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Cover Page - Editorial:
Bulldozer Raj and the Constitutional Order: Why are the Constitutional Courts silent in the face of Punitive Demolitions?

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BULLDOZER RAJ AND THE CONSTITUTIONAL ORDER: WHY ARE THE CONSTITUTIONAL COURTS SILENT IN THE FACE OF PUNITIVE DEMOLITIONS?

In the last 7 years and more, one of the sadly distinguishing features of BJP-ruled states in India has been the ushering in of the `bulldozer raj' – the use of the ubiquitous `JCB' brand bulldozers to arbitrarily and lawlessly demolish houses and buildings of persons belonging to the minority – read Muslim – people. The demolitions started in UP soon after Yogi Adityanath took over as CM in March, 2017 with the targeting of the supposedly criminal mafia, but very quickly the strategy was used against people protesting against acts of majoritarian violence or against state policy. What started in UP was copied in other BJP ruled states including MP, Uttarakhand, Gujarat, Haryana, Rajasthan and other states.

The pretext has always been that the houses or buildings demolished belonged to people named as accused for participating in cases of protests, demonstrations when stone throwing allegedly took place or rioting and vandalism allegedly took place. Sometimes the overt excuse were that the constructions didn't have building approvals or permissions or were built on government land. In a number of cases, civil cases regarding the same buildings and houses were pending in courts.

The common factor in all the cases were that the demolitions were done in total – in fact in absolute violation of all laws. Despite the clear legal provision and stipulation that no demolition can be effected by the state machinery without completing the judicial and court process and in violation of `due process of law' – the state governments used their police power to first demolish so they present a fair accompli even if the matter was challenged in court. So popular did these `illegal' demolitions become as a weapon of state violence against minorities, that there was a race for terms carrying the chilling reminder of what bulldozers and demolitions mean for the minority community - `Bull dozer Baba' and `Bulldozer Mama'!

The most deplorable aspect of the demolitions, which were publicly carried out and widely covered in the media, was the silence from the constitutional courts. Barring a few exceptions, notable by the sparseness of such court interventions, the higher

judiciary remained mute spectators as the `rule of law' was brazenly violated with impunity by the various governments. When courts of law meant to enforce the `rule of law' themselves remained complicit by their inaction, could ordinary citizens, and minority citizens dare to protest or oppose?

It is in this context that the latest incident of bulldozing happened in Haldwani on 8th February of 2024. The state government led by the Chief Minster Mr. Pushkar Dhami and right-wing groups has been upping the communal ante by vilifying Muslims as engaging in love jihad, Land Jihad, Vyapar Jihad, and now Mazaar Jihad. Maazar Jihad like all other jihads noted above are a figment of the right wing imagination. Mazaar Jihad spreads the canard that Muslims are 'building mazaars or sacred mausoleums across the state to overshadow and overpower its Hindu identity'.

The Chief Minister is reported to have stated that, 'they have demolished sometimes 1,000 mazaars, sometimes 3,000 mazaars.' It is in the backdrop of this communal campaign that the incident in Haldwani is to be seen. In Haldwani, the issue of the mosque being built on forest land and hence illegal was raised by the administration and in response the Muslim community members filed a petition in court challenging the state government's contention that the mosque was built on forest land. In spite of the fact that the matter was before the High Court, without warning on the evening of 08.02.2024 the officer of the Municipal office arrived with bulldozers and demolished the sealed Mosque and the Madrasa despite the matter being sub-judice.

This arbitrary and illegal state action of demolition when the matter was sub judice angered the local community who gave vent to their anger and frustration by throwing stones and burning of vehicles outside the police station. In what has become the playbook of BJP governments, the slightest sign of resistance by the Muslim community to any attempt to marginalise them, is visited by even more brutal force.

This violence was followed by the heavy handed response of police firing which has resulted in six people being reportedly killed. Post that, police indiscriminately entered houses of Muslims in the surrounding area and arrested hundreds of Muslim men who are according to a fact finding report being arbitrarily detained and tortured.

What speaks of a discriminatory intent underlying state action is that Chief Minister Dhami travelled to Haldwani , after the violence and while he met police persons injured in the clash, he ignored the families of those who lost their lives in the police firing that followed the demolition. As a further psychic affront to the community, he announced that a police station would be built at the site of the demolished mosque. This move in particular, shows that the administration under Dhami has no interest in repairing relationships and promoting fraternity which is the constitutional responsibility of the Chief Minister.

The demolition of the Masjid in Uttarkhand is part of a systematic policy of repression of the Muslim minority led by the Chief Minister, Dhami. The proclaimed aim seems to be to make Uttarakhand as a Devbhoomi the holy land for Hindus which would have no place for other religious minorities.

The fig leaf the government is using to justify its actions is that what it is targeting are only illegal structures. However the fact that the illegal structures belong primarily to the Muslim community (while illegal temples of Hindus are not deemed illegal enough to be demolished) bespeaks a discrimination in the way state policy is being carried out and betrays the real intention of the government.

The real intention of the government is not to rid the state of illegal structures but rather to destroy Muslim places of worship, residence and work and thereby relegate Muslims to second class citizenship. These are the dangerous implications of the project to turn Uttarkhand into Devbhumi, i.e. a place without Muslims.

While in Haldwani, illegal demolition was followed by arrests and shooting, in previous instances be it in Uttar Pradesh when the house of Afreen Fatima was destroyed or Nuh in Haryana when Muslim houses and shops were destroyed or Khargone in Madhya Pradesh or Kambhat in Gujarat, demolitions were a way of punishing the minority community.

Punitive demolitions are a new crime on the horizon of a new India. The aim is to punish the entire community and not just the alleged perpetrator. Innocents who reside in the house, be it children, women or elderly people, suffer an erosion of their rights be it the right to shelter, the right to food, the right to health, the right to dignity or the right to peaceful enjoyment of family life. Punitive demolitions are a form of collective punishment which are a blot on any country governed by the rule of law.

The judiciary has sadly been silent as punitive demolitions become a part of policy in state after state. This de facto policy has not been seriously taken cognizance of by the courts other than by a brave judicial order by the Punjab and Haryana and High court, in the context of the Nuh demolitions in which the Court held that, 'the buildings belonging to a particular community are being brought down under the guise of law and order problem and an exercise of ethnic cleansing is being conducted by the State.'

Chander Uday Singh in an introduction to a Report, titled, 'Routes of Wrath' documents how Ram Navami processions have become a pretext to carry out punitive demolitions. He notes that, 'bulldozers following in the wake of processionists, ready to demolish the businesses businesses, livelihoods and homes of anybody perceived to have obstructed the procession.' What is more shocking is that, 'the civilian administration play judge and jury, pronounce the hapless people in the path of processionists guilty of being stone-throwers, the police play hangman with the bulldozers, and the municipal authorities come in to clean up the mess by post-facto declarations of encroachments, unauthorised constructions and other neat cover-ups for the demolitions.'

The discourse on understanding this crime of punitive demolitions has been given a fillip by the two recent reports of Amnesty International. The Report titled, 'If you speak up your house will be demolished' , focuses on documenting 'targeted demolition by the Indian statement authorities of at least 128 properties including homes, businesses and places of worship largely belonging to Muslims in the states of Assam, Gujarat, Madhya Pradesh, and Uttar Pradesh and Delhi.' The second report seeks to ensure accountability of JCB which is used in most demolitions and argues for JCB and JCB India being held accountable under the UN framework of the human rights responsibilities of businesses.

