation



— from 11 years to five. It is almost as if CAB in its provisions and impact is trying to give definitional illustrations of the word “arbitrary”.

CAB is devoid of any constitutional logic, as explained above. But it does have a sinister political logic. By prioritising Hindus in matters of citizenship as per law, it seeks to make India a Hindu homeland, and is the first de jure attempt to make India a Hindu Rashtra. If India is to stay a country for Indians and not for Hindu Afghans, Hindu Pakistanis and Hindu Bangladeshis and eventually for Hindu Russians, Hindu Americans, CAB should not be passed in Parliament. If it is, the judiciary must call it out for what it is — a patently unconstitutional piece of legislation. Else, make no mistake, it is only the beginning and not the end of similar legal moves, which, with time, will bring an end to the Constitution as we know it.

[Shadan Farasat is an advocate practising in the Supreme Court of India] (The views expressed are personal)

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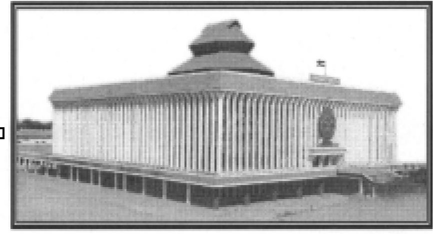
11 December 2019.



Safeguarding constitutional morality

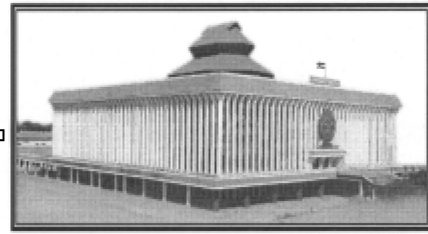
M.K.Narayanan

On the occasion of Constitution Day, at a joint sitting of Parliament to mark the 70th anniversary of the adoption of the Constitution, President Ram Nath Kovind, (quoting B.R.Ambedkar) made a significant observation that all three organs of the state, persons occupying constitutional posts, civil society members, and citizens should abide by 'constitutional morality'.

The reiteration by the President of an essential truth came not a moment too soon. Concerns are increasingly being voiced by different segments of people regarding violations of the Constitution by those in authority.

Concerns about the future of democracy and democratic traditions are, no doubt, growing across the world. In quite a few democracies, moreover, one can also perceive a decrease in democratic freedoms and a trend in favour of illiberal populism. India was hitherto perceived to be an exception to this, being protected by safeguards found in its Constitution — the product of a Constituent Assembly that consisted of not only the best legal minds, but also of compassionate individuals who espoused the finest human values.**Article 370, and after**

Recent developments in India, however, seem to 'singe', without as yet undermining, the basic structure and principles of the Constitution. Steps need to be taken expeditiously to prevent any further slide. For instance, much has been made of the fact of diluting Article 370, that it was a temporary provision. The reality is that it was, nevertheless, a provision made in the Constitution for a specific purpose, which clearly required more detailed and careful treatment before being peremptorily invalidated. Even if the end justified the means, the haste was unwarranted.



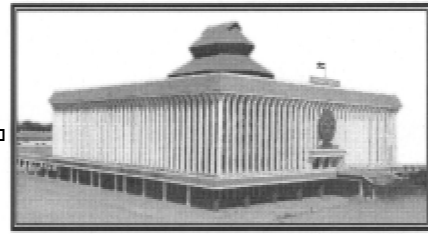
Again, while the Indian Constitution provides for a federal system with a unitary bias, the Central and State Governments both derive their authority from the Constitution. This implies that States are not exactly subordinate to the Centre. Splitting Jammu and Kashmir (J&K) into two Union Territories, without due consultation with different segments and shades of opinion there, including its political leadership, ran contrary to this essential principle. It violated the spirit, if not the letter, of the Constitution.

Furthermore, while secularism is becoming an ugly word today in many parts of the globe, we in India were free of any such bias. Lately, it would seem, that some of these biases are beginning to emerge in many circles in India as well, undermining our long held secular precepts. In its seminal judgment in the Kesavananda Bharati v. State of Kerala case (1973), the Supreme Court held that secularism is part of the basic structure of the Constitution and cannot be trifled with in the name of security or other considerations.

These are all portents of danger, and call for a great deal of introspection. They merit a calibrated response. Unfortunately, this does not seem to be happening. Those in authority would do well to heed the warning given by former President Pranab Mukherjee while delivering the second Atal Bihari Vajpayee Memorial Lecture that "A numerical majority in elections gives you the right to make a stable government. The lack of popular majority forbids you from a majoritarian government. That is the message and essence of our parliamentary democracy".

