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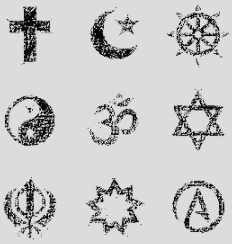
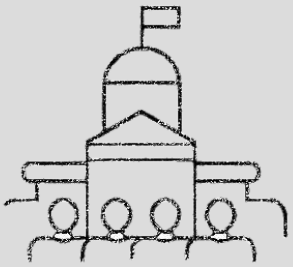
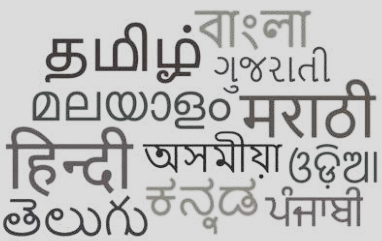
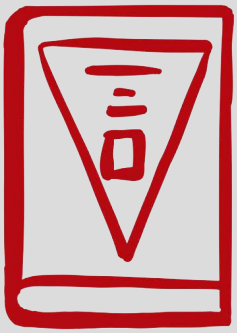
ONE NATION, MANY PATHS

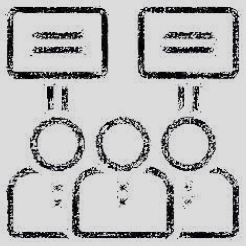
A Position Paper on the Indian Constitution











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BOOK OF INDIA

This report is an independent, non-commissioned piece of work by the Vidhi Centre for Legal Policy, an independent think-tank doing legal research to help make better laws.

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The cover image for this paper is a collective effort by Debadityo Sinha (Lead at Vidhi's Climate and Ecosystems Initiative), Manmayi Sharma and Ritwika Sharma.

Any errors are the authors' alone.

Contents

One Nation, Many Paths

A constitutional document is designed to act as a compass to guide popularly elected governments, as well as a fetter to restrain them. For such a reference point and limitation to be meaningful and acceptable over time, it must both be able to capture the founding principles of the nation as well as their evolution over time. This can only happen if the original document is nourished periodically, reinforcing the original vision while also ensuring that it speaks to today's challenges.

2022 is the 75th year of India's independence and the eighth decade of the functioning of the Constitution of India. While constitutional principles have largely remained resilient during this period, this juncture is an opportune one to reflect particularly on four basic facets of India's identity—secularism, federalism, multilingualism, and underpinning them all, liberty.

All four have faced significant challenges over the course of India's independent history and are being severely tested today. Federalism has often been reduced to an academic concept when powerful Union governments dismissed state governments led by opposing political parties; threats to secularism have been endemic since the communally charged days of partition and are even more acute today with the evolution of Hindutva as a mainstream ideology; Hindi imposition was a real possibility in the early 1960s when the honeymoon period for the usage of English was coming to an end and the possibility has continued to come up intermittently since then; and the space for liberty, best captured through discordant views, independent opinions, and free thinking, has been fast shrinking.

We are now at an appropriate time, neither too early, when these challenges are academic, nor too late, when the challenges have become insurmountable, to understand what the constitutional vision of secularism, federalism, multilingualism, and liberty is. Once the challenges, real and perceived, are identified, an evolved vision of what these concepts ought to mean can be articulated.

Deriving from Ramakrishna Paramhansa's pithy statement 'joto mot, toto poth' (as many views, as there are paths), we believe that India is one nation with many paths—governments, religions, languages, voices. It is this plurality that defines India as a nation where opposites cohabit, intermingle and get along. Out of this plurality arise many rich possibilities.

While some may grow tired today of hearing old slogans like "unity in diversity", our Constitution epitomises this slogan and it is this very document that has held India together by allowing us to live, work, learn, and grow alongside those different from us. Central to this achievement is the constitutional celebration of differences. An India filled with clones, yes-men and parroted views would neither capture the nation's vast plurality today nor create any meaningful possibilities for tomorrow.

The Constitution remains our best hope of ensuring that this spirit of plurality is sustained in India over time. With this objective, this paper—One Nation, Many Paths—is presented as a critical reflection on the Constitution: one in which an appraisal of developments since 1950 can lead to a reaffirmation of the original vision on some matters and the possibility of reorientation in others. The paper inaugurates a multi-year research project on the Constitution, its relevance, and need at a crucial moment in India's journey as a constitutional democracy. We invite you to join us in this reflection.

In the spirit of pluralism that we hold so dear, we hope we can encourage you to explore your own visions of India and its challenges, whether or not they are the same as ours.

I. Many Religions

A. Secularism and the Constitution

1. The motivations

Indian secularism and its contours have been often described as amorphous.[1] The shape that Indian secularism assumed was not by accident. On the contrary, the framers of the Constitution were acutely aware of the peculiarity of Indian circumstances which merited the need for a home-grown brand of secularism. Even though the term "secular" was not inserted in the Preamble to the Constitution, as originally adopted, there was agreement among the members of the Constituent Assembly on the necessity of establishing a secular state.[2] The framers of the Constitution were motivated by certain compelling concerns to adopt a form of secularism which could best respond to India's felt needs and realities.

To begin with, the framers could not contemplate the establishment of an "irreligious" or "anti-religious" state.[3] Given the penetration of religion in the lives of the Indian peoples, a Western-style rigid separation between state and religion would have been ill-suited.[4] Religion in India also places emphasis on specific practices, many of which naturally envisage participation from specific religious groups. Consequently, the rights associated with religion had to account for recognition of communities in addition to that of individuals.

The other key consideration which played on the framers' minds was the existence (as well as persistence) of religiously-sanctioned oppressive and illiberal social practices. The Constituent Assembly remained mindful of social customs which were concomitant with the practice of religion, and which adversely affected vulnerable groups within religious communities, particularly women and marginalised caste groups.[5] Consequently, state intervention was deemed necessary to uproot regressive practices which were inherent in religions.

2. The outcomes

The core of the Constitution's promise of secularism lies in specific provisions concerning religious discrimination and religious freedoms instead of the ceremonial insertion of the word "secular" in the Preamble.[6] The drafting of the provision concerning the rights associated with religion[7] witnessed considerable back-and-forth on its precise contours – whether the right was to be construed narrowly as the right to "worship", or broadly as the right to practice a religion.[8] Advocates of the latter contended that to construe religion narrowly as a set of performative rituals in a public place of worship would misunderstand the significance of religion for a believer.[9] Given how a religion can bear several elements, all of which could not be exhaustively specified in the Constitution, the right to religion was worded broadly so as to encompass divergent practices. A narrow right to worship would have denuded the rights associated with religion of their true content.[10]

Proponents of the contrary view argued that a broad interpretation of religion would bring within it illiberal customs and practices, such as child marriage, polygamy, and unequal laws of inheritance.[11] To meaningfully address this concern, the Constitution authorised the state to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice,[12] and to enact laws for the purpose of social welfare and reform.[13]

The freedom of religion, in its eventual formulation, conferred on all persons the right to profess, practise and propagate any religion. Concerns were expressed regarding the inclusion of the right to propagate, and how that could pave the way for proselytisation by coercive means.[14] Allaying these concerns, K Santhanam said that that provision was couched as a right to propagate, and propagation is merely a freedom of expression. Further, the provision did not employ the word 'convert' and, in any event, the state retained the authority to regulate mass conversions induced by undue influence.[15]

Discussions around the freedom of religion witnessed the repeated use of the term "secular state." Among the various forms a secular state could assume, there was an understanding among the members of the Assembly that such a state would neither establish a particular religion or provide any patronage to it, nor would any citizen receive any preferential treatment or be discriminated against simply on the ground of their religion.[16] The standout exception to this was the explicit inclusion of provisions for reform of various aspects concerning Hinduism and its associated practices, within the Constitution.[17] This exception apart, neutrality (understood as the state maintaining some distance from all religions) existed as a general undercurrent through the constitutional provisions concerning religious freedoms.

One manifestation of neutrality can be found in the constitutional provision prohibiting religious instruction in educational institutions wholly maintained out of state funds.[18] A multiplicity of views was expressed in the Constituent Assembly, spanning across the redundancy of prohibitions on religious instruction to the need for an absolute bar. Dr. Ambedkar alluded to the plurality of religions in the country, along with every religious community's considered belief that theirs was the only right path for salvation, as a potential source of controversy and conflict.[19] Eventually, a bar on religious instruction in state educational institutions was incorporated as a path of safety.

In the form that it eventually assumed, Indian secularism was palpably distinct from its Western counterparts. The Constitution exhibits a combination of the freedom of religion (for all individuals as well as communities), along with a mandate for the state to intervene in religious affairs.[20] It guarantees to every religious denomination the right to manage its own affairs in matters of religion, subject to public order, morality and health.[21] The adoption of a state religion for India was considered unsuitable,[22] while the guarantee of non-discrimination on grounds of religion, as well as religious minorities' right to establish and administer educational institutions of their choice were incorporated.[23] Owing to the Constitution's attempt to address various facets of the freedom of religion, India's constitutional vision for secularism is considered to have oscillated between the notions of "religious neutrality" (*dharma nirpekshta*) and "equal respect for all religions" (*sarva dharma sambhava*).[24]

B. Challenges to Secularism

Despite the ambiguity and open-endedness in the Constituent Assembly's unique vision for secularism in India, its implementation has faced challenges not so much because of any fault inherent in the vision itself as it has because of failures in applying and adapting its underlying principles. Indeed, principles in the Constitution often have to be worded broadly, leaving it to governments and courts to implement them effectively by developing specific rules.

In the case of religious freedom in India, governments actively sought to reform religious practices and administer places of worship, raising questions on where the limits of such intervention lay. Early on, the Supreme Court clarified that the Constitution recognised not only the freedom to believe in religious doctrines but also the freedom to "practice" religion in the form of rituals, ceremonies, modes

of worship, and even customs related to food or dress.[25] It also indicated that religious denominations would themselves have the freedom to decide which religious matters would be protected without outside interference.[26] However, this initial acknowledgement of the breadth, depth, and autonomy of religious freedoms was not maintained by courts in later decisions or governments in practice. While the government's ability to restrict religious freedom was supposed to be determined by exceptions to the freedom laid out in the Constitution, new "exceptions" have been created by changing the scope of the freedom itself. In a similar vein, reformist measures, legal schemes and administrative mechanisms on religious matters have been developed by governments piecemeal and on the basis of convenience or immediate need. Without systematic justifications and consistency, these measures have run the risk of degenerating into an invitation for future governments to discriminate. While the idea of a state religion has never been accepted under the Constitution,[27] courts and governments have failed to clarify how the complex and differentiated system of religious governance in the country respects the right against religious discrimination.

