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Announcement of the PUCL National Council Meeting

All members are informed that the next National Council Meeting of PUCL will be held in Delhi between Friday, 4th to Sunday 6th November, 2022 at the Gandhi Peace Foundation, Delhi. All NC Members from different states are requested to reach the venue by 4th November (Friday) morning and arrange to leave after 400 pm on Sunday, 6th November. Elections of new office bearers will be conducted during this NC meeting. All State General Secretaries are requested to confirm to the National Office the number of NC members from their states who will be participating by 15th September, 2022 so that appropriate arrangements can be made for boarding and lodging.

Dr. V. Suresh, General Secretary, PUCL

The idea of India at 75: The Flag, the Constitution and the Anthem¹
Arvind Narrain, President, PUCL Karnataka

What is the idea of India? According to Tagore who was perhaps the first person to use this evocative phrase, in a letter to a friend in 1921, "the idea of India is against the intense consciousness of the separateness of one's own people from others, which inevitably leads to ceaseless conflicts". Sunil Khilnani made the phrase popular in his book called the 'The Idea of India'.

It's an evocative phrase gesturing to the warp and the weft out of which India is spun. One thinks of the language of dreams, of imagination and of future possibilities when we think of the idea of India.

If today standing to mark 75 years since India's independence, we want to understand what is the idea of India, where do we go? How do we discover India or perhaps rediscover India? I would submit that a diverse, plural and heterogenous idea of India is present in the National flag, the Constitution of India and the national anthem. Let me take you through these three symbols which capture the idea of India.

Today through the 'Har Ghar Tiranga' campaign, the national flag is more visibly a symbol of India than ever before. The question is what is the meaning of the tricolour and why do we hoist it?

One part of the story is that the flag stands for sacrifice. There are stories of blood and tears behind even the attempt to hoist the flag in colonial times. We learnt that in many places when Indians tried to hoist the flag, the British tried to prevent it through firing on unarmed Indians and even killing them.

Many of those who sacrificed their lives are unknown and unsung martyrs to the flag. To take just one example Nallavenkataraya, who was a resident of Mysore State, aged 34 attended a large public meeting in a garden at Vidhuraswatha village, held by the local Congressmen in defiance of the order which prohibited the hoisting of the National flag

and holding of public gatherings. The gathering was first lathi-charged and then fired upon to disperse; Nallevenkataraya died in this police firing on 25 April 1938 along with 34 other freedom fighters. This was referred to as Karnataka's Jallianwala Bagh.

The question still remains, there is blood and tears which are part of the history of the flag, but what is the idea of India for which so much of blood was shed? What does the national flag symbolize?

To understand this we can back to those days of the drafting of the Indian Constitution when the Constituent Assembly met. On one day relatively early in the drafting process on 22 July, 1947, 24 members from Hindu, Muslim, Christian, Dalit and Adivasi backgrounds of the Constituent Assembly spoke on the resolution moved by Jawaharlal Nehru on the National Flag.

The resolution basically described the flag as 'having deep Saffron (Kesari), white and dark green in equal proportion. In the centre of the white band, there shall be a Wheel in navy blue to represent the Charkha.' In Nehru's words, it was a 'technical resolution' with no 'glow or warmth in the words'.

But in moving the resolution Nehru narrates the 'history' behind the adoption of the flag in a speech which Sarojini Naidu described as 'epic in its quality of beauty, dignity and appropriateness' and 'sufficient to express the aspirations, emotions and the ideals of this House'. The flag according to Nehru was a symbol of the freedom struggle waged by Indians against British rule.

The flag symbolizes the objective of Indian freedom. However he sounds a note of caution by stating that, 'we have not attained the objective exactly in the form in which we wanted it' and goes on to note that, 'it is very seldom that the aims and objectives with which we start are achieved in their entirety in life in an individual's life or in a nation's life.'

He goes on say that, as much as the flag is a 'symbol of freedom', it will also be a reminder that 'there will be no full freedom in this country or in the world as long as a single human being is unfree. There will be no complete freedom as long as there is starvation, hunger, lack of clothing, lack of necessities of life and lack of opportunity of growth for every single human being, man, woman and child in the country.'

He says that the flag draws its inspiration from the past, from the 'trackless centuries' before the freedom struggle. The 'chakra emblem' is associated with Ashoka, 'one of the most magnificent names not only in India's history but in world history.' For Nehru, to go back to Ashoka 'at this moment of strife, conflict and intolerance' is to 'go back towards what India stood for in the ancient days.'

Ashoka is not only associated with peace but also with 'internationalism'. As Nehru puts it, 'India has not been in the past a tight little narrow country, disdaining other countries'.

He concludes by stating that 'this Flag that I have the honour to present to you is not, I hope and trust, a Flag of Empire, a Flag of Imperialism, a Flag of domination over any body, but a Flag of freedom not only for ourselves, but a symbol of—freedom to all people who may see it.'

The speech resonates with members of the Assembly representing the diversity of India.

V. I. Muniswami Pillai, welcomes the 'introduction of the Sarnath Lion Capital of Asoka', saying that 'the Harijan classes and all those communities who are in the lowest rung of the ladder of society, feel that the constitution which is on the anvil of this supreme body is going to bring solace to the millions of the submerged classes.'

H. J. Khandekar, as the 'President of the All India Depressed Classes Union', supports the resolution saying that, 'If the honour of the

Flag, maintained by us even up to this day is besmirched any time, my Community along with other inhabitants of the country will sacrifice themselves to save the honour of the Flag.'

Chaudhri Khaliqzammam, a Muslim member from the United Provinces, supports the resolution and says that, 'I think that from today everyone, who regards himself as a citizen of India—be he a Muslim, Hindu or Christian,—will as a citizen make all sacrifices to uphold and maintain the honour of the flag which is accepted and passed as the flag of India'

Jaipal Singh, speaking on behalf of the '30 million Adibasis', says that he has 'great pleasure in acknowledging this Flag as the Flag of our country in the future' and goes on to say that, 'members of the House are inclined to think that flag hoisting is the privilege of the Aryan civilized', but 'adibasis have been the first to hoist flags and to fight for their flags'.

S. Nagappa from Madras say that, 'Everyone, whether he be a Muslim, Hindu or Christian, will own this Flag. He has to defend it and stake even his life, if need be then alone will the honour of our country be high in the eyes of the world.'

The Rev. Jerome D'Souza from Madras expresses the hope that, 'Above all, in every case of fratricidal warfare, of strife among ourselves, when injustice is done, when tempers rise, when communal peace is broken up, may the sight of this Flag help to soften the harsh and discordant voices, and help us to stand together, as we have gathered today in unanimity, in happiness is brotherly feeling to salute this, our National Flag.'

The final word rests with Sarojini Naidu who expresses her happiness that 'the representatives of the various communities that constitute this House' have pledged 'their allegiance to this Flag.'

She asks the prescient question as to 'Who shall live under that Flag

without thinking of the common Indian? Who shall limit its functions? Who shall limit its inheritance? To whom does it belong?' She answers it by saying that, 'It belongs to India. It belongs to all India.'

Why go back to this history of the flag today?

Going back to this history may help us to give philosophic content and historical depth to the celebration of the 75th year of our independence.

Firstly, the universal sentiment of those who spoke in the Constituent Assembly was that across the religious, caste, adivasi and gender diversity of India, all were united in the sentiment that the flag belongs to us all.

Secondly, the celebration of the 75 year of independence must have content, beyond just an invocation of a national feeling. We must be able to give the idea of India, economic and social content and assert that freedom from want is a critical dimension of freedom. Nehru in his speech says that there is 'no complete freedom as long as there is starvation, hunger, ... and lack of opportunity of growth for every single human being, man, woman and child in the country.' If India is one of the most unequal countries in the world, then a celebration of freedom must include an awareness of economic and social unfreedom and the need to redress it.

Thirdly, if the flag is a symbol of freedom it is also a symbol of what the author of our national anthem, Rabindranath Tagore would have called 'tireless striving'. In his poem, *Where the mind is without fear*, Tagore speaks of 'tireless striving which stretches its arms towards perfection'. Nehru before he died had on his table the Robert Frost poem which reads:

The woods are lovely, dark and deep
But I have promises to keep
and
And miles to go before I sleep
And miles to go before I sleep

This idea of freedom as a ideal which we are constantly aspiring to reach, as a work in progress is also echoed by the father of the Indian Constitution, Babasaheb Ambedkar. As he put it in his famous concluding speech in the Constituent Assembly

"On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value, How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?"

We have to continue to travel on that road, realizing that we have only imperfectly realized our dreams. That awareness, that modesty, that feeling that we have more to do has to be part of the way we mark 75 years of independence. It has to be a pledge and a rededication to the task still to be done.

Finally, the flag should be a symbol of freedom, and most importantly freedom from fear. As Gandhiji points out in *Hind Swaraj*, 'those alone can follow the path of passive resistance who are free from fear, whether as to their possessions, false honour, their relatives, the government, bodily injury, death'. Today people are fearful, fearful of speaking their minds fearful of acting in accordance with their conscience. We have to remember Gandhiji and learn to speak and act fearlessly, without worrying about what the government, your family or your society may say. We need to cultivate fearlessness as a form of freedom.

Much as the flag is an important part of who we are at 75, equally important is the text we know as the

Constitution of India. All our leaders at the level of the state and the centre, our president and Prime Minister, the judges of the High Court and the Supreme Court take oath under the Constitution. They take an oath to 'bear true faith and allegiance to the Constitution of India'

What is the nature of the Constitution which our leaders have promised to follow? It's a long document comprising 395 articles and 12 schedules. One way of understanding what is this document is by understanding the Preamble which symbolizes the heart of the Constitution. OR as Upendra Baxi put it, 'the Constitution is a footnote to the Preamble'.