Drama in Maharashtra

Constitutional capers are aggravating this situation. The unfortunate drama enacted after the Maharashtra State Assembly results were announced could have been avoided if constitutional proprieties were adhered to. A pre-election alliance of the BJP-Shiv Sena had secured a majority, but the inability of the two allies to resolve



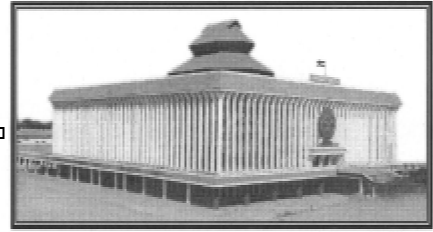
issues relating to sharing of power led to a breakdown. President's rule had to be invoked. Later, after a compromise was reached between the Shiv Sena, the Nationalist Congress Party (NCP) and the Congress to form a government, the President's rule was revoked in a midnight charade using the Prime Minister's 'special powers', and a BJP-led government was sworn in. The State also witnessed unseemly incidents such as sequestering of MLAs who were taken to safe havens to avoid poaching in the event of a trial of strength in the Assembly. That the attempt to impose a BJP-led government did not succeed is less important than the fact that provisions of the Constitution and the position of constitutional functionaries had been compromised.

A still more expedient experiment, which conflicts with some of the basic precepts contained in the Constitution, has been the passage of the Citizenship (Amendment) Act (CAA). On the face of it, the CAA only makes it easier for refugees from countries such as Afghanistan, Bangladesh and Pakistan to gain Indian citizenship. The fine point, however, is that it excludes certain categories, such as Muslims. This denies people belonging to one particular religion recourse to the new law.

While the CAA implicitly violates India's liberal traditions, when combined with the move to compile a National Register of Citizens, it carries an ominous ring. Many experts had apparently warned that the proposals were in violation of the Constitution, but these warnings were not heeded. That the Citizenship (Amendment) Bill passed through both the Houses without any detailed debate or discussion thereafter is, hence, unfortunate, giving an impression that a majority in Parliament is adequate to push through Acts which may or may not be in tune with the Constitution.

A study was needed

Whatever be the merits or demerits of the CAA, given India's many-layered democracy and the existence of different religious communities spread across



different regions of the country, a more detailed and in-depth study was called for before pushing through such a key measure. Granting citizenship may be the sole discretion of the Centre, with the States having no role. Yet, this could still be unconstitutional if it violates Articles 8 and 14 of the Constitution.

The violence in varying degrees of intensity that has erupted across the nation is a testimony to the divisive nature of this latest piece of legislation. The issue of refugees from neighbouring countries has been pending for long. No satisfactory outcomes were readily forthcoming. Given that the Constitution has been the guarantor of equal treatment to people of all religions and regions, and irrespective of geography and history, the issue of refugees called for not only greater understanding, but also more time, so that the fundamental principles of the Constitution were not violated. While piloting the Bill, the Home Minister had mentioned that “if the Congress had not divided this country on the basis of religion, there would have been no need to bring in this Bill”. This is hardly a valid argument. On the other hand, it raises more questions as to what were the real reasons behind the enactment of the Act.

What is also not understood is the haste with which the Bill was pushed through Parliament. India has been grappling with several more critical issues in recent months, including the state of its economy. To raise this matter at this time seemed uncalled for. At this juncture, it may be worthwhile to quote Winston Churchill ‘the price of greatness is responsibility’. Is India acting responsibly?

[M.K. Narayanan is a former National Security Advisor and former Governor, West Bengal]

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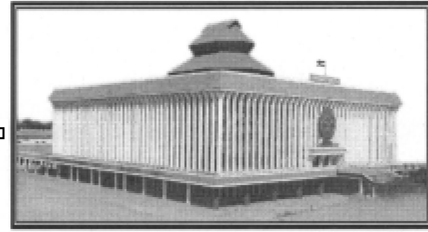
11 December 2019.



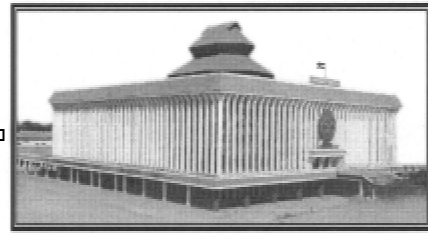
Strengthening Parliamentary Democracy and Capacity Building thorugh in House devices including Zero Hour.

(Speech delivered by **Hon'ble Speaker Shri P. Sreeramakrishnan**
at the 79th Conference of Presiding Officers of Legislative Bodies in India,
Dehradun, Uttarakhand, December 2019.)

Introduction

India adopted the parliamentary democracy system based on the conviction that it was the best suited for our Country, taking in to account our peculiar socio-political conditions. It was expected that this system would be the most accountable to the people and that it would work for the comprehensive development of the Country, meeting the basic needs of the people, achieving socio-economic and political justice for the common man, creating employment opportunities, eradicating mass poverty, ensuring universal education, providing effective health care and putting an end to the exploitation of the disadvantaged sections of society. The Democratic polity and the parliamentary system was determined by the history of the country, decided by its people and driven by the vision of our great freedom strugglers. Seventy years of our independence are a testimony of survival and success of democracy.