1. A narrow understanding of religious freedoms

Governments may legitimately need to interfere in various religious practices to maintain public order or health or to ensure social equity and the freedoms of others. However, if unchecked, governments may limit religious freedoms out of convenience or partisan interests. This is why courts must play a special role in defining religious freedoms and regulating exceptions to such freedoms. Conventionally, courts in secular countries define the boundaries of religion and then decide whether a particular practice is religious in this sense.[28] This is necessary if courts are to decide which freedoms are constitutionally protected because of their *religious* nature. If religion has too vast a scope in social life, it can become difficult for governments to reform practices in the interest of social justice. But if the understanding of religion is too narrow, governments would be free to limit strongly-held religious beliefs without having to justify their actions. In engaging with this problem, Indian courts have chosen to only protect those practices which are an "essential" part of the religion in question.[29] Under this approach, Indian courts directly examine religious texts and doctrines to decide what is or is not important to a particular religion, regardless of any widespread or genuine beliefs that the actual adherents of the religion may have. Over the years, courts have gone into the essentiality of such practices as praying at mosques,[30] the *tandava* dance by Ananda Margis,[31] the Jain practice of *santhara*,[32] the Muslim practices of triple *talaq*[33] and the wearing of the *hijab*,[34] and the prohibition of menstruating women's access to the Sabarimala temple.[35]

Instead of defining religious freedoms by differentiating secular practices from religious ones, courts have narrowed freedoms by differentiating essential religious practices from ones they deem unimportant. If courts only act when the very essence of a religion is threatened,[36] they leave many strongly-held beliefs unprotected while also taking away the ability of religious groups to define themselves. Certain religious practices may not be acknowledged because they are only followed by a smaller religious sub-group and not by the larger group that it is a part of. For example, in the *Sabarimala Case*, the Supreme Court did not recognise the practices of Ayyappans because it clubbed them with Hindus, and Ayyapan practices are not essential for Hindus.[37] By the same logic, new movements and dissenters from a religious tradition can be left without any protection at all, even if their minority status makes them more vulnerable.[38] Courts have also held that optional practices are not protected because only obligatory ones can be essential to a religion.[39] This means that a religious practice (like performing *santhara*, wearing a turban or the *hijab*, or applying *sindoor*) can be restricted by the government if it is voluntary as per a religion, and yet protected as a "freedom" if the religion makes it compulsory. In the

bargain, these judicial innovations leave religious freedom in India vulnerable to unchecked government interference.

2. The fate of the right to propagate religion

In a distinct but related development, the right to propagate religion, which is protected under the Constitution, has been restricted only to activities that create awareness about a religion's beliefs and not to the religious conversion of another person.[40] While any attempt to convert a person can only claim to be legitimate if it respects that person's free choice, narrow views on the right to propagate have encouraged governments to pass anti-conversion laws with vague terms that can be abused by the state as well as private parties. For instance, Odisha's Freedom of Religion Act, 1967 prohibits conversion activities through "the grant of any benefit, either pecuniary or otherwise". Later laws qualify the term by using "material benefit", attempting to define various ways in which conversion activities may become manipulative.

Recent laws in Himachal Pradesh, Uttarakhand, Uttar Pradesh, and Madhya Pradesh punish conversion that is done "by marriage", through "undue influence", on offers of "better lifestyle", or on threats of "divine displeasure". These laws fail to account for how, when a person wants to create awareness regarding their religion, they may have to express ideas regarding divine displeasure or the culture and lifestyle of a religious community. They may also be in various forms of private social relations of influence with a person (especially a child) who may be considering conversion.

What is more, such laws require intrusions such as notifications to government officials and investigations by police authorities, while at the same time entirely exempting conversion that returns a person to their "original", "immediate previous", "native", "ancestral" or "parental" religion (popularly called "*ghar wapsi*"). It is unclear how this secures non-discriminatory governance or how it respects the privacy of religious and family life or the freedom of speech. In their haste to identify and check manipulative conversion, these laws fail to account for the vast scope for their abuse and, in any case, take little account of the fact that the law is limited in its ability to verify a person's reasons for conversion.

3. The discrimination conundrum

Another set of challenges relates to the differentiated treatment of members of different religions. A prominent part of India's model of religious governance has been the application of religious norms in certain matters of family law such as marriage, divorce, and maintenance, with different schemes in place for different religions.[41] The treatment a person receives under these "personal laws" depends on their religious identity.[42] In the Constitution's architecture, the framers consciously targeted certain Hindu practices (untouchability under Article 17) and institutions (temples under Article 25(2)(b)) for reform and regulation, while providing safeguards for minorities (such as the right to establish and administer educational institutions under Article 30). Even post-1950, there have been marked differences in the treatment of the personal laws and religious institutions of different religions, with lopsided government involvement in the reform of Hindu personal laws and institutions.[43] It is unclear how this scheme respects the right against religious discrimination, an issue that is at least partly tangled up with the unsatisfactory development of discrimination law generally under the Indian Constitution. While it is possible that adequate justification for some differentiated treatment may be derived from the need to accommodate religious freedom and ensure equity, our constitutional law is yet to offer a systematic explanation as to how this kind of governance can be designed or any guidance as to what its limits are.

4. Majoritarianism and religious identity

Starting from the late 1980s and the early 1990s, majoritarian Hindu-nationalist politics has seen a remarkable rise in popularity, a phenomenon that has been accompanied by the rise of the Bharatiya Janata Party (BJP). Along with this ascendance of religious majoritarianism in politics, pivotal events such as the demolition of the Babri Masjid in 1992 and the communal violence in Gujarat in 2002 have raised a new set of concerns for secularism in India. For one matter, there is a common allegation that governance in India is "pseudo-secular" because it exercises higher levels of state control over Hindu institutions and practices and exclusively fails to treat Hindus as a voting bloc for political compromises and monetary support.[44]

With the present BJP-led government coming into power in 2014 and being re-elected in 2019, further concerns have emerged on a range of issues. One feature of the broader concern for secularism has been that vigilante groups, self-appointed moral police, and fringe political outfits can operate to limit individual freedoms.[45] Given that India lacks legal protections against religious discrimination by private persons, the political climate also aggravates existing social divisions in the form of discriminatory treatment in housing, employment and other transactions, while also encouraging hate speech and misinformation about communities. Further concerns arise in relation with recurrent campaigns against Muslim immigrants or against Muslim men marrying Hindu women (through an act of "love *jihad*", as it is referred to in common parlance), and the continuing failure of state authorities to take action against the mob lynching of Muslims.[46]

Following the BJP's 2019 re-election, a set of concerns relating to the creeping majoritarianism within the legal framework has also emerged. These include the Supreme Court's decision to uphold the legal rights of Hindu parties over the land where the Babri Masjid stood, the criminalisation of triple *talaq*, the abrogation of constitutional provisions on the special status of Jammu and Kashmir, and the passage of the Citizenship (Amendment) Act, 2019, a law on accelerated naturalisation that excludes Muslims from its benefits.[47] Hindu nationalism has always had an uneasy relationship with the Constitution because it can use one's social identity in an exclusive and divisive way to undermine the equal civic status of non-members.[48] But the direction of recent official measures in India suggest that the foundations of the constitutional framework may itself be changing to accommodate such views rather than the other way around.

C. Towards Diversity

The original constitutional vision placed strong emphasis not only on the existing prevalence of religious practices in India but also the need to reform many illiberal strains in these practices. The social consequences of not interfering in matters of religion at all would have been too monumental.[49] It is important that we acknowledge this factor, especially keeping in mind the need to reform such practices as the caste system and gendered provisions in most religious practices. That said, untouchability and gender discrimination are also stark examples of where interferences in religious freedoms can be considered best justified—in matters where such freedoms conflict with other fundamental constitutional norms, such as the right against discrimination. This recognition can help us devise an appropriate solution to the problems in India's model for the protection of religious freedoms.

Fears regarding the fate of secularism in India are accentuated by the weakness and limited scope of the constitutional protection for religious freedoms. Even if many religious freedoms are not currently

restricted by governments, the approach of courts has not inspired confidence. In trying to keep Hinduism open to reform, courts have failed to account for the breadth and diversity of practices that the Constitution should recognise. This has left a wide range of religious freedoms of all religions open to government interference. One way of addressing these concerns would be for courts to adopt a better method of identifying religious freedoms, for example by giving at least some weight to the sincerely held beliefs of individuals regardless of the religion's official doctrine[50] or even just by recognising optional practices. The Constitution already provides for the restriction of these freedoms where they conflict with public interest and reform-oriented values, and firm commitment to these constitutional values can offer a more consistent method for engaging in religious reform by law.[51]

The differentiated treatment of Hinduism and minority religions in the Constitution itself and by governments since 1950 may seem, on the face of it, to conflict with the right against discrimination. This has led to governments being labelled "pseudo-secular" in some instances and "majoritarian" in others. In India, however, the answer to this conundrum cannot lie in a facile equality that takes the form of artificial neutrality between the positions of different religious communities.[52] If governance is driven only by political convenience, Indian secularism may continue to oscillate between lopsided reform and majoritarianism. Instead, further work is required to articulate a constitutional vision that accounts for the variety of socio-economic disadvantages faced by minority religious communities, including their representation in decision-making processes aimed at reforming the practices of their respective religions. This needs to supplement existing understandings of the importance of religion, including Hindu practices and symbols, in the public sphere. The deprivation and exclusion of minorities is certainly anathema for secularism's future as is the banishment of religion itself.

II. Many Governments

A. History and Evolution of Indian Federalism

The Constitution of India was framed during Partition, and amidst a foundational threat posed by states exhibiting "fissiparous tendencies".[53] These circumstances propelled the Constituent Assembly to consciously design and adopt a centralised federal model in which residuary powers would lie with the Union government, enabling decisive action to protect national integrity.[54]

In this sense, the Constitution continued the broad framework of the Government of India Acts of 1919 and 1935. While it brought in models of limited self-governance at the provincial level, it still retained the hugely centralising features of pre-colonial legislation.[55] Reflecting this, the word federalism does not appear in the text of the Constitution.

In the Assembly, Dr. Ambedkar highlighted how India's Constitution differed from the "tight mould" of other federal systems, and instead offered the flexibility to be both "unitary as well as federal according to the requirements of time and circumstances."[56] The intent was to have adequate division of power, but enable India to tide over social, political, and economic crises at the time through a stable national government. The outcome was a document that allowed for a strong centre, which at the same time required interdependence and cooperation from states. These two strands of Indian federalism have evolved over the years maintaining a careful balance between centralisation of power to meet national needs, and the expansion of state powers to meet diverse regional requirements.

Over time, federalism has deepened in India. This has happened through the reorganisation of states on linguistic lines, provisions introducing special concessions to states to address local political demands, constitutional amendments attempting to devolve power to local governments,[57] and also, through judgments of the Supreme Court. In this regard, most notable was the decision in *S.R. Bommai v. Union of India*[58] where the Supreme Court restricted the power to impose President's rule in states and upheld federalism as part of the basic structure of the Indian Constitution.

However, the evolution of federalism in India has not been strictly linear. Side-by-side with growing power of states, India has also witnessed periods of more centralising governance. The 1970s during the Emergency was one such period.[59] Another instance of this was the Centre's implementation of a national lockdown in March 2020 to combat COVID-19, under a central disaster management law. The return of a single party majority at the Union since 2014 has ushered in another phase of centralisation of governance. This has led to the resurfacing of several challenges to the federal character of the Constitution including the rise of newer concerns. This provides an ideal opportunity to contemplate right-sizing India's government, where allocation of responsibility is matched with accountability.

B. Pushes and Pulls

Federalism in India has evolved in response to various developments that the country has witnessed. In the Congress-dominated post-independence era, federalism took the form of accommodation of state and regional voices through the creation of linguistic states, the subsequent growth of coalition politics and regionalist parties[60] that made their voices heard against centralising tendencies, and through liberalisation promoting inter-state competition.

These phases have not just led to a steady evolution in Indian federalism but have also brought forward various challenges to its implementation. Because of the resulting changes in allocation of power, autonomy and responsibility, these challenges can be broadly categorised (and described) in a three-fold manner as issues that **(1)** are a source of friction between the Centre and states, **(2)** have led to inter-state disputes, and **(3)** are caused by lack of decentralisation to grass-roots administration.