The first report documented the impact of demolitions on, 'at least 617 people, including men, women, and children, either rendering them homeless or deprived of their sole livelihood.' The chilling conclusion drawn is that, 'this crime of punitive demolitions has been given a fillip by the two recent reports of Amnesty International. The Report titled, 'If you speak up your house will be demolished' , focuses on documenting 'targeted demolition by the Indian statement authorities of at least 128 properties including homes, businesses and places of worship largely belonging to Muslims in the states of Assam, Gujarat, Madhya Pradesh, and Uttar Pradesh and Delhi.' The second report seeks to ensure accountability of JCB which is used in most demolitions and argues for JCB and JCB India being held accountable under the UN framework of the human rights responsibilities of businesses.

The first report documented the impact of demolitions on, 'at least 617 people, including men, women, and children, either rendering them homeless or deprived of their sole livelihood.' The chilling conclusion drawn is that, 'this selective targeting of Muslims was punitive retaliation for the alleged involvement of some Muslims in protesting discriminatory laws and practices enforced by the Indian state.' The Report simply concludes that, 'In India, bulldozers have now become synonymous with the oppression of Muslims.' This policy of punitive demolitions according to the Report, 'amounts to a form of collective and arbitrary punishment that egregiously violates the rights of those affected including the rights to a fair trial, adequate housing, dignity and non-discrimination.'

The PUCL has also been responding with statements and petitions to the issue of punitive demolitions in India. However as the Amnesty Report concludes, there is a need for greater research on this crime which must enter the public discourse as a shocking betrayal of the values of the constitution founded as it is on rule of law and non discrimination. Finally the issue

of punitive demolitions, should be highlighted during the electoral process and political parties must in their manifesto disavow punitive demolitions as a form of state policy.

Every punitive demolition is akin to a hammer blow targeting the basic structure of the Indian Constitution. If the constitutional order is to survive and India is to remain a rule of law society, its vital that the Constitutional Courts end their silence on this most egregious of crimes, punitive demolitions.

PUCL STATEMENTS

STOP WAGING WAR AGAINST OUR FARMERS

15.02.2024

PUCL NATIONAL

The People's Union for Civil Liberties strongly condemns the Union Government's repressive measures against the protesting farmers who are exercising their fundamental rights in demanding a legal guarantee for Minimum Support Price (MSP), full waiver of farmers' debts, pensions to farmers, and withdrawal of cases filed in 2020-21 against the protesting farmers.

We are appalled by the display of brute force by the BJP-led Union Government and the Haryana Government in dealing with the farmers' protests. The measures include:
(1) Layers of heavy blockades made up of barbed wires, nails, and huge containers set up at the borders to prevent the farmers from entering the NCR region.
(2) Section 144 enforced in certain parts of Delhi, and Haryana.
(3) Makeshift prisons set up at various points to prevent the farmers from carrying on their march.
(4) Internet shutdowns in several districts of Haryana.

What is even more disturbing is the use of:
(a) Rubber bullets
(b) Long Range Acoustic Devices or Sonic Devices capable of causing hearing impairments; and
(c) Using drone-based tear-gas launchers developed by the Border Security Force (BSF)

The tactics adopted by the Union and State Governments raises a fundamental question: Does the Union Government consider the protesting farmers as citizens of India or as enemy aliens?

'Samyukta Kisan Morcha' (Non-political), Kisan Mazdoor Morcha (KMM) and the Kisan Mazdoor Sangharsh Committee (KMSC) and many other workers unions had called for and set out on the `Dilli Chalo' march on 13th February 2024, to condemn the Union government's failure in upholding the promise given in 2021 following the year-long farmers protest. PUCL would like to point out that the farmers protest in 2020 – 2021 saw thousands of women and men farmers, workers unions and others participating in the protest braving adverse weather conditions which resulted in the death of over 700 farmers. The Modi-government has failed to comply with the public assurances given to the farmers based on which they had called off the struggle in 2021.

It should be pointed out that the current actions were decided only after talks between farmers unions and government failed, with the farmer's unions alleging that the government engaged in talks only as a means to delay and avoid implementation of assurances.

PUCL strongly denounces the undemocratic, tyrannical response of the Union Government to the farmers' march. Instead of any substantial attempt to engage in good faith dialogue to address the farmers' grievances, the State has chosen to use force and repression to suppress their voice. In what should be a matter of terrifying concern and shame to every Indian citizen, it has employed tactics normally used against enemies in wartimes, against its own citizens!

Reports have been coming in about the effect of the violence with around 200 farmers having been left injured by the highhandedness of the police.

Apart from the strong-arm tactics used, several social media accounts of prominent farmer leaders/unions on X (formerly Twitter) and Facebook were withheld ahead of the Delhi March. The Haryana government had also imposed Internet shutdown and a ban on bulk messaging in seven districts. These prohibitory measures, along with sealing off of the Delhi borders, have been challenged in the High Court of Punjab and Haryana.

The brutal crackdown also highlights the hypocrisy of the Union government. In the same week of conferring the country's highest civilian award, the Bharat Ratna, to Mr. Charan Singh, a celebrated farmers' leader and former Prime Minister, and to Dr. MS Swaminathan, an agricultural scientist, the Union government has deployed violent measures to prevent farmers from exercising their democratic rights. The height of irony is that the farmers are demanding the implementation of MS Swaminathan Committee Report, while the government steadfastly refuses to adopt the recommendations whichsupport MSP and other farmer welfare measures.

We wish to point out that instead of recognising the demands of the farmers as a matter of their right to life and livelihood, the state is treating them as criminals and their struggle as a `law and order' problem to be suppressed.

We believe the actions of the Union Government, Haryana government, and the Delhi Police expose the deep mistrust that the present disposition has against its own citizens, and the functioning of a police-state in the place of democracy.

Their actions, are in violation of the Article 19(1) (a), (b), and (d), resulting in the trampling of the farmers right to express, assemble peacefully, and move freely between the states of India. These constitutional rights are the heart of any democracy as it is only by the peaceful expression of opinion through public assemblies and marches that change can be brought about.

In fact, Babasaheb Ambedkar defined a democracy as 'a form and a method of government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed.' It is this essence, of what makes India a vibrant democracy in the eyes of its founders, that is being shut down before our eyes.

PUCL expresses its solidarity with the protesting farmer unions and organisations, and all the farmers who are asserting their constitutional and fundamental right to expression, movement, and assembly. The protesting farmers are by this very assertion, reclaiming the Indian Constitution for all of us.

"JAIL, NOT BAIL": IS THE SC SETTING THE CLOCK BACK?

The Supreme Court in its ruling on 7th February, 2024 in `Gurvinder Singh v State of Punjab' held that its own well-developed jurisprudence that "Bail is the rule and jail the exception" will not apply to those charged under the UAPA. Gurvinder Singh was accused of being a member of `Sikhs for Justice', allegedly a pro-Khalistani group banned by India, for being in possession of cloth banners with the terms, `Khalistan Zindabad' and "Khalistan Referendum 2020'.

While dismissing Gurvinder Singh's UAPA bail application, the Court opined that UAPA was an exception to the ordinary criminal law and bail could only be considered if no prima facie case was made out based on records before the court.

The factual matrix did not indicate that the accused were involved in any violent act, but rather were charged under the draconian provisions of the UAPA for associated activities like raising funds for a terrorist act (sec 17), conspiracy to commit a terrorist act (Sec 18) and concealing a person knowing that such person is a terrorist (Sec 19).

The bail for the accused was denied following the precedent of the Supreme Court on bail under UAPA. Admittedly, the UAPA has a particularly draconian provision on bail under Section 43D (5), which states that the Court should not release the accused on bail, if there are 'reasonable grounds for believing that the accusation against such person is prima

facie true.' This provision has been interpreted in a particularly harsh manner by the Supreme Court in `Zahoor Ahmad Shah Watali v National Investigating Agency', (2019) due to which bail shall be denied if the accusation appears to be prima facie true based on materials on record.