Having gone-through seventeen General Elections to the Indian Parliament and experienced a good degree of political stability for over seven decades, no one today would dispute that Indian democracy has come of age and that it is here to stay. India, by its unwavering commitment to the promotion of parliamentary democracy, has earned its rightful place as the largest working democracy in the world. Our country-men have proved time and again their abiding faith in Parliamentary democratic ideals, much to the surprise of the rest of the world. Economic cultural and technological changes that transformed India into what she is today in terms of global reckoning and



internal reshaping is the result of a long chain of policies and programmes and priorities that the Government of the country framed with a vision and followed with a verve. The law makers and the legislators who provided an initial momentum to progress were statesmen of high stature.

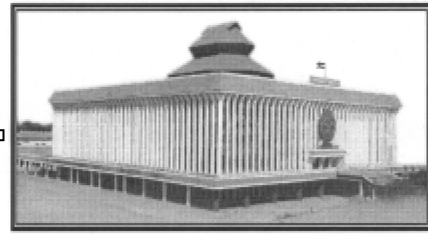
Over the past seven decades parliamentarism has struck deep roots in the Indian soil and our Parliament has emerged as the pivot of our political system. As the supreme representative body, Parliament has evolved into a people's institution par excellence, ever adapting to the changing needs of the times, articulating the nation's urges and aspirations and facilitating greater harmony in the country. Over the years, the constitution has been the watchdog, guiding us across the troubled waters and illuminating the path for us.

Challenges before Indian Democracy.

There are' several challenges on all fronts of our national life, particularly on the developmental arena to be tackled by us as a nation. Industrial and infrastructural bases are below the desirable levels. The benefits of the advances in Science and Technology are yet to reach large sections of our people. While small sections of the population enjoy great degree of affluence, there are large sections of others experiencing stark poverty. The practices of discrimination and exclusions in the social, economical, political and cultural spheres have their adverse effects on the overall development of large sections of our society. Such discriminations on social exclusion lead to inequalities and the consequent resentment among those at the receiving end of the Social Spectrum.

Empowerment of women is another challenge faced by the Indian democracy. This warrants urgent attention to the context that women get equal opportunities for involving themselves in the cultural process of decision making. All the political parties need to work together pro-actively to evolve political consensus on the Women's Reservation Bill, already passed by the Rajya Sabha in 2010.

Another challenge relates to the attempts to dilute the concept of

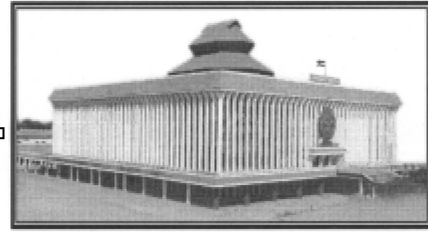


federalism and secularism and seeking to redefine nationalism from very narrow perspectives. The efforts of the divisive forces based on caste, communal, religious or linguistic lines should be contained and at the same time our effort should be to use our democratic commitment to address these issues with a constructive bent of mind, based on secular ideals. Another great challenge that we face centres around the erosion of our cherished national values which inspired our freedom movement and which characterised our national life in the early years of our Republic. We must earnestly strive together to restore them. Though we already have in place the frame work of political democracy, the task of achieving economic and social democracy still remains unfulfilled. This is a major challenge before the nation today.

Capacity Building

Democracy in technology is bringing technology in democracy. A new electronic public space and a new virtual community is well in sight. Information and communication technology has added new communities of bloggers, chatters and twitters. These may not necessarily be constituencies of voters but surely a community of reckonable voices. Technology has connected the people, emboldened them to express and exchange views. The legislators have to be technically equipped to handle and use the devices to understand and reach to people of their constituencies to acknowledge their aspirations, analyse their expectations, assure them of right intentions and advance with right actions to meet people's legitimate interests and fulfil their legitimate demands. Network should be used for neat and functional networking and not for negative and false campaigning. Websites should be used to surf for facts and be well informed about people's problems and not for shameful acts, which at times the press and the media report, boldly.

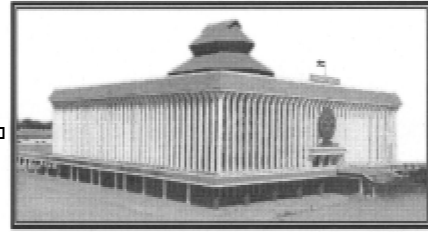
Legislators are a linkage and a liaison between the government and citizens. Linkage is a two way process of education for citizens and legislators about their respective roles in a representative democracy. It legitimizes democratic



government, legitimizes government vision and legitimizes government decision and action based on that vision. Representative democracy means public participation in decision-making, which is possible only through well informed, well meaning and well intentioned and well communicating legislators. Only legislators have access to information which common citizens do not have. Collecting, collating and communicating the information to serve best interest of the people is an art that necessarily requires building capacity much before legislators take on to making law. Capacity should be build to play a role of 'trustee' of people and their confidence, not role of a 'delegate' of people's problems.