1. The threat of over-centralisation

While India's federalism mostly exhibits a strong bias towards the Centre, it has also been characterised by a constant push and pull between the Centre and States in the assertion of power and influence. This is not inherently bad – it has helped bring about necessary change – starting with the creation of linguistic states that allowed states to retain their cultural autonomy, as well as (more recently) the implementation of the Goods and Services Tax (GST) as a long-planned reform intended to further collaborative power-sharing.[61] However, this push and pull has not always been smooth sailing. For example, with the GST itself, while the Union promised a high rate of compensation to states,[62] it appeared to have reneged on this promise later and instead suggested that states make up the shortfall by borrowing from the Reserve Bank of India.[63]

Captured below are some of the key challenges that have generated considerable friction in Centre-state relations in a manner that has posed a threat to the idea of federalism itself.

a. The challenge to asymmetric federalism

Asymmetric federalism refers to the "granting of differential rights to certain federal sub-units, often in recognition of their distinctive ethnic identity."[64] The Indian Constitution has relied on several forms of

"asymmetric federalism" over time, to address the aspirations of the culturally, linguistically, regionally, and ethnically diverse states.

This is evident from the fact that India accommodated as many as nine states under specific asymmetrical arrangements, starting with the negotiation of Article 370 for Jammu and Kashmir, and thereafter, spanning Nagaland,[65] Mizoram,[66] Sikkim,[67] Andhra Pradesh, Telangana, Maharashtra, Gujarat, and Karnataka.[68] Given its use and prominence in enabling India to keep its diverse regions knitted together with a fine balance of autonomy and parity, asymmetric federalism for India is not merely a description of its federalism but constitutes a vital prescription for unity.

However, the Union government's willingness to accommodate such constitutional asymmetry was severely tested with the move to abrogate Article 370 in August 2019. This move, taken without mandatory consultation with the state government (Jammu and Kashmir was under President's Rule at the time), meant that the flexible nature of Indian federalism was subverted in the interests of promoting centralisation through a legalistic sleight of hand. A state was abolished, two new Union territories were created and the special rights enjoyed by the state in national governance, constitutionally promised to them, were taken away without any semblance of consultation or public discussion.

This is not a one-off instance. A similar disregard to the choice and consent of the states was also observed in the creation of Telangana in 2014 by the Andhra Pradesh Reorganisation Bill, 2013, despite its rejection by the Andhra Pradesh Assembly.[69] Though this instance did not abrogate an article of the Constitution, it demonstrated the shortcomings of Indian federalism if a determined Central government resolved to bypass constitutional safeguards meant for states.

b. The role of the Governor

The Constitution provides for the appointment of the Governor by the President as the executive head of every state.[70] The Governor has a range of powers that are meant to maintain the careful federal balance of power. However, the role and discretion of the Governor has been routinely abused to impose the Union's will and erode the autonomy of states. The most controversial powers exercised pertain to the right to appoint the Chief Minister,[71] the right to summon, prorogue and dissolve the legislative assembly,[72] and the recommendation of President's rule[73] on breakdown of constitutional machinery.

In India's federal set up, the Governor is supposed to play a dual role - *one*, as the constitutional head of the state, and *two*, as a link to the Union. For decades, Governors, in order to perform the latter function, have routinely recommended the imposition of President's rule in states to dismiss political formations hostile to the Centre. This was only stemmed by the Supreme Court's decision in *S.R. Bommai* which limited such power, making it subject to judicial review and also asserting that the only way to assess if a State government enjoyed the confidence of the legislature was through a floor test.[74] This has had some effect, though recent instances of imposition of President's Rule in Uttarakhand and Arunachal Pradesh show that a judgement of the Supreme Court by itself is not enough for unconstitutional actions to go away.[75]

Over time, the post of the governor has been utilised more as a political position or a sinecure for furthering the Union's ends. Thus, for instance, while the post of the Governor was intended to be protected from vested interests,[76] Governors have played highly controversial roles, interfering in State politics at the behest of the Union, giving the impression that they are "agents" of the Union, instead of

being constitutional dignitaries of the state. This has also been observed in 2017 in Goa and Manipur, where the respective Governors called on the BJP to form a government even though it lacked a majority.[77] The frequent run-ins between the Governors of Kerala and West Bengal and their respective governments show that in several instances, this friction is proxy for a larger dispute between two hostile political formations at the Union and State levels.[78]

2. Inter-dependence in a union of states

The initiation of liberalisation reforms in 1991 saw the increase in avenues for states to drive India's growth and thereby reduce their fiscal dependence on the Centre. This changing landscape also brought with it certain new challenges emanating from fiscal, environmental, and resource federalism.

a. The "3-3-3 puzzle"

"The rich get richer and the poor get poorer" has become an unpleasant economic reality for Indian states on account of the widening income gaps between them. In India, two researchers documenting income gaps have, on observing the ratio of per capita state income levels between the three richest and three poorest states, noted that the three richest states are at least three times as rich as the three poorest states. This has been dubbed the "3-3-3 puzzle".[79]

It is described as a "puzzle" because economic theory predicts that contiguous economic units, like the Indian states, knitted together by movements of trade and people ought to exhibit convergence, not divergence. In fact, since India's liberalisation, Central governments have tried to aid convergence by encouraging competition between States as a means of incentivising them to attract investment. This is also evident in the efforts of successive Finance Commissions that have tried to reduce inter-State disparities by ensuring allocation of resources from the Centre to the States.

And yet, inter-state disparities persist and are growing. The more the disparity between states, the greater is the likelihood of resentment building up between them: For instance, richer states have lamented that they do not receive fiscal allocations from the Centre at an amount that is commensurate with their contribution.[80] Poorer states on the other hand have felt short-changed as sector specific improvements have not benefited them as well as already well-performing states.[81] Such regional imbalances among states can lead to further inter-state tensions, and matters could get worse once the delimitation of parliamentary constituencies is unfrozen in 2026, despite states' rapidly and unevenly changing demographics.

The delay in conducting a regular delimitation exercise is cause for severely unequal representation in the Lok Sabha.[82] While the last delimitation exercise was carried out in 2006, it did not change the inter-se allocation of seats between states. Parliament has deferred further delimitation until at least 2026.[83] This is leading to a skewed representation of states in Parliament, with better off states currently having much more representation than they would proportionally, in comparison to the less well-off states.

While poorer states may argue it is high time for (a correct and updated) proportional representation in the Lok Sabha, better-performing states are opposed to a reallocation as they will lose seats when a delimitation exercise is finally carried out: they argue that they should not be punished for curbing population growth more effectively than the poorer, more populous states.[84] This trend of skewed representation, if left unchecked and unaddressed, could well further resentment, and fuel inter-state disputes and even greater disparity between states.

The delimitation exercise, whenever it is carried out, would result in abrupt changes to the representation of states. In the backdrop of that sentiment, it has been suggested that delimitation should ideally be accompanied by other corrective measures.[85] These measures could include increasing the number of seats in the Lok Sabha, so as to ensure that better performing states do not lose their existing seats, and Members of Parliament are tasked with governing manageable constituencies. To counterbalance the framework of representation in the Lok Sabha, reforms to the Rajya Sabha may also be considered whereby states are represented equally (one seat for each state), instead of proportionally.[86]

For a large and diverse federation such as India, addressing (and reducing) inter-state disparities, in a manner that is not perceived as unfair, is critical going forward.

b. Environmental challenges and natural resource distribution

The lack of inter-state cooperation also poses a challenge to India's handling of natural resources and climate change. The lack of strong institutions that facilitate inter-governmental cooperation, especially in the context of environmental resources, gives rise to unique challenges. For example, states with large forests or large hydel power potential are claiming compensation for the environmental services they provide.[87] Such issues have also come up in relation to water transfers between two different states sharing the same river basin.

In the coming years, climate change is likely to impact cropping patterns, exacerbate coastal erosion, increase the incidence of cyclones, and hasten the retreat of Himalayan glaciers.[88] Climate change poses a unique challenge to federalism as it is not affected or contained by state or national borders. The division of powers in the Constitution along with its larger fiscal capabilities gives the Centre more powers in handling climate-based challenges. States, on their part, cannot work alone to tackle most climate emergencies. Similar concerns emerge in other areas of environmental policy such as inter-state air and water pollution.

The need for a comprehensive federal governance mechanism in matters related to natural resources is acutely felt in the context of inter-state river water sharing. This is evident in how the sharing of river water is overwhelmingly characterised by dispute resolution, rather than a well-defined, coordinated approach. This kind of 'conflictual federalism' is said to get even more adversarial before the adjudicatory tribunals that are to be constituted by the Centre in such cases.[89] Years pass while the process remains mired in several challenges and appeals filed before the Apex Court as inter-state political positions get hardened. The Cauvery River Water Dispute, which has gone on for well over 100 years with numerous tribunal and Supreme Court orders is just one example which bears testament to this.[90] These issues will only be aggravated by the rise in global temperatures, and it is appropriate that mechanisms for cooperation and the resolution of inter-state disputes be strengthened in time to meet coming challenges.

3. The promise of decentralisation

The third tier of India's federal system, comprising urban local bodies and panchayats have not been sufficiently empowered, despite the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 which sought to strengthen them. Local governance is located in the State list under the Constitution, which means states maintain panchayats

and municipal councils under their control.[91] As a result, local levels of governance have little fiscal and administrative autonomy.

As of 2011, the census records over 72% of India's population as living in rural areas.[92] But most state-level Panchayati Raj laws have not spelt out their powers or procedures and remain works-in-progress. At the same time, the rapid expansion of cities, metros and adjacent settlement areas has meant that a significant proportion of urban India remains unacknowledged as such. Studies indicate that the current definitions of "urban" are not reflective of the extent of urbanisation that the country has already witnessed.[93] The results of a 2019 study point to a level of urbanisation that is higher than the official rate, stating that it is likely to be in the range of 40-70%, instead of barely at 30% as recorded by the 2011 census.[94]

Such a demographic transition from rural to urban, though generally associated with the provision of better resources, is presenting unprecedented challenges to urban governance in India. Urban municipalities are facing acute issues with administration and delivery of services: problems of water, sanitation, housing, etc. are increasing manifold in all major cities.[95]

This calls for a 'deepening of federalism' that goes beyond the Centre-state relationship and draws focus on decentralisation measures that delegate autonomy and responsibility to the local levels of administration. However, the unfulfilled promise of urban local bodies is highlighted by the fact that the decentralisation of urban planning functions from states to elected self-governing urban local governments has not happened in the manner envisaged by the 74th Amendment.

Though the 74th Amendment sought to supplement the lack of constitutional provision for local self-government, it fails to provide meaningful autonomy and powers to local bodies and leaves it to the states to devolve power and responsibility to urban local governments. While three decades have passed since the amendment came into effect, states have not taken much initiative for devolution of powers or relaxation of control in this regard.[96] Most states still reserve various functions for themselves, or devolve them in a largely haphazard manner. This is evident from their continued grip over amenities such as state transport corporations, state electricity boards and water supply departments.

The burgeoning city of Mumbai presents an example of this kind of confusion. The Mumbai Metropolitan Region Development Authority (a state planning agency) and the Brihanmumbai Municipal Corporation (the local body) have had long standing disputes on who has the authority to widen and maintain roads, resulting in delays and major traffic congestion.[97] And multiple public agencies such as the Maharashtra Housing and Area Development Authority and the Maharashtra State Road Development Corporation remain in charge of housing and the development of roads, bridges and flyovers, leading to intersecting and uncoordinated jurisdictions and making the situation even messier.[98]

In requiring pervasive state control over urban local bodies – whether for raising of finances, their very composition, supersession, and dissolution, the 74th Amendment leaves such local bodies to function as subservient units of local administration rather than as institutions of self-governance. This is an unsustainable state of affairs.

C. Towards a Broader and Deeper Federalism

While the Constitution was framed with a unitary tilt, its makers also gave plenary powers to states, building a flexible and cooperative set-up. However, this flexibility has been twisted on occasion to promote unitary and majoritarian ends, eroding the strength, and contours of Indian federalism.