However the rigours of Watali have been tempered by subsequent judgments of the SC itself, which the Bench comprising of Justices MM Sundaresh and Arvind Kumar appear to not have taken into account. What is particularly troubling is that the present ruling goes out of its way to ringfence the UAPA from the jurisprudence of the Indian Supreme Court which has sought to dilute its harshness by applying constitutional principles to the UAPA. In `Union of India vs Najeeb' (2021), the Supreme Court granted bail under the UAPA, on the ground that the right to speedy trial is a constitutional right under Article 21. However, Justices Sundaresh and Kumar distinguish Gurvinder's case from Najeeb's case arguing that while in Najeeb's case, trial was yet to begin, in Gurvinder's case trial was under way with 22 witnesses being examined. However the Court misses the wood for the trees as the ratio in Najeeb's case is that 'statutory restrictions like Section 43D(5)', do not 'per se oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution.' In the Supreme Court's opinion, '… the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence'.

Similarly, the judgment of the Division Bench of the High Court of Andhra Pradesh in `Devender Gupta v. National Investigating Agency' (2014), which is cited by the Supreme Court in this case is important for the proposition that the Court should 'strike a balance between the mandate under Section 43D(5) on one hand and the rights of the accused on the other particularly after the charge sheet is filed'. One of the ways the balance is sought to be struck in this judgment is by laying down factors which could constitute that a case is 'prima facie true' and hence bail should be denied. However, these factors are not applied to the fact situation and analysed with a view to ascertaining if there is 'prima facie' truth to the charges.

In a final troubling conclusion, the Supreme Court privileges the UAPA over the Constitution, when it holds that 'jail is the rule, bail is the exception… while dealing with bail applications under UAP Act.' By so stating the Court reverses a core principle of constitutional justice articulated by the very same Court under the leadership of Justice Krishna Iyer.

Ten days later on February, 17th of 2024, a Session Court in Delhi, denied bail to Sharjeel Imam who was accused of 'unlawful activity' under Section 13 of the UAPA as well as sedition under Section 124-A.

The Sessions Court seemed to follow the template set by the Supreme Court of reversing existing precedent. It should be pointed out that Sharjeel Imam had completed four years in jail and Section 124-A (sedition) was suspended with the Court acknowledging that due to the suspension of Section 124-A, 'it cannot take into consideration Section 124-A'. The court nevertheless goes on to illogically assert that, 'but if the acts and actions of the applicant are considered, in a normal dictionary meaning they can be termed seditious'. (emphasis supplied).

It is deeply troubling that in spite of credible and strong documentation by the Delhi Minorities Commission that the violence was clearly preceded by a number of speeches by BJP leaders openly maligning anti-CAA protesters, the Court chooses to blame Sharjeel Imam for the violence without any evidence of the same. The conclusion that one seems to be left with is that when it comes to what the IPC calls 'offences against the state', the law will be bent to serve the interest of the state. Or as K.G. Kannabiran succinctly put it, "the law defines the offence, the state decides the offender"!

However, the ruling in Gurvinder Singh deserves greater censure than the session court ruling in the case of Sharjeel Imam, because it is a judgment coming from the highest court in the land and the Supreme Court cannot shirk its responsibility to uphold the Constitution and apply constitutional principles to laws like the UAPA.

The Gurvinder Singh judgment joins the sad list of precedents which besmirch the reputation of what has been called the world's most powerful constitutional court. The Supreme Court has given in to the state's blackmail that when it comes to any allegation related to the support for terrorism, the Constitution ceases to exist. One might indeed be forgiven for thinking that as far the Supreme Court is concerned, it has sworn to 'bear true faith and allegiance' to the executives charter, namely the UAPA and not the Constitution. This judgment weakens the democratic justice system and people's faith in justice. One hopes against hope that the Court rediscovers its role as a constitutional court and begins to apply constitutional principles in its interpretation of the UAPA and tempers the rigour of the law with a constitutional logic. The factual matrix of the case is itself an eloquent, if tragically ignored, plea for the repeal of a law which criminalises the right to speech and association as well as an immediate suspension of its harsh bail provisions.

Under this law, hundreds of innocent citizens across the country are being arrested and incarcerated for exercising their constitutional right to expression, association and assembly, against the government. Too many lives have been destroyed by the UAPA and these lives stand as testimony to the pressing need for its repeal. As the PUCL Report on the UAPA showed starkly, with a conviction rate in UAPA cases less than 3%, of all those arrested, the use of UAPA is shown to be clearly targeting dissenters and people raising questions about the State. The question is however at what cost?? The end result is that persons arrested under UAPA spend many years in jail only to be declared innocent in the end and released. Who is to compensate these people? Shouldn't action be taken against the police officials, across the chain of command, for abusing and misusing the UAPA? This is the larger issue of constitutional morality before all of us – the Supreme Court included – and should be kept in mind when deciding bail cases.

UTTARAKHAND WOMEN'S GROUPS' STATEMENT ON THE UTTARAKHAND UCC DRAFT BILL

On a perusal of the draft Uniform Civil code (UCC) Bill presented at the Uttarakhand Legislative Assembly, it is apparent that the rhetoric that the Chief Minister of Uttarakhand and his Government were mouthing has been actualized through the draft. Therefore, while seemingly being uniform across religions, the Bill is actually criminalizing and regulating constitutionally acceptable behaviours, like adult consenting cohabitation, called "live in', reducing autonomy and choice, which the women in this country have attained through concerted [struggle] , inside the homes and on public platforms. Moral policing measures have been introduced in this regard. What is shocking is that this law is applicable even to those living outside Uttarakhand, apart from being applicable on all residents of the state including those who do not have a domicile. Interestingly there is a glaring silence about the rights of queer and transgender persons within a family and the rights of transgender and same sex persons to marry.

Majorly it seeks to introduce changes in the provisions that are perceived as defective in the Muslim law, such as unequal inheritance, polygamy and the practice of halala (by which a person can only remarry his divorced spouse after she has married someone else, consummated the marriage and thereafter obtained a divorce). In one sense the Bill has terminated the application of Muslim family law and has further criminalised the Muslim man and woman. Ironically, the Bill has not incorporated positive and progressive aspects of Muslim law such as the compulsory payment of mehr by the husband to the wife which provides financial security of the wife, nikahnama (marriage contract) which allows for the spouses to add legally binding conditions that are mutually acceptable, and a 1/3 limit rule for willing away property. Had the intention of the Bill genuinely been to bring about gender justice, such provisions could have been extended to women of all communities.

The discrimination that Hindu

women face in the family, and which stands unaddressed in the various family laws prevalent in the country, be they the religious personal laws or the Special Marriage Act have not been addressed at all. So also, there is a total silence on addressing the issues of discrimination against women within the Hindu Joint Family or rather the provisions are so drafted that they cannot be applied to the Hindu Joint Family and coparcenary property owned by it. The 2005 amendment to the Hindu Succession Act, provided daughters right to coparcenary property on par with sons, but excluded other female members of the HJF such as widows, wives and mothers. The Hindu Joint Family is premised, even after the 2005 amendment , on descendants (male and female) from a common male ancestor. These glaringly patriarchal and gender discriminatory provisions have been left untouched by the Bill. The Bill is completely silent on the application of Christian family law and Parsi family law as well as other religious communities, which, apart from being legally untenable, means that these personal laws also have been terminated in the state without any consultation with the said communities.

The five Tribal communities of the state have been excluded, giving preference to customary law, however, other communities that work with customary law cannot seek intervention there as it has been set aside and termed illegal.

The critical aspect of any law is that every stakeholder in the law should be able or should have the space to access the law. In the prevailing climate where minorities are being targeted, it will make it difficult for women from minority communities to access any uniform law, howsoever progressive it is made, (which is not the case in this retrograde law), when its basic objective is to show one upmanship over minorities, especially Muslims.

To illustrate how the Code Bill follows the Hindu law template, it is important to note that the existing realities that make equal provisions of inheritance in the Hindu law unrealisable, have not been factored. For instance, the reality that property is by and large purchased in the name of the man, is not factored. This means that after the male expires, the property will be inherited by his parents (but not by his wife's parents), along with his Class I heirs, in the same share. That, according to the Bill, her property will also be inherited by her husband along with her parents as Class I heirs, has no meaning in a society that by and large does not purchase property in the name of females. In other ways the structural discrimination against Hindu females has been kept intact. The concept of matrimonial property has not been introduced, despite the Law Commission of India's recommendation in this regard. Similarly, the positive provisions from the Muslim law or the Goa law, such as the restrictions on making a will to render equal inheritance rights to naught, have not been considered in the framing of this law. The Bill has retained restitution of conjugal rights as a matrimonial remedy at a time when its constitutional validity has been challenged in the Supreme Court. This is a regressive provision with colonial origin, that legally compels unwilling spouses to live together in the name of consortium, companionship and conjugality. In the case of a wife, she may be subjected to rape and forcible pregnancy by the husband.

Criminalising the violation of compulsory registration of marriage without a provision in the law for creating awareness and facilitating documentation, in effect will mean that people will be rendered law violators for no fault of their own, and be subject to penalties. In a state with poor socio- educational status of women, the ramifications are bound to be more adverse for women. There is a function creep in this law, in that this Bill is intended to target political dissenters and those who are minoritized, which includes, the minoritized with the Hindu community as well. Therefore, in the guise of establishing non-registration of a live-in relationship, the State will have the power to enter the home and surveil. Criminalisation of adults in consensual live-in relationships, who may have deliberately decided to avoid marriage and its legal consequences, appears to be overshadowing other intentions.

Fundamental rights are either denied or taken away by this law. Even the existing provision of right of women to reside in their matrimonial homes, has been taken away. Thus rights to equality, right to live and livelihood and to live with dignity, right to freedom of speech and expression, freedom of conscience and right to freely profess, practice and propagate religion, have become casualties under this Bill. There is also total silence on areas pertaining to custody, guardianship and adoption of children, which are critical areas around which there has been much gender-based discrimination. No special provisions have been brought in to safe guard the rights of queer and transgender persons within a family and the rights of transgender persons to marry. Similarly, same sex marriages are not envisaged or recognised under the draft Code. The concerns addressed by persons with disability, that required special provisions to safeguard the rights are also not addressed in the Bill.

In this form, this Bill should be referred to a Standing or a Select Committee for wider deliberations, as the Bill, which has much import for the people of Uttarakhand and also for the rest of India as a precedent setter, needs to be discussed and people's, including diverse women's, queer and trans communities' responses from Uttarakhand need to be taken into account.

The Uttarakhand women's groups and representatives of organisations, reject this Bill in toto, in the form introduced in the State Assembly.

1130 CITIZENS CONDEMN THE HARASSMENT OF DR. HARSH MANDER BY THE INDIAN STATE

We the undersigned unequivocally condemn the continued victimisation and intimidation of Dr. Harsh Mander. We are deeply disturbed by the raid on the morning of 2nd February, 2024 at the residence of Dr. Harsh Mander and ongoing raid on the Centre for Equity Studies, the organisation founded by Dr. Harsh Mander.

Harsh Mander is a widely respected and internationally acclaimed human rights activist who has taken up issues of those most oppressed.

Today's raid is a part of the long chain of harassment of Dr. Harsh Mander, his colleagues, his family and former and present board members of the Centre for Equity Studies. It is important to know that since 2020 multiple investigating agencies of the Government including National Commission for the Protection of Child Rights (NCPCR), Delhi Police's

Economic offences wing, Income Tax (IT) authorities, Enforcement Directorate (ED) and now the Central Bureau of Investigations (CBI) have been carrying out what can only be described as a vindictive witch hunt. In not a single case has a chargesheet been presented in a court of law. These egregious attacks on Harsh Mander and the CES are an attack on all of civil society in India and all those who work to promote constitutional values.

It is clear from the FIR No. RC2202024 E0002/EO II/N.D. under sections 35 r/w 7,8,12(4) (a) (vi) and section 39 of FCRA Act 2010 invoked by the CBI, that the charges being brought under Mr Mander are entirely fabricated and without any material basis.

We demand the closure of all investigations including the CBI FIR against Harsh Mander, his, colleagues and the CES. Speaking on the raids, Dr. Mander said that he was further strengthened in his resolve and added that "my life, my writings and my work are my only response".

We stand in solidarity with Dr. Mander, in his determined resolve to preserve the principles and values of constitutional India.

Kavita Srivastava, President PUCL, V Suresh, General, Secretary, PUCL, Aruna Roy, MKSS, Rajasthan and President NFIW and others.

CIVIL LIBERTIES IN SOUTH ASIA: A REPORT FROM THE WORLD SOCIAL FORUM.

(16TH FEBRUARY, 2024 ,KATMANDU AT A PANEL ORGANIZED BY THE PUCL)

The panel discussion on "Civil Liberties in South Asia" was moderated by Lara Jesani, a human rights lawyer from India and member of PUCL. The session was chaired by human rights activist, feminist and PUCL National President Kavita Srivastava. Lara stated that the session had been organized to inquire into and assess the situation of Civil Liberties in the South Asia region, since it was fundamental to the assertion and achievement of all human rights.

Diep Saeeda (Peace activist and Director Institute of Peace and Secular studies, Pakistan) provided insights on the continuing human rights violations in Pakistan, in particular the violence and discrimination against religious minorities, lack of independence of media and judiciary, the shrinking democratic spaces to express and protest. Despite the silencing and criminalizing of dissent, citizens and movements did not stop raising their voices on the streets, which also had the consequences of arbitrary arrests and intimidation by the security establishment. She also emphasized that the strife between the neighbouring countries India and Pakistan, had an adverse impact on the people of both countries and on the region, and more civil society efforts were necessary to facilitate travel between the countries and camaraderie amongst the people.

Nalini Rathnarajah (Woman Human Rights Defender and member SAPPE, Sri Lanka) highlighted the misuse of online safety bill in Sri Lanka, stating that in the age of online advocacy it poses another restriction on the expression of dissent. She also spoke of the attacks on academic freedoms and the various restrictions put on the right to protest and freedom of movement. She informed the audience that the restriction on the right of women to own property through the religious property laws were hampering their entrepreneurship. She talked of how as a fall out of the people's movement in Sri Lanka (Aragalaya), there have been increasing restrictions imposed on the right to protest using laws and executive orders, including monthly monitoring of accounts to reign in civil society.

Namrata Sharma (Coordinator mass communication, Nepal National Commission for UNESCO) started by providing a background of how the Nepal Constitution provided progressive laws and rights to the people, for instance the representation it provides for different genders and ethnicities in the government, right upto the ward level. However, she stated that there were several lacunae and corruption in the delivery of rights. She stated that civil liberties were being curtailed, with laws such as Online Security Act and Social Media Act and in the name of sovereignty there was an exercise of control. She expressed a need for all of South Asia to have open borders as is the case with Nepal and India.

Zakir Hossain (Nagorik Uddyog, Bangladesh), informed that since the last 3 elections in Bangladesh, there was an artificial democracy functioning and it has been a mockery of the right to vote of citizens, with governments being formed without opposition. Meanwhile the accountability institutions of democracy, such as law enforcement agencies and election commission were ineffective. He stated that for 12 years civil society has been demanding for anti-discrimination law to curb atrocities on Dalits and marginalized groups. He also Biraj Patnaik (former South Asia Director Amnesty International and former Principal Adviser to the Commissioners of the Supreme Court on the Right to Food in India), highlighted how India's geopolitical status has led to India getting a free pass on human rights violations. He spoke of how the country is slowly becoming an elections-only democracy, an electoral autocracy. While focusing on the common challenges posed to South Asia, he said that in all the countries there was a roll back on socio economic rights. He also said that there was hope in the younger generation of the countries to end this authoritarianism.

The chair Kavita Srivastava while summing up the discussions, emphasized on the need to address the growing sectarianism, islamophobia and identity-based violence in the region. She said that there had been an increase in the attacks on minorities and in India the present situation of minorities was that of being relegated to second class status. She added that the country was witnessing an everyday undermining of dissent in the name of threat to national security and terror, along with various forms of digital security laws and the new media broadcasting in the process of being legislated, being tools to outright curtail people's autonomy vis a vis the social media. The continuing ethnic conflict in the Northeast for the last nine months in Manipur presented a grim situation. Cases continued to be filed against activists who did fact finding and spoke the truth. Domination of agencies of non-state actors in the dispensation of the rule of law was extremely worrying. Similarly, in the Kashmir valley, encounters, suppression of the people, in an increasingly militarized terrain, silencing of the media in the valley, denial of elections, showed how the dreams and aspirations of the Kashmiri people were still being throttled. She emphasized on the need for civil society of all countries in the region to connect with each other and build solidarity across the region to stand up for truth and justice. She concluded by saying that only a people's movements for human rights would rebuild the eroding democracy and restore the civil liberties of the people from authoritarian Governments.

Several participants joined the discussions and presented their comments. From India, T.S.S. Mani, a human rights activist and member of PUCL, spoke of the criminalization and vilification of defenders as anti-nationals, as was seen with anti-Sterlite protestors in Tamil Nadu. Also Mr. Tejinder Ahuja, a human rights lawyer and PUCL member, emphasized on the importance to raise the issue of Dalit rights across the region. A participant from Bangladesh also raised the need for laws addressing caste atrocities and discrimination. From Nepal, Amnesty International Nepal Director stated that in the name of gentrification and urbanisation, informal settlements in Kathmandu were being demolished and protests of slum dwellers were being curbed.

The participants and speakers resolved to work towards building solidarities among people of the countries and strengthening civil liberties in the South Asia region. We resolved that with the democracies in South Asia region witnessing erosion and people's basic freedoms like right to express dissent, protest, form association and freedom of movement being suppressed, media and judicial independence being compromised, the governments in the region need to be called upon to restore and ensure civil liberties and democratic rights. We also need to ensure that the breakdown of the rule of law and attack on people's rights is not allowed, and a strong people's movement is built to protect our human rights collectively as people from the South Asia region.

ARTICLES

JUDICIARY MUST BE AWARE OF UNPRECEDENTED CONSTITUTIONAL CRISIS FACING OUR REPUBLIC & DEFEND CONSTITUTION AND RIGHTS, DR MOHAN GOPAL

Judiciary and Democracy: Justice Barak's analytical framework

I would like to begin with the analytical framework developed by Justice Barak in addressing the issue of the role of the judiciary in a democracy. Justice Barak argues in "The Judge in a Democracy": Our age is the age of democracy. New countries have joined the community of democracies. Many of them wish to re-examine the nature of modern democracy, which is not based solely on the rule of people through their representatives (formal democracy), but also separation of powers, the independence of the judiciary, the rule of law, and human rights (substantive democracy).

The protection of human rights — the right of every individual and every minority group— cannot be left only in the hands of the legislature and the executive, which, by their

nature, reflect majority opinion. Consequently, the question of the role of the judicial branch in a democracy arises.

Justice Barak goes on to say in his book:

In my opinion, every branch of government, including the judiciary, must use the power granted to it to protect the Constitution and democracy. The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy and proper elections, and substantive democracy, as expressed in the concepts of separation of power, the rule of law, fundamental principles, independence of the judiciary, and human rights…. In light of the increasing recognition of judicial review of constitutionality of statutes since World War II and of the inclusion of human rights provisions in new constitutions, the second role, preserving democracy, has grown in importance."

The distinction made here by Justice Barak between formal democracy (electoral democracy, legislative supremacy, proper elections) and substantive democracy (separation of powers, the independence of the judiciary, the rule of law, and human rights) provides us a useful enumeration of the key dimensions of democracy that must be considered in assessing the role of the judiciary. Justice Barak's division between formal and substantive democracy is merely an analytical framework . It does not deny the essential inter-relationship of the two dimensions.

The ethos of the Indian Constitution is rooted in democracy

Seventy-five years ago, the people of India declared their solemn resolve to constitute India into a democratic Republic. Democracy, and its constituent values of liberty, equality, fraternity, dignity and human rights for the powerless, are thus at the core of the vision of the Indian Republic. The ethos of the Constitution of India is rooted in democracy, at the core of which are human rights. This is not surprising because the Universal Declaration of Human Rights (UDHR) was drafted and adopted between February 1947 and December 1948 in parallel with our Constitution (which was drafted and adopted between December 1946 and November, 1949).

The preamble of our Constitution commits the Republic of India to substantive ideals of equality, liberty, fraternity and unity which are keystone human rights values. Part III of the Constitution sets out the essence of the human rights laid down in UDHR as judicially enforceable fundamental rights. Summarizing the Directive Principles of Public Policy which reflect key human rights principles, and setting out the mandate of the Republic, Article 38(1) says,

"(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

We're ruled by an oligarchy

There is an additional and crucial dimension to substantive democracy in India — representative democracy. Speaking at the 1930 Round Table Conference as the representative of the Depressed Classes, Dr. Ambedkar warned that after the British rule, India would be ruled by an "oligarchy" (a small group of people having control of a country). Today, as predicted by Dr. Ambedkar, we are ruled by an oligarchy. We have a sharp concentration of social, religious, economic, political, bureaucratic, legal and judicial, professional, cultural power as well as control over media and academia, in members of just four communities at the national level and about 2-3 communities in each state. Over the last 75 years, our oligarchy is also growing strongly into a plutocracy (government by the wealthy). To counter the emergence of an oligarchy, Dr. Ambedkar demanded representative democracy — a representative government with due (proportionate to the population) and adequate (effective) representation for all communities in public employment (judiciary and

executive) and for depressed classes in the legislature.

Regrettably, the democratic practice of our State institutions has remained focussed on electoral democracy. It has neglected the centrality of representative democracy and the protection of human rights of individuals and minority groups — which have been central to civil society Constitutional activism and politics. As a result, the State's understanding of democracy and our jurisprudence is lacking in these key areas. This has created an ambivalence in the State's approach to democracy that remains a vulnerability for India.

The Struggle over Democracy in India

From the very outset, the rulers of the country were uncomfortable about democracy and sought to control and limit democracy, and the rights of the powerless. The first amendment to the Indian Constitution, made only some fifteen months after the Constitution came into effect, added three further grounds of restrictions to narrow the fundamental human right to freedom of speech and expression guaranteed in the then-new Constitution. The resistance of rulers against democracy has only grown and intensified since then, reaching an apogee in the emergency that was declared in 1975, 25 years after the Constitution came into effect. Today, nearly a half-century (48 years) after the emergency and 73 years after the Constitution came into effect, the resistance against democracy has overtaken its 1975 apogee, and is seeking to reach its ultimate zenith which will lie in the overthrowing of liberal democracy and the replacement of the democratic republic by a theocratic autocracy.

For over a century, the Hindu Mahasabha (formed in 1915), the Rashtriya Swayamsevak Sangh (RSS, formed in 1925) and other like-minded organizations have maintained that India is a “Hindu Rashtra”. They have developed a “Hindi-Hindu-Hindustan” (H3) platform as its cultural-social-political guiding vision of the movement to establish the Hindu Rashtra. This H3 vision rejects the key tenets of democracy, formal and substantive — elected governments, separation of power, the rule of law, independence of the judiciary, and human rights. The H3 vision also rejects the idea of representative government demanded by Dr. B.R. Ambedkar and embedded in Article 16(4) of the Constitution. The actualization of the Hindu Rashtra will necessarily require the overt or covert overthrowing of the Constitution.

Since 2014, control of the Union executive and legislature has been taken over by H3 groups. As institutions, therefore, the Union executive and legislature are today simply incapable of protecting themselves or protecting democracy. The judiciary is the only branch that is not controlled by a group committed to the H3 agenda. This has created a grave Constitutional crisis that is not envisaged in the Constitution.

In these circumstances, the Indian judiciary has a very special and unparalleled responsibility to protect democracy and the Republic. It is in this context that the question of the role of the judicial branch in our democracy arises and the responsibility of our judiciary needs to be assessed. The Supreme Court's contemporary track record on protecting the Constitution and defending human rights.

While there is a large and powerful body of jurisprudence in which our Supreme Court has delivered judgments which have protected the Constitution and defended human rights over the years, there is a sufficient number of worrisome contemporary matters of great consequence in which the judiciary does not appear to be able to adequately protect the constitution and defend substantive democracy. Here are some examples.

Judicial primacy in judicial appointments:

Perhaps the most serious strategic issue that will influence the ability of the judicial system to fulfil its responsibility to protect the Constitution and defend democracy is the issue of appointments and transfers of judges in constitutional courts. There is a clear H3 political agenda to exclude from, or delay entry into, the Supreme Court, certain judges with impeccable liberal democratic credentials, respected for their competence, integrity and fierce independence; and to induct into the Supreme Court judges whose legal views are genuinely and bona fide aligned on critical issues with the ethos behind the broad H3 agenda. This is not to suggest in any way that those sought to be inducted would, if appointed, be under the control of the government or any political or

other group, or would tailor their decisions to any directions, preferences or incentives. They would be acting independently of their own accord. Although the collegium system established by the Supreme Court does not allow the Union a veto in appointments to constitutional courts, the Union is able to successfully exclude and delay, or include, judges selectively so as to fulfil their H3 agenda. A key strategy is simply sitting on appointments which have been approved by the collegium and letting them run out. In turn, this adversely affects public trust and confidence in the Supreme Court. In such cases, there seems to be reluctance on the part of the Supreme Court to enforce the law it laid down in the judges' cases on appointments and transfers of judges.

Protection of liberty:
Substantive democracy is being pushed back by the judiciary by not proactively and rapidly protecting free speech and dissent; by not stepping in to rein in extensive selective prosecution of opponents while sparing those who align with the ruling regime; by permitting prolonged under-trial detention of democratic activists, opposition leaders and journalists even in the absence of adequate evidence against them; by not devising legal measures to prevent hate speech and communal violence against minorities; by not effectively protecting religious freedom and press rights; by allowing growing concentration of economic power; and by not stopping open theocratic assertion of Brahmanic Hindu religion in public spaces and institutions, in effect converting India into a “quasi-secular” state.

Minority rights:
Substantive democracy was pushed back by the judiciary in the Ayodhya judgment (2019) in which a political dispute was, in the words of Justice Barak, dressed up in legal garb so as to ensure that the Ram temple would be constructed before the 2024 elections by the Hindu party to the dispute. As a matter of coincidence, the judgment fulfilled a long standing main plank of the H3 agenda. This decision has dented confidence in the Supreme Court's role in protecting human rights of minority groups. The decision on the abrogation of Article 370 and the lowering of the status of Jammu and Kashmir into two Union Territories has also eroded confidence in the role of the judiciary in protecting human rights of minorities — the human and democratic rights of the people of Kashmir, which was the core issue involved, did not even adequately figure in the formalistic judgments delivered in the Article 370 matter. Again as a matter of coincidence, this judgment also fulfilled a long-standing main plank of the H3 agenda. Representative democracy was also pushed back by the judiciary in the split judgment upholding reservations for economically weaker sections from amongst forward communities (2022), reducing by 10% the space available for representation of unrepresented communities. Substantive democracy was pushed back by the judiciary when Prashanth Bhushan was convicted for contempt in 2020, sending a chilling signal against any questioning of the conduct of judges given the nature of the issues involved which was generally seen as not serious enough to merit the titanic response of the Supreme Court. Substantive democracy was also pushed back by the judiciary in deference to the H3 sentiment when the judiciary rejected recognition of same-sex marriage in 2023.

Criminal law:
Substantive democracy was set back when the judiciary did not ensure a proper investigation into the Sahara-Birla matter in 2017 or the Rafale controversy in 2019, both of which involved serious allegations of corruption against the Union government. Substantive democracy was avoidably pushed back by the judiciary when it pre-empted a normal police investigation into the death of Judge Loya in 2018. Substantive democracy was set back when the Supreme Court allowed the government to by-pass the Rajya Sabha (where it then did not have a majority) and enact as money bills several crucial laws that made incursions into human rights, including the Aadhar Act and amendments to the Prevention of Money Laundering Act (PMLA) that made significant changes to the powers of the Enforcement Directorate (ED). Substantive democracy was again pushed back by the judiciary when it did not address key legal issues raised before it regarding demonetisation. Substantive democracy is pushed back by the delay in taking up petitions filed against electoral bonds.

Why is the judiciary on occasion aligning on occasion with the H3 agenda?
It appears that a key part of the strategy to establish a Hindu Rashtra in India is to do so through theocratic constitutional

interpretation by the Supreme Court rather than through replacing the Constitution with a brand new constitution (as has been done in the case of the criminal codes) or through comprehensive amendments of the existing Constitution. This strategy will require H3 forces to dominate the judiciary as they have done in the case of the executive and the legislature. It is only to expected that this will be sought to be accomplished. There is already today a rising presence in the legal community (academia, bench and bar) of those who genuinely buy into the H3 agenda of the Union — that India should be a theocratic Hindu Rashtra and not the modern secular democracy envisaged in the Constitution. They believe this genuinely, bona fide, sincerely. They do not need any incentive or reward to work towards this goal. Unlike in the 1975-77 emergency, there is no need or room for any direction or command to be delivered to them to advance the H3 ethos.

What can be done to ensure that the judiciary discharges its responsibility to protect the Constitution and defend democracy?

Speaking at the 1930 Round Table Conference as the representative of the Depressed Classes, Dr. Ambedkar warned that after British rule India would be ruled by an "oligarchy" (a small group of people having control of a country). When India became independent in 1947, the two social groups that had subjugated the dominant Hindu communities and ruled India for a millennium left (the British were ousted and the Muslim ruling classes created their own independent homeland) . The dominant Hindu communities became the unchallenged rulers of India. The others — the Scheduled Castes (SC), Scheduled Tribes (ST) and the socially and educationally backward classes, as well as the religious minorities that were left behind, who together constitute some 85% of the population— are still too weak to seriously challenge the dominant communities.

History has proved Dr. Ambedkar right. Today, we have a sharp concentration of members of dominant communities in the social, religious, economic, political, bureaucratic, legal and judicial, professional, cultural and epistemic (relating to knowledge) domains, in the media, in academia and in the learned professions. In the last 75 years, our oligarchy has acquired immense wealth and grown into a plutocracy (government by the wealthy). The legal realm — the judiciary, the Bar and legal academia — are heavily dominated by members of oligarchic communities.

This oligarchy is leading the drive for the establishment of a Hindu Rashtra in India in order to entrench their oligarchic, plutocratic rule. To counter the emergence of an oligarchy, Dr. Ambedkar demanded representative democracy — a representative government with due (proportionate to the population) and adequate (effective) representation for all communities in public employment (judiciary and executive) and for depressed classes in the legislature.

The second step is to create greater public awareness about the role and responsibilities of the judiciary in a democracy. As noted, Justice Barak identifies one of two key roles of a judge in a democracy is to defend the Constitution and protect democracy. The oath taken by judges of the Supreme Court and High Court as mandated in the Third Schedule to the Constitution, in relevant part, requires the judge to swear in the name of God or to solemnly affirm that, she or he will bear true faith and allegiance to the Constitution of India. The Preamble to the Constitution clearly says that the purpose of the Constitution and of the Republic is to constitute India into a democratic Republic. This means that, so long as they hold office, all judges must have faith in democracy as defined in the Constitution. In tun, this means that judges must have faith in human rights. Says Justice Barak, "Above all, a democracy cannot exist without the protection of individual human rights — rights so essential that they must be insulated from the power of the majority." Having faith in democracy and human rights means that a judge cannot have faith in the authoritarian idea of a Hindu Rashtra with its "othering" and graded inequality between humans. Swearing faith in the Constitution means swearing faith in democracy; in individual human rights; in minority human rights; in the rule of law. The implication is that individuals with faith in the theocratic Hindu Rashtra idea would be disqualified to be judges. The assumption that all

judges would have faith in the Constitution is the reason why the Constitution does not provide for any remedy to the current situation in India in which those who have faith in the Hindu Rashtra assume Constitutional offices.

Conclusions

Given that the executive and legislative branches have already fallen under the control of groups that have openly committed themselves to establishing a theocratic nation totally opposed to the Constitutional vision of formal and substantive democracy, the Indian judiciary is the only branch of the Indian state that is still at this time independent enough of anti-democratic forces to be able to resist this onslaught and protect the Constitution and defend human rights. We earnestly hope that the judiciary is aware of this unprecedented constitutional crisis facing our Republic and will study and reflect on their oaths carefully and ensure that they stoutly defend the Constitution and protect human rights of individuals and minorities. To stave off the challenge against democracy, we also need to take forward Dr. Ambedkar's vision of representative democracy (including a representative judiciary) as well as put the human rights of individuals and minorities at the centre of our own public vision of democracy.

Dr G. Mohan Gopal, who is an eminent jurist delivered the fourth Professor Shamnad Basheer Memorial Lecture organized by Live Law on December 22, 2023. This has been edited for length and reproduced with the kind permission of the author.

ELECTORAL BONDS RULING: HOW SC BALANCED RIGHT TO KNOW WITH RIGHT TO PRIVACY

ARVIND NARRAIN

The unanimous constitutional bench decision holding the scheme which allows for the purchase of electoral bonds without disclosing who the purchaser is has been struck down the Supreme Court in Association of Democratic Reforms v. Union of India. Under the scheme, political parties need not disclose the contributions received through electoral bonds; Companies are not required to disclose the details of contributions made in any form; and Unlimited corporate funding was permissible.

To facilitate this scheme the Representation of Peoples Act, Income Tax Act, Companies Act and Finance Act were amended. In a remarkable decision authored by Chief Justice Chandrachud for the plurality consisting of Justices, Gavai, Pardiwala and Misra and Justice Khanna speaking for himself, both the scheme as well as these facilitating provisions were struck down leaving no scope for ambiguity.

What flowed from this finding was that the issue of Electoral Bonds was stopped and the SBI was required to 'submit details of the Electoral Bonds purchased since the interim order of this Court dated 12 April 2019 till date to the ECI.' The SBI was also required to 'submit the details of political parties which have received contributions through Electoral Bonds'.

In an indication that this was not merely a declarative judgment and that there were consequences to follow, the Court prescribed 6th March, 2024 as the deadline for SBI to submit the above information to the Election Commission. The Election Commission in turn was ordered to 'publish the information shared by the SBI on its official website by 13 March 2024.

The Court for its reasoning drew upon its previous precedents with respect to proportionality analysis as well as the doctrine of arbitrariness to arrive at this result. The base of the judgment was the seminal importance of Article 19(1)(a) as including the right to know of citizens. The integrity of the electoral process was based on the citizen's right to know and this right to know, the Court derived from the previous judgments of the Supreme Court where the Court had held that transparency with respect to criminal records / assets of a candidate were essential to a democracy.

However the Union of India contended that this right to know must be balanced against the right of a person to

'maintain privacy of their political affiliations' and that 'donating money to one's preferred party is a form political self-expression, which lies at the heart of privacy'.

To understand if these rights could be restricted, Justice Chandrachud employed what he called a 'double proportionality analysis', under which the two so called competing rights, namely the right to donate anonymously and the right to know were analysed within the proportionality framework.

The proportionality framework examines whether the measure restricting a right has a legitimate goal (legitimate goal stage);The measure was a suitable means for furthering the goal (suitability or rational connection stage); The measure was the least restrictive and equally effective (necessity stage); and the measure did not have a disproportionate impact on the right holder (balancing stage).

With respect to the right of the donor to be anonymous, the Court reiterates that the right to not let your political affiliation be disclosed is a legitimate dimension of one's privacy. However if that is the concern of the Union of India the measure adopted is not 'suitable'. In the Court's understanding, 'the right to privacy of political affiliations does not extend to contributions which may be made to influence policies. It only extends to contributions made as a genuine form of political support that the disclosure of such information would indicate their political affiliation and curb various forms of political expression and association.' Justice Khanna's concurring opinion which lists the party wise donation through bonds as being in the thousands of crores, (mainly flowing to the BJP) adds further weight to this conclusion and gives the lie to the Union of India's argument.

The Court then applies the proportionality analysis to the restrictions on the citizen's right to know. It took seriously the Union's argument that this scheme is required to deal with the problem of black money and then asks the question as to whether this is the 'least restrictive' means to achieve that objective? It held that, the 'Electoral Bond Scheme is not the only means for curbing black money in Electoral Finance'. In its reasoning it holds that 'there are other alternatives [such as the extant Electoral Trust Scheme] which substantially fulfil the purpose and impact the right to information minimally when compared to the impact of electoral bonds on the right to information.'

The other legal test which the Court applies is the doctrine of 'manifest arbitrariness', under which a legislation can be struck down if 'the determining principle of it is not in consonance with constitutional values.' In this case the amendment to Section 182 of the Companys Act which does away with the distinction between contributions by companies and individuals is found to be 'manifestly arbitrary'.

In the Court's reasoning, this is because 'the ability of a company to influence the electoral process through political contributions is much higher when compared to that of an individual' and hence a 'company has a much graver influence on the political process' and the two cannot be equated for the purposes of political contributions.

The future Chief Justice of India, Sanjiv Khanna, in his concurring opinion, while agreeing on the conclusion of the plurality, does not agree with the conclusion that to eliminate the distinction between individuals and corporations when it comes to political contributions is manifestly arbitrary !

While the judgment is soundly grounded in law, it remains alive to the political context. The citing by Justice Khanna of the thousands of crores received by political parties and disproportionately cornered by the BJP is one example. Justice Chandrachud is also alive to the context as he observes that, 'the challenge to the statutory amendments and the Electoral Bond Scheme cannot be adjudicated in isolation without a reference to the actual impact of money on electoral politics' and concludes that 'the nexus between money and electoral democracy' should be borne in mind, while deciding these petitions.'

While this judgment is to be welcomed, it has been seven long years since the case was first filed allowing for what the Chief Justice has appositely called the 'murder of

democracy'. One cannot but note that the aliveness to the political context which the Court exhibits in this judgment was sadly absent in the other major constitutional bench decision on the constitutionality of the abrogation of Article 370.

Still, this is a step in the right direction and hopefully the Court will begin the process of restoring the tattered faith of the common man that the Court will vigorously defend the values of the Constitution against an overweening executive.

Arvind Narrain is the President of the PUCL-Karnataka and this piece was first published in The Federal.

NOT IN THE NAME OF GENDER JUSTICE: REFLECTIONS ON UTTARAKHAND'S UCC

SAUMYA UMA

The Uttarakhand Bill on the Uniform Civil Code (UCC) has been passed. In the past decades, the UCC has been projected as a tool to achieve nari shakti (empowerment of women) and gender justice was seen to be the goal, by wrongly equating uniformity with equality.

An underlying presumption in family law is that marriages and intimate relationships are consensual, that they protect the constitutionally guaranteed fundamental rights and dignity of the parties concerned, and that the agency and decisional autonomy exercised by the concerned parties are acknowledged and protected. However, some provisions of the Bill are a cause of grave concern as they violate this fundamental principle.

Registration of marriages, divorces and live-in relationships

The Bill, through clause 6, makes it mandatory for marriages to be registered subsequent to the commencement of the Code, if the marriage takes place in Uttarakhand or one of the parties is a resident of the state. Clause 7 makes it mandatory for marriages performed from 2010 (when the Uttarakhand Compulsory Registration of Marriage Act was enacted) to the commencement of this Code, to be registered, unless it has already been registered under the 2010 Act. Placing the onus of registration on women, many of whom are poor and illiterate, with no corresponding legal mandate of the state to create awareness of the same, seems unfair and unjust.

Similarly, registration of decrees of divorce and nullity passed after and before the commencement of the Code are also to be mandatorily registered, as per clauses 8 and 9 respectively.

While non-registration will not affect the validity of a marriage, as per clause 20, failure to register marriage, decrees of nullity and divorce would result in penal consequences – fine of up to Rs 25,000, as per clause 18(2). This is indeed very steep.

The registers of marriage, nullity and divorce are open for public inspection, as per clause 15. In a country with rampant honour crimes, and parents' and communities' resistance to inter-caste, inter-religious and inter-class marriages, such public inspection is likely to exacerbate the situation of vulnerability of adult women in choice marriages without parental approval.

A statement is also required to be submitted to the Registrar upon termination of the live-in relationship, as per clause 384. Upon such a submission, if either of the parties is below 21 years of age, the Registrar is also mandated to inform the parents/guardians of the party regarding the same, as per clause 385(3). This infantilises individuals aged 18-21 years who engage in such relationships.

As in the case of choice marriages, in live-in relationships too, this enables surveillance, moral policing and harassment by the natal family, community and possibly, the state machinery.

The only benefits available to those who register their live-in relationships are – avoidance of penal consequences, the woman can claim maintenance from her partner (under clause 388), and a child born from such a registered live-in relationship would be treated as legitimate, on par with other children, and consequently enjoy all rights including maintenance and property rights through intestate succession.

In a democratic country, adults living together in a consensual relationship ought not to be subjected to state monitoring through mandatory administrative procedures, in the guise of protecting the woman in the relationship. While society may

frown upon or disapprove such relationships, such social morality ought not to colour a law. Through several judgments, the courts have affirmed the right of persons over 18 years of age to choose their intimate partner/spouse, irrespective of caste, religious or other differences. The provisions on compulsory registration make a mockery out of such jurisprudence.

Retention of restitution of conjugal rights

The Bill has retained restitution of conjugal rights (RCR) as a matrimonial remedy at a time when its constitutional validity has been challenged in the Supreme Court. Clause 21 of the Bill is a copy paste of section 9 of the Hindu Marriage Act and section 22 of the Special Marriage Act. This is a regressive provision with colonial origin, that legally compels unwilling spouses to live together in the name of cohabitation, consortium, companionship and conjugality. Though on the face of it, it is a gender neutral provision, it has disproportionate and adverse ramifications for the wife who may be subjected to rape and forcible pregnancy by the husband.

This provision violates the right to live with dignity, bodily integrity, sexual autonomy, privacy, decisional autonomy, agency and reproductive rights and health, which every woman, including married women, are entitled to. Such rights have been upheld in various judgments.

The Uttarakhand Bill is a missed opportunity for eliminating this regressive matrimonial remedy from the statute book, thereby promoting gender justice.

Non-recognition of rights of trans and queer persons

Clause 3(1)(j) of the Bill defines "person" as "an individual, whether male or female, and the expressions "he/she", "his/her", "her/him" and "herself/himself" shall be construed accordingly. The Bill is replete with references to son and daughter, husband and wife, brother and sister, completely excluding the transgender persons from the purview of the Bill and the rights and protections it may accord. Alternatively, it compels them to adhere to their gender assigned at birth, which violates their constitutionally guaranteed rights.

The Bill does not include marriages among queer persons, as clause 4 of the Bill states that a marriage maybe solemnised between a man and a woman, after they fulfil the criteria laid down in the clause. Additionally, the Bill does not recognise live-in relationships among same sex couples, as clause 3(4)(b) defines a live-in relationship as "a relationship between a man and a woman…" Thus, only heterosexual relationships and marriages are recognised in this Bill.

In *Supriyo*, the majority judgment said that the State is duty-bound to ensure that there are no impediments for queer couples to enjoy the rights flowing from all previous judgments as well as the right to relationship as defined in this judgment. Chief Justice of India D.Y. Chandrachud mandated the legislature to enable these rights. The Uttarakhand legislature had the first opportunity to follow these directives, but it failed to do so, by completely ignoring the rights and concerns of queer and trans communities as if such communities do not exist.

Additionally, the Bill ought to have addressed familial violence in the lives of queer and trans persons. Last year, a report of the findings of a closed door hearing on the issue was published, based on the testimony of 31 queer and trans persons from across India. It found that natal family violence is often normalised, ignored by the law and legal institutions, justified as "punitive" or "corrective" measures for perceived transgressions of gender and sexuality norms, and facilitates surveillance and control by the natal family in the name of protecting its "honour". The Bill does great disservice to queer and trans persons in ignoring this ground reality.

The Bill sets no limit to the quantum of property that can be willed away in clause 61. Thus, a parent may completely disinherit their child based on the child's gender identity or sexual orientation. In 2018, the Law Commission of India had recommended that, drawing from Muslim law, some portion of the property must be fixed by law for the dependants of the deceased under all family laws. This recommendation has been completely ignored in the Bill.

Conclusion

A cumulative analysis of the three set of provisions discussed

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above indicate that the Bill embeds and enforces heterosexuality in its provisions, ignores ramifications of these provisions on women (including queer and trans women) and reinforces natal family's control over choice marriages and live-in relationships among adults. It criminalises adult consensual relationships that are not registered and infantilises them; simultaneously, it turns a blind eye to natal family's violence on and imposition of their choice of partner on their children through forced marriages. Its protectionist approach in mandating registration of live-in relationships is hardly empowering for women; in fact, it exposes them to the wrath of the combined forces of family, community and state agencies and further disempowers them. As such, the claim that a UCC promotes gender justice is a hollow one.

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OBITUARY

The PUCL mourns the sad demise of Fali Nariman (10.01.1929 - 21.02.2024) Mr. Nariman was a titan among Indian constitutional lawyers with a deep and abiding commitment to the constitutional values of liberty, equality and fraternity. He was a PUCL member and donor whose work enriched the civil liberties discourse in the country. We express heartfelt condolences to his family members and may they find the strength to bear this difficult loss.

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I, V. Suresh, hereby declare that the particulars given above are true to the best of my knowledge and belief.
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