Promotion of civic education among people is an area relatively untouched in our country. Capacity building in this sphere is essential if leadership is to be substantiated. Legislators can take that mantle on them only when they have the capability of assessing the nature of civic education needed in their constituencies. It may be about ideas and institutions of democracy, about roles of citizens in democracy, about policies and programmes and, most importantly, about Fundamental Duties prescribed in the constitution. Where rights take, precedence over duties, democracies suffer. Where parties take precedence over public representatives, quality of representation suffers.

Democracy promotes the inborn and inherent leadership qualities. Nevertheless, inculcation of traits essential for effective leadership is needed. It is possible through specialized courses for capacity building. Certain Legislatures in the country have developed facilities and occasion for capacity building for legislators. However, exclusivity of courses tends to make it an academic formality. Inclusivity of courses may be preferable and desirable. Development is a phenomenon of cooperation and coordination among people's servants, civil servants and civic society in the implementation process. This presupposes priority to initiative for consensus and priority to efforts for' solutions. Leadership, therefore, assumes role beyond decision-



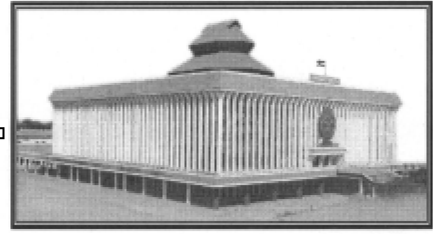
making. It anticipates a role of facilitator, consensus builder and problem solver. Perhaps, programmes for capacity building in the country can be made more effective through an inclusive approach.

Legislators are lawmakers. Process of law making involves debates and discussions. Debates distil the proposals and make it a filtered wisdom of intents and objectives. Quality debates lead to quality laws. Debate is an art of speaking, listening, analysing, thinking, answering and replaying. Complexities of modern society and technicalities of legislative issues, require knowledge and expertise in many areas. New and emerging issues are complicated in nature and wide in scope. A readiness to study legislation, consult experts, examine court decisions and correlate draft provisions to realities is expected from the legislators. Building capacities in art of debate is necessary to make the role of lawmakers effective.

One of the cornerstones of democratic system and institutions is Legislature's oversight. The purpose of oversight is to hold the government accountable for the policies that it implements. It is monitoring of the executive's actions. Only through an effective oversight can the Legislature ensure a balance of power and assert its role as true representative of the people and their interests.

Capacity building - A Kerala Model

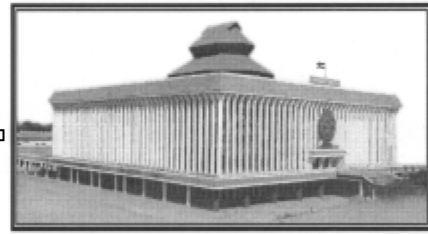
I am so happy to state that the Kerala Legislature has set up a Centre for Parliamentary Studies and Training (CPST) with a view to imparting and nurturing professional efficiency in parliamentary practices and proceedings to the legislators and officials. In a parliamentary democratic set up, it is only the institutions of legislature, which can impart such knowledge to all stakeholders of democracy. Besides members and officials, these stakeholders include media, the civil service, and the academic community including students, civil society and the citizens at large. Being the forerunner of many democratic innovations in India, the Kerala



legislative Assembly as part of its various initiatives started a Certificate Course in Parliamentary Practice and Procedure in the distance education stream to propagate the idea, principle, philosophv and practice of parliamentary democracy and the feedback and participation is noteworthy. We have published a reference book on the same pattern adopted in the famous book "Practice and Procedure of Parliament" by M.N. Kaul and S.L. Shakdher, in our regional language Malayalam about the practice, procedure and precedence in the Kerala Legislative Assembly. This book has been widely appreciated by legislators, academicians, research scholars, and students and so on.

The Kerala Legislative Assembly has organised a prestigious programme named "Festival on Democracy", which was inaugurated by Shri. Ram Nath Kovind, the Hon'ble President of India on 6th August 2018. A "**National Legislators' Conference on Challenges in The Empowerment Of Scheduled Caste And Scheduled Tribes In Independent India**" was held in connection with the above programme. During February, 2019, we have also conducted a **National Students' Parliament** focussing on promoting the faith and affinity towards politics and parliamentary democracy. Another national conference on **Challenges to Constitutional Values in India** is proposed to be conducted in the coming days in view of the recent political developments in our country. In this connection, I would also like inform this august gathering that steps have been taken for the setting up of a **National Institute for Parliamentary Studies Public Policy and Governance (NIPS)** with a vision to create world-class leaders, who through good governance, smart legislation, policy making and leadership excellence will uphold democratic values and ensure equitable and sustainable development for the citizens.

In addition to the Legislative Assembly Interpellation System (LAIS), a centralised web-based system for the effective management and monitoring of questions and answers and an Assurance Implementation Desk (AID), a Web



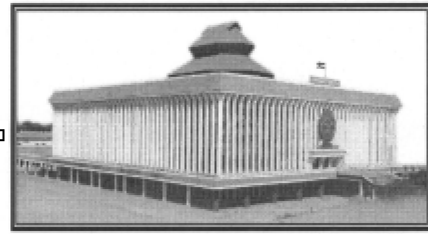
enabled system for the efficient distribution, follow up, implementation and monitoring of assurances made in the House, we are actively proceeding to the **"e-Vidhan project (e-Niyamasabha)"** with a vision to change over to-the total automation of the Assembly duly compiling all the subsidiary functions now being undertaken manually and make it a "Paperless Assembly".

More over, the intervention of Legislature is planned in television, social media and OTT platforms. It would be in the form of time-space acquisition in existing television channels on the one part and a comprehensive social media management plan with enhanced analytics and an OTT platform which enables both live broadcasting and Video on Demand on the other part.

Zero Hour - gaining popularity

The subject and relevance of Zero Hour proceedings gained popularity and acceptability amongst members, media and masses. But it did not find approbation from presiding officers in view of the fact that there would be unexpected encroachments, upon the precious time of the House during Zero Hour. Sometimes it would lead to acrimonious and unruly scenes and disorderly conduct on the part of some members. Its emergence and establishment started causing grave concern amongst presiding officers in legislature in India. In Kerala, after the amendments in the Rules of Procedures in 2018, the commencement of sittings on Ordinary days has been shifted to 9.00 AM from 8.30 AM with the Question Hour first. On completion of the Question Hour by 10.00 AM the Zero Hour starts which may extend beyond one hour depending on the number of matters which arise and the gravity and importance of such matters. It is also not necessary that there would be Zero Hour proceedings every day during the session.

The first and foremost item which may come up in Kerala Legislative Assembly during Zero Hour is the consideration of the notice for a Motion for an adjournment of the business of the Assembly for the purpose of discussing a definite matter of urgent public importance under Rule 50 of the Rules of Procedure. The consideration



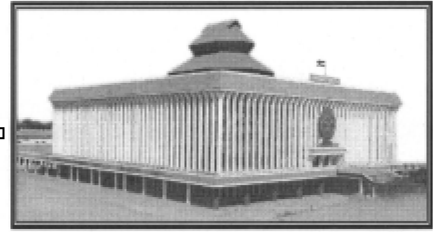
of the notice of adjournment motion will be followed by calling attention (Rule 62) and Submissions (Rule 304). Under Rule 304, a member who wishes to bring to the notice of the Assembly any matter or recent and urgent public importance can raise the matter with the permission of the Chair. Prior notice in this regard is a must. Unlike in the case of Special Mention in Parliament, the Minster concerned will give reply to the submissions orally at the same time. Subject to a maximum of 10 such matters will be permitted for a day. Over the years the Submissions have taken the shape of an additional devise for the members and many issues of great public importance and urgency began to be raised by members during the occasion in Zero Hour. The main advantage of this dev ice is that the minister will be able to give a reply directly and even policy announcements could be made by them as part of the reply.

Conclusion

Legislator's responsibility as a leader, facilitator, consensus builder, negotiator, problem solver, lawmaker, oversight manager and representative is a big package of capabilities demanded of him in today's time. An institutional mechanism, within the party structures and outside and inside the legislative system and beyond, for building capacities among the new and young legislators is very much essential. Sensitization programmes for those already in the ·field is also needed. I firmly believe that the Indian democracy and its institutions would get much more strength and vigour from such efforts.

We still have a very long way to go in achieving our developmental potential. Though we have made significant strides on all fronts of our national life, our achievements so far, not match our challenges or potential or expectations of the people. Many important national priorities are getting subsumed in petty politics. It is therefore imperative for us to identify those factors that are coming in the way of effective governance and evolve mechanisms for ensuring that our legislative bodies are used as a forum for portraying pursuing and addressing the issues of national importance.

Thank You.



Tenth Schedule of the Constitution and the role of Speaker

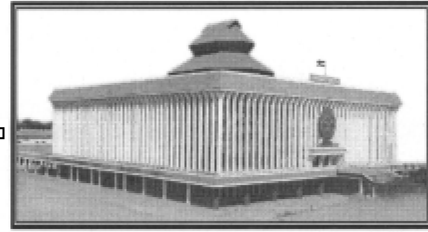
(Speech delivered by **Hon'ble Speaker Shri P. Sreeramakrishnan**
at the 79th Conference of Presiding Officers of Legislative Bodies in India,
Dehradun, Uttarakhand, December 2019.)

Introduction

The question of defections has been haunting the Indian polity for over decades. The events during the period at the Centre and various States reveal that the provisions of the Anti-Defection Law have not succeeded in eradicating the evil of defection so far. Under the anti-defection law the Speaker has the power to decide whether or not a legislator had defected from a party. The way this power had been exercised by the Speakers in India had left: enough scope for controversy. The frequent changing of coalition partners and the formation of new alliance has resulted in destroying the moral fabric of the Society. The persons who get into positions of power and authority transgress the limits that underlie the ethics of representation, which is very important in the functioning of our representative democracy.

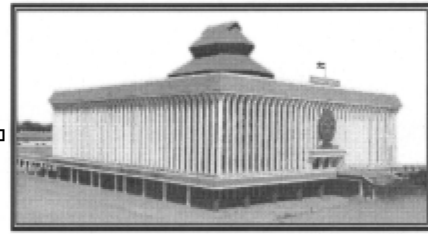
Role of Speaker in disqualification of Members

The Supreme Court of India, in its landmark judgment of Kihoto Hollohan v. Zachillhu [(1992) 1 SCC309] struck down Para 7 of the Ant-Defection Law (Tenth Schedule) which provided that the Speaker's decision regarding the disqualification shall be final and no Court could examine its validity. The Court held that the function of the Speaker, while applying the Anti-Defection Law is like that of a Tribunal and therefore is open to judicial review. At the same ti me the Court held that the Tenth Schedule is not violative of freedom of speech, freedom of vote and conscience of Members of Parliament and State Legislatures. The provisions are intended to strengthen the fabric of Indian Democracy by curbing unprincipled and unethical political defections.



Further, the Court set aside the disqualification order of the Speaker and directed the Speaker of Meghalaya Legislative Assembly to allow 5 Members who were disqualified by him to participate in the proceedings of the Assembly. We are also aware of an incident where the Supreme Court issued notice of contempt proceeding against the Speaker of the Manipur Legislative Assembly for ignoring the order setting aside the disqualification of seven members. In an another instance the Madras High Court (K.A. Mathialagan v. P. Srinivasan, AIR 1973 MAD 371) has observed that "the office of the Speaker being obviously an office resulting from election or choice, the person so chosen holds the office during the pleasure of the majority members. As a Speaker is expected to be a friend of every member and be circumspect in all respects, it is an office of reverence as total impartiality is the basic requisite of the office. The Court also observed that the Speaker is undoubtedly a servant of the House, not its Master and the authority transmitted to him by the House is the authority of the House itself, which he exercises in accordance with the mandates, interests and well being of the House."

Here in the State of Uttarakhand, one of the beautiful States in India, we have a classic example of court verdict emphasising the role of Speaker in defection cases. In the case of Dr. Shailendra Mohan Singhal & others v. Speaker Legislative Assembly, Uttarakhand & Another (Writ Petition (M/S) No. 792 of 2016-High Court of Uttarakhand), the petitioner members challenged the show cause notice dated 19.03.2016 given by the Speaker of the House asking why they should not be disqualified as per the Anti-Defection Law. The High Court is of the opinion that it would not be proper for this Court to interfere in any manner at this stage, with the proceedings, which have been initiated by the Speaker of the House, as there is absolutely no doubt that it is a matter relating to a question of disqualification of grounds of defection of a member of House, a question which can only be decided by the Speaker of the House and his decision is final.

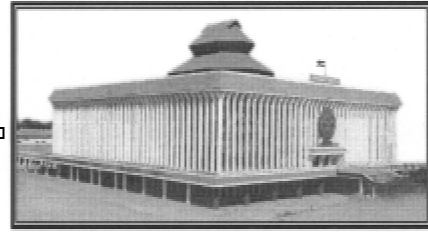


Anti Defection in Kerala

There are only two instances where the Speaker had disqualified a member of the Kerala Legislative Assembly under the Anti Defection Law since its inception. On January 15, 1990, the Speaker through his speaking orders disqualified one member under paragraph 2(1)(a) of the Tenth Schedule to the Constitution of India on the ground that the Member had voluntarily given up his membership of the political party, the Kerala Congress. The decision of the Speaker had been accepted by the Member and he did not seek the intervention of the Court against the order of the Speaker.

On February 17, 2016 the Speaker disqualified another member in terms of Article 191 of the Constitution and cited reason as per Para 2 (1) (a) of the Tenth Schedule. The most prominent charges against him was the letter written by the Member to the Speaker, seeking permission to vote independently or abstain from voting based on his issues with the political party to which he belongs. In addition to this, there was a complaint from the leader of his parliamentary party stating that he had evaded and defied his party whip on numerous occasions. Consequently to avoid disqualification, the member had submitted his resignation from the Assembly much before the Speaker could take a decision on the complaint against his defection. There upon he was disqualified under Tenth Schedule by the Speaker before taking a decision on his resignation letter.

In the above case (P.C. George v. The Hon'ble Speaker and others - Writ Petition (C) No. 37428 of2015 - High Court of Kerala) the Court held that the petitioner had a constitutional right to tender his resignation in order to have his seat vacated under Article 190 (3) (b) of the Constitution. The Court observed that the Speaker was bound to consider such letter of resignation to determine whether it is tendered voluntarily or genuine before taking any action on the complaint made against the petitioner. The constitutional right of the petitioner as a member-of Assembly to have his letter of



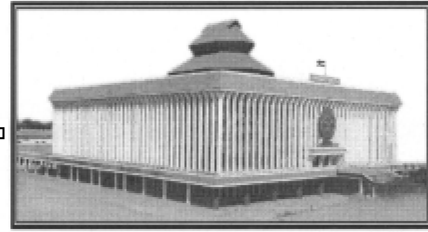
resignation considered has been trampled upon. It was a malafide action on the part of the Speaker to keep the letter of resignation put in by the petitioner pending and disqualifying him in the interregnum.

Conclusion

The Anti-Defection Law has, no doubt, several serious lacunae, which threaten to vitiate the democratic fabric of our polity. Any reforms in the working of the Anti-Defection Law would be meaningless without a thorough analysis of the composition, structure, and functioning and role perception of political parties in the present day politics. As regards the question of the impartiality of the presiding officer, it is disconcerting that some of the Speakers have tended to act in a partisan manner and without a proper appreciation, deliberate or otherwise, of the provision of the Tenth Schedule. In the recent Indian Parliamentary history one can very well see the examples of extremely partisan behavior of Speakers when it comes to interpreting and applying the Anti-Defection Law. It may be due to the fact that Speakers in India unlike in UK, do not resign from the political party after being elected to the post and thereby still maintaining a certain degree of partisan behavior. In view of the instances involving the partisan act of the Speakers in interpreting the Anti-Defection Law, I am of the opinion that we must be vigilant about an extremely significant recommendation of the National Commission to Review the Working of the Constitution, that the power to settle question of disqualification on grounds of defection should be taken away from the Speaker and be vested with the Election Commission, something which the Election Commission has also been talking about.

Now, the settled position of the law is that power of the Speaker .to adjudicate under Tenth Schedule of the Constitution is subject to the following conditions and limitations namely:

1. The Speaker has no power to proceed with the disqualification proceedings during the pendency of a motion for removal of the Speaker.



2. The Speaker should look into the intention of the Member before passing any order for disqualification.
3. The Speaker should issue show cause notice to the member to explain his/her stand, then only order be passed on merit.
4. The Speaker ought not do any constitutionally impermissible activities relating to disqualification of a member.

At present, any disagreement with the party organisation and a casting of any vote against the party whip on any issue can be subjected to a legislator to disqualification under Tenth Schedule. My feeling is that this should be changed.My suggestion in this regard is that the whip should only be applicable for any matter where the life of the Government is in danger and not to all votings as at present. In other words, except on voting relating to important legislations and confidence/non-confidence motions, whip should not be applied from the point of view of anti defection. If the law is amended such a way, the question of defection will arise only when a member actually changes allegiance or defies his party directives on critical issues.

Anyway, I am of the strong opinion that all the Stake holders of this law, across the board need to move beyond partisan politics and shall take a conscious effort to make our electoral politics more vibrant and democratic.

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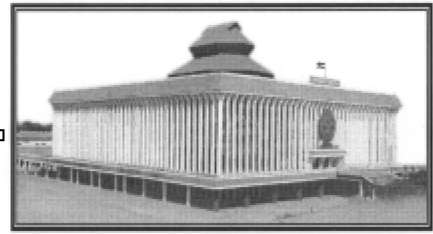

Cabinet approves conduct of Census 2021 and updation of National Population Register

Roshni Sinha

The Union Cabinet approved proposals to: (i) conduct the Census of India 2021 throughout the country, and (ii) update the National Population Register (NPR) in all parts of the country, except the state of Assam.

The Census will be conducted in two phases: (i) a house listing and housing census between April and September 2020, and (ii) population enumeration in February 2021. The NPR will be updated along with the house listing and housing census (except in Assam). The NPR is a register of the usual residents in the country. Usual residents refer to those who have either resided in a local area for the past six months or more, or intend to reside in that area for the next six months or more.

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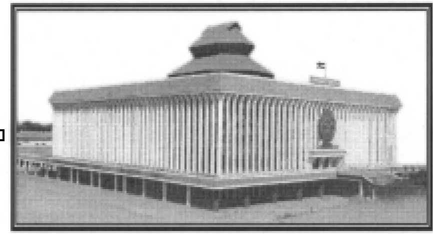

Changes notified to the areas regulated by the Inner Line Permit

Roshni Sinha

Currently, certain areas in Arunachal Pradesh, Mizoram and Nagaland are notified as "Inner Line" areas under the Bengal Eastern Frontier Regulations, 1873. In these areas, entry and exit of persons is regulated by an Inner Line Permit.

The Ministry of Home Affairs has issued a notification to replace these areas. The Inner Line will now include: (i) Arunachal Pradesh, (ii) Manipur, (iii) Mizoram, and, (iv) notified areas of Nagaland. The Home Department of Nagaland has notified Dimapur under the Inner Line, in addition to the rest of the state.

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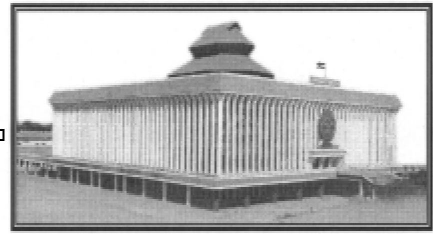

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Nagaland declared as a disturbed area under AFSPA

Roshni Sinha

The Ministry of Home Affairs has declared the entire state of Nagaland to be a 'disturbed area' under the Armed Forces (Special Powers) Act, 1958 (AFSPA), for a period of six months from December 30, 2019. [13] The AFSPA empowers the governor of the state, or the central government, to declare any part of the state as a 'disturbed area'. In a disturbed area, armed forces officers have certain special powers. These include the power to open fire at any individual for violating laws which prohibit: (i) the assembly of five or more persons, or (ii) the carrying of weapons.

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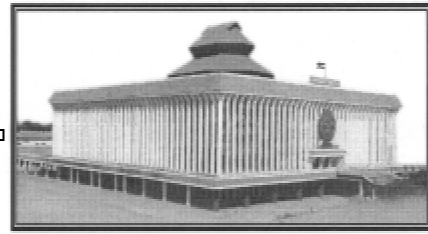


Citizenship (Amendment) Bill, 2019 passed by Parliament

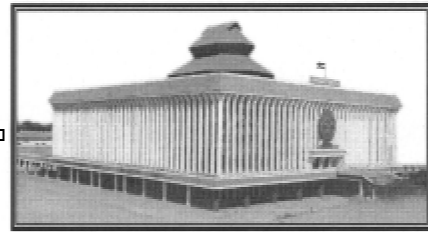
Roshni Sinha

The Citizenship (Amendment) Bill, 2019 was passed by Parliament. [3] The Citizenship Act, 1955 provides various ways in which citizenship may be acquired. It provides for citizenship by birth, descent, registration, naturalisation and by incorporation of territory into India. Key features of the Bill include:

- **Definition of illegal migrants**: The Act prohibits illegal migrants from acquiring Indian citizenship. Illegal migrants are those foreigners who do not have valid passport or travel documents. The Bill amends the Act to provide that that the Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who entered India on or before December 31, 2014, will not be treated as illegal migrants.

- **Citizenship by naturalisation**: The Act allows a person to apply for citizenship by naturalisation if he has resided in India or has been in central government service for at least 11 years before applying for citizenship. For Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, the Bill reduces the residency requirement from 11 years to five years.

- The provisions on citizenship for illegal migrants will not apply to the tribal areas of Assam, Meghalaya, Mizoram, and Tripura, included in the Sixth Schedule to the Constitution. These tribal areas include Karbi Anglong (in Assam), Garo Hills (in Meghalaya), and Tripura Tribal Areas District. Further, it will not apply to the "Inner Line" areas notified under the Bengal Eastern Frontier



Regulation, 1873. In these areas, visits by Indians are regulated through the Inner Line Permit. Currently, this permit system is applicable to Arunachal Pradesh, Mizoram, and Nagaland.

- **Cancellation of registration of OCIs**: Overseas Citizens of India (OCIs) are entitled to some benefits such as a multiple-entry, multi-purpose lifelong visa to visit India. The Act provides that the central government may cancel registration of OCIs on certain grounds. These include: (i) if the OCI has registered through fraud, or (ii) if within five years of registration, the OCI has been sentenced to imprisonment for two years or more. The Bill adds one more ground for cancellation, that is, if the OCI has violated the provisions of the Act or of any other law notified by the government.

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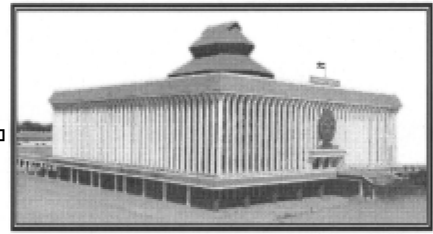

The Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Bill, 2019 passed by Parliament

Prachi Kaur

The Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Bill, 2019 was passed by Parliament. The Bill provides for the merger of the Union Territories (UTs) of Dadra and Nagar Haveli, and Daman and Diu into a single UT. The Bill makes consequential amendments including retaining the representation in Lok Sabha, the jurisdiction of the High Court of Bombay, and provisionally allotting all officials of the two UTs to the merged UT.

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