It is important to ensure that the fine balance of India's federalism, achieved by ensuring adequate power and accountability to the Union and the states, is not permanently altered. For this, the practice of federalism must evolve beyond the status quo to face up to its current and upcoming challenges.

For this, federalism in India ought to be "wider" – where States are given greater powers in more fields and "deeper" – where local governments are further empowered to serve the people they are closest to. This is the most optimal way to ensure that governments serve the people most effectively, with the least friction, while preserving the Union.

Seeking a wider and deeper federalism does not mean seeking a weaker Union Government. It is to ensure a true reflection of India's pluralist-democratic ethos where greater state autonomy allows for sharing of power and better decision-making that protects and furthers India's unified yet multi-national identity. This should be the case regardless of instances of centralisation or decentralisation of power. A country as diverse as India requires dynamic solutions building on federalism to adjust to current and emerging realities.

III. Many Languages

A. English, Hindi and Regional Languages: The Constitutional Vision

The question on India's official language was the most fraught and emotive issue in the Constituent Assembly, based on the participation of members in the debate as well as the number of amendments sponsored. India's all-pervasive multilingualism posed a distinct challenge to the Constituent Assembly—questions of national unity, administrative ease, protecting public sentiments, and preserving minority cultures had to be carefully balanced. The position adopted by the Constitution on the language(s) to be adopted in independent India can be aptly described as a workable, if somewhat uneasy, compromise between the multiple linguistic identities of India.

After extensive debates, the Constituent Assembly moved away from any one *national* language of India, and instead conceptualised an *official* language. Hindi was accorded this status of the sole official language, and the use of English was allowed for a limited period, in the interest of practical ease. While concessions were given to regional languages, the positioning of Hindi as the official language demonstrated a clear strand of unilingualism in the Assembly. This was, at that time, in line with the necessity of unifying the country, integrating it into a national whole, and preventing regional and secessionist tendencies. This was a well-considered decision, with Hindi accorded this status only after extensive deliberation of its place in India vis-à-vis Hindustani, English and regional languages.

Despite Hindustani (a hybrid of Hindi and Urdu) being most prominently championed by Mahatma Gandhi and in the Assembly by Maulana Abul Kalam Azad, the partition of India and the adoption of

Urdu as the national language of Pakistan meant that the Assembly was firmly against it. On the other hand, English, the official language of communication, was considered a colonial legacy and a symbol of foreign rule. However, since it had come to be the only link language in India where 70% of the population did not consider Hindi as their first language,[99] it was necessary to let it continue for a limited period until a replacement could emerge. Accordingly, English was to be continued for official communication for a period of 15 years, with Parliament having the option to extend this period further.[100] In the contest between Hindi and regional languages, Hindi, by virtue of being the most widely spoken Indian language, had to be given primacy as the official language. While this was a disagreeable suggestion to most non-Hindi speakers, this proposition was accepted so long as Hindi was not imposed on non-Hindi speaking areas.

Consequently, a compromise was reached, and Hindi was given the status of India's sole official language, with English retaining a supplementary status. However, this was not proposed as a permanent compromise; the Constitution allowed Parliament to pass a law to continue the use of English for any purpose of its choice. In essence, the Constituent Assembly shifted the burden to decide the contest between Hindi, English and regional languages onto future lawmakers.

B. Challenges to the Constitutional Vision

1. The Tamil Agitation

Regardless of the constitutional compact that was reached, India remained inherently multilingual. As the fifteen-year transition period for English came close to its expiry, a movement towards multilingualism gained traction.

Anti-Hindi sentiments began mounting in Southern states against a perceived imposition of Hindi. A 1959 report by the Committee of Parliament on Official Language[101] stated that a complete switch to Hindi by 1965 would be impractical, recommending that Parliament should extend the transition period by enacting a suitable law.[102] In this context, Prime Minister Jawaharlal Nehru stated that Hindi would not be imposed on southern states without their consent,[103] and the Official Languages Act (OL Act) was enacted in 1963.

Section 3, the key provision of the OL Act, stated that notwithstanding the expiry of the transition period, English may continue to be used, in addition to Hindi, for all the official purposes of the Union for which it was already being used and for the transaction of business in Parliament.[104] The transition period for the use of English was thus made indefinite, and for all practical purposes, both Hindi and English were given the status of official languages.[105] This made India firmly bilingual.

However, as the provision for obtaining consent from non-Hindi speaking states in the future was markedly absent from the OL Act, an apprehension against the imposition of Hindi nevertheless persisted. In this backdrop, the Dravida Munnetra Kazhagam (DMK) steadily became prominent in Madras capitalising on the anti-Hindi sentiment across the state. The perceived challenge to the linguistic autonomy of the state led to widespread unrest, beginning with a student-led agitation in Madurai on January 25, 1965.[106] This rapidly developed into full-scale riots across the entire state.

As a consequence of the agitation, in 1968, the OL Act was amended by the Indira Gandhi Government, making the use of English mandatory in certain cases[107] and locked in the status of English as an official

language until the legislatures of *all* non-Hindi states pass resolutions affirming the discontinuance of English.[108]

The 1965 agitation unravelled the first compromise,[109] and led to a second compromise which was markedly different from the first. Officially speaking, India has been a bilingual country since 1968, and continues to remain so until *all* the non-Hindi speaking states decide otherwise. But given that this second compromise is statutory and the first is constitutional, it is a frail compact. The possibility of the country going back to a one-nation, one-language formulation remains, especially if led by a strong Hindi-first Central Government.

2. "Hindi-Hindu-Hindustan"

The current ruling party, the BJP is commonly perceived as a Hindu nationalist party, with its cultural origins situated in Hindutva,[110] a political ideology first articulated by VD Savarkar.[111] Over time, this ideology has become the basis of Hindu nationalism in India.

Since their inception, both the Bharatiya Jana Sangha (BJS), the political predecessor of the BJP, and the Rashtriya Swayamsevak Sangh (RSS), the ideological parent of the BJP, have been associated with the propagation of a Sanskritised form of Hindi as the lingua franca of India. According to Savarkar, Sanskrit is the "sacred language" of India, while Hindi derived from Sanskrit is the national language. He clarified that while the adoption of Hindi is not meant to disrespect any regional language and "they will all grow and flourish in their respective spheres", Hindi is the most suited to be the national language, given the long history of its use in India. He further believed that the Nagari script[112] should be the national script.[113] These views have further been echoed by various other leaders of the RSS, the BJS, and later the BJP. [114]

The "Hindi, Hindu, Hindustan" slogan, which has long been associated with the BJS, the RSS and the BJP,[115] neatly captures the sentiments espoused by some of their most influential members.[116] These views have also found expression in the political objectives of the party. For instance, BJS manifestos from 1951 to 1971 show a consistent commitment to Hindi. According to the 1967 manifesto, Sanskrit would be made the national language of India, while regional languages would be given official status in respective states.[117] The 1971 manifesto declared the party's intention to develop Hindi as the link language over the course of the next five years.[118]

Given the nature of the BJP's cultural origins and a historic emphasis on Hindi, non-Hindi states have unsurprisingly become cautious against a potential imposition of Hindi. Since 2014, India has witnessed rising protests by both the governments of non-Hindi states and the people comprising them, at any perceived attempt at the imposition of Hindi on them.[119] This impression might be further aggravated given that the primary support base of the BJP is located in Northern and Western parts of India,[120] and it is this electorate that is responsible for giving it a simple majority in Parliament.

While a careful examination of BJP's policy decisions in the last eight years, as they relate to language, will clarify that they have not posed any distinct or open threat to the status of multilingualism in India, an implied preference for unilingualism nevertheless runs through its politics. For instance, the 2019 draft of the New Education Policy stated that Hindi would be compulsory as part of the three-language formula,[121] which was eventually revoked as a result of large-scale agitations in Tamil Nadu.[122] The 2019 BJP Manifesto also shows a marked departure from a focus on the development of 'Indian languages' in the 2014 manifesto to a focus on the development of both 'Indian languages' and Sanskrit.[123] These are early indications of the restoration of the original compromise, this time less as a compromise and more as a diktat.

However, a few isolated incidents indicative of a preference for Hindi or Sanskrit do not constitute a significant threat to multilingualism yet. But the historical provenance of the BJP, its ideological moorings, and its primarily Northern and Western vote base may, over time unravel an already precarious compromise. The primary counter-weight today may only be its own aspirations to be a pan-Indian party, appealing to non-Hindi speaking voters in the South and East as well.

C. Towards Multilingualism

Both the compromises, of 1950 and of the mid-1960s, on the official language(s) in India have been precarious. The compromise that Hindi would be the official language and English would also be used for 15 years, was given parliamentary sanction in 1963. The move from 1950 to 1963 was a move towards recognising Indian multilingualism in letter and spirit. Whereas the first compromise epitomised unilingualism, the second was unequivocally bilingual.

What remains unquestionable is that India is multicultural and multilingual, with 1369 spoken mother tongues, 121 of which have been recognised in the Census of India.[124] Preserving a sense of national and cultural unity in such a heterogeneous country is likely to be a difficult task, and as such, must be carefully thought through.

In the Constituent Assembly, votaries of one nation-one language advocated Hindi for its quality of being able to integrate a nation. In the backdrop of the partition, it was felt that the proliferation of multiple regional languages would lead to a new wave of identity politics, and ultimately, secession. However, several regional agitations later, it is clear that this fear of secession would only materialise if any language was to be imposed from the Centre to the exclusion of local languages.

Today, any Central Government must recognise that the spirit of the original constitutional compact was rooted in the preservation of national unity, and take steps to protect and advance this spirit. At that time, Indian unity was threatened by regionalism, identity politics and the fragmentation of a national identity. The promotion of regional languages might have further augmented the possibility of disintegration. However, as has been demonstrated well, the threat to India's unity today is the imposition of unilingualism and an attempt at homogenisation of its culture.

The issue of an official language may have settled somewhat today. The current multilingual compromise accurately reflects that India is comfortably coexisting in multiple languages. But it is a precarious compromise, settled only by statute with the constitutional question remaining somewhat more open. This requires the exercise of great caution lest the compromise is unsettled through the backdoor.

IV. Many Voices

A. Early Visions of Liberty in Independent India

Even as Indians celebrated their new Constitution on January 26, 1950, A.K. Gopalan, a renowned communist politician, was stuck in jail for a crime he hadn't committed. He was detained under a law for "preventive detention" because the government felt he was a person who *might* stir up trouble. Given

that the new Constitution promised him certain freedoms related to movement and personal liberty, Gopalan challenged his detention.

The Supreme Court dismissed his petition.

In essence, the judgment of the Supreme Court in *AK Gopalan v. State of Madras*[125] held that the legislature could make any law to decide what kind of personal liberty individuals would have, and the courts could do very little to question such a law. In deciding the matter like this, the Supreme Court was not simply surrendering to the elected government. It was only trying to stay true to what it felt the Constituent Assembly had decided, no matter how liberty suffered as a result.

While deliberating on the liberties to be granted under the Constitution, the Constituent Assembly could not help but consider the events unfolding in the country at the time. As communal riots deepened the raw wounds of Partition, the members of the Assembly felt that the government had to be able to keep together the newly-birthed nation.[126] Many of them also felt that unrestricted fundamental rights would mean that courts would read "liberty" to include strong safeguards for property rights, thus stalling social reform such as *zamindari* abolition.[127] Owing to these anxieties, broad restrictions were placed on the exercise of the liberty rights.

Two provisions were initially considered - one that listed certain specific freedoms of speech, assembly, movement etc., (what would become Article 19), and another that provided for a general right to "life and personal liberty" (what would become Article 21). The first provision was drafted in such a manner that each of the specific rights (like free speech and free movement) in the list could be restricted by the government on certain grounds. These grounds were also explicitly provided for, together with the requirement that any restriction would have to be reasonable.[128] Some members of the Assembly felt that the provision was "riddled with so many exceptions that the exceptions [had] eaten up the rights altogether".[129]

Critics argued that the Indian Constitution, like the Constitution of the United States, should have rights without listed exceptions so that courts would be free to decide when restrictions were legitimate.[130] But in the end, a majority in the Assembly accepted Dr. Ambedkar's view that courts did not require such a vast ability to shape rights. India could learn from the previous experiences in other jurisdictions and specifically circumscribe governmental powers to restrict freedoms.[131] The Assembly understood that governments could misuse this but there was some consensus that the scheme was appropriate given the difficult circumstances at the time.

When it came to the general right to "life and personal liberty", the Assembly had to decide what kind of protection the right would have and when it could be restricted. A key choice was between the two terms "due process of law" and "procedure established by law". If restrictions on liberty required "due process", governments would have to show that the law itself was adequately justified. But if such restrictions only needed to follow the "procedure established by law" it would seem that any restriction of liberty, as long as it followed a procedure, would be valid.

Given the American experience, where courts had been able to strike down a range of laws for failing to meet "due process", B.N. Rau, the constitutional adviser, warned the Assembly that courts in India would likewise be able to thwart social welfare legislation.[132]

Ultimately, all amendments proposing "due process" were rejected. In response to public dissatisfaction on the weak protection for personal liberty, the Drafting Committee decided to insert a new fundamental right providing certain safeguards against arrest and detention (what would later become Article 22). Under this new provision, those arrested and detained had a right to be informed of the

grounds of their arrest, to consult and be defended by a lawyer of their choice, and to be produced before a magistrate within twenty-four hours of the arrest.[133] However, members originally in favour of "due process" were dissatisfied with this, particularly with how Article 22's provisions on preventive detention eventually shaped up. The Constitution that was finally adopted offered Indians a close-fisted liberty that continues to haunt the country to this day.

B. The Struggle for Freedom After 1950

1. Freedom from arbitrary arrest and detention

Though the framers of India's Constitution were also, by and large, India's freedom fighters and were jailed under repressive colonial laws, as draftsmen, they carefully balanced the need for individual freedom with the powers of the state to arrest and detain persons. Article 22 provided some minimum safeguards in relation to arrest, for example by requiring a judicial officer to check if a person has been arrested legally and requiring that such a person be informed of the grounds of arrest.[134] But what would happen if a person is legally arrested under an unfair law? And what would deter the police from making wrongful arrests? Some key institutional questions on how personal liberty would be shielded from the state were deflected. Much hope was placed on the fact that in newly independent India, even institutions of state would work in good faith, protecting individual freedom and restricting it only if necessary.

The Supreme Court made some headway on these matters by requiring the government to show that a law taking away life and personal liberty is not arbitrary, oppressive, or unreasonable.[135] Unfortunately, this has not prevented the continued use of "extraordinary" criminal laws or "anti-terror" laws that make significant exceptions from ordinary criminal law. A striking example of this is the Unlawful Activities (Prevention) Act, 1967 (UAPA). In its current form, the law is littered with vaguely defined crimes, allowing for arbitrary arrests on ill-defined grounds, and stringent provisions that, for example, make it difficult to get bail.[136] What is more, though such laws are meant to be used only in extraordinary situations, the UAPA is now used frequently, with 10,552 arrests being made under the law between 2014 and 2020.[137] This, despite the fact that only 253 persons were convicted eventually.[138]

A further extraordinary situation relates to a variety of preventive detention laws, which allow for detention without trial before any actual offence has been committed. In Article 22, the Constitution itself lays down a legal regime for these laws that, in today's context, arguably legitimises and safeguards them instead of limiting them.[139] These laws can relate to matters of national security, foreign exchange, smuggling, black-marketing, narcotics, and other subjects identified by state governments. In Jammu and Kashmir, the stringent Public Safety Act, 1978 (PSA)[140] has been used extensively after the abrogation of Article 370, with approximately 13,000 people arrested.[141] Nearly 600 petitions were filed with the High Court within a year of the abrogation,[142] but the court showed little urgency in disposing of the petitions. In fact, enough time had passed before many detainees were released,[143] as the detention orders were revoked before the petitions could be considered.[144] Nearly 75 years after Independence, the constitutional regime for preventive detention remains the same, with thousands detained every year and little to check executive abuse of legal powers. Further, in relation to laws such as these, courts have tended to afford a wide berth to governments on issues of "national security" requiring "extraordinary measures".[145]

Even if courts were to be more vigilant, India's criminal justice system is known for delayed delivery of justice. For example, nearly 76% of prisoners in India were undertrials according to data released by the National Crime Records Bureau in 2020,[146] indicating that the legal process has effectively been recast into a punishment in and of itself. Little has been done systematically to stem this rot. To add insult to injury, provisions for compensation in cases of wrongful arrests have never been meaningfully implemented.[147]

2. Freedom of speech and expression

The Constitution of India protects free speech and expression as a fundamental right under Article 19(1)(a). While this is meant to promote a deliberative democracy, a colonial hangover has meant the continuation of blunt restrictions on speech in the form of laws related to sedition, insult to religion, and criminal defamation. Restrictions on free speech are supposed to be justified only if they are "reasonable" and if they promote any of the legitimate goals listed in the Constitution for this purpose. Article 19(2) lists grounds like "security of the State", "contempt of court", "decency" etc. Despite their troubling legacy, it is important to scrutinise how courts have come to uphold harsh and overly restrictive laws as "reasonable".

For example, the offence of sedition in the Indian Penal Code criminalises mere attempts to create "disaffection" towards the government. Weary of its misuse by colonial rule, the Constituent Assembly excluded 'sedition' as a ground for restricting free speech.[148] However, with constitutional amendments inserting further expressions — "friendly relations with foreign States", "public order", "incitement to an offence", and "the sovereignty and integrity of India"[149] — as grounds for restricting free speech, the Supreme Court has upheld offences like sedition as a reasonable restriction on free speech.[150] The Court did insist that the offence had to be applied only in rare instances where speech is likely to promote certain grave forms of violence. Today, however, sedition cases are filed indiscriminately, sometimes in apparent attempts to suppress dissent.[151]

The Supreme Court is again looking into the constitutional validity of sedition,[152] and will have to consider whether the offence is really necessary to curb secession or terrorism. As it happens, it is often used alongside other laws - in more than 60% cases over a 10-year period, offences from the UAPA and the Information Technology Act, 2000 (IT Act) have been applied along with sedition.[153] The various tests of reasonableness and proximity developed by the Supreme Court as safeguards to free speech seem to pale in insignificance in the face of this volume of prosecution.

What about the ability of Indians to engage in protest? The Supreme Court has recognised the right to peacefully protest as being "an essential part of free speech and the right to assemble."[154] However, the absence of a formal framework for this right means that it can be subverted at will.[155] For instance, various "police standing orders" in India require prior permission for assembly, and this permission can easily be denied.[156] Even courts have remained ambivalent about the lack of a framework in this regard. For instance, the Supreme Court, in the context of the protests conducted against amendments made to the citizenship law, chose to emphasise on the "occupation of public ways and spaces"[157] as a ground for circumscribing protests.

Restrictions on these traditional methods of speech have to be considered alongside the increasing complexity and volume of speech on the internet. The growth of information technology means that a lot of political expression and opinion-shaping occurs online. In this regard, it is necessary to consider the procedure by which the government can issue directions for blocking specific internet content under Section 69A of the IT Act. While the constitutionality of this provision has been upheld by the

Supreme Court,[158] there continue to be grave concerns regarding the lack of adequate checks on the exercise of this power by government officers and the limited scope to challenge blocking orders.[159] On a similar note, over the last few years, India has earned the shameful reputation of being the country that has implemented the maximum number of internet shutdowns in the world.[160]

In the growing list of restrictions on internet speech and expression, one may also consider the continued usage of Section 66A of the IT Act, despite the fact that the provision was struck down in 2015.[161] This example should give readers a clearer understanding of one of the key problems with restrictions on liberty in India: the wanton abuse of power by state authorities. If a provision that has been struck down by the court can still be applied by the police, one has good reason to believe that even the best safeguards are open to abuse.

3. Freedom to make personal decisions

Further challenges to the protection of individual freedom in India arise in relation with the right to privacy. To start with, it is often unclear as to what the right to privacy refers to, since the different interests usually protected under it can seem fluid and unrelated.[162] The Supreme Court considers it to be "a bundle of entitlements and interests which lie at the foundation of ordered liberty".[163] Amongst the various pressing concerns that privacy raises, some of the oldest and most significant issues relate to the ability of an individual to make personal and intimate decisions.[164]

Along with a number of other rights that have not been explicitly listed in the Constitution, courts had, in the past, found reason to protect certain personal decisions, such as decisions to medically terminate pregnancy,[165] eat food of one's choice,[166] or express gender identity.[167] Meanwhile, the criminalisation of intimate conduct that was supposedly unnatural ("against the order of nature") had, for a long time, restricted freedoms related to sexuality.[168] In 2017, the Supreme Court offered privacy as a common basis for the constitutional protection of these kinds of choices, referring in passing to a variety of interests in sexual behaviour, reproduction, intimate relations, faith, appearance and apparel, modes of dress, marriage, choice of a family life, choices related to food, and even travel and residence.[169]

These decisions are core to an individual's identity and to their ability to define their own life's meaning. It remains a pressing concern that individuals in India are unable to freely make these choices despite legal protections.[170] In the face of judicial orders, the freedom to wear clothing according to one's choice has been questioned in the ban on hijabs in the classroom. The freedom to eat and drink what one wants is not only sometimes restricted by law, but can also come at the cost of one's life as has been the case with multiple lynchings for suspected eating of beef. Similarly, sexual minorities continue to be harassed and repressed on the basis of their identity. Worryingly, rather than the law informing police and judicial action, it appears that such action is informing the law given how judgments regularly uphold these restrictions.[171]

C. Towards Meaningful Liberty

The three rights discussed above have been selected particularly because of their significance to ensuring meaningful liberty, their role in ensuring healthy democracy, and the substantial stress they are under today. Naturally, much more can be said about how Indians remain unfree in many other ways (and free in some) so many decades after the country's Independence.

While India's original vision for constitutional liberty was clouded by threats of violence, the long journey of progress since then does not offer a heartening record. Some rights like free speech, the freedom of the press, and the freedom to marry, long policed by the government, are under even more stress because of the actions of private actors. Similarly, though the framers of the Constitution placed much faith in courts, the judiciary has only occasionally acted to defend personal liberty against the security apparatus of the state.

This points to a fundamental and somewhat sobering realisation. Despite the emphasis on fundamental rights in the Constitution and the regular evocation of individual liberty by the Supreme Court, the actual journey of fundamental rights has seen the subordination of speech to law and order, liberty to national security and choice to diktat. As a preliminary step, it is critical to recognise that if plurality of voices and viewpoints is considered essential for a healthy democracy, as the framers believed, the Constitution they left us may not entirely have evolved the way they imagined.