I hope all of you have read the Preamble, because it is the foundation on which India at 75 rests. It provides you a master key to understand the idea of India.

The Preamble reads:

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

JUSTICE, social, economic and political;

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

EQUALITY of status and of opportunity;

and to promote among them all **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;

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

By talking of the national flag we have indirectly talked about some of the ideals in the Preamble including the idea of equality, freedom, secularism and

democracy. I want to pick up on two central ideas in the Preamble, which are absolutely key to imagining India at 75.

The two key ideas in the Preamble which I will focus attention on are dignity and liberty. Dignity we owe to Babasaheb Ambedkar and liberty we cannot understand without thinking of the one who fought ceaseless for freedom, namely Mahatma Gandhi.

Why is the word dignity in the Preamble? Going back to the precursor to the Preamble, the Objectives Resolution moved by Nehru, there is no mention of dignity, but yet it finds a place in the Preamble.

We get a sense of what the word meant in the debates in the Constituent Assembly on whether 'dignity of the individual' should precede 'unity of the nation'. B.N Rau argues that the reason for putting the dignity of the individual first was that unless the dignity of the individual is assured, the nation cannot be united. The lexical priority of the individual was really about the philosophical centering of the individual in the Indian Constitution.

Akash Singh Rathore persuasively argues that dignity is there in the Constitution because Ambedkar insisted it be there. Why was dignity important to Babasaheb? One can perhaps read it autobiographically and make the point that Babasaheb's entire life was a struggle against humiliation and hence dignity was absolutely important to him.

In one of his few autobiographical writings he tells us about his experience of discrimination.

For instance, I knew that in the school I could not sit in the midst of my classmates according to my rank [in class performance], but that I was to sit in a corner by myself. I knew that in the school I was to have a separate piece of gunny cloth for me to squat on in the classroom, and the servant employed to clean the school

would not touch the gunny cloth used by me. I was required to carry the gunny cloth home in the evening, and bring it back the next day.

While in the school I knew that children of the touchable classes, when they felt thirsty, could go out to the water tap, open it, and quench their thirst. I could not touch the tap; The presence of the school peon was necessary, for he was the only person whom the class teacher could use for such a purpose. If the peon was not available, I had to go without water. The situation can be summed up in the statement—no peon, no water.

Babasaheb's way of responding to this experience of humiliation, of being made to feel alone and powerless and of feeling stripped of his humanity is to insist that dignity be a part of the Constitution.

Today whenever you see people humiliated on the ground of their caste, religion, gender, sexuality etc, it is a violation of their right to dignity. If you want to honour the meaning of the Indian Constitution, you must take a pledge never to violate any persons right to dignity.

To understand liberty in the Preamble of the Indian Constitution we have to go to the words and actions of that great lover of liberty, Mahatma Gandhi.

Freedom of speech and expression is an essential dimension of political freedom, according to Mahatma Gandhi. As he put it:

“We must first make good the right of free speech and free association before we can make any further progress towards our goal. [...] We must defend these elementary rights with our lives. Liberty of speech means that it is unassailed even when the speech hurts; liberty of the press can be said to be truly respected only when the press can comment in the severest terms upon and even misrepresent matters.... Freedom of association is truly

respected when assemblies of people can discuss even revolutionary projects.

Civil liberties consistent with the observance of non-violence are the first step towards Swaraj. It is the breath of political and social life. It is the foundation of freedom. There is no room there for dilution or compromise. It is the water of life”.

Where Mahatma Gandhi's words became the fire of action was when he was tried for sedition in the Great Sedition trial of 1922 for writing three articles which criticize the British government.

In an article called the '**Puzzle and its solution**' he wrote:

“We are challenging the might of this Government because we consider its activity to be wholly evil. We want to overthrow the Government. We want to compel its submission to the peoples' will. We desire to show that the Government exists to serve the people, not the people the government. Free life under the Government has become intolerable, for the price exacted for the retention of freedom is unconscionably great”.

For this he is tried for sedition.

He goes on to say that:

“Section 124 A, under which I am happily charged, is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence. ..But I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system”.

We have to understand all the rich concepts in the Preamble not just as words but as words in which life is breathed by struggle- the struggle of innumerable Indians who suffered and died for these ideals. It is in this history of struggle that the idea of India is born.

Finally I want to briefly refer to the national anthem by Rabindranath Tagore. What is the idea of India encoded in the national anthem?

“You are the ruler of the minds of all people,
Dispenser of India's destiny.
Thy name rouses the hearts of Punjab,
Sindh, Gujarat and Maratha,
Of the Dravida and Orissa and Bengal;
It echoes in the hills of the Vindhya and Himalayas,
Mingles in the music of Jamuna and Ganges
and is chanted by the waves of the Indian Ocean.
They pray for your blessings

and sing your praise.

The saving of all people waits in your hand,

You dispenser of India's destiny.

Victory, victory, victory, victory to you”.

You read it the references are to the cultural and social diversity of India right from Sindh and Gujarat to Orissa Bengal and the Dravidian lands. It is a reference to the geographic diversity of India right from the mountains of the Himalayas and Vindhya to the great rivers of India from the Jamuna to the Ganga to the Indian ocean.

The national anthem, invokes a feeling of love and veneration towards this diversity of India. It shows what inclusive nationalism can mean based as it is on the common love of the plurality and diversity that is India. Tagore was a critic of exclusive nationalism saying that, the 'idea of the nation'

is 'one of the most powerful anesthetics that man has invented', under the influence of which 'the whole people can carry out its systematic programme of the most virulent self-seeking without being in the least aware of its moral perversion—in fact being dangerously resentful if it is pointed out'. From Tagore we learn that our nationalism can't be narrow and exclusive but open and inclusive, based on the love of land and the love of all the people who inhabit the land.

To summarise, the idea of India is encoded in the Preamble, the national flag and the national anthem. It is up to us to decode the meaning and follow through on its promise. That would be an appropriate way of celebrating our 75th year of independence.

¹Text of a talk delivered by **Arvind Narrain** to the RBANMS Education Charities, Bengaluru. □

Press Statement: 18th August, 2022

PUCL Condemns the Remission of the Sentence of the 11 Convicts in the Bilkis case as Arbitrary, Unfair and Dangerous for Indian Democracy

People's Union for Civil Liberties (PUCL) condemns the release on remission of the 11 convicts in the Bilkis Bano case on August 15, 2022. 11 convicts charged with charges of gang rape of a pregnant woman and multiple murders walked out free. The release of the 11 convicts, even as many others accused of less serious offences remain in jail is an arbitrary exercise of power, having dangerous political overtones. It mocks the idea of a democracy based on rule of law when those accused of serious offences including rape and murder are arbitrarily released even as those who are falsely accused of crimes, continue to languish in jail.

The release of the accused sends out the chilling message that the most heinous crimes including rape and murder when committed

against the minority community, are not crimes. This has fatal repercussions for the future of Indian democracy.

On March 3rd 2002 Bilqis Bano from Randhikpur village of Dahod district Gujarat was 21 years old and 5 months pregnant when she was gang raped, 3 other women including her mother were also gangraped in front of the men of their family. Bilqis's 3-year-old daughter Saleha was murdered, as the accused smashed her head with a stone and 7 members of her family were brutally murdered. All those who committed this gruesome act of brutality were people she knew from her neighbourhood.

Due to public outrage in the matter the Supreme Court ordered the investigation to be carried out by CBI. In 2004 the accused in the

case were arrested and the trial began in Ahmedabad, however due to apprehensions over the trial being conducted in Gujarat, fearing evidence tampering and threats to the witnesses, the trial was transferred to Maharashtra by the Supreme Court. On January 21, 2008, the Special CBI Court sentenced the 11 accused to life imprisonment on the charges of conspiring to rape a pregnant woman, murder, and unlawful assembly under the Indian Penal Code. The court acquitted seven other accused for lack of evidence and one of the accused had died during the trial. In January 2018 the Bombay High Court upheld the conviction of the accused. The case was carried to Supreme Court which upheld the convictions.

Thereafter one of the accused Radheyshyam Shah approached

the Gujarat High Court seeking remission of the sentence under sections 432 and 433 of the Code of Criminal Procedure (CrPC). The Gujarat HC dismissed his plea saying that since the trial has been concluded in the State of Maharashtra, the application for premature release must be filed in the State of Maharashtra and not in the State of Gujarat, as prayed by the petitioner. The petitioner approached the Supreme Court, the court in its order dated 13th May 2022 held that the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial was to be concluded in the same State and in terms of Section 432(7) CrPC, the appropriate Government in the ordinary course would be the State of Gujarat but the instant case was transferred in exceptional circumstances by this Court for limited purpose for trial and disposal to the neighbouring State (State of Maharashtra) by an order dated 06th August, 2004 but after the conclusion of trial and the prisoner being convicted, stood transferred to the State where the crime was committed (Gujarat) which remains the appropriate Government for the purpose of Section 432(7) CrPC. The policy with which the petitioner must be governed, applicable in the State of Gujarat on the date of conviction, is Resolution No. JLK/3390/CM/16/Part/2/J dated 9th July 1992.

Based on the order of the Apex Court, the government of Gujarat formulated a committee to consider the release of the accused and found it fit to allow the pre-mature release of these accused.

Recently the Ministry of Home affairs, Central Government issued a notice on "Special Remission Module" to grant remission to prisoners as part of the celebration of Azadi Ka Amrit Mohotsav and

directed the states to take necessary action to expedite the process, the notice says prisoners to be released on 15th August 2022, 26th January 2023 and 15th August 2023 after due consideration by the committees formulated at the state levels. However, the guideline clearly mentions that the policy will not be applicable for prisoners convicted of rape. Similarly, as per the resolution no JKL/822012/1859/J dated 23rd January 2014 of the Government of Gujarat Home Department, prisoners convicted for gang rape, group murder of two or more members would not be considered for remission. However, the Resolution No. JLK/3390/CM/16/Part/2/J dated 9th July 1992. according to which the 11 convicts were released has not categorised the convicts eligible for remission process. In any case this is a discretionary relief which has to be exercised on objective basis. In the present case where the Supreme Court had itself felt that situation in Gujarat was not ripe for handling the trial and the victim and her family were constantly under pressure and threat the discretion should not have been exercised to release the persons. It was also incumbent, in the context of the case, to ascertain the views and apprehensions of Bilkis and her family before any decision was taken.

It should be noted that under section 435 of the CrPc if the case is investigated by the CBI, that the power of remission that is awarded to the state government in a case investigated by the CBI shall not be exercised by the government except after consultation of the central government.

The arbitrary release of these 11 convicts sends a rude shock across the nation, raising several questions as to how the State of

Gujarat has arrived at this decision and how has the central government remained silent after affirming decisions on such matters. The decision to grant remission should be consultative, fair, informed, and reasonable. Here it is evident that the state has abused the discretionary power awarded to it.

This decision also mocks the efforts of all the human rights defenders in the country who have been walking the difficult path to seek justice for the most vulnerable in this country. Bilkis and Yakub did not give up their faith in the state for nearly 17 years and fought tooth and nail for justice. The family today is again pushed into the darkness of fear, their faith shaken, and their world shattered.

While PUCL is supportive of the remission of sentences, at the same time it cannot be done in a discriminatory manner, and especially in heinous crimes such as this one and that too without ascertaining and establishing full support and safety structure for victims.

As concerned citizens of the country we demand that this injustice be undone

1. The remission of these 11 convicts be immediately revoked
2. Protection measures for Bilkis and her family be immediately ensured
3. The Central and State government be held accountable for such arbitrary abuse of power
4. The Government of Gujarat should place in the public domain the entire process, the proceedings of the committee leading to the governor finally giving assent to the remission of sentences.

Dr. V. Suresh, General Secretary, PUCL; **Ravi Kiran Jain**, President, PUCL □

The Executive('s) Court: Notes on the Legacy of Justice A.M. Khanwilkar¹

Gautam Bhatia (Blogpost); 29th July, 2022

This blog has a long-standing tradition of assessing the judicial legacies of Chief Justices of India, upon their retirement (see here, here and here). This tradition has hitherto been limited to Chief Justices, because of the sway that they exercise upon the Supreme Court as “master(s) of the roster”, and because during their tenures, they tend to hear significant constitutional cases themselves.

Last year, an exception was made upon the retirement of Justice R.F. Nariman, for reasons explained in this blog post. Today, the retirement of Justice A.M. Khanwilkar requires, I believe, a second exception. One reason for this is that during the course of his career (as we shall see in this post), Justice Khanwilkar has written some of the most consequential judgments concerning State power and the rights of the individual. But secondly – and more importantly – when you study these judgments together, you glimpse a certain judicial philosophy – such as it is – at work. This judicial philosophy – subject to a few important exceptions – is, I believe, largely representative of the Supreme Court today (which also perhaps explains why, across Chief Justices, these kinds of cases have been regularly assigned to Justice Khanwilkar, one of its most forceful proponents).

What is this philosophy? In my earlier analysis of Justice Khanwilkar's judgment in the FCRA Case (also discussed below) I had compared it to the Peruvian President Óscar R. Benavides famous line, “for my friends, anything; for my enemies, the law.” In a similar vein, the common thread running through Justice Khanwilkar's constitutional law judgments is: “for the State, anything; for the individual, the law”: it is the philosophy not just of the executive court, but of the executive('s) court.

Before we begin, a final point, by way of caveat: it is almost trite to say that I do not agree with the outcomes of the

cases that I discuss below. I have criticised some of these judgments when they were delivered, and in the Central Vista Case (that I flag, but do not discuss), I was one of (many) arguing counsel on the losing side. My analysis below, however, is not founded simply upon the fact of disagreement with the outcome, or of dislike of these judgments. Regardless of my predilections, I believe that these judgments reveal something important, both about Justice Khanwilkar's judicial career, and about the contemporary Supreme Court, which is important to articulate and to discuss. This post should be read in that spirit.

Watali: Taking a Sledgehammer to Personal Liberty

Any discussion of Justice Khanwilkar's legacy must begin with the 2019 judgment in National Investigation Agency vs Zahoor Ahmad Shah Watali. The case involved the interpretation of Section 43(D)(5) of the Unlawful Activities Prevention Act [“UAPA”], India's umbrella anti-terrorism statute. Section 43(D)(5) prohibits a Court from granting bail to an accused if “on a perusal of the case diary or the report made under Section 173 of the [Criminal Procedure] Code, [the Court] is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.” In layperson's language, Section 43(D)(5) bars the grant of bail if it appears that the police version (through the case diary or the chargesheet) against the accused is, on the face of it, true.

Watali was an appeal by the National Investigation Agency [“NIA”] against an order of the Delhi High Court. In that order, the Delhi HC had granted bail to Watali (the accused), under Section 43(D)(5) of the UAPA. The High Court took into account the (uncontroversial) legal proposition that “as far as the statutes concerning serious offences inviting grave consequences are invoked, the trial Court will scrutinize the material with extra care.” The Court's job was not

to proceed simply on the basis of the statements made by the investigative agency, and nor to act as a “post-office” for the State. On this basis, the High Court subjected the police version – according to which Watali was involved in terror funding – to rigorous scrutiny. It found that many of the witness statements were inadmissible under the law of evidence, that the documents purporting to originate from the accused were neither signed by him and nor on his letterhead, and that other documents were entirely innocuous, and consistent with his position as a prominent Kashmiri businessman. On this basis, the Court found that at that point, the police version was speculative, and there was no ground for denying bail to the accused.

When the case came up in appeal, the Supreme Court – in a judgement authored by Justice Khanwilkar – overturned the High Court's order, and put Watali back in jail (he stayed in jail – awaiting trial – for three more years, until in February 2022, he was moved to house arrest because of a terminal disease). Crucially, Khanwilkar J's problem with the High Court was not that it had incorrectly appreciated the facts of the case. Rather, it was that the High Court had applied the wrong legal standard altogether, and that the true role of the Court under S. 43(D)(5) of the UAPA was, effectively, to act like a post office. He noted that while examining the question of bail, “elaborate examination or dissection of the evidence is not required to be done”, and that furthermore, to reject inadmissible statements at the stage of bail was akin to entering into the “merits and demerits of the case.” Instead, the Court was to form a view based on the “broad probabilities” flowing from all the materials supplied by the police.

The judgment in Watali was criticised at the time as being incorrect (see, e.g., Abhinav Sekhri's blog post), and I do not intend to traverse covered

ground once again. It is worthwhile, however, to recall once again just what it did. As is well known, at the time of bail, the defence cannot present its own arguments, put forward its own witnesses, or cross-examine the prosecution's witnesses. It has no real way to effectively contest the State's case. All that is for the stage of trial. At the time of bail, all the Court can look at – and all that the defence can point to – is the State's version of events. Thus, when Section 43(D)(5) prohibits the Court from granting bail if “there are reasonable grounds for believing ... that the accusation is prima facie true”, everything turns upon how closely and deeply the Court is authorised to examine the State's version, on its own terms – for internal consistency, for plausibility, for whether the State is relying on materials that would even be admissible at trial (such as hearsay statements) – to come to its prima facie conclusion. And when, in Watali, Khanwilkar J barred all Courts from “examining” or “dissecting” the evidence, he effectively made the grant of bail in UAPA cases borderline impossible. As Sekhri wrote at the time, he “actively chose a legal position that makes lengthy undertrial detention more likely.”

The asymmetry in power is glaring. UAPA trials in India take years – decades – to complete. If the grant of bail is made borderline impossible, then all the police are required to do is to slap the UAPA onto a chargesheet, and an individual will be condemned to years – or decades – in jail without trial. The chargesheet and the materials need not be persuasive, need not be internally coherent, and in addition to all this, may even rely on plainly inadmissible material (as in 'Umar Khalids case) : all that ceased to matter once, in Watali, Khanwilkar J turned all courts into stenographers for the Prosecution, while attaching dumbbells to the feet of the Defence and throwing it into the river to swim or sink. In this sense, Sekhri's 2019 warning has turned out to be prescient: “it is hard to conceive of outcomes which are anything but

fearsome. The decision could make the UAPA an even more attractive tool to law enforcement agencies now that getting bail is harder...” We now know that this is exactly what has happened: the UAPA is the foremost tool of political repression in India, and Watali has become the chant that almost all Courts (barring a few) invoke to justify keeping people in jail for years without trial.

PMLA: Taking another Sledgehammer to Personal Liberty

If the UAPA is the executive's weapon of choice to keep inconvenient individuals in jail for years without trial, the Prevention of Money Laundering Act [“the PMLA”] is its political weapon. By now, every Indian knows about the “Enforcement Directorate” – or, as it is commonly known by its abbreviation – the “ED”. The eyeball impression that the ED is used to overwhelmingly to jail political opponents without trial, has been confirmed in this detailed analysis; that the purpose is jail without trial is borne out by the fact that while the number of PMLA cases filed by the ED has risen by eight times over the last eight years, the conviction rate under the law is under 1% – a statistic that should send alarm bell ringings for everyone (other than, it seems, the Supreme Court).

Amendments to the PMLA – passed in 2019 – which made the legal regime more draconian, were challenged before the Supreme Court. On 27 July – two days before his retirement – a three-judge bench led by Khanwilkar J delivered judgment, upholding all the provisions under challenge (see here, here and here).

A similarly exhaustive analysis of the judgment is not the subject of this post. However, its underlying philosophy is simple enough: while in every sense the officials of the ED act like the police – as coercive appendages of the State, and in the power that they hold over citizens – the Court liberated them from following the minimal procedural constraints under the Code of Criminal Procedure that do apply to

the police. For instance, the Court exempted the ED from sharing the equivalent of the police's First Information Report – the “ECIR” – with the accused, noting that communicating the “grounds” was enough; the Court held that as an ED summons was not an “arrest” (even though functionally indistinguishable from it), the constitutional right against self-incrimination doesn't apply to statements made under ED questioning; that because ED officials weren't “police officers” (even though functionally indistinguishable from them), confessions made to them were admissible in evidence (even though the whole purpose of making confessions to the police inadmissible was the fear of coercion); and that because the ED wasn't a police force (even though functionally indistinguishable from one), the procedures that it followed (the “ED manual”) wasn't required to be made public, but could remain an “internal document.” If all of this sounds somewhat reminiscent of the Stasi, it is because it is rather reminiscent of the Stasi (or, in Pratap Bhanu Mehta's words, “Kafka's Law”).

The effect of the judgment is clear: it is the sanctioning of a State-controlled, coercive militia, exempt from the basic principles of due process and the rule of law. To this heady cocktail, the Court added further, dangerous mixes: it upheld a bail requirement even harsher than section 43(D)(5) of the UAPA, and which the Supreme Court had itself struck down four years before (Khanwilkar J overruled precedent, simply to ensure that bail would become almost impossible under the PMLA), and upheld the “reverse burden” clause – i.e., that under the PMLA, the burden was on the individual to prove their innocence, and not on the State to prove guilt.

And finally, to expand the scope of the PMLA, Khanwilkar J went further: Section 3 of the Act stipulates that “whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or

activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.” In other words, for the PMLA to be attracted, two conditions had to be satisfied: involvement (whether intentional or unintentional) in connection with proceeds of crime, and the (definitely) intentional “projecting” or “claiming” it as untainted property. Khanwilkar J held, however, that actually, the word “and” meant “or” (just like “day” means “night”), and that therefore, simply being in possession of “tainted” property was enough for guilt under the PMLA.

When you now combine this with the reverse burden clause (that under the PMLA, the individual is guilty until proven innocent), and Khanwilkar J’s finding that any criminal offence could be brought under the PMLA (thus effectively making the CrPC wholly redundant), the effects of this judicial rewriting exercise are terrifying. They also exacerbate and worsen the already wide definition of tainted property under the PMLA, which effectively covers just about everything (and makes just about everything subject to attachment orders (see here), financially crippling someone under PMLA scrutiny; note that Khanwilkar J also held that property can be attached right from the beginning of PMLA proceedings).

But there are three things really of importance here. The first is that the re-worded section makes no grammatical sense (try reading it aloud and see for yourself). The second is that this interpretation turns basic criminal law principles on its head: because criminal legal statutes are coercive, and impose jail time on people, there is a time-honoured, well-worn principle in criminal law that they are to be read strictly and narrowly. In Khanwilkar J’s judicial philosophy of “for the State, everything; for individuals, the law”, however, every canon of interpretation is upside down, and nobody is safe from arbitrary State action; and finally, of course, to

accomplish this task, he had to rewrite the section, taking the word that existed and replacing it with its opposite. I have previously referred to this as “Humpty Dumpty jurisprudence”, where the Court – like Humpty Dumpty in Alice Through The Looking Glass – decides that words mean what it decides them to mean, just because it can:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

In his analysis of the judgment, Abhinav Sekhri points out that there was material on record to show that while drafting Section 3, the legislature had made a genuine error, and used the word “and” while it meant to use the word “or”. However, when it comes to criminal law, it is most certainly not the Court’s job to save the legislature from the consequences of its own incompetence (especially when the same leniency is hardly accorded to the individual!): the whole point of the doctrine of reading criminal statutes literally, narrowly, and strictly is that, given the differences in power between the State and the individual, the reach of the criminal law is not to be expanded any further than what the words can bear. It is that principle that is Khanwilkar J entirely forsook in rewriting Section 3.

Let us take a step back, and sum up. When we look at the judgment in a broader context, it is important to keep in mind Sekhri’s observation that not all of this is entirely new. In many respects, the PMLA judgment is a continuation of the Indian Supreme Court’s long-standing tradition of expanding the State’s coercive powers and erasing the procedural safeguards that the law extends to individuals. In the PMLA context, however, the statute’s provisions magnify that substantially: the statute “weaves together all the restrictive, rights-effacing clauses

from this illustrious past in one fine blanket, and it then goes further.” And the PMLA judgment, in turn, is perhaps unique in that it brings all of those rights-effacing judicial predilections together, in one case – what Sekhri calls a “greatest hits” video, and to which we can add: the band is the Supreme Court and the “hits” are direct hits to our constitutional rights: in sum, Khanwilkar J rewrote a criminal statute to substantially widen its ambit; authorised the State to bring any offence within that ambit; upheld the reverse burden of proof within that widened ambit; deprived individuals of their procedural and constitutional rights within that widened ambit; made the grant of bail almost impossible within that widened ambit; and exempted the State authorities from any effective constraints, once they began to operate within that widened ambit. When you put all of these together, what emerges is the classic definition of a lawless law, blessed by the executive’s Court.

Noel Harper: Taking a Hatchet to the Freedom of Association

In April 2022, Khanwilkar J wrote a judgement upholding various amendments to the Foreign Contributions (Regulation) Act of 2022. Elsewhere, I have analysed this judgment at some length, and pointed out how the Court accorded its imprimatur to a set of provisions that had turned India’s NGO regulation law into a Russian-style legislation that effectively made the work of most NGOs either impossible, or prohibitively difficult. A few salient points stand out from this judgment.

First, at the time of hearing Noel Harper, there were challenges to the FCRA pending in High Courts. Noel Harper itself was a limited challenge to one set of restrictions. Now, ordinarily, the Supreme Court is quick to talk about how the High Courts should not be bypassed; however, it seems that all that rhetoric ceases to matter when legislation that the political executive really cares about is at stake. Here, the Khanwilkar J-led bench could not

wait to bypass those same High Courts, and hear and decide all questions about the constitutional validity of the FCRA, thus effectively depriving the High Courts from hearing the cases before them.

Secondly, the judgment in Noel Harper applied differential standards to the State and to the petitioners, where the State's factual claims (contrary to the prevailing legal standard of proportionality) were taken as true without any scrutiny, whereas the petitioners' claims – and bona fides – were taken with the highest level of mistrust. In my post analysing the judgment, I wrote that: The Court begins by framing the issue in a way that is most favourable for the State, and least favourable for the citizen. Having framed the question thus, it then goes on to accept the State's factual claims at face value, but does not extend the same courtesy to the citizen. Having done that, it then applies those parts of existing legal doctrine that favour the State, and ignores – or misrepresents – those parts that protect the rights of citizens. Having framed the question in favour of the State, accepted the State's version of reality, and applied the doctrine in favour of the State – voila! – the conclusion is that the challenged State action emerges validated from the tender caresses of judicial review.

Indeed, this is a thread that runs throughout Khanwilkar J.'s judgments, and for a more elaborate articulation in this case, interested readers may consult the above blog post as a whole.

However, the most glaring aspect of Khanwilkar J.'s judgment (other than its impact on the freedom of association) – is that he explicitly and unashamedly framed its arguments in ideological terms, and this ideology was evidently the ideology of the political executive. Lines from the judgment include: “*The question to be asked is: “in normal times”, why developing or developed countries would need foreign contribution to cater to their own needs and aspirations?”; “Indisputably, the aspirations of any country cannot be*

fulfilled on the hope (basis) of foreign donation, but by firm and resolute approach of its own citizens”; “*There is no dearth of donors within our country.*”

These are familiar lines. These are lines that we hear from the mouths of authoritarian leaders across the world, when they justify clamping down on civil society, and in particular, on NGOs. None of these words have anything to do with the law, legal reasoning, the Constitution, and the practice of constitutional adjudication. Yet here they are, serving as the articulated major premise of a Constitutional Court judgment that is *supposedly* about whether restrictions upon the freedom of association – achieved via choking off funds to NGOs – are reasonable or not. But as we have seen, that is not *really* what this judgment is about: what this judgment is really about is giving formal judicial imprimatur to some of the more extreme and prejudicial rhetoric of the political executive, giving a dressing down to citizens who have the temerity to want to raise funds for NGO work, and telling them to be “resolute and firm” if they want to have rights. This is the language not just of the executive court, but of the executive(s) court.

Teesta Setalvad and Himanshu Kumar: Taking a Dagger to Article 32

The language of the executive's court is present most starkly in Justice Khanwilkar's notorious opinion in the Zakia Jafri case. Once again, it is not my task here to examine the correctness of the judgment in refusing to set aside the SIT Report that had found that there was no controversy at high governmental levels during the horrendous 2002 Gujarat Riots (interested readers may refer to Nizam Pasha's analysis of the judgment, here; see also the discussion in Episode 2 of the Concast, with Abhinav Sekhri, on the criminal legal standards applied – or not applied – by the Court). For the purpose of argument, let us say that the Court found – as was its prerogative to find – that the petitioners had failed to provide

adequate evidence to dislodge the SIT's findings of no political conspiracy, and that therefore, the writ petition had to be dismissed.

But that is not the only thing that Justice Khanwilkar did. First, he spent some time in the judgment lavishing fulsome praise on the executive authorities (“indefatigable work”) – something particularly embarrassing, coming from a constitutional court, in a case involving large-scale riots. Most seriously, however, he then went on to note that this case was the result of a “coalesced effort by disgruntled officials”, that those who had brought the present proceedings “had the audacity to question the integrity of every functionary ... to keep the pot boiling”, and “all those involved in such abuse of process, need to be in the dock and proceeded with in accordance with law.”

There are a few things we need to note about these lines. The first is that in a functioning legal system, lines such as these would invite an immediate action for defamation, with heavy damages to follow. None of that, however, applies here: following the example set by Khanwilkar J., it seems that Supreme Court Justices, in the course of their official duties, are free to engage in character assassination, insinuations, and personal attacks, without being called upon to provide a shred of evidence for the same. Forget evidence, the Supreme Court did not even accord the petitioners the courtesy of a hearing on this point before damning them through its judgment. Needless to say, at the next available opportunity – judicial or extra-judicial – the same Supreme Court is likely to issue moral lectures on the principles of natural justice.

But what followed is even more alarming. The day after these “observations”, Teesta Setalvad – petitioner no. 2 in this case – was arrested by the Gujarat Police. The paragraph of the Supreme Court judgment that I have extracted above was the literal basis of this arrest: it was cited in the FIR. In other words, the Supreme Court – through Khanwilkar J – by making statements

such as “all those involved in such abuse of process need to be in the dock” laid the groundwork for an arrest that State authorities followed up on within hours. And this arrest – it is important to note – was on the basis of a judgment in a case filed under Article 32 of the Constitution, which guarantees the right to move the Supreme Court for the enforcement of rights; in other words, the petitioner in a case filed against alleged State impunity, before the Supreme Court, was arrested by the State, based on the judgment of the Supreme Court.

At the time of writing, Teesta Setalvad remains in jail.

Perhaps you may say that this is a one-off, an aberration. Except that, a few days later, the same thing happened all over again, and once again it was Justice Khanwilkar who was the senior judge on the bench (although the actual judgment was written by a future Chief Justice of India, Justice J.B. Pardiwala). Himanshu Kumar vs State of Chhatisgarh involved a 2009 petition regarding extra-judicial encounter killings in the state of Chhatisgarh. As in Zakia Jafri's case, this was an Article 32 petition against State impunity, seeking police accountability for a massacre of adivasis. As in Zakia Jafri's case, the Supreme Court dismissed the petition, and then took it upon itself to do more. First, it imposed a fine of Rs 5 lakhs on the petitioner, Himanshu Kumar. And then, as in Zakia Jafri's case, it laid the groundwork for legal action against the petitioner. It noted that:

We leave it to the State of Chhattisgarh/CBI (Central Bureau of Investigation) to take appropriate steps in accordance with law as discussed above in reference to the assertions made in the interim application. We clarify that it shall not be limited only to the offence under Section 211 of the IPC. A case of criminal conspiracy or any other offence under the IPC may also surface.

Notice, once again, the loose language used by a Constitutional Court in a case that involved the

undisputed massacre of adivasis: that a “case of criminal conspiracy or any other offence” under the IPC “may also surface.” Without evidence. Without a hearing. Once again, this is exactly the kind of stuff that gets you cleaned out for defamation in functioning legal systems; maybe it even would in India, unless you're the Supreme Court. If you're the Supreme Court – and especially if Justice Khanwilkar is on the bench – it's open season, especially on citizens who take Ambedkar seriously when he said that Article 32 was the “heart and soul of the Constitution.”

It is also important to note that during the pronouncement, the Court only referred to the State of Chhatisgarh. The reference to the Central Bureau of Investigation [“CBI”] was added subsequently to the judgment, on the oral request of the Solicitor-General, after the pronouncement. Once again, you can see the attitude of the Constitutional Court in cases like this: just add a reference to a central investigative agency in the judgment, on the request of the union government's lawyer, as if it was the correction of a typographical error. What else can we call this, other than the executive(s) court?

These two judgments – driven by Justice Khanwilkar – mark a profoundly dangerous shift in the history of the Supreme Court. It is one thing for the Court to dismiss Article 32 petitions against State impunity. However, it is quite another – and truly unprecedented – for the Supreme Court to turn upon the petitioners themselves, and pass prejudicial remarks against them that then become the basis of FIRs and jail time. In every way, this is an inversion of the rule of law, of the Constitution, and of the Supreme Court itself: from the protector and guarantor of fundamental rights, to persecutor-in-chief. Idi Amin famously said: “I can guarantee freedom of speech, but I cannot guarantee freedom after speech.” Likewise, through these judgments, Justice Khanwilkar has said: “I can guarantee freedom to come to Court; but I cannot guarantee freedom once

you've come to Court.”

Sabarimala: The Unreasoned Volte-Face

The final case that I want to (briefly) analyse is not strictly in the same line of cases as the others, but does bear a family resemblance, in terms of significant judicial action not backed up by any reasons whatsoever.

In November 2018, a five-judge bench of the Supreme Court held that the Sabarimala Temple's ban upon the entry of women between the ages of ten to fifty was unconstitutional. The verdict was 4 – 1. Chief Justice Dipak Misra and Justices Khanwilkar, Chandrachud, and Nariman held against the exclusion. Justice Indu Malhotra dissented. All judges except for Justice Khanwilkar wrote separate opinion; Khanwilkar J joined the opinion of the Chief Justice.

I do not, in this post, intend to re-litigate the correctness of the Sabarimala judgment. The point, however, is this: an application for review was filed. Recall that for the Supreme Court to review its own judgment, it is not enough to just show that the judgment under review was mistaken on law, but to show that there was an inescapable error, on the very face of the record (that phrase, *prima facie*, again!) – and that this has to be demonstrated before the same bench that passed the original judgment.

The Sabarimala review was heard in open court. At the time, Chief Justice Dipak Misra had retired, and had been replaced by Chief Justice Gogoi. The rest of the bench was the same.

By a 3-2 verdict, the Supreme Court decided to “refer” certain “questions” about the correctness of the Sabarimala judgment for interpretation to a larger bench (this, effectively, stayed the implementation of the judgment). Two of the judges who voted to refer were CJI Gogoi (new to the case) and Malhotra J (a dissenter in the original judgment). Two of the judges who dissented were Chandrachud and Nariman JJ (both in the majority in the original judgment). The tie-breaking vote was that of Khanwilkar J, who

had been in the majority one year before, but now seemingly believed not only that the judgment that he had signed on to was arguably wrong, but so wrong – so prima facie wrong – that the threshold for review was activated.

Can a judge change their mind about the correctness of a judgment they have signed onto? Yes, of course. We are all changeable creatures. Can a judge change their mind about the correctness of a judgment they have signed on to so much that they not only believe they were wrong, but blatantly, egregiously wrong – within a year? Perhaps. Perhaps Justice Khanwilkar had a Damascene moment about the rights of women to enter temples. But if that is the case, is there not a minimum – a bare minimum – requirement for a judge to explain themselves? To provide reasons for a 180-degree turn? What is notable is that in neither of the two cases – Sabarimala or Sabarimala “Review” – did Justice Khanwilkar do us the courtesy of a reasoned opinion. We do not know the reasons why he agreed with his brother, the Chief Justice, in 2018; and we do not know the reasons why he came to believe that his brother, the Chief Justice, was egregiously wrong in 2019. Walt Whitman could well ask the rhetorical question, “do I contradict myself?”, and expect his readers to nod knowingly when he answered, “very well then, I contradict myself”, but that is not open to a Supreme Court Justice who, with a stroke of the pen, can extend or withdraw rights from millions of people.

Conclusion: The Executive (s) Court

These examples could be multiplied. One could talk about Khanwilkar J.'s majority opinion in *Romila Thapar vs Union of India* – another UAPA case – where the Supreme Court turned a blind eye to obvious police misconduct in the prosecution of a case (see Abhinav Sekhri's analysis here), and at the time of writing, the accused are still in jail without trial (can you see a trend here?); one could talk about the *Central Vista Judgment*, where Khanwilkar J's

majority opinion laid down a standard of public participation, and then refused to apply it to the facts at hand; one could talk about all these, but there is little benefit in belabouring the point.

And the point is this: the cases that we have discussed involve some of the most basic and crucial civil rights in our Constitution. *Watali* and *PMLA* involved the right to personal liberty; *FCRA* involved the right to freedom of speech and freedom of association; *Zakia Jafri* and *Himanshu Kumar* involved the right to enforce fundamental rights, and the right to seek judicial remedies against State impunity. Enforcement of these rights is at the heart of the rule of law, at the heart of what it means to be a constitutional democracy governed by the rule of law rather than by State arbitrariness. Each of these rights is a crucial bulwark between the individual and the State, and it is the task of the Court to preserve and maintain that bulwark.

However, when we look at the judgments in these cases (four out of five were authored by Khanwilkar J, and he was a party to the fifth), a disturbing picture emerges. It is not simply that the State always wins, and the individual always loses; regrettably, that is a familiar story in the history of our constitutional jurisprudence, with only a few exceptions scattered on the sands of time. Rather, it is the manner in which the State wins. When it comes to the State's claims, the State's interests, the State's (presented) facts, the State's vision of the world, the Court treats all this with a feather-light touch, takes everything as true, and occasionally takes the time out to praise the State and its authorities for the great job that they are doing. On the other hand, when it comes to the individual, the Court turns into the proverbial “lion under the throne”, baring its fangs and unsheathing its claws. Under this judicial philosophy, rights are nuisances, individuals are dispensable, and to approach the Court for justice is like playing a game of Russian Roulette: it's you who might end up in jail after the dust has cleared. And, as Justice Khanwilkar's

conduct in *Sabarimala* shows, none of this needs justification: it is not the exercise of reason that drives this judicial philosophy, but the exercise of raw power. The Court does, because it can. And that's about it.

This phenomenon of judicial rule by decree, of orders without reason – the language of the executive, in other words – is why, in a previous post, I referred to the Court led by the previous Chief Justice as an “executive Court”: “an institution that speaks the language of the executive, and has become indistinguishable from the executive.” Judgments in cases like *Watali*, for example, are classic examples of the workings of an executive court. But at the same time, the observations in the *FCRA* Case, and in *Zakia Jafri* and *Himanshu Kumar*'s cases, are more than just that: it is not simply that the Court is speaking the language of the executive, but has become an institution where executive ideology can be laundered, and shown to the world as sparkling, judicially-declared truth. This is what happens when, in *FCRA*, Khanwilkar J speaks about citizens needing to “be firm and resolute” so that they wouldn't need foreign remittances; and this is what happens in *Zakia Jafri*, where Khanwilkar J's character assassination of *Teesta Setalvad* and the suggestion that she be “put in the dock” is immediately followed up by an FIR (which quotes his very words), arrest, and jail.

Khanwilkar J is now gone. His individual legacy can be measured in the months, the years, and the decades that people have spent and will spend in jail, without trial (indeed, the State's lawyers have already begun arguing that under the *PMLA*, a Court can only ever grant bail on health grounds, and never otherwise). It can be measured in ruined lives and broken futures. But it is the coming time that will reveal whether the normalising of the Supreme Court as the executive(s) court would, at the end of the day, be his most significant contribution to Indian constitutional jurisprudence. □

Salman Rushdie: “An inspirational leader of persecuted writers and journalists” PUCL condemns the attack on Salman Rushdie!

PUCL strongly condemns the brutal targeted attack on noted author of Indian origin, Salman Rushdie on August 13, 2022 in a literary event in the US by the attacker identified as Hadi Matar. It is reported that the author has suffered serious injuries to arm and liver' and is in danger of losing his eyesight in one eye. .

Though Salman Rushdie is now a British citizen he was famously one of India's 'Midnight's Children' born within a few weeks of India's independence in August of 1947. Apart from writing the fictional narrative of a nation post-independence through the eyes of its narrator, Saleem Sinai, in 'Midnight's Children', he also wrote the book 'Satanic Verses' which was banned in India in 1988 and earned him a fatwa condemning him to death by Ayatollah Khomeini of Iran.

The PUCL stands for freedom of speech and expression guaranteed in the Indian Constitution and hence opposed the ban on his book. PUCL also demanded that the Rajiv Gandhi Government withdraw the ban. When Prof Mushirul Hasan was attacked as the Vice Chancellor of Jamia for saying that he believed in freedom of speech and expression, PUCL stood with him. We continue to demand that the ban be withdrawn. Throughout his life and in his works, Rushdie has stood for the right to artistic expression and for the right to speak truth to power and the right to offend, shock and disturb. As he puts it, 'nobody has the right to not be offended. That right doesn't exist in any declaration I have ever read.'

The PUCL asserts the right of the

artist to speak truth to power. Any kind of social change is premised on this right to free speech and opinion, which encompasses in itself the right to dissent, criticise and express freely without fear or intimidation. In Dr. Babasaheb Ambedkar's own words in the 'Annihilation of Caste', *'The world owes much to rebels who would dare to argue in the face of the pontiff and insist that he is not infallible.'*

Rushdie has also been a defender of heterogeneity, diversity and difference and opposed to a monoculture of the mind. He is a defender of the 'imaginary homelands' of literature and says that, 'It has always been a shock to me to meet people for whom books simply do not matter, and people who are scornful of the act of reading, let alone writing. It is perhaps always astonishing to learn that your beloved is not as attractive to others as she is to you.' In his view, literature represented the multiplicity and diversity which was the characteristic of plural societies.

In his book of essays titled 'Imaginary Homelands', he says that, 'I come from Bombay, and from a Muslim family, too. 'My' India has always been based on ideas of multiplicity, pluralism, hybridity: ideas to which the ideologies of the communalists are diametrically opposed. To my mind, the defining image of India is the crowd, and a crowd is by its very nature superabundant, heterogeneous, many things at once. But the India of the communalists is none of these things.'

Salman Rushdie was a critic of orthodoxies and fundamentalisms

of all stripes and hues and the attack on him needs to be condemned strongly. At the same time we would like to point out that that despite his known vulnerability, adequate security / police protection was not provided at the time of his attack. This is a serious breach of security for a person who has for over 3 decades been leading a reclusive life because of the threat by fundamentalist forces opposing his works.

The threat and attacks on writers and creative artistes for expressing their freedom of expression and writing on social and cultural issues questioning majoritarian and divisive discourse and politics is now seen worldwide, as also in India. The global human rights movement should take the lead not just to challenge such unacceptable attacks on writers, singers and cultural artistes but also put pressure on the UN system and national governments to implement the fundamental freedoms promised under the UDHR, ICCPR, ICESCR and other international instruments proactively and not wait for an attack to respond. In the context of Salman Rushdie, PUCL urges that efforts be made to demand the withdrawal of the fatwa issued against him and to protect him from future attacks.

The PUCL wishes the author a speedy recovery from this latest and most brutal assault.

Dr. V. Suresh, General Secretary, PUCL; **Ravi Kiran Jain**, President, PUCL; **Kavita Srivastava**, National Secretary, PUCL; **Arvind Narrain**, President, PUCL Karnataka; **Lara Jesani**, PUCL Maharashtra. □

A Fact finding Report on arrests in the alleged terror activities in Phulwarishreef, Patna

The PUCL came across news about arrest of individuals on allegations of running camps imparting weapons training and martial art training and further in possession of communal and anti-India literature & documents. As on date several arrests have been made in Bihar & outside but as per the news reports and the FIR bearing nos. Phulwari PS case 827 of 2022 & 840 of 2022 the whole case, as alleged and as per reporting in several media outlets specially print media, had its roots in Phularishareef, Patna. Soon after the breaking of the news several media outlets particularly hindi dailies such as Dainik Bhaskar ran several stories whose tenor appeared judgemental & conclusive despite the fact that investigation was in its infancy and very limited official releases were made after the arrests. The use of words such as "Teror Module" & "Aatank ki Phulwari" were, as it appeared, to vilify a particular community. The stories ran by the print and electronic media outlets were polarizing despite the fact that investigation had only begun. It is under these circumstances that it was decided to undertake an investigation with a view to fact find with a human rights perspective. Resultantly, a six -member Fact Finding Team was constituted to investigate the incident. It comprised of the following PUCL members:

1. **Priyadarshi** (Member, State Council)
2. **Pushendra Kumar Singh** (Member, State Executive)
3. **Nand Kishore Singh** (Member, State Executive)
4. **Priti Sinha** (Member)
5. **Ashok Kumar**, Advocate (Secretary)
6. **Kumaresh Singh**, Advocate

(Member, State Council)

The Report of the Factfinding Team

Background

Summary of Allegations as contained in FIR against Athar Parvez & Md. Jalaludin & others:

A.) First Information Report

FIR in Phulwari PS case 827 of 2022. Named accused include Athar Parvez, Md. Jalaluddin & 23 others and unnamed; Filed under following sections:-

- i. **u/s 120, IPC-** Concealing design to commit offence punishable with imprisonment;
- ii. **u/s 120B-** Punishment of Criminal Conspiracy;
- iii. **u/s 121, IPC-** Waging war against Government;
- iv. **u/s 121A-** Conspiracy to commit offence u/s 121;
- v. **u/s 153A-** Promoting enmity between different groups;
- vi. **u/s 153B-** Imputations, assertions prejudicial to national-integration;
- vii. and **u/s 34-** Common Intention

B.) Allegations (venue- Ahmad Palace, Naharpar, Nayatola)

- 1) 2nd floor of Ahmad Palace- Questionable literature found- India 2047 20 February 2021 Towards Islamic Rule India, Internal Document; Not for circulation & Popular Front of India 20 February 2021
- 2) Premises rented for training
- 3) Hiding their identity
- 4) Astra-Shashtra training given to unemployed youth
- 5) Promoting enmity between two groups
- 6) Harming integrity of India

C.) Our Findings

- 1.) Our team visited Ahmad

Palace situated at Naharpar, Nayatola, but could not enter the premises as it was locked from outside. To our bare eyes, the area appeared to be around 1000 sq. ft (approx.). There were shops on the ground floor but all of them were locked as well. There was no official/police seal & locks preventing entry and there were no police men guarding the premises which was allegedly a centre for *astra-shashtra* training and meetings for anti-India activities.

- 2.) Upon enquiring from people in the vicinity whether they heard or saw of any arms (traditional or fire arms) training being given at Ahmad Palace, all of them implied in negative. When it was specifically asked if they heard any gunshots etc regarding fire-arms the answer was still in negative.
- 3.) The team had to roam around for at least one and half hours to find Md. Jalaluddin's house. We were shocked to perceive the fear among the residents as there was hardly anyone willing to tell us the address. Thus, after roaming around for more 1.5 hours we reached his house only to find that it was locked. Upon talking to some young men who had directed us to the house, they said they can't believe the allegations to be true and had a very good opinion about him saying that Md. Jalaluddin

had in his long carrier in Jharkhand police remained untainted. These young men directed us to Jalaluddin's brother's house but we could not locate the same as again the residents appeared very fearful and nobody told us the address.

- 4.) In the words of local resident and journalist Md. Sami Khan, police went to Ahmad Palace on 11.07.2022 and the FIR was registered on 12.07.2022 and Md. Jalaluddin was arrested on 13.07.2022.
- 5.) According to him Ahmad Palace is built in an area of merely 600 sq.ft. and CCTV is installed in the premises as well and that no training can be given in that small space. Further, according to him, in light of the rent agreement which we have not seen, the house was rented as recently as on 15.05.2022. Moreover, he states that the family had no information of PFI & SDPI office and that there is no recovery of weapons. According to him PFI says that the 2047 literature mentioned in FIR is not theirs.
- 6.) The team could neither visit the house of Athar Parvez or nor talked to his family members.
- 7.) Another accused namely Arman Malik, as found out during our investigation, is a prominent resident of the area and is resident of Alba Colony at Phulwarishareef. He runs a school namely International School in his own house. In words of Md. Sami Khan, Arman Malik has cases of murder and

POCSO registered against him and that he is also into the business of property dealing. He says that Arman Malik was taken to Gardani Bagh PS.

- 8.) The team visited his house. It appeared to us that only female members were present in the house at that time, therefore, they only allowed Preeti Sinha to enter the house. She talked to the mother and wife of the accused, wherein they stated that he had no connection with SDPI and PFI. They accepted that martial art training was imparted at school run by the accused and that it is still going on and children irrespective of their religion are taught martial arts by a teacher duly appointed for that purpose.
- 9.) Upon talking to locals near his house and specifically asking whether they heard or saw any arms training being given, they replied in negative and regarding the martial training it was informed to us by the locals that the same was also advertised in the school flex boards and banners of International School that martial arts training was given at school. Further, we were told that before construction of the school building, martial art training was given openly on the piece of land school was constructed.
- 10.) It was also learnt from Sami Khan that sometime back Malik had protested with other locals in front of Phulwarishareef Police station regarding a different incident which took place and it is also alleged that he had

verbally abused the SHO as well during that protest. He was involved social work in that area and had supported the **Chairman in his election campaigning.**

Against Maghroob

- A.) FIR in Phulwari PS case 840 of 2022.** Name of the accused is Maghroob Ahmad, resident of Munir Colony, Phulwari. Filed under following section:-
- i. u/s **121, IPC-** Waging war against Government;
 - ii. **u/s 121A-** Conspiracy to commit offence u/s 121;
 - iii. **u/s 120B-** Punishment of Criminal Conspiracy;
 - iv. **u/s 153A-** Promoting enmity between different groups;
 - v. **u/s 505(1)(b)-** Statements conducing to public mischief- with intent to cause alarm to the public whereby a person may be induced to commit offence against state.
 - vi. and **u/s 66** of the Information Technology Act (IT Act)

B.) Allegations

- 1) The allegations against Maghroob, S/o Saifuddin appear to be specific in nature and concerned with his alleged online activities such as being Group Admin of a Whatsapp group Ghazwa-e-Hind, members of other whatsapp group wherein Pakistani, Bangladeshi etc nationals were also members and indulged in anti-India propaganda.

C.) Our Findings

- 1.) The team went to Munir Colony to meet and talked to the family of Maghroob. Maghroob's father Saifuddin talked with us. He said that he went to Dubai and worked there from 2006 to 2020 in a

store. According to him Maghroob was born in 1998 and used to get enraged very suddenly since the age of 5-6 years itself and that he sometimes roamed naked in front of the family members. He took Maghroob to a doctor in Kankarbagh and then to AIIMS for treatment, for which he presented prescriptions, of sudden rage but Maghroob never took the medicines prescribed. He said that he has no information regarding the online activities of his son. He said that police took him at 10:30 p.m. at night and that no information was given by police.

- 2.) Maghroob took education at Madarasa till Fukania level and that he used to teach Quran to kids which earned him his pocket money. According to him Maghroob never mingled with boys of neighbourhood but spent most of the time using phone.
- 3.) He showed us the medical prescription of AIIMS, Patna where he took Maghroob for treatment but Maghroob never took the medicines regularly.

Visit to ASP Manish Kumar's Office & Phulwari PS

The team visited the office of ASP Manish Kumar twice but on both occasions could not meet him. One the first occasion we were told he is out on round and the second occasion we were informed that he is unwell and thus couldn't meet.

As far as visit to Phulwari PS is concerned we went to the PS and called the SHO but he said that he is not authorised to speak and that the team should talk to ASP.

Visit to Sangat Par

The team also visited Sangat Par, local temple which has been in news as being situated in communally tensed locality. The team talked to Pujari and the secretary of the temple who was also contesting the **election for Chairman**. While interacting with him we realised that all the information he had was mostly gathered by him by watching news channels or reading in news papers. Though he presented himself for the cause of Hindu Muslim unity but was concerned that India will soon turn into a Muslim nation if the Muslim population is not controlled. Further, upon being enquired about the recent incidents at Phulwari he said that he stood informed mostly from the media and goes by their word that there existed a terror module. When asked whether he personally faced any trouble at the hands of members of other community he said no but said that other people he knew always faced it. He further alleged that when communal tensions took place in 2017 the administration discriminated in taking action and arrested 80 % Hindus and only 20 % Muslims.

Overall Findings

- 1.) Prima facie it appeared to the team that there was not any terror activity being undertaken at the places visited by us. It highly impractical to claim that arms training was given in such highly populated without anyone else noticing, hearing or seeing it.
- 2.) It appears to us that the whole incident is being used to vitiate and polarize the Hindu and Muslim communities and create fear in their minds.
- 3.) The timing of the arrests at the time of Prime Minister's visit is also an important aspect of the whole incident and the same has been mentioned in the Police and NIA's FIR.
- 4.) The roll of the media has been

to vilify Muslim community by reporting irresponsibly and indulging in red top journalism. The use of the words and phrases such as 'Terror Module', "Aatank ki Phulwari" etc. despite the fact the NIA FIR has not slapped UAPA sections rather simply reiterated the police FIR. The investigation being in such early stage, it is highly irresponsible for the media to demonize a community by leading such stories and headlines. Several incorrect stories were reported such UAPA charges against the accused etc.

- 5.) The FIR does not clarify what does it mean by using the words astra-shastra. Does it mean conventional weapons such as lathi or it means fire-arms?
- 6.) Further, the allegations in FIR appear to be vague against the accused and are not specific in nature. Moreover, police in their press conferences made several allegations and then subsequently retracted. One such being against Maghroob where they stated that he had gone to Dubai, despite the fact that Maghroob had no passport.
- 7.) PFI & SDPI are not a banned organisation and as we know has a particular religion at the centre of their activities. It appeared to us that it is due to these reasons that it was being targeted.

Recommendations

- 1.) Media should be held accountable for running the stories which vilified a community. Use of the words such 'Terror Module', Aatank ki Phulwari", etc despite the investigation in its nascent stage and intending to sensationalise the whole incident by incorrectly reporting at sometimes led us

to believe that attempt was to demonize a certain section of public and further polarise the society. Precs Council of India and other such agencies must look into and take action accordingly to prevent further animosity among communities.

2.) Police conducted press conferences in a very irresponsible & uninformed manner in a serious incident such as this. There were occasions when they made wrong claims against the accused then were found

retracting. Though, they corrected themselves but till then it was late as media largely caught up with it and reported with much sensation. Police department is urged to be more careful in cases like these and should only state about which they are sure and with precision.

3.) In light of the highly polarized and fearful environment it is urged that members of civil society should come forward and conduct peace meetings and allay the fears of the residents of both communities.

4.) The accused Maghroob's case should not be considered at par with the others as he appears to be under treatment, therefore, all the relevant provisions of law should be followed while investigating his case and further an evaluation of his mental state may be undertaken.

Legal aid to those accused who cannot afford representation in court of law and their fundamental right and must be provided to them. □

India Punishes Internationally Recognized Activists Arbitrary Arrests, Bogus Charges Further Tarnish Government's Reputation¹ Meenakshi Ganguly, South Asia Director, *Human Rights Watch* (5th July, 2022)

At the G7 Summit last week, Indian Prime Minister Narendra Modi pledged to defend freedom of expression, civil society, and religious freedom. Yet back at home, his Bharatiya Janata Party (BJP) led government, which has long promoted majoritarian Hindu nationalism at the expense of the rights of Muslims and other minorities, was renewing its crackdown on rights defenders.

Officials in several BJP-governed states have demolished property owned by Muslims in response to protests or communal clashes provoked by Hindu religious processions, often led by BJP supporters. There is little effort, however, to prosecute government supporters who commit abuses.

The government has always downplayed criticism of its systemic discrimination; but now that it is causing dismay among key trading and strategic partners, it is taking stronger action: not to end the abuses, but to clamp down on critics who are able to reach a global audience. In June, Delhi police arrested

Mohammed Zubair, cofounder of an independent fact-checking website Alt News, accusing him of hurting Hindu sentiments in a 2018 Twitter post. The police opposed bail, seized his electronic devices, and secured a 14-day custodial sentence while they undertook their investigation. Many believe that Zubair is being punished for exposing the controversial remarks of a BJP politician about the Prophet Mohammed that led to angry condemnation by India's Supreme Court and from several Muslim governments. A Hindu tailor was brutally murdered by two Muslim men over the politician's remarks.

Authorities also jailed internationally recognized activist Testa Setalvad, accusing her of criminal conspiracy, forgery, and other crimes, in an apparent reprisal for pursuing justice for the Muslim victims of the 2002 Gujarat riots. The attacks on Muslims, which caused an international outcry, led to the conviction of numerous BJP leaders and supporters. Teesta was detained

on June 25, a day after the Supreme Court denied a petition seeking the prosecution of Modi and other senior leaders.

Earlier this month, Pulitzer-winning Kashmiri photojournalist, Sanna Irshad Matto, said that Indian immigration authorities prevented her from flying to Paris, but gave no explanation. Scores of journalists and activists in Jammu and Kashmir have faced police interrogation, raids, threats, and arrest, for reporting human rights violations. Many have been stopped from international travel, a violation of their rights to freedom of movement.

India's partners should not let the government's expressed commitments to human rights go unchallenged. This is important globally, but also to send a message to India's activists that the world is watching and supports them.

¹ <https://www.hrw.org/news/2022/07/05/india-punishes-internationally-recognized-activists> @ 15Jul2022

Courtesy: Human Rights Watch □

The Law: Bail is the Rule, Jail the Exception The Court: Jail is the Rule, Bail the Exception

Prabhakar Sinha

It is believed that the Supreme Court had declared 'bail is the rule and jail the exception', but the reality is the very opposite. One is arrested at the drop of a hat, and is sent to jail even faster. Bail has become the rarest of rare gifts for the privileged. Recently, the SC has observed that there is a need to have a law on bail. The observation is unconvincing and an excuse to cover up the judiciary's failure to protect personal liberty. The Criminal Procedure Code (Cr. P. C.) was amended in 1973 and the judiciary was empowered to liberally grant bail to people arrested by the police without a warrant. In fact, the provisions in the Cr. P. C. (Criminal Procedure Code) empowers the judiciary (lower than the District and Sessions Judge and the High Court) to grant bail as a rule and refuse it as an exception. The law states that bail may be granted unless there is reasonable ground to believe that the accused is guilty of a crime punishable with death or imprisonment for life (s4371c). Bail may be granted unless the accused has been earlier convicted of an offence punishable with death or imprisonment for life or imprisonment for seven years or has been convicted on two occasions of a cognizable offence. The provision also empowers the court to grant bail even to those persons if the accused is under 16 years of age, is a woman or is sick or infirm. The provision goes to the extent of empowering the court to grant bail even to the persons mentioned above if the court is satisfied that it is 'just and fair' to do so 'for any special reason.'

The provision for bail under s 437 is unimaginably liberal. It restricts denial of bail only if the accused is believed to be guilty of a grave offence for which he may be awarded death sentence or life term or has already been convicted

of an offence, which attracts death sentence or a sentence for life and is accused of committing a cognizable offence.

It is especially noteworthy that the law empowers the court to grant bail to even such persons if they are less than 16 years of age, a woman or a sick person or an infirm person. It is remarkable that the law empowers the court to grant bail to an accused 'for any special reason' 'if it (the court) is satisfied that it is just and proper so to do for any special reason.'

Thus, the letter and the spirit of the law is to make bail the law and jail the exception, but it is the judges who have been defeating the liberal and humane objective of the law by refusing bail in spite of the provision to grant bail most liberally. It is the judges, not the law, who are responsible for robbing us of our personal liberty.

Let us examine the case of Muhammad Zubair. What was his offence? He has allegedly hurt someone's feelings. Look at Teesta Setalvad, who is in jail because 20 years ago, she allegedly conspired to topple Modi's government in collusion with the Congress leaders! Does s 437 of Cr. P. C. support denial of bail to them. They are not the only victims of the judges. There are thousands languishing in jails on charges which do not justify denial of bail under the law (s 437 of Cr. P. C.). The courts should stop playing with our personal liberty (which is the same thing as playing with our life) by refusing to follow the letter and spirit of the law due to their prejudices and lack of humane feelings*. A look at s 437 of the Criminal Procedure Code or Cr. P. C. 1973 cited below would confirm the violation of the letter and spirit of the law mandating liberal grant of bail by the judges.

*s 437 When bail may be taken in case of non-bailable offence

(1)When any person accused of or suspected of commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Sessions, he may be released on bail, but -

(i) such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

(ii) such person shall not be so released if such offence is a cognizable offence and he has been previously convicted of an offence punishable with death or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of (a cognizable offence punishable with imprisonment for three years or more but not less than seven years) :

PROVIDED that the court may direct that the person referred to in clause (i) and clause (ii) be released on bail if such a person is under the age of sixteen years or is a woman or is sick or infirm PROVIDED FURTHER that the court may direct that the person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any special reason."

Note: It is crystal clear that the law gives maximum latitude to the court to liberally grant bail, but for reasons beyond imagination, the courts have been refraining from following the letter and spirit of the law and keeping people behind bars in inhuman condition.

Prabhakar Sinha on FB
22 July, 2022 ☐

PUCL expresses deep concerns and anguish over the speech made by Hon'ble Justice Pratiba M Singh, Judge, Delhi High Court praising Manusmriti as an authority that accords a “respectable position” for women in India

Justice Prathiba M Singh, a sitting judge of the Delhi High Court while speaking during an event organised by the FCCI on 10 August, 2022 on the issue of challenges faced by women in 'Science, Technology, Engineering, and Mathematics' (STEM) claimed that because of our scriptures and our cultural and religious background, women in Indian society are respected better. Referring to the lines in Manusmriti which say *“if you don't respect and honour women, all the pooja that you may do has no meaning”*, Justice Singh stated that Indian women are a blessed lot because of Hindu scriptures like Manusmriti. While Justice Singh is entitled to her views as an individual, as a constitutional functionary and a High Court Judge, her approval of the Manusmriti raises many serious issues. Manusmriti disregards women's autonomy and plays a crucial role in propagating the patriarchal, caste, and class social structures. According to the text, a good woman submits to her husband's wishes in this life and even in her afterlife. She is supposed to be dependent on the father or the brother and later on the husband because if left untamed she can be a vile creature and therefore she requires constant protection and guidance.

It should be pointed out that Dr. Babasaheb Ambedkar viewed Manusmriti as the fountainhead of the caste based order and legitimising caste discrimination. The Manusmriti thus stands contrary to the fundamental precepts of the Indian constitution. It violates the right of persons to live with human dignity as envisaged in

Article 21, Article 15 (1) which prohibits discrimination on the ground of sex and caste, Article 17 which criminalises the practice of untouchability in any form and Article 51a (e) which mandates the state to renouncing practices derogatory to the dignity of women. The emphasis the learned justice lays on Manusmriti as opposed to the constitution, despite her being a sitting high court judge is deeply troubling.

The Manusmriti with its deeply problematic views legitimising misogynistic treatment of women by men, approving unequal treatment of and discrimination of Dalits and lower castes along with the imposition of horrifying punishments for transgression, is essentially antithetical to the key values underlying the Indian Constitution, especially the fundamental right to equality and equity, fraternity and dignity.

The judge in her speech further stresses the need to “strengthen the Indian family system” and advises women to live in joint families by “being a little more adjusting and compromising”. In doing so, she places family as an institution at a higher pedestal than individual autonomy, disregarding the gender based domestic violence and social evils like dowry perpetuated through the family system that still afflict a large number of women in our country. It is in the name of 'family' and preserving 'family honour' that hundreds of girls are forced to submit to family choices and decisions on all aspects of their lives: from the type of dress they can wear, where they can study and about choices of marriage. The

phenomenon of brutal and savage, summary justice meted to girls choosing their own marriage partners by 'khap panchayats' and the nationwide malaise of 'honor killings' are all carried out in the name of 'family' honour. Thus this uncritical espousal of the 'family' in the context of praising the Manusmriti effectively lends legitimacy to the practice of denying independence and autonomy to girls and women in Indian society.

Justice Pratibha Singh's espousal of the Manusmriti and advice to Indian women to follow the 'family' is also opposed to the constitutional imagination that the individual is entitled to enjoy her rights and freedoms even against her family, community and society. The 'dignity of the individual' assured in the Preamble, forms a core value of the Indian Constitution. The rationale here was to reiterate the need to protect individual autonomy because it's only when the dignity of the individual (including the autonomy of expression, the freedom of choice and the freedom from humiliation) is protected that the unity and integrity of the nation become possible. Therefore no institution, including the family, has precedence over the individual (women's) autonomy. This notion of human dignity has been further elucidated in many Supreme Court judgments like 'Francis Coralie Mullin vs. Administrator, Union Territory of Delhi' and 'Puttaswamy vs Union of India' which speaks of the protection of the dignity of the individual as the cornerstone of our Constitutional edifice.

In the light of the above, the

statements made by Justice Pratibha M Singh claiming that Manusmriti accords "respect" to women in Indian society, not only rings false but is also a retrograde step. It discounts the enormous

struggles of the feminist movement and women's rights advocates, for gender just laws and gender justice.

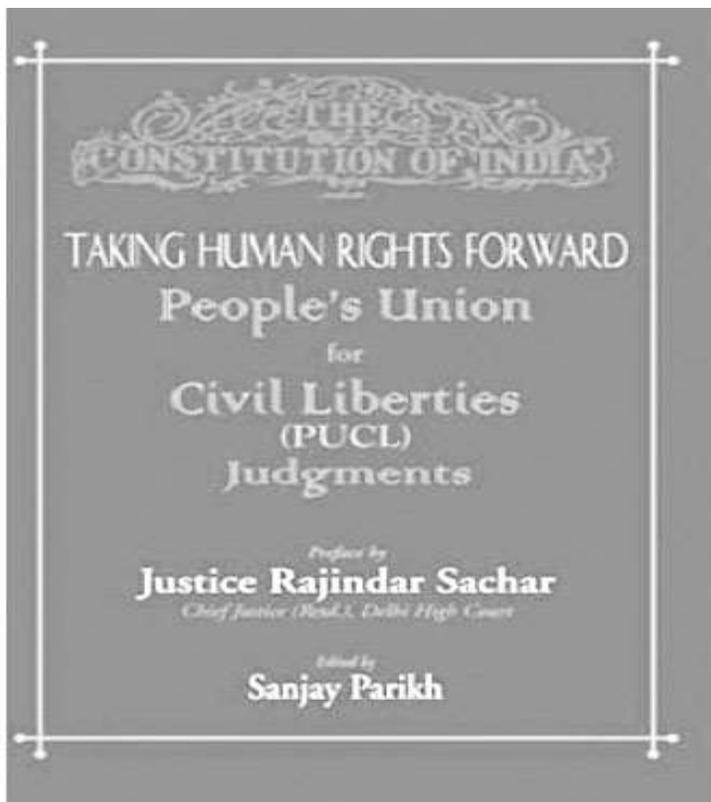
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