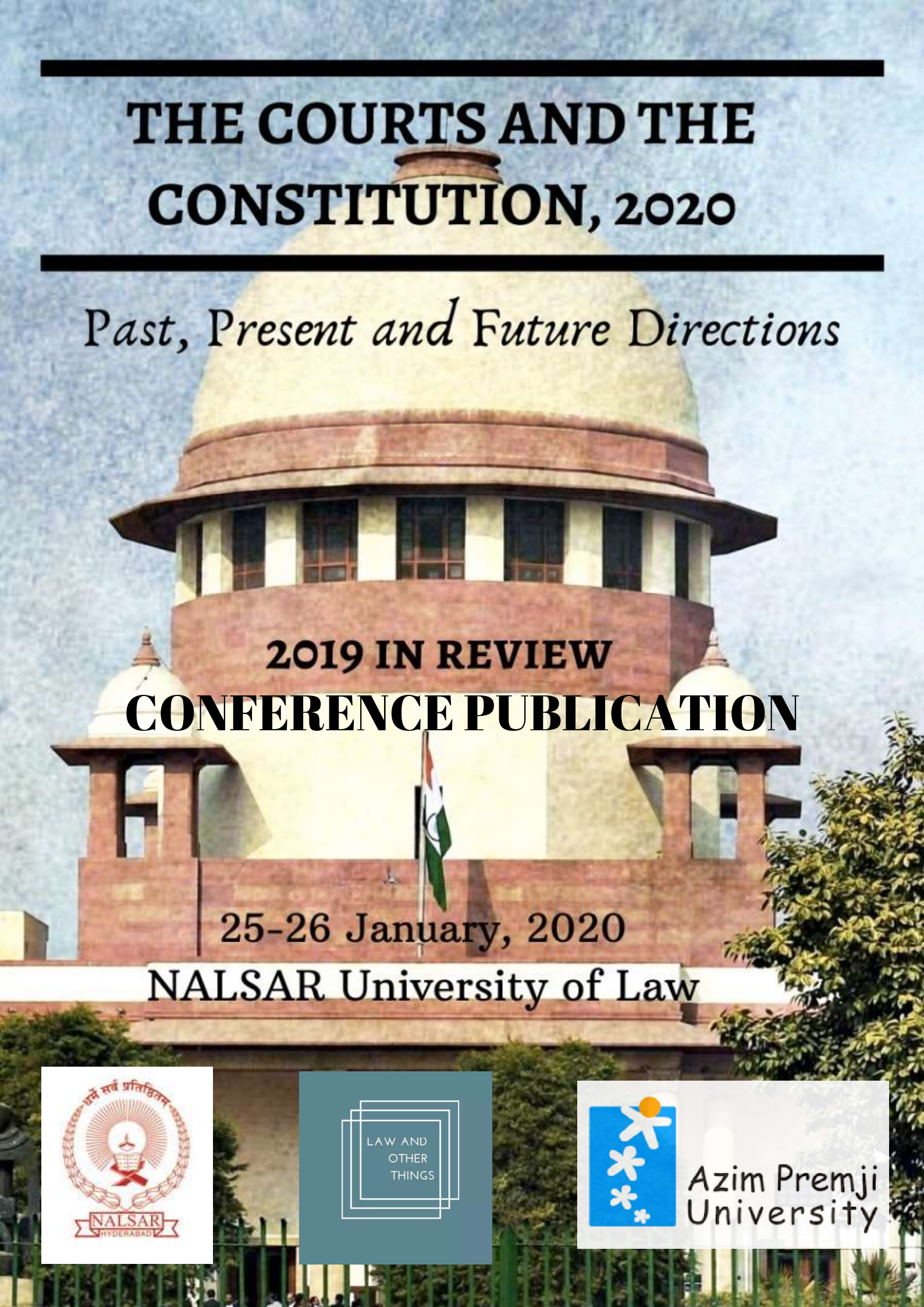
THE COURTS AND THE CONSTITUTION, 2020

Past, Present and Future Directions



2019 IN REVIEW

CONFERENCE PUBLICATION

25-26 January, 2020

NALSAR University of Law

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NALSAR HYDERABAD

LAW AND OTHER THINGS

Azim Premji University

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We are also extremely grateful to the numerous volunteers & staff members who made this Conference possible.

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2019 IN REVIEW

EDITORIAL NOTE

It is with great pleasure that we release this publication developed from the proceedings of the second edition of *The Courts and the Constitution Conference.* The Conference was organised by the NALSAR University of Law, Hyderabad, in association with the School of Policy and Governance, Azim Premji University and the editorial team of the Law and Other Things Blog from 25-26 January, 2020.

The idea behind this annual conference is to take the opportunity of the Republic Day weekend to have a *Year-in-Review* exercise to analyze some of the key constitutional law judgments delivered in the preceding year and discuss their long-term impact. The Conference also provides an opportunity to bring members of academia, bar and the bench together to discuss and deliberate upon these decisions which have a bearing upon the future of the Republic, its citizens and its governance.

In this year's editions, the Conference had seven substantive sessions which thematically discussed the judicial developments in 2019.

The Opening Session on 25th January was a tribute to the memory of Dr. N.R. Madhava Menon, whom we lost in 2019. Prof. Faizan Mustafa, the Vice-Chancellor of NALSAR welcomed everyone to NALSAR and declared the Conference open. He expressed his disappointment that the year 2019 will not be remembered for what the Court *did do*, but for what all it *did not do*. Prof. N. Vasanthi gave an overview of the conference agenda. Prof. Sitharamam Kakarala, Director, School of Policy and Governance, Azim Premji University then took the opportunity to share his anecdotal experiences of having worked alongside Dr. N.R. Madhava Menon. He exhorted the need to move from Legal Education 2.0 to Legal Education 3.0 where NLUs must start paying more attention to their postgraduate programmes. Finally, Vikram Raghavan informed the audience of the objective behind the Law and Other Things Blog and the Conference to facilitate judges, lawyers, litigants, academics and students from across India to engage with the courts and the constitution.

The first substantive panel on the *Institutional Developments in the Judiciary* was opened by its moderator Sidharth Chauhan. Dr. Arghya Sengupta touched upon questions of accountability and independence in the form of appointments, in-tenure transfers, and post-tenure retirement appointments in the higher judiciary. Apurva Vishwanath narrated in detail

the Supreme Court's failure to secure justice to one of its staffer who had accused the former Chief Justice of India of sexual harassment. She discussed how the higher courts have failed at addressing issues of sexual harassment not just in this case but similarly in the past and noted that this must be addressed as a failure in the responsibility of not just those involved but the institution as a whole. Venkat Venkatesan expounded on the role of a legal journalist in holding the judiciary accountable and Anuj Bhuwania talked about how the Supreme Court was merely granting rights without remedies in 2019.

The second panel, moderated by Prof. Arun Kumar Thiruvengadam, dealt with *Federalism* where the focus shifted from courts to other constitutional actors. Prof. Anthony Blackshield AO, Emeritus Professor, Macquarie Law School opened the discussion by explaining unique features of federalism in different jurisdictions. Alok Prasanna Kumar explained the issues with fiscal federalism in India and discussed the issues with the functioning of the GST Council. Malavika Prasad took the session's attention to the issue of de-operationalization of Article 370 of the Constitution *vis-à-vis* Jammu and Kashmir's special status. Suchindran Baskar discussed about the complicated role of governors in a quasi-federal country like India. Lastly, Prof. Rohit De gave a historical context to federalism in India since 1940s and explained the political reluctance to federalism.

The third panel chaired by Prof. Amita Dhanda was devoted to Prof. Shamnad Basheer, another luminary whom we lost in 2019. She opened with a poignant account of her memory of Prof. Basheer. The panel was titled *Emerging Voices* where some of the work carried out by young and emerging scholars was presented. The panel consisted of Dr. Chintan Chandrachud, Kanika Gauba and Manav Kapur, all of whom spoke on the theme of the current tides against the Citizenship Amendment Act, 2019 with a focus on the history of India and its partition in 1947. Dr. Chandrachud analysed the TADA Act through the *Kartar Singh* case and brought out the importance of scholarship that takes a step farther from just focusing on the text and instead looks at the performance.

Day two of the conference witnessed four panels. The first one pertained to *Citizenship* and was opened by the moderator Arvind Narrain. Justice Swaminathan commented upon the importance of engaging with people in order to facilitate a conversation. Aymen Mohammad discussed the refusal of states to enforce union laws. He drew upon federalism and Article 355 of the Constitution so as to point out how the Union was wrongly justifying its protection of the federal units. Dr. Mohsin Alam Bhat drew upon his experiences from Assam so as to

enlighten the audience about the *twilight of citizenship* by explaining the inhumane functioning of foreigners' tribunals. Thereafter, Nizam Pasha stressed upon the need to examine citizenship, the right to rights, in the larger constitutional framework.

The panel on *Law and Religion* saw Professor Faizan Mustafa critiquing the Supreme Court's judgment in the Ayodhya dispute. Sruthisagar Yamunan highlighted the inconsistencies in courts' attempt to strike a balance between social reforms and religious rights of communities. Suhrith Parthasarthy drew the audience's attention to the problematic nature of the Supreme Court's order to review its judgment in the *Sabrimala* case. Professor N. Vasanthi, who was moderating the session concluded by emphasizing the need to have a proper relationship between law and religion.

The panel on *Developments in Equality Jurisprudence* was moderated by Dr. Sudhir Krishnaswamy who posited some grilling questions to the panelists. Arundhati Katju discussed the strategy behind shifting the conversation through *Navtej Johar* and for the bringing out the need on looking at the equality jurisprudence in a broader manner than the Courts have been currently able to do. Dr. Anup Surendranath pointed out how the Supreme Court failed in its application of the test of manifest arbitrariness in the *Bombay Dance Bar* Case and discussed the issue of importing creamy layer into SC/ST reservation jurisprudence. Alok Prasanna Kumar sought to explain how the 103rd Constitutional Amendment fell afoul of the Basic Structure doctrine and confused the objective of reservations as one of handing out charity.

The last session on *Reforming Tribunals* was moderated by Vivek Reddy. He prompted the speakers to speak on the possibility of removing tribunals, instead of reforming them. T. Prashant Reddy and Arun Thiruvengadam discussed the existing inefficiency of tribunals and the Court's decision in *Rojer Mathew* case. The conference ended with a vote of thanks by Sidharth Chauhan.

We found immense value in the ideas discussed during the panels held at the Conference and felt that they must be made available to a larger audience, hence this publication. We hope you enjoy reading this report, which seeks to share the collated learnings from the conference with law students and legal fraternity in order to further the discourse on major legal developments taking place in India and the role played by the Indian judiciary.

We are currently releasing this report Panel by Panel and will soon make available the compiled version. We also plan to release a special publication expanding upon the themes

which were discussed during the Conference. We hope you find this publication as a useful resource.

This Publication would have obviously been impossible without those who made the Conference possible in the first place. The dedicated team of student volunteers that we have is the backbone of our organizing team. Beyond us students and our faculty, what really makes this Conference possible is the dedicated staff at NALSAR to whom we are extremely grateful. We would like to particularly thank the IT Department led by B Md Irfan Sir for their constant support.

We are grateful to our dedicated team of rapporteurs without whose assistance and excellent transcribing this publication could not have been developed. We would also like to acknowledge Gitika Lahiri for her assistance in the design of this publication and Vishal Rakhecha for his technical assistance towards the digital release of this report.

We are also extremely grateful to our speakers who took the time out of their schedules to go over these transcripts and dealt with our multiple emails. Finally, we would like to acknowledge the constant support and encouragement of Prof. Arun Kumar Thiruvengadam, Prof. Sidharth Chauhan, Vikram Raghavan and our Vice Chancellor, Prof. Faizan Mustafa without whom neither the Conference nor this publication would have been possible.

Any errors are of course, ours and ours alone.

Best,

Dayaar Singla and Gayatri Gupta

Editors

THE COURTS AND THE CONSTITUTION

FEDERALISM AND THE CONSTITUTION

Moderator
Dr. Arun Kumar Thiruvengadam
Professor, Azim Premji University

Dr. Anthony Blackshield
Emeritus Professor of Law, Macquarie University

Alok Prasanna Kumar
Vidhi Centre for Legal Policy

Malavika Prasad
Ph.D. candidate, NALSAR

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Associate Professor, Yale University

2019 IN REVIEW

INTRODUCTION

For the third panel on 'Federalism and The Constitution' at *The Courts & The Constitution Conference*, Dr. Arun Kumar Thiruvengadam gave a brief introduction of all the distinguished panelists of the Federalism and the Constitution panel.

Prof. Anthony Blackshield started the discussion by giving a comparative constitutional perspective on federalism. He analysed the landmark judgments on federalism in the US, Canada and Australia and their impact on these jurisdictions. Head over to the YouTube Video at 22:20 to listen to Prof. Blackshield's rendition of the Melbourne Corporation Principle.

Alok Prasanna Kumar, building upon Prof. Blackshield's point on the horizontal scale of federalism, discussed federalism as an evolving concept in India wherein political, bureaucratic and administrative developments have been much more influential than courts. He particularly focused upon fiscal federalism and the new challenges posed by the GST Council.

Malavika Prasad, in her speech, spoke about the scheme of Article 370 and the events which led to its de-operationalization. Next, she discussed the inactions of the Supreme Court in the petition challenging the constitutionality of the presidential orders that did away with Jammu and Kashmir's special constitutional status and the primary arguments submitted by the petitioners.

Suchindran Baskar Narayan gave his presentation on the office of the governor and how it has become a consequence of the problems with Indian federalism. He also touched upon the impact of All India Civil Services Rules, revenue distribution and 73rd and 74th Amendment on federalism.

Dr. Rohit De, the discussant for the panel, went over the history of federalism from the early 1940s to 2000s to show the reasons why it was difficult to make a political case for federalism in India. He addressed specific questions to each of the panelists. Since this panel covered vast array of issues, we have arranged these Questions & Answers immediately below each of the speaker presentations.

We hope that you find these presentations on the different aspects of federalism insightful! We would like to express our gratitude to Prabhu Ruchika, Pranav Mihir Kandada,

and Ananyaa Gupta in performing an excellent job in transcribing the proceedings for this panel. You may also access the video of this panel discussion on the NALSAR University of Law YouTube channel.

ANTHONY BLACKSHIELD[1]

I am glad Dr. Thiruvengadam said that I was going to give a comparative contribution, because on this occasion I am not going to talk about Indian Constitutional Law, I am going to talk about other countries. I am taking a Comparative Constitutional Law course in NALSAR, where in each class, we take up a particular topic and look at cases from five different countries. And it just so happens that on Tuesday this week, my topic was federalism. So, I am going to take a couple of cases from that class and talk about them today.

The first case I want to talk about is the American case of *Alden v. Maine* in 1999. It is often said that the Indian Constitution tilts too far towards the Centre, but there is no doubt in my mind the American Constitution tilts too far towards the States. For me, the worst example of that is instead of having some independent national commission to run the federal elections, each state runs its own federal election agenda with its own federal officers and its own federal rules and the result is, these days, whenever a republican government is in power in a particular state, it manipulates the voting rights and the voting rolls in all sorts of ways to ensure that in that state a majority of republicans get elected. And to some extent democrats are now doing the same thing.

But the example I am talking about in *Alden v. Maine* is a different example. Back when the Constitution was being ratified, many people who were opposed to ratification were worried that the federal government was going to have too much power; and one of their big fears was that under the Constitution, it would be possible for the State governments to be sued in federal courts. The advocates of ratification strongly argued that this would not be allowed, but in 1793, the Court decided that it *was* possible for State governments to be sued. As a result, the Eleventh Amendment was immediately passed. The Eleventh Amendment says that: *"the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."*

Now, the wording is perfectly clear. What it says is that a state cannot be sued in federal court by citizens *of another state* or by citizens or subjects *of a foreign state*. But in fact, the Supreme Court immediately interpreted it as meaning also that a State cannot be sued in the

[1] Cite as Anthony Blackshield, *Federalism and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 25th January, 2020.
* Transcribed by Prabhu Ruchika, Edited by Gayatri Gupta.

federal courts *even by the citizens of its own State*, which is not what the Eleventh Amendment says.

Years later, Antonin Scalia explained it by saying: *"Despite the narrowness of its terms …, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our federal structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty …; and that a State will therefore not be subject to suit in federal court unless it has consented to suit."* In *Alden v. Maine*, the court took that even further and said that a state cannot be sued *in its own courts by its own citizens*. And this to my mind is quite an extraordinary proposition, and it is an example of how the idea of sovereign immunity is taken to an extreme.

I would also point out that this was a 5 against 4 decision, and so it is a typical example of the pattern that we are getting all the time now in the American Supreme Court: 5 conservative judges on one side, 4 democratic judges on the other side and so regularly a 5:4 majority in favour of the conservative view – except that every now and then, one of the conservatives switches his/her vote.

For most of the time since this has been the pattern, the potential swing voter was Anthony Kennedy. Now that he is gone, the potential swing voter is actually the Chief Justice John Roberts; and it is going to be very interesting to see how he performs now -- because there is no doubt that he is conservative, but he is genuinely concerned about the image of the court. I do not know if he really *wants* it to be impartial, but he is certainly very anxious that it should continue to *look* impartial. It is going to be even more interesting to watch how he performs as the presiding officer in the impeachment case.

Well, that was *Alden v. Maine* and it is a shocking decision.

Now I am going to move on to a good decision in Canada. It is a Reference to the Supreme Court in 1988 about the secession of Quebec. Quebec had a referendum in 1980 on whether they should secede from the federation, and 59% voted no. In 1994, they had another referendum and this time it was a lot closer; and in 1996, they announced that they were going to have another referendum – but only when they were sure that they were going to get the right result this time.

At that stage, the federal government referred three questions to the Supreme Court and the most important question was: if Quebec did secede from the federation unilaterally, would it be constitutional? And the Supreme Court said that it *would* be unconstitutional; but then they went into a long discussion of the values underlying the Constitution, and they discussed those values under four main headings: Federalism; Democracy; Constitutionalism and the Rule of Law; and the Protection of Minorities. The Court said a lot of things about those values, and finished up putting all those values together to say that if Quebec did want to secede, it would have to be taken seriously. They also added that: *"The relationship between democracy and federalism means that, in Canada, there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion."* And so they said that if Quebec did want to secede, the mere fact that they wanted it would confer legitimacy on their demands for secession, and place an obligation on the other provinces and the federal Government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

It turned out that everybody was very happy with this judgment. Quebec was happy because the Court had said that if Quebec wanted to secede, it would have to be taken seriously and the rest of the country would have to enter into a dialogue. The national government was happy because they had said Quebec could not secede unilaterally. Both sides have since passed legislation so that if it ever did come to that point, they would know exactly how to proceed.

But what is interesting for me about the case is the very detailed discussion about the underlying constitutional values that the court used as the foundation for this conclusion. When judges make high sounding proclamations about constitutional values, I tend to be a little bit cynical. When I first started reading this judgment, I was a bit cynical about it too. But the more I look at it, the more I think it is a really careful, important, valuable exposition on the underlying values that accompany a constitution.

The last case that I will mention briefly is the Australian case in 1947, *Melbourne Corporation v. Commonwealth*. The central government in Australia during World War II had all sorts of special powers arising from the defence needs, including all sorts of powers to control the banks. After the War, the Labor government wanted to hold on to those powers. In 1945, they passed the Banking Act, which said that the State governments and any agencies of

the State government had to do their banking with the Commonwealth Bank. They were not allowed to bank with the private banks, they had to use the Commonwealth Bank. And when the Melbourne City Corporation was told that it would have to comply with that, they applied to the High Court for a declaration that it was invalid – and they got it.

And this was the case where Sir Owen Dixon, not yet Chief Justice but becoming very influential on the Court, had been worrying about implied limitations on constitutional power for years and this was where he got to impose a constitutional limitation.

Sir Owen Dixon said: *"to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority."* And he made it clear that this was not spelled out anywhere in the Constitution, but he thought it was a necessary implication, from what he called the very "frame of the Constitution." And one of the judges who agreed with him said: *"action on the part of the Commonwealth may be invalid in two classes of case, one, where the Commonwealth singles out the States or agencies to which they have delegated some of the normal and essential functions of government, and imposes on them restrictions which prevent them from performing those functions or impede them in doing so; another, where although the States or their essential agencies are not singled out, they are subjected to some law of general application which, in its application to them, would so prevent or impede them."*

So, it is a very important implication, and it is now about 70 years old. In the last 35 years, there have been four or five cases where the Melbourne Corporation Principle has in fact been applied. For the first 35 years after the case, it was not applied at all. Again, and again we had barristers getting up and trying to rely on it, and again and again the court would say: That is a very important principle, but of course it does not apply in this case. And part of the trouble is, we all talk about "the Melbourne Corporation Principle", because none of us are really sure what the principle is.

But I told my students in Australia that there used to be a song called *"A kiss to build a dream on"* and I told them that, for the *Melbourne Corporation Case*, that should be called *"A case to build a dream on."*

And here is how it goes [Listen to it here]:

Basic

To any federation

Is Melbourne Corporation

And what that case dictates:

Simply

You must protect the States

Against discrimination.

Also,

There must be no appearance

Of too much interference

With vital state concerns –

Even

If such a doctrine turns

On verbal incoherence.

If you impair

Core state functions

More than is due,

There will be High

Court injunctions

But only on one view –

For all this

Is just an implication.

There is no limitation

That is textually set.

That is why

It is never safe to bet

On Melbourne Corporation!

Comment [Rohit De] When Professor Blackshield says that this is a good judgment on federalism, or a bad judgment on federalism, how do we make that decision in the Indian context? In many cases we use comparative constitutional law and there is a family of comparative constitutional law and federalism in British imperial territories. But most of the British imperial federations were dominions that were set up by European settlers in regions where the territories have initially formed their kind of particular histories, their kind of local cultures, and raised very different kinds of questions. The reason why Quebec becomes a problem is because of its cultural specificity. Is it easy enough to apply Australian constitutional legal principles to think about best practices of federalism elsewhere?

Comment [Prof. Anthony Blackshield] In the Australian context, I have very strong objections to the High Court's failure to do anything with implied limitation principles.

In Australia, I have come to the conclusion that federalism was a mistake. Partly because, if it is going to work, we would need a larger number of smaller states. And partly because, the way the Australian Constitution is set up, the Commonwealth has all the money and the States have all the power. One result of this is that it makes it very easy for the federal government to pass the buck, as witnessed in the present bushfire crisis. And finally, we are looking very enviously at New Zealand, which I think is the only significant British Dominion that did *not* adopt federation.

Having said all of that, if I look at the current political turmoil here in India, there are all sorts of things that may or may not come out of it. One thing I hope does come out of it is that the States will have come out of it with more power.

ALOK PRASANNA KUMAR[1]

It is a really hard act to follow and Prof. Blackshield is someone who had lectured at NALSAR when I was a student here. It is a deep honour and privilege to be sharing the stage with him, to be talking on a topic such as federalism on which he has written so much.

Let me just add one small point. I think in India also, we have an example of such a case, *Centre for Public Interest Litigation v. Union of India*. It came up with the concept of institutional integrity to strike down the appointment of P.J. Thomas. It is known as the "CVC case" as he was appointed as a Central Vigilance Commissioner ("CVC"). If you actually look up the judgments of the Supreme Court since, it has been cited in no fewer than 15-20, though there may be more. In not one instance has the Supreme Court applied the doctrine of institutional integrity to strike down an appointment. Everybody says, as Prof. Blackshield has said in his way, "wonderful case, great principle, but the facts of this case are different." I do think we do have such cases and it is, of course, always interesting to be able to discuss that.

That is the last case I will talk about for the rest of this speech, because what I am going to be talking about is Fiscal Federalism, where the courts have so far, had almost no role to play. To take a slight change from what has been the topic of discussion since morning, I am going to be talking about political, bureaucratic, and administrative developments, which I think are just as important for our constitution as what our constitutional courts hold. The constitution is not just what the courts and lawyers say. There is of course what the people say, which I think Rohit De will be the best person to talk about. But also, so much of our constitution is constantly being built and rebuilt every day. So much of our constitution happens because of the practices, conventions, and norms, which happen in everyday, day-to-day functioning.

There is a great story I have heard. One of the forgotten fathers of federalism in India is N.T. Rama Rao. There was one Inter-State Council meeting, where it came to the mind of one bureaucrat that they should change the order of entry of Chief Ministers to start with the last alphabet, which was West Bengal. N.T. Rama Rao walked out of the conference. Keep in mind this was when Rajiv Gandhi had just won his record 404-seat majority in Lok Sabha, the single

[1] Cite as Alok Prasanna Kumar, *Federalism and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 25th January, 2020.
* Transcribed by Pranav Mihir Kandada, Edited by Gayatri Gupta.

largest party afterwards was Telugu Desam Party with thirty odd seats. You would think it would be a complete one-party rule, but N.T. Rama Rao emerged as a voice of federalism in that. He said *"this is an insult to Andhra Pradesh. Andhra Pradesh used to be the first. This is against the dignity of my state. Unless you reverse this, I am not coming for the conference."* They had to. He threw such a tantrum, he stood for what he felt were the necessary rights and privileges of the State, even in the face of such an overwhelmingly strong central government.

The theme of what I am going to talk about is that federalism in India is an evolving concept. The Constitution as it was framed never intended India to be as federal as we see it today. The Constitution retained the broad framework of the Government of India Act, 1935, which had hugely centralizing features. They retained it, given the context in which they were drafting the Constitution. You had the partition riots; you did have fissiparous tendencies. With those tendencies having dissipated to some extent, you see that we have moved further along the spectrum of federalism.

I think Prof. Blackshield made a very valid point right at the start, that federalism is not just an up-down scale. It is in fact a horizontal scale where something can be too much in favour of the State and something can be too much in favour of the Centre. The US perhaps being too much in favour of the State and India being closer to the Centre. However, India has probably moved along the spectrum. States have been able to assert their powers, and the scope of their legislative rights over the last 70 years.

I would like to propose, and this is something I hope to develop over the course of the next few years, that three things have happened to make this move happen.

One is of course, the fact that regional parties have arisen. You have had linguistic division of states which has led to the creation of regional parties. Actually "regional parties" is the wrong term. The correct term is "regionalist parties". I was made aware of this distinction by Prof. K.K. Kailash who teaches at the Hyderabad Central University. He makes a key distinction: a regional party may be limited to a given region, but a regionalist party's ideology is focused on the region. To take a contemporary example, Janata Dal United may be regional, in that it is focused on Bihar and Jharkhand. But the DMK is regionalist because it builds on the idea of a certain kind of Tamil nationalism and a history of that state. A Telugu Desam Party is regionalist, whereas a Janata Dal

Secular, in a similar manner in Karnataka, is just a regional party. Thus, the first factor is the growth of such regionalist parties.

Second, there has also been a change in the Supreme Court jurisprudence that we do not fully acknowledge. We do not see the change from the *State of Rajasthan* case to the *Bommai* case, we do not see the change from *Atiabari tea* case to *Jindal Stainless* case. All these cases show that something has fundamentally changed in the Supreme Court's understanding of federalism as being part of our Constitution.

The third point is Fiscal Federalism. We have seen over the last seventy years that some states have done vastly better than other states in being able to reduce their dependence on Union funds. Under our Constitution, the bulk of taxation powers are given to the Union. Before the Goods and Services Tax ("GST") was introduced, the Union could tax income, income of corporations, impose excise, customs, tax on services. Whereas, states could impose limited excise duty on alcohol or petrol, could impose a sales tax. The other big source of income for states was property, including stamp duty and land revenue and so on. There was always a huge asymmetry between how much money one would yield and how much money the other would yield.

Our Constitution had a mechanism where the Centre was compelled to share its finances with the states. This mechanism was the Finance Commission. It would have been lovely if the Financial Commission had submitted its report this year. We would have had a much more interesting discussion but as I understand, it is still under discussion and finalization. Full disclosure: Vidhi has submitted some papers to the Finance Commission and will probably be relied upon to some extent.

We are seeing some tensions arise here. For the last two years, we have seen a very contentious discussion about the Finance Commission and its suggestions. Five years ago, I do not think too many people even knew of the existence of the Finance Commission or what it did. But we have seen in the last couple of years, driven primarily by Chief Ministers in South India, and to an extent in North India, let us say Punjab, who have made a strong claim that the Finance Commission should stand up for the states' share in Union Revenue and made a bigger pitch for getting a greater part of the revenue. In fact, in 2014, the Finance Commission for the first time had maximum share allocated to the states, but had retained the usual formula on the basis of which the shares would

be allocated. The larger goal of this particular exercise was to ensure some level of equity. Keeping in mind the dependence of states on the Union for their revenues (for example, Bihar or Uttar Pradesh depend on the Union Government for 80-90% for their revenues, whereas Telangana or Karnataka depend on it only to the extent of about 30-40%), they relocate the shares and use different criteria.

There was a proposal for a change in this criterion which has been very strongly resisted. The proposal came in the terms and conditions for the latest 15th Finance Commission which suggested that the latest population census should be used. This was resisted on the ground that this will result in states such as Tamil Nadu, Karnataka, and Kerala losing out on even more shares in the central revenue.

Per se, it is not a bad idea but it in fact fits into a larger problem with Indian federalism. I will not say "problem" but an "issue" with Indian federalism. The states where the revenues are being generated are not necessarily the ones that are equally well represented at the Union level. This is going to be a bigger problem moving forward as the next delimitation exercise will happen in 2031 and the imbalance is only going to grow in the meantime.

The second element is the GST. I have argued elsewhere that the GST Council is unconstitutional. I have argued that the GST Council is against the basic structure as it makes the State governments' revenue generation subordinate to that of the Union. State governments were given plenary power to tax sales and now that is being made subject to the Union. You might ask "Why Union? This is the GST Council where all the states are represented and the Union itself is represented." Yes, but the voting system is not what we think it is.

The voting system within the GST Council is weighted such that the Union will never be in a minority. The GST Council requires that all decisions be taken by a majority of not less than 3/4th. But the Union alone has 1/3rd weightage in the votes. If you do the basic mathematics of this, you will realize that the Union can never be in a minority. Even if every single State were to say that this measure is against their interests, they will still not be able to get it passed. The Union may not be able to get it passed, but States cannot do something in their favour which the Union does

not agree with. This is a significant shift from the earlier draft of the GST Council which had said that all decisions will necessarily be taken by consensus.[2]

Why am I highlighting this? Because for the first time, towards the end of 2019, we have seen that a matter was finally put to vote in the GST Council. 37 times before this, decisions had been taken by consensus. The Union and the States had sat together, worked out a compromise, and had taken a decision by consensus. That does not mean it was a good decision because we all know that GST is in a mess, but they had still taken the decision by consensus.

On this particular issue of lotteries, how much to tax interstate sale of lotteries, some States wanted to be taxed only at 12% while other States wanted it to be taxed only at 28%. The Centre was not able to get them to sit together and agree to a compromise so they put it to a vote. If I am seeing this correctly, I think about 21 states were in favour of the rate of 28 percent while 7 voted against, and the 28 percent carried the day. Now, here is the question: What can the aggrieved states who want the 12 percent rate do? The GST Amendment Act, rather the Constitutional Amendment which introduced the GST into the Constitution, is not clear on this. It says there will be a mechanism to be decided by the GST council itself on how such a dispute will be resolved. As far as I know, and subject to any correction, no State has decided to take action against this.

But now that this barrier has been breached, now that we know that decisions are being put to vote, we are going to see much more conflict within the GST Council. Which brings into question how the Council is going to resolve the disputes. If it is going to be such a hardcore dispute that the State feels this will break the bank if we do not accept this, and they decide to litigate it, what happens? No one is clear. The GST Council has not set up a clear mechanism on how disputes will be resolved. We do not even know if a suit can be filed in the Supreme Court against the decision of the GST Council by a State. All of these have been left very undecided.

And all of these are going to come into the picture in the next two years for the reason, and this is again a development which has taken place outside the pure boundary of the law, the Union's revenues are falling. For the first time in two decades, tax revenues have actually fallen for the

[2] Alok Prasanna Kumar clarifies this point further while responding to an audience question: *"The point I was trying to make was simply that the Union will never find itself in a minority. If those 16 states or even all 30 states want to do something, if the Union opposes, it will not go through."*

Union government as opposed to missing its target. It has actually fallen from last year. The Centre has promised compensation to the States, assuming a growth of 14 % year-on-year. That is, not 100% of that 14% but it progressively reduces. But we still assume that your revenues will grow 14% year-on-year and we will compensate you if it does not. Nobody seems to have thought of what will happen if the Union itself does not have the money to compensate them. We have seen the specter of the Union delaying refunds to the State. We have seen the specter of Sates having to write angry letters and release it in public saying "You are being discriminatory, you are favoring one party over the other, you are leaving our state out."

Speaking for Karnataka, we have seen the extraordinary sight of a BJP Chief Minister criticizing the BJP Prime Minister in a public forum on a public dais for not releasing enough money. If you think about it, this has not happened ever. Maybe the historians would be able to tell us but I cannot think of such an instance.

To conclude, there is not much by way of courts. We are talking about federalism being a feature of our Constitution, which involves a lot of practice, convention and certain norms of constitutional behavior. If perhaps the organizers invite me next year, I think I will have an opportunity to talk about how we are going to see some of these norms and practices really being put to the test and we will really know the true robustness of federalism in India.

Thank you!

Q. [Rohit De] *In a similar account, I was hoping Alok would talk a little bit about another way that could be used to engage in push-up federalism which is really thinking about political economy. The 1950s unitary state was really focused on a certain kind of political economy where the Center would do resource extraction and resource redistribution. Is there a compelling political argument one can develop, thinking about what the means of political economy today might be?*

A. India suffers from a 3-3-3 problem. The three richer states are three times richer than the three poorer states. Now, this has happened nowhere else in the world. Even though at the time of

independence, they were approximately the same. The more shocking thing that I realized recently was that the per capita GDP of a person from Madras state was the same as a person in Bihar in 1950. Now, it is almost three times more. One hypothesis is that these states have invested more in human resources. Some states have a combination of wise policy choices, sheer luck, or the ability to use resources and have been able to invest better in human resources. As India's economy has shifted from agriculture to services, they have been able to maximize it to their advantage. The research on this is just starting but this political economy question is very important. This 3-3-3 problem, which ties up with the demography problem, is going to dominate discussion on fiscalism and federalism. There are no easy answers for this.

MALAVIKA PRASAD[1]

Thank you for the forum to all the organizers at NALSAR.

I am going to briefly talk about the scheme of Article 370, then what led to the litigation and talk a little about what did not happen in the Supreme Court in 2019 that we think might unfold before us in February and the arguments that we are making in the petition against the de-operationalizing of Article 370.

Article 370 recognises 3 distinct kinds of power in the hands of the state of Jammu and Kashmir ("J&K") and before I tell you what those powers are, the key thing to unravel here is that federalism in India is not a single concept that can be monolithic and applied across the board. There are multiple federalisms, they are visible in different ways after Article 370 in the Constitution (if you flip the pages) for different states. But Article 370 is probably the most distinctive arrangement that India had to enter into with the Maharaja of Jammu and Kashmir at that time. The reason that Article 370 is distinctive is that it incorporates the terms of Instrument of Accession that the Maharaja entered into with the Indian state. So, the three kinds of power that were left in the hands of Jammu and Kashmir are consultation, concurrence and recommendation.

The state of J&K had the power to be *consulted* on those matters in the lists that the Union had power to enact laws over that were already named in the Instrument of Accession. Why were they just merely to be consulted? The reason was because the Maharaja has already exercised his sovereign power entering into a treaty with the Indian Union, conceding that these powers now belong to the Indian Union. Because there is already sovereign acceptance that those powers would be with the Indian Union, the state of J&K would merely be consulted.

The state would have to *concur* through the government of the state of J&K to any additions of Indian Constitution to the state of J&K. Which is to say, an extension of a provision of the Indian Constitution to the state of J&K perhaps in a modified form, perhaps with an exception, the state of J&K will have to concur through its government. So, for example, list entries that were

[1] Cite as Malavika Prasad, *Federalism and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 25th January, 2020.
* Transcribed by Ananyaa Gupta, Edited by Gayatri Gupta.

not agreed to in the instrument of accession as well as other provisions of the Indian Constitution that were extended to apply to the state of J&K had to be concurred to.

Consultation is a lesser kind of power because you can be consulted and then you can be ignored by the body that is consulting you. In this case, the State of J&K is not truly being ignored because the Instrument of Accession had kind of taken care of the power of the people of J&K at that time. Concurrence on the other hand is an elevated kind of power because you have to agree with the proposal to extend a principle or rule or a provision of the Indian Constitution to J&K.

The third kind of power is power of *recommendation* and that power is in Article 370(3). It states that the provisions of Article 370 itself can be changed only if there is an affirmative recommendation emanating from the state of J&K through its constituent assembly- not any other organ, not the government but the constituent assembly. So, this is the scheme of powers that we are operating under.

Now I am going to talk about the events of December 2018 and onwards.

In December 2018 the President imposed President's rule in the state; it looked a bit innocuous at the time because the state had been subject to President's rule several times for several years sometimes in the past. That President's rule order said that the proviso to Article 3 in the state of J&K would also be suspended. After 6 months, President's rule was extended in the State of J&K.

On 4th August 2019, communication channels are all shut down in the state. We watched journalists dropping off on the 4th night on Twitter; some of them declaring that they are losing access to the internet.

On the 5th August morning, we know there is a cabinet meeting and we know that the Solicitor General is accompanying the government to parliament and this is what unfolds.

The Constitution application order C.O. 272 is placed before the Parliament. Constitution application order 272 extends all provisions of Indian Constitution to the state of the J&K. This order was issued under Article 370(1)(d), which is the provision that, I mentioned, mandates the concurrence of the government of J&K. This order, C.O. 272, modifies only Article 367 as applied

to J&K. Article 367 is the interpretive clause in the Constitution and was being used as the mechanism by which some parts of Article 370 would now read differently.

Article 370, as I mentioned says that the constituent assembly of the State of J&K is the only body that can recommend a change in the text of Article 370. Through this interpretive provision (Article 367), "constituent assembly" is replaced with "legislative assembly". Then, C.O. 272 reaffirms a change made in the past, which is that the government of J&K, which is the body that should "concur", can be read as the governor as advised by the cabinet.

Next, a resolution is put before the house on 5th August morning that says that the State of J&K Reorganization Act is being approved by us, the Parliament, acting in the capacity of the State's legislative assembly. This happened because the state is still under President's rule and under Article 357, the Parliament acquires the power of the State legislature during the President's rule.

So, the deeming transference of powers in the hands of parliament is why now, the Parliament is voting on a State Reorganization Act that, otherwise, the state would have had to be consulted on under Article 3. Now the perturbing thing is that this resolution is put before the house but the Bill itself is not before the house. At the time, several parliamentarians said that we do not know what we are approving in this resolution because the Bill that we are meant to be approving is not before us. If we are acting in our capacity as the State Legislature under President's rule, then we need to read the Bill before we can exercise the "consultation" right of the State under Article 3. Notwithstanding that the bill is not before the house, this resolution is passed.

Next, over 5th evening and 6th morning, Constitution application order C.O. 273 is introduced in both houses. Constitution order 273 now follows after Constitution order 272. Remember, Constitution order 272 has already said the constituent assembly will now be read as the legislative assembly. By the same deeming transference of power (under Article 357), the Parliament acts as the legislative assembly of the state of J&K which, thanks to Constitution order 272, was acting as the constituent assembly of the state of J&K. In C.O 273, the Parliament says that Article 370 will no longer operate in the same fashion *vis-à-vis* the state of J&K.

All of this happens in the span of 48 hours. This is pretty remarkable in terms of parliamentary procedure because when a bill is introduced before the Parliament, parliamentary

procedure says parliamentarians need to have 48 hours before the bill is considered and passed to allow them time to go back, study it and make their views on it. Arguably, this is one of the trickiest constitutional mechanisms that has unfolded before us and all the parliamentarians had just a few hours to decide this way or that, about these two constitutional application orders.

After Constitution order 273 is passed and then the state reorganisation bill is put before the house and that is passed as well.

Just to cut back to what happened between the Supreme Court and the petitioners in the time that we filed the petition. 5th August was when these events began unfolding and the first petition was filed on the 10th of August. On the 16th of August, the petition came up for the first time and there were some procedural defect issues, for which, to be fair, the counsel for petitions are responsible. After the 16th, the next time the petition is listed is the 28th of August. The registry is directed to place all the petitions before the Chief Justice to constitute a constitutional bench. The petitioners as well as the respondents are directed to finish the pleadings in the interim period. After the 28th of August, the next hearing took place on the 1st of October, that is after a little over a month. In the interim, no pleadings are filed by the Union and the Union comes before the Court and says we need another four weeks to file our counter affidavit. J&K state continues to be under communication shutdown. Several of us who assisted in drafting the petitions could not, at the time, reach the people we filed the petitions for because they have either been taken back to the state of J&K and therefore are incommunicado or taken back and detained.

The most constitutionally absurd thing in this order, is that the Court directs that the registry is now required not to entertain any more petitions in this regard. The absurdity of this is that the people of J&K - who were fundamentally affected by what happened because their state has now become a Union territory over a bunch of executive acts enacted in a span of 16 hours - still have not had a say in what is happening to them. They have not been able to file petitions in the way that they wanted to. A bulk of petitions at the time were either public interest petitioners in Delhi or members of the legislative assembly of the state of J&K or parliamentarians in the Parliament from J&K. Essentially, politicians are approaching the Court because they have that kind of social capital but the people of J&K are still not heard; yet the Court has said no more petitioners will be entertained by them on the constitutionality of deoperationalizing Article 370. This is also at a time when the High court of J&K is not functioning.

The next time the petitions are heard is shortly after 14th of November, which is when the Union finally files its counter affidavit. The petitioners are in a scramble to submit their rejoinders within the time allotted to us - which was perhaps 24 or 48 hours - given that we had to meet the court's deadlines and not look like we were being tardy.

The first date that the court gave us for a substantive hearing was on December 10th. The primary arguments that we made in these petitions are threefold:

i. President's rule is temporary, restorative and exceptional:

First, that the State was under President's rule and President's rule is a kind of unique power conferred on the President for a specific purpose and therefore can only be used for that purpose. So, to speak to Alok's point about we do not fully reckon with the transition from the *State of Rajasthan* to *Bommai*, President's rule is to be used in an exceptional situation because it is an invasion into the federal structure that the Constitution constitutes. It is to be used for a temporary period because it is an executive power, not a legislative power. It is to be used for a purpose that is solely restorative because the provision for President's rule (Article 356) says the President may intervene in the constitutional governance of a state to ensure that the state can be restored to constitutional governance. So, the idea is constitutional governance is broken down and the Union executive intervenes in a fiduciary capacity, if you will, to restore constitutional governance in the state. There is a very clear purpose for which the Union may intervene in the federal structure and that is entirely restorative. The President, therefore, does not acquire power to intervene in the state's governance to extinguish the state from its constitutional existence as a state. Likewise, the President cannot intervene to give the Parliament the power to do what the government of J&K could have done, in terms of new constitutional provisions being applied to the state. He cannot intervene to give the parliament the power that the constituent assembly of J&K would have had, to change the very existence of Article 370 *vis-à-vis* the state of J&K.

This argument can also be thought of in terms of the separation of powers. Separation of powers as a matter of keeping the ambitions of other sources of power in check. So, the state of J&K has constitutional powers to keep its state in existence under Article 370. These powers may not look like the way in which the state of Karnataka's or Telangana's powers do, but it is the constitutional provision we committed to. The state of J&K has these powers and its constitutional existence therefore, can only be changed only through powers of concurrence or recommendation.

It cannot be changed by somebody else exercising these powers of concurrence or recommendation, leave alone the Parliament exercising these powers. The separation of powers articulation is that there was *no power* that could have transferred to the Union executive through the President in this scheme of things. You are supposed to intervene as a Union executive only to restore constitutional governance. In this period, when you are attempting to restore constitutional governance, the Union only acquires the day-to-day powers of the state's functioning, and not the powers of states' capacity to keep its constitutional existence itself.

So, the argument is made by pitching the three powers that the state of J&K has as constituent powers themselves. Article 370(3) is evidently a constituent power because a constituent body was conferred that power. Only a body that has the power to amend the constitution of J&K, could have the power to change the constitutional relationship of J&K with India. This is clearly a constituent power. We have also had to build before the Supreme Court the idea that even the power of concurrence is a species of constituent power. The reason for that is every time the government of J&K concurs the application of the Indian Constitution to the state of J&K, something changes in the constitutional relation between the Union and the state.

ii. The second argument we make is on the very nature of Article 370 as a unique federalism, which I already covered in the introduction on the scheme of 370.

iii. The final argument is on the State Reorganisation Act itself.

This argument is on the very unconstitutionality of having the Parliament act as the state legislature while under President's rule. This is a violation of a constitutional provision under Article 3, not a parliamentary procedural irregularity which is not traditionally reviewable. Under Article 3, states ought to be consulted when there is a change in their area, names and boundaries. Because this is a constitutional provision and the parliament was acting in its capacity as the state legislative assembly, without even looking at the Bill there is no way that they could have approved the reorganisation of the state of J&K.

But the more principled argument is that everything about Article 370 de-operationalization abides by the letter of the law very strictly, while violating the spirit of the constitution in a flagrant manner. So, the last set of arguments we make are on principle: that a state that has democratic powers at the level of a state cannot suffer a retrogression of rights by

being reduced into a union territory. The non-retrogression principle we draw on from several cases, primarily the *NCT of Delhi v Union* judgment.

We also make an implied limitation argument. While the power under Article 3 appears to have a very wide conferral of power in the hands of the Union, we claim that if you could, under President's rule, completely degrade a full state into a UT, then India i.e. "Bharat is a union of states" will no longer be true. Because you can declare President's rule and reduce every full state into UTs and one day you could envision that India will be a Union of one UT, which fundamentally violates the principle that India will be a Union of states. So, we try to imply the limitation that India shall be a Union of states into the power under Article 3 to say that the state reorganisation and complete degradation into a UT could never have been done under President's rule.

The litigation is currently adjourned because they are considering the question of whether they should refer it to a larger bench. Hopefully, it will unfold with more nuance in February and we will have a judgement to talk about in 2021.

Thank you!

Q. [Rohit De] *Malavika, thank you for the account of the petition. I was wondering if one of the sorts of problems with Indian federalism has been various different states have made demands that are specific to their own States. We have the sort of plethora of Article 371 clauses. But there has not been a lot of coordinated action by states on questions of common interests. Everyone wants a particular individual customized result for themselves but not a kind of general deference to federal ideas. I was wondering whether looking post the abolition of 370 do we see either concerns or possible legal problems running into the NAGA accord record? Are there any kind of precedents one can find from what happens to the integrated princely states who suddenly find they lose all the rights of a promise in the Instrument of Accession? Where else can we draw examples to understand what's happening in Kashmir or to build the political constituency to think about what's happened in Kashmir.*

A. Where can we look to understand what is happening in Kashmir- Constitutionally, we need to look at where the Constitution is being weaponized against the states. To me the latest sort of instance of weaponizing the Constitution is in the CAA 2019 itself where they make an exception for regions governed by the inner-line permit of the 6th Schedule. The ruling government would like us to believe that this a step forward from the CAB 2016, but there is no clarity on what this means. Because, the resource and demographic problem of North east is not solved if we have someone getting a citizenship under the CAA in Karnataka and then migrating with an inner-line permit to work in the north-east. Then, have we really changed anything? We learn even from the Kashmir experience that there are ways in which we incrementally weaponize the Constitution against the people for 70 years and then, this is the natural consequence.

Q. [Prof. Faizan Mustafa] *The way the Court is today, in all likelihood they will say that you have 2 five-judge bench judgments which are contrary to each other. Of course, the subsequent five judge bench did not even refer to the earlier five-judge bench judgment. So, we are referring it to a seven-judge bench. Then, this matter will be delayed and only decided in 2023.*

A. The referral question was actually taken by Mr. Parekh before the Court. We (petitioners) tried to dodge this possibility of referral, for the exact reason that you mentioned. We did that by taking the position that all the cases can actually be reconciled on the principle of constituent power of J&K. While *Prem Nath Kaul* was decided, they were recognizing that after all the fundamental power of concurrence was being ratified by a constituent body under Article 370(2). *Sampath Prakash* could not speak to that reality because the constituent assembly was a relic but they still recognize that concurrence. So, we try to say that at the end of the day, all the cases toe the line that the J&K people have that constituent power.

Q. *I felt that a lot of your arguments were on the basis of what procedural limitations can be there in terms of 'amending' Article 370. Given the fact that it is essential like a treaty provision, can we think of any substantive limitations to the power to amend. Here, I am referring to the limited amendability as being itself part of the basic structure, as per Minerva Mills. So, if limited amendability is part of the basic structure, the basic structure of Article 370 seems to be that it requires two hands to clap (both State and the Union). Can we think about a substantive limitation on the power to amend Article 370 that it cannot be amended in a way that it takes one hand away?*

A. This is one of the arguments that we have made. The second argument is that these are three shades of constituent power and the Union merely had the executing power. So, the first hand to clap was the constituent power, either concurrence or recommendation. Union was merely the second hand i.e. the executing authority. We make the specific limited amendability claim because we have to overcome the *Pooran Lal- Lakhan Pal* 'broad- modify-as-you-will' dicta. We said that *Pooran Lal* was pronounced in an era where we did not think of amendability as a limited power i.e. before *Keshavananda Bharati*.

SUCHINDRAN BASKAR NARAYAN[1]

Let me start off by saying that governors are not the problem with Indian federalism. Although, they might be a consequence of the problem with Indian federalism. Let us first see how the office of the governor evolved in the constituent assembly itself and then see whether the Court should intervene as it has been doing.

The constituent assembly sat in different circumstances and it was an evolving situation. We started with the talk of governors being elected and Alok Prasanna Kumar mentioned about the original scheme of the Constitution. If you see the first sitting of the constituent assembly, India was meant to be a federal state. Why was it worded this way? It was very clear that it was supposed to be a federal state because the negotiations with princely states were still going on. That is why a lot of princely states at the time of independence were tempted to go ahead with Pakistan because Jinnah offered better terms. He was probably the greatest voice of federalism in that assembly. Rather outside the assembly, since I do not think he participated in the constituent assembly. After the horrors of partition, we moved towards the centralization argument. At that time, it was probably necessary, because they were unsure of things and the problem with Kashmir was also one issue. Most of the states had signed the instrument of accession before or in August 1947. The great miracle of Patel was that he managed to get all but one state to sign instruments of merger, which no one would have thought was possible when they sat for the first meeting of constituent assembly in 1946. This was the template under the Government of India Act, 1935 and that it was taken to apply to instrument of accessions and mergers in 1947 because civil servants were familiar with that.

They started with the debate of governors and they started with the thought, and it is very difficult to imagine now, that they will have elected governors. Can you imagine a Chief Minister and an elected governor pitted against each other? It is difficult enough for us to imagine a Deputy Chief Minister and Chief Minister itself because they cause enough problems, but we were going to have that situation.

[1] Cite as Suchindran Baskar Narayan, *Federalism and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 25th January, 2020.
* Transcribed by Prabhu Ruchika, Edited by Gayatri Gupta.

But slowly as the situation evolved and mergers came through, they saw this as an office where many of the '*Maharajas*' could be accommodated. So, if you see a lot of the early governors, they were '*Maharajas*' because it was a very practical thing since they did have influence over people. If people were unhappy, they might tend to make them figureheads. It had already happened in history where erstwhile rulers became the centre of power. So, they wanted to keep the people comfortable and understood that being practical meant that you cannot take a royal hereditary and put them aside. I mean Harry and Meghan can try; I do not think they are going to succeed. That is why Patel defended privy purse when they tried to abolish it during his lifetime. He told the Parliament that he had given his word and it should not be done and that it was a small price to pay, when one imagined what they were giving up peacefully. They were giving up their sovereignty, they were giving up everything else, so Patel said it is a small price to pay. So, a lot of the early governors were accommodated in many of the Raj Bhavans to ensure that their lifestyles could be maintained.

Now, by the end, the Centre realised that they needed a person in the states. It is probably analogous to the third or fourth minister in every embassy who is normally supposed to be reporting to the RAW, and acts like an information gatherer. The role of governors comes to the forefront when politics becomes more important. One significant thing was when becoming a governor became a retiring job, it then became a protection from prosecution. I mean it has evolved into all those things.

Another thing that had an influence was Rajendra Prasad's little stunt where he offered to become President to Nehru and if you see some of his letters, he discusses whether the President of India should have a sash etc. I mean we are a democracy but all that colonial influence is still continuing. I mean maybe that is why judges in the Madras High Court still had a mace.

Why did I say governors are a consequence and not a problem themselves? If governors have come into the picture in instances like Karnataka, Goa, or Arunachal issues, it is because they are able to invite and they act at the directions of the Centre. But that is also a problem of party-men being appointed there and the *Kuldip Nayar* judgment. The *Kuldip Nayar* judgment made an innocuous amendment in Section 3 of the Representation of the People Act but the damage it has done to the Indian democracy and federalism is too great to imagine. It was a simple amendment which said that a member of the Rajya Sabha need not be elected from the state in which he is an

elector. The Supreme Court upheld the amendment. But what has happened is that the political high command in the parties has become more powerful and the states are not able to appoint people whom they want to. States might want their person to be appointed for whatever reasons- nepotism, caste equations etc but they should have a say. The coterie was already small, it has now become smaller- the party high command coterie.

Now coming back, for seventy-five years, you had disputes and the Supreme Court have given three or four instances where the governor can act at his discretion. They have limited that discretion further. But it is one of those things, once the damage is done at the interim order stage, it will be done. So, I mean you think that since they are talking about bots and artificial intelligence, going by the Supreme Court's jurisprudence, the first job under the Indian Constitution to be given to artificial intelligence is probably the of the governors.

But I would still say that there is some use of that office, if it is amended. And a little foresight might have helped the framers of the Constitution to know that all this is going to happen inevitably. If the President appoints the governors, it is effectively the Home Ministry which appoints governors and this is going to deteriorate in this manner. There should have been some check involved like some security of tenure or some protection. Now the governor is at the complete mercy of the President. There are instances when the governor used to resign if the Supreme Court holds one of his decisions as wrong or against him. Now, you do not really remove them but transfer them to another state. These kinds of issues are there and if you sort out these issues, then the governor's office can still be useful to federalism.

Coming to the larger issue, one thing I wanted to point out was that we are probably less of a federation. I mean the final scheme on 26th November, 1949 was fiscally weighted towards this thing but I think we need to seriously re-look at it, and with the GST amendment, as Alok said, we are going completely in the wrong direction. Having the Centre decide when to hand over revenue is an example of how Centre exercises