With the experience of the last seven decades, we now need a clear-eyed understanding of why liberty is important, how much weight to provide which kind of liberty and how institutions of state need to be equipped to respect the idea of liberty. At this juncture, there is a groundswell of opinion that the Constitution needs to focus on duties and not freedoms. Without disregarding the importance of duties, the core value of freedom needs to be restated. Without it, even the ability to think freely, perform duties and go about our daily lives is lost. Various liberties need to be ordered so that courts can provide a higher degree of protection for basic freedoms (such as free speech), allow greater leeway to the state when it comes to freedoms that require realisation over time (right to shelter), and recognise others as aspirational (right to peaceful sleep). These cannot all be treated exactly the same way.

Finally, any talk of liberty is meaningless without a detailed understanding of the institutions of state that are meant to protect it. The police, prosecutors, courts, and bureaucrats require a degree of sensitisation to liberty that is conspicuously absent. In the absence of genuine concern for the worth of individual freedom, the institutions of independent India will only secure our rights in name, while remaining in substance engines of oppression.

It should be apparent then that, in all these long years since 1947, the struggle for freedom has never ceased and the hope for it has sprung up irrepressibly no matter how often it has been trampled down. It is now our turn to think long and hard on what kind of India we want to call home.

V. Endnotes

[1] Hans Nagpaul, 'Secularism in India: Unresolved Conflicts and Persistent Problems' 2 *International Journal of Politics, Culture, and Society* 201, 201 (1988)

[2] Shefali Jha, 'Secularism in the Constituent Assembly Debates, 1946-1950' 37(20) *Economic and Political Weekly* 3175, 3175 (2002)

[3] Constituent Assembly of India Debates, Vol. 7, 6 December 1948 (H.V. Kamath)

[4] Indian Constitutional Documents Vol I. Bharatiya Vidya Bhavan (1967) 309

[5] B. Shiva Rao, *The Framing of India's Constitution – Select Documents* (Indian Institute of Public Administration, New Delhi 1967) 146

[6] "Secular" was inserted into the Preamble of the Constitution through the Constitution (Forty-second Amendment) Act, 1976

[7] Draft Constitution, Article 19 (which was eventually numbered Article 25 in the Constitution of India)

[8] Evident in the views evinced in the proceedings of the Sub-Committee on Fundamental Rights. See, B. Shiva Rao, *The Framing of India's Constitution – Select Documents* (Indian Institute of Public Administration, New Delhi 1967) 185-187

[9] B. Shiva Rao, *The Framing of India's Constitution – Select Documents* (Indian Institute of Public Administration, New Delhi 1967) 187

[10] Shefali Jha, 'Secularism in the Constituent Assembly Debates, 1946-1950' 37(20) *Economic and Political Weekly* 3175, 3177 (2002)

[11] B. Shiva Rao, *The Framing of India's Constitution – Select Documents* (Indian Institute of Public Administration, New Delhi 1967) 146

[12] Constitution of India, Article 25(2)(a)

[13] Constitution of India, Article 25(2)(b)

[14] Constituent Assembly of India Debates, Vol. 7, 6 December 1948

[15] Constituent Assembly of India Debates, Vol. 7, 6 December 1948 (K. Santhanam)

[16] Constituent Assembly of India Debates, Vol. 7, 6 December 1948

[17] Constitution of India, Article 17 (Prohibition on untouchability); Article 25(2)(b) (temple entry)

[18] Constitution of India, Article 28(1)

[19] Constituent Assembly of India Debates, Vol. 7, 7 December 1948 (Dr. B.R. Ambedkar)

[20] Cecile Laborde, 'Minimal Secularism: Lessons for, and from, India' 115(1) *American Political Science Review* 1, 6 (2021)

[21] Constitution of India, Article 26(b). Article 26 also guarantees to every religious denomination, subject to public order, morality and health, the right to establish and maintain institutions for religious and charitable purposes, to own and acquire movable and immovable property, and to administer such property in accordance with law.

[22] Constituent Assembly of India Debates, Vol. 7, 6 December 1948

[23] Constitution of India, Article 30

[24] Cecile Laborde, "Minimal Secularism: Lessons for, and from, India" 115(1) *American Political Science Review* 1, 2 (2021)

[25] *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, paras 17-19

[26] *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, para 23

[27] Instead of strict separation, scholars have suggested that the Indian Constitution only requires a "principled distance" between state and religion in a system that permits governmental intervention in religious matters to advance religious freedoms and equal citizenship (Rajeev Bhargava, "India's Secular Constitution" in Hasan et al ed., *India's Living Constitution: Ideas, Practices, Controversies* (Anthem Press, 2005) 105-33). Similarly, it has been argued that India's secularism hinges on the (potentially contradictory) principles of religious freedom, celebratory neutrality, and reformatory justice (Rajeev Dhavan, "The Road to Xanadu: India's Quest for Secularism" in Larson ed., *Religion and Personal Law in Secular India* (Bloomington, 2001) 301-29)

[28] Pratap Bhanu Mehta, "Passion and Constrain: Courts and the Regulation of Religious Meaning" in Bhargava ed., *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008) 319 ("No constitutional culture can entirely escape the thorny problem of defining religion and thereby regulating its meaning."); see also, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd Edn. (Oxford University Press, 2103) 139-56 (describing how defining "religion" can be difficult and even problematic)

[29] For an explanation of how courts may have arrived at this distinction, see Gautam Bhatia, "Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution" 5(3) *Global Constitutionalism* 351 (2016)

[30] *Ismail Faruqui v. Union of India*, (1994) 6 SCC 360, para. 82

[31] *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770

[32] *Nikhil Soni v. Union of India*, 2015 SCC OnLine Raj 2042

[33] *Shayara Bano v. Union of India*, (2017) 9 SCC 1

[34] *Resham v. State of Karnataka*, W.P. 2347/2022 (High Court of Karnataka)

[35] *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1 ('*Sabarimala Case*')

[36] This standard was set in *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770, para 9

[37] *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1, paras. 96, 192 and 319

[38] Tarunabh Khaitan, 'Two Facets: Religious Adherence and Religious Group Membership' 34 *Harvard Human Rights Journal* 231, 235 (2021)

[39] *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1, para 286

[40] *Rev. Stanislaus v. State of Madhya Pradesh*, (1977) 1 SCC 677, para 20

[41] Farrah Ahmed, 'Remedying Personal Law Systems', 30(3) *International Journal of Law, Policy and the Family* 248, 249 (2016)

[42] Farrah Ahmed, 'Remedying Personal Law Systems', 30(3) *International Journal of Law, Policy and the Family* 248 (2016)

[43] Deepa Das Acevedo, 'Secularism in the Indian Context' 38(1) *Law & Social Inquiry* 138, 157 (2013); Cecile Laborde, "Minimal Secularism: Lessons for, and from, India" 115(1) *American Political Science Review* 1, 6 (2021)

[44] Deepa Das Acevedo, 'Secularism in the Indian Context' 38(1) *Law & Social Inquiry* 138, 144 (2013) (noting also that the Hindu right aimed to explain instances of communal violence by Hindus as reactions to this "pseudo-secular" politics)

[45] Christophe Jaffrelot, 'A *De Facto* Ethnic Democracy? Obliterating and Targeting the Other, Hindu Vigilantes, and the Ethno-State' in Chatterji et al eds., *Majoritarian State: How Hindu Nationalism is Changing India* (Oxford University Press, 2019); Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton University Press, 2021), Chs 6 and 7

[46] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' 14(1) *Law & Ethics of Human Rights* 49, 58-59, 91-92 (2020)

[47] Niranjan Sahoo, 'Mounting Majoritarianism and Political Polarization in India' in Carothers and O'Donohue eds., *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers*, Carnegie Endowment for International Peace, available at https://carnegieendowment.org/2020/08/18/mounting-majoritarianism-and-political-polarization-in-india-pub-82434

[48] Cecile Laborde, 'Minimal Secularism: Lessons for, and from, India' 115(1) *American Political Science Review* 1, 4, 9-10 (2021)

[49] Pratap Bhanu Mehta, 'Reason, Tradition, Authority, Religion and the Indian State' in Jaising ed., *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia* (Women Unlimited, 2005) 66

[50] Anup Surendranath, 'Essential Practices Doctrine': Towards an Inevitable Constitutional Burial' 15 *Journal of the National Human Rights Commission, India* 159 (2016); Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd Edn. (Oxford University Press, 2103) 139-56

[51] Cecile Laborde, 'Minimal Secularism: Lessons for, and from, India' 115(1) *American Political Science Review* 1-13 (2021)

[52] Rajeev Bhargava, 'India's Secular Constitution' in Hasan et al ed., *India's Living Constitution: Ideas, Practices, Controversies* (Anthem Press, 2005) 115-17

[53] Various statements recorded in the Constituent Assembly Debates emphasised the need to be on guard against 'fissiparous and disintegrating tendencies' which they felt were bound to prevail especially given India's newly attained freedom and owing also to the partition of the country. *See*, Constituent Assembly of India Debates, Vol. 5, 21 August 1947 (G.L. Mehta) and Vol. 11, 24 November 1949 (Basanta Kumar Das)

[54] Louise Tillin, *Indian Federalism* (1st edn, Oxford University Press 2019) 22. *See also*, Louise Tillin, 'The fragility of India's federalism' (The Hindu, 8 August 2019) < https://www.thehindu.com/opinion/lead/the-fragility-of-indias-federalism/article28872165.ece > accessed 14 March 2022

[55] Louise Tillin, *Indian Federalism* (1st edn, Oxford University Press 2019) 19, 20

[56] Constituent Assembly of India Debates, Vol. 7, 4 November 1948 (Dr. B.R. Ambedkar)

[57] Through the Constitution (73rd Amendment) Act, 1992 and the Constitution (74th Amendment) Act, 1992

[58] *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 ('*S.R. Bommai*')

[59] Louise Tillin, *Indian Federalism* (1st edn, Oxford University Press 2019) 80, 87

[60] These are to be differentiated from regional parties and have a strong appeal based on sub-nationalism and cultural identity – such as Tamil Nadu and West Bengal.

[61] *See*, M Govinda Rao, 'Goods and Services Tax: Some Progress Towards Clarity' (2009) 44 (51) *Economic and Political Weekly*. As the author states, "*Although GST reform is considered a major step toward fiscal centralization, the very process which led to the implementation of the new GST regime was highly "federalizing," i.e. strengthened the shared rule dimension of fiscal federalism.*"

[62] In 2017, when the GST was introduced, states had been assured via constitutional amendment that the Centre would compensate them for five years for any shortfall in revenue incurred for giving up their taxation rights.

[63] *See*, Shoaib Danyal, 'With the Centre refusing to pay compensation to states, is GST nearing an end?' (Scroll, 29 August 2020) < https://scroll.in/article/971657/with-the-centre-refusing-to-pay-compensation-to-states-is-gst-nearing-an-end > accessed 22 March 2022

[64] Louise Tillin, 'The fragility of India's federalism' (The Hindu, 8 August 2019) <https://www.thehindu.com/opinion/lead/the-fragility-of-indias-federalism/article28872165.ece> accessed 14 March 2022

[65]Constitution of India, Article 371A

[66]Constitution of India, Article 371G

[67]Constitution of India, Article 371F

[68]Constitution of India, Articles 371D, 371 and 371J

[69] *See*, Alok Prasanna Kumar and Arghya Sengupta, 'Interpreting a federal constitution' (The Hindu, 4 February 2014) <https://www.thehindu.com/opinion/lead//article59783998.ece> accessed 18 March 2022

[70]Constitution of India, Articles 154 and 155

[71]Constitution of India, Article 164

[72] Article 174, Constitution of India

[73] Article 356, Constitution of India,

[74] *See*, *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, paras 118, 119, 434

[75] *See*, *Nabam Rebia v. Deputy Speaker*, *Nabam Rebia v Deputy Speaker*, (2017) 13 SCC 326 and *Union of India v. Harish Chandra Singh Rawat*, (2016) 16 SCC 744. In Arunachal Pradesh, the exercise of certain powers by the Governor, such as by using his discretion to summon the assembly at an earlier date and directing legislative business, was held unconstitutional, and in Uttarakhand, a Supreme Court-ordered floor test helped the Congress regain power.

[76] Article 158 of the Constitution specifies that the Governor should not be a member of the legislature or Parliament or hold any office of profit.

[77] Express Web Desk, 'Election Results 2017 Highlights: Goa Governor Mridula Sinha appoints Manohar Parrikar as Chief Minister' (The Indian Express, 14 March 2017) <https://indianexpress.com/elections/election-results-2017-live-updates-bjp-congress-uttar-pradesh-punjab-goa-manipur-uttarakhand-pm-modi-amit-shah-amarinder-singh-manohar-parrikar-4566428/> accessed 2 April 2022; The Times of India, 'Manipur Governor invites BJP to form government, oath ceremony tomorrow' (The Times of India, 14 March 2017) <https://timesofindia.indiatimes.com/elections/assembly-elections/manipur/news/manipur-governor-invites-bjp-to-form-government-oath-ceremony-tomorrow/articleshow/57632055.cms> accessed 2 April 2022

[78] The Economic Times, 'Governors interfering in day-to-day administration of states, TMC's Sougata Roy alleged in Lok Sabha' (The Economic Times, 7 February 2022) <https://economictimes.indiatimes.com/news/politics-and-nation/governors-interfering-in-day-to-day-administration-of-states-tmcs-sougata-roy-alleged-in-lok-sabha/articleshow/89412098.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 2 April 2022

[79] Vivek Dehejia 'The '3-3-3 puzzle' and what to do about it' (Live mint, 10 September 2017) <https://www.livemint.com/Opinion/ctuQdKDhgQNqGAbo6yJFyN/The-333-puzzle-and-what-to-do-about-it.html> accessed 15 May 2022

[80] *See*, Livemint, 'Why India's States are Antsy about Money' (Livemint, 19 February 2020) <https://www.livemint.com/news/india/why-india-s-states-are-antsy-about-money-11582131907759.html> accessed 22 March 2022

[81] Chirashree Das Gupta and Prabhat Prasad Ghosh, 'Political Implications of Inter-state Disparity' (2009) Vol. 44, Issue No. 26-27 *Economic & Political Weekly* <https://www.epw.in/journal/2009/26-27/inter-and-intra-state-disparities-special-issues-specials/political-implications> accessed 15 March 2022. *See* for discussion on how inter-state tensions between Punjab, Haryana and Uttar Pradesh were aggravated in the aftermath of the Green Revolution, and for a discussion on how low-income states were disadvantaged in the open market as compared to higher-income states.

[82] Milan Vaishnav, Jamie Hinston, 'India's Emerging Crisis of Delimitation', (Carnegie Endowment for Internal Peace 14 March 2019), <https://carnegieendowment.org/2019/03/14/india-s-emerging-crisis-of-representation-pub-78588> accessed 15 March 2022. While seats in the Lok Sabha are allotted in proportion to the population of each state, the number of seats per state has been frozen by way of a constitutional amendment since 1976.

[83] The Constitution (Eighty-fourth Amendment) Act, 2001 had suspended the delimitation exercise till the first census after 2026 (i.e., until after 2031) so that states' family planning programs would not affect their representation in the Lok Sabha.

[84] *See*, Milan Vaishnav, Jamie Hinston, 'India's Emerging Crisis of Representation' (Carnegie Endowment for International Peace, 14 March 2019) <https://carnegieendowment.org/2019/03/14/india-s-emerging-crisis-of-representation-pub-78588> accessed 15 March 2022. *See also*, Sanjeev Chopra 'Is India ready for delimitation of constituencies?Time has come for reorganisation of states' (The Print, 3 January 2022) <https://theprint.in/opinion/is-india-ready-for-delimitation-of-constituencies-time-has-come-for-reorganisation-of-states/793024/> accessed 1 April 2022

[85] Milan Vaishnav, Jamie Hinston, 'India's Emerging Crisis of Representation', (Ideas for India, 29 May 2019) <https://www.ideasforindia.in/topics/governance/india-s-emerging-crisis-of-representation.html> accessed 1 April 2022

[86] Milan Vaishnav, Jamie Hinston, 'India's Emerging Crisis of Representation', (Ideas for India, 29 May 2019) <https://www.ideasforindia.in/topics/governance/india-s-emerging-crisis-of-representation.html> accessed 1 April 2022

[87] Prakash Chandra Jha, 'Current trends and issues in Federalism' (2019) 2 (377) *Indian Journal of Public Administration* <https://journals.sagepub.com/doi/abs/10.1177/0019556119844591> accessed 22 March 2022

[88] The Intergovernmental Panel on Climate Change,*Special Report: Global Warming of 1.5 degree Celsius* (2018) Ch 3

[89] Sayanangshu Modak, Ambar Kumar Ghosh, 'Federalism and Interstate River Water Governance in India', (Observer Research Foundation, January 14 2021) <https://www.orfonline.org/research/federalism-and-interstate-river-water-governance-in-india/> accessed 15 March 2022

[90] Aditi Singh, Sharan Poovanna, 'Cauvery water dispute verdict: A timeline' (Live mint, 16 February 2018) <https://www.livemint.com/Politics/m8iE7m0z9IDMdCha3U6oqL/Cauvery-river-water-dispute-A-timeline.html> accessed 15 March 2022

[91] Constitution of India, Seventh Schedule, List II, Entry 5.

[92] Office of the Registrar General & Census Commissioner, India, 'Rural Urban Distribution' <https://www.censusindia.gov.in/census_Data_2001/India_at_glance/rural.aspx> accessed 14 March 2022

[93] Niti Aayog, *Reforms in Urban Planning Capacity in India*: *Final Report* (September 2021) <https://www.niti.gov.in/sites/default/files/2021-09/UrbanPlanningCapacity-in-India-16092021.pdf> accessed 15 March 2022

[94] Kala Seetharam Sridhar, 'Is India's urbanization really too low?' (2019) *Area Development and Policy* 1 (106) <https://doi.org/10.1080/23792949.2019.1590153> accessed 15 March 2022

[95] Katie Pyle and Tarun Arora, 'City municipalities are poor in fixing problems. People are turning to MLAs middlemen, NGOs' (The Print, 17 December 2020) < https://theprint.in/opinion/city-municipalities-are-poor-in-fixing-problems-people-are-turning-to-mlas-middlemen-ngos/567428/ > accessed 15 March 2022

[96] Niti Aayog, *Tenth Five Year Plan 2002 - 2007 Governance and Development*, (2007) Ch 17 < https://niti.gov.in/planningcommission.gov.in/docs/plans/mta/midterm/english-pdf/chapter-17.pdf > accessed 15 March 2022

[97] Ashley, D'Mello, 'CM resolves BMC-MMRDA spat over roads' (The Times of India, 12 November 2008) <https://timesofindia.indiatimes.com/city/mumbai/CM-resolves-BMC-MMRDA-spat-over-roads/articleshow/3701358.cms > accessed 16 March 2022. Clara Lewis 'BMC unlikely to get not to be sole planning authority' (The Times of India, 15 February 2022) < https://timesofindia.indiatimes.com/city/mumbai/bmc-unlikely-to-get-nod-to-be-sole-planning-authority/articleshow/89577635.cms > accessed 16 March 2022

[98] Abhay Pethe, Sahil Gandhi, Vaidehi Tandel, 'Assessing the Mumbai Metropolitan Region: A Governance Perspective' (2011) Vol. 46, Issue No. 26-27 *Economic & Political Weekly* <https://www.epw.in/journal/2011/26-27/special-articles/assessing-mumbai-metropolitan-region-governance-perspective.html> accessed 15 March 2022

[99] Registrar General, India, *Census of India*, Paper No.6 Language (1953) <http://lsi.gov.in:8081/jspui/bitstream/123456789/775/1/23902_1951_LA.pdf> accessed 2 April, 2022

[100] Constitution of India, Article 343

[101] Constituted under the Constitution of India, Article 344

[102] Committee of Parliament on Official Language, *Report of the Committee of Parliament on Official Language* (1958) <https://indianculture.gov.in/report-committee-parliament-official-language> accessed 2 April, 2022

[103] See, Lok Sabha Debates (Second Series) Vol.32 (1959), 1298-99; Lok Sabha Debates (Second Series) Vol.34 (1959), 6435; and Lok Sabha Debates (Third Series) Vol.17 (1963), 11633, 11640, 11645, 11648 and 11652. Nehru made this assurance thrice in the Lok Sabha.

[104] Official Languages Act, 1963, Section 3

[105] Although Hindi was still technically the sole 'official' language and English the transitional language (according to Part XVII of the Constitution), for all practical purposes, both were given the status of official languages. This was evident from the title of the legislation, which used the plural 'languages', unlike the title of Part XVII, which uses the singular 'language'.

[106] Duncan B. Forrester, 'The Madras Anti-Hindi Agitation, 1965: Political Protest and its Effects on Language Policy in India' 39(1) Pacific Affairs (1966)

[107] See, Official Languages Act, 1963, Section 3(1) proviso; for e.g., for communication between the Union and a state which has not adopted Hindi as its official language

[108] Official Languages Act, 1963, Section 3(5)

[109] See, Rose Deller, 'Language Movements and Democracy in India', London School of Economics Blogs (December 2018) <https://blogs.lse.ac.uk/lsereviewofbooks/2018/12/13/feature-essay-language-movements-and-democracy-in-india-by-mithilesh-kumar-jha/> accessed 2 April, 2022; The anti-Hindi agitation in Madras was squarely about resisting the imposition of Hindi. There have been a range of other agitations for the recognition of regional languages. These have been led by speakers of languages such as Maithili, Bhojpuri, Awadhi, Braj, Bodo, Tulu etc.

[110] See, Venkitesh Ramakrishnan, 'The Hindutva road', (Frontline, 17 December 2004) <https://frontline.thehindu.com/politics/article30225920.ece> accessed 2 April, 2022. The Bharatiya Janata Party officially adopted Hindutva as its ideology in its 1989 Palampur resolution.

[111] Vinayak Damodar Savarkar, *Hindutva: Who is a Hindu* (Hindi Sahitya Sadan 1923)

[112] 'Devanagari' and 'Nagari' are used synonymously at times, but the Nagari script is the ancestor of the Devanagari script, and was used to write Prakrit and Sanskrit.

[113] Vinayak Damodar Savarkar, *Hindurashtra Darshan* (Maharashtra Prantik Hindusabha 1949), 47-48

[114] See, M.S. Golwalkar, *Bunch of Thoughts* (Rashtrotthana Sahitya 1966) 101-102. According to Golwalkar, the second Sarsanghchalak, the link language of the country should be Sanskrit, and as long as practical considerations limited the use of Sanskrit, Hindi should be prioritised.

[115] Christophe Jaffrelot, *Hindu Nationalism: A Reader* (Princeton University Press 2009) 5; Ramchandra Guha, 'Why this revival of Hindi chauvinism?', (Hindustan Times, 15 July 2017) <https://www.hindustantimes.com/columns/why-this-revival-of-hindi-chauvinism/story-9Zi7uSZV6MvWvIVXr8EbdM.html> accessed 2 April 2022; Amit Ranjan, 'Language as an Identity: Hindi–

NonHindi Debates in India, Society and Culture in South Asia' (2021) 7(2) *Society and Culture in South Asia* <https://journals.sagepub.com/doi/abs/10.1177/23938617211014660> accessed 2 April 2022

[116] See, for a discussion of this slogan, Karthik Venkatesh, 'Hindi-Hindu-Hindustan: The History of a Slogan' 44(2) *India International Centre Quarterly* 101-112 (2017). This slogan originated in 1890, given by Pratap Narain Mishra in the context of the Braj-Hindi controversy, and later came to be associated with the BJS, the BJP and the RSS.

[117] Bharatiya Jana Sangh, *Manifesto* (1967)

[118] Bharatiya Jana Sangh, *Manifesto* (1971)

[119] See, for an example, Snigdhendu Bhattacharya, 'Anti-Hindi movement re-surfaces in Bengal, leader says BJP's rise a threat to regional languages' (Hindustan Times, 6 July 2018) <https://www.hindustantimes.com/india-news/anti-hindi-movement-re-surfaces-in-bengal-leader-says-bjp-s-rise-a-threat-to-regional-languages/story-waqTnAfUTHrNyqKmZyPw8N.html> accessed 2 April 2022

[120] See, 'Elections 2019: BJP alone got more than half the votes in 13 states and Union territories' (The Scroll, 4 March 2019) <https://scroll.in/latest/924583/elections-2019-bjp-alone-got-more-than-half-the-votes-in-13-states-and-union-territories> accessed 2 April 2022. In the 2019 general elections, the BJP's independent vote share was: 61.01% in Uttarakhand, 69.1% in Himachal Pradesh, 58.47% in Rajasthan, 58% in Haryana, 58% in Madhya Pradesh, 56.6% in Delhi, 62.2% in Gujarat, 49.6% in Uttar Pradesh, and 23.6% in Bihar.

[121] Gaurav Vivek Bhatnagar, 'National Education Policy Draft Amended to Address 'Imposition' of Hindi', (The Wire, 3 June 2019) <https://thewire.in/education/national-education-policy-amended-hindi> accessed 2 April 2022. The original 2019 draft of New Education Policy does not seem to be available any longer in the public domain.

[122] Gaurav Vivek Bhatnagar, 'National Education Policy Draft Amended to Address 'Imposition' of Hindi', (The Wire, 3 June 2019) <https://thewire.in/education/national-education-policy-amended-hindi> accessed 2 April 2022

[123] Bharatiya Janata Party, *Lok Sabha Manifesto* (2019)

[124] Registrar General & Census Commissioner, India, *Census of India 2011* (2011) <https://censusindia.gov.in/2011Census/pes/Pesreport.pdf> accessed 2 April, 2022

[125] *AK Gopalan v. State of Madras* 1950 SCR 88

[126] B.S. Rao, *The Framing of India's Constitution: Select Documents Vol. II*, 143

[127] See, Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 5th Edn. (Wolters Kluwer, 2015), §8.2. The drafters had in mind the experience in the United States where courts liberty rights such as the freedom of contract had been used to strike down social reform legislation on price control, labour conditions etc.

[128] See, B.S. Rao, *The Framing of India's Constitution: Select Documents Vol. III*, 328 and 522-23. For example, the freedom of speech and expression was made subject to decency, morality etc., the freedom of assembly to public order, the freedom to form associations to the interests of the general public, etc.

[129] Constituent Assembly Debates, Vol. 7, 4 November, 1948

[130] Constituent Assembly Debates, Vol.7, 1 December, 1948 (Sardar Hukum Singh)

[131] Constituent Assembly Debates, Vol. 7, 4 November, 1948 (Dr. BR Ambedkar)

[132] B.S. Rao, *The Framing of India's Constitution: Select Documents Vol. II*, 20-36 and 147-153

[133] Draft Constitution, 1949, Draft Article 15-A

[134] Constitution of India, Article 22(1), (2)

[135] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

[136] The Unlawful Activities (Prevention) Act, 1967 has evolved into an anti-terror law, as it has been amended to include provisions of the now-repealed Prevention of Terrorism Act, 2002, like incarceration without a chargesheet, preventive detention, etc.

[137] Gautam Doshi, 'In seven years, 10,552 Indians have been arrested under UAPA – but only 253 convicted', (Scroll,in 15 November 2021) <https://scroll.in/article/1010530/in-seven-years-10552-indians-have-been-arrested-under-uapa-and-253-convicted> accessed 1st April 2022

[138] Gautam Doshi, 'In seven years, 10,552 Indians have been arrested under UAPA – but only 253 convicted', (Scroll,in 15 November 2021) <https://scroll.in/article/1010530/in-seven-years-10552-indians-have-been-arrested-under-uapa-and-253-convicted> accessed 1st April 2022

[139] Constitution of India, Article 22 (3) - (7). See, for a discussion on the inadequacy of the provision, Abhinav Sekhri, 'Article 22 - Calling Time on Preventive Detention' (2020) *Indian Journal of Constitutional Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455821> accessed 1 April 2022

[140] Public Safety Act, 1978, Sections 8(1)(a), 8(3)(b), 18 allow for the preventive detention of any person acting in a manner that is considered "prejudicial to the maintenance of public order", and a person so arrested may remain in custody for up to 2 years, on the basis of the detention order

[141] Apoorva Mandhani, '99% habeas corpus pleas filed in J&K since Article 370 move are pending, HC Bar tells CJI' (The Print, 28 June 2020) <https://theprint.in/judiciary/99-habeas-corpus-pleas-filed-in-jk-since-article-370-move-are-pending-hc-bar-tells-cji/450281/> accessed 1 April 2022

[142] Apoorva Mandhani, '99% habeas corpus pleas filed in J&K since Article 370 move are pending, HC Bar tells CJI' (The Print, 28 June 2020) <https://theprint.in/judiciary/99-habeas-corpus-pleas-filed-in-jk-since-article-370-move-are-pending-hc-bar-tells-cji/450281/> accessed 1 April 2022

[143] Naveed Iqbal, '2,300 booked under UAPA in J&K since 2019, nearly half still in jail' (Indian Express, 5 August 2021) <https://indianexpress.com/article/india/2300-booked-under-uapa-in-jk-since-2019-nearly-half-still-in-jail-7438806/> accessed 1 April 2022

[144] Safwat Sargar, 'A year when courts failed to hear petitions and left jailed Kashmiris at the mercy of the government', (Scroll.in, 2 August 2020) <https://scroll.in/article/968714/a-year-when-courts-failed-to-hear-petitions-and-left-jailed-kashmiris-at-the-mercy-of-the-government> accessed 1 April 2022

[145] For example, in *State of Punjab v. Sukhpal Singh* 1990 SCC (1) 35, the Supreme Court stated that "the Court cannot question the sufficiency of the grounds of detention for the subjective satisfaction of the authority" under National Security Act, 1980, and that "those who are responsible for the national security or for the maintenance of public order must be the judges of what the national security or public order requires".

[146] National Crime Records Bureau (Ministry of Home Affairs), *Prison Statistics India 2020* <https://ncrb.gov.in/sites/default/files/PSI_2020_as_on_27-12-2021_0.pdf> pp. 45-46

[147] Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (Report No. 277, 2018) paras. 6.10-6.11

[148] Constituent Assembly of India Debates, Vol. 7, 1 December 1948 (K.M. Munshi). However, it is to be noted that the offence of sedition continued in Section 124A of the Indian Penal Code (IPC).

[149] The Constitution (First Amendment) Act, 1951 and the Constitution (Sixteenth Amendment) Act, 1963.

[150] *Kedar Nath v. Union of India* AIR 1962 SC 955. The offence was upheld on the basis that retaining it would prevent the government from being subverted and that "*the continued existence of the Government established by law* [was] *an essential condition of the stability of the State*". (para 24)

[151] *See*, Meher Manga, 'Sedition Law: A threat to Indian Democracy?' (Observer Research Foundation, 26 July 2021) <https://www.orfonline.org/expert-speak/sedition-law-threat-indian-democracy/> accessed 30 March 2022; *See also*, Kunal Purohit, 'Our new database reveals rise in sedition cases since the Modi era' (Article 14, 2 February 2021) The database created by Article 14 finds that of the 10,938 Indians that were charged with sedition since 2010, 65% were booked after 2014.

[152] *Kishore Chandra Wangkhemcha & Anr. v. Union of India* (2021) 6 SCC 177

[153] Sakshi Rai and Nikita Bansal, 'India's Spiralling Sedition Crisis & Why A Dilution Of The Law Will Not Prevent Its Misuse' (Article 14, 2 December 2021) <

https://www.article-14.com/post/india-s-spiralling-sedition-crisis-why-a-dilution-of-the-law-will-not-prevent-its-misuse-61a83b9694436 > accessed 30 March 2022

[154] *Himmat Lal K. Shah vs Commissioner of Police, Ahmedabad & Anr.* (1973) 1 SCC 277; *Ramlila Maidan Incident, In re* (2012) 5 SCC 1

[155] *See*, Vrinda Grover, *Assessing India's Legal Framework on the Right to Peaceful Assembly* (December, 2021). In contrast to the Indian scenario, the US has detailed best practices to protect and govern the right to protest such as the prohibition to use lethal force (*See*, Inter-American Commission on Human Rights, Office of the Special Rapporteur on Freedom of Expression, *The inter-American legal framework regarding the right to freedom of expression*, (2009) 103). The Council of Europe has also adopted detailed guidelines, which, for instance, require that states be tolerant even if protests cause some disruption to daily life and should regard them as equally legitimate uses of public space (*See*, European Commission for Democracy through Law (Venice Commission) and the Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly* (3rd ed., July 2019)

[156] As per various 'police standing orders', India requires prior permission for assembly. *See for example*, Delhi Police standing order No, 35/2011 < https://drive.google.com/file/d/1JSdTb8gjpPXrSfjhmqBPTUuiQJzVRBJr/view > accessed 30 March 2022

[157] *Amit Sahni v Commissioner of Police and Ors*, (2020) 10 SCC 439 para 17

[158] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

[159] Torsha Sarkar, Gurshabad Grover, 'Content takedown and users' rights' (Centre for Internet & Society, 14 February 2020) <https://cis-india.org/internet-governance/blog/content-takedown-and-users-rights-1> accessed 1 April 2022

[160] Access Now, 'Shattered Dreams and Lost Opportunities: A year in the fight to #KeepItOn" (March 2021) 26 < https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf > accessed 1 April 2022. The report states that India topped the global list of maximum internet shutdowns in the three consecutive years of 2018, 2019 and 2020.

[161] *See*, Abhinav Sekhri and Apar Gupta, *Section 66A and other Legal Zombies*, (Internet Freedom Foundation Research Series, Working Paper No. 2, November 2018) < https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/Sec.-66A-and-Other-Legal-Zombies.pdf > accessed 31 March 2022

[162] Daniel J. Solove, "Conceptualising Privacy" 90 *California Law Review* 1087, 1088-89; Manuel José Cepeda Espinosa, "Privacy" in Rosenfeld and Sajó ed., *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) [___]

[163] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, para 322; see, for illustrations of how privacy interests can be present in various freedoms under the Constitution, paras 373 and 412-415; see further, for an example of how rights other than liberty may also be relevant in locating privacy interest, para 96

[164] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, para 248-250, 323, 371.

[165] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1

[166] *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33

[167] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

[168] Section 377 of the Indian Penal Code was struck down by the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 before being upheld by the Supreme Court on appeal in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

[169] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, paras 248-250, 271, 298, 373-374

[170] See, for example, Madhavi Menon, "Hadiya, Hinduism and Heterosexuality" 17 Socio-Legal Review 52 (2021) (for discussion on restrictive characterisations, in legal processes, of freedoms related to intimate relations)

[171] An example of this is the recent judgment in *Resham v. State of Karnataka*, W.P. 2347/2022 (High Court of Karnataka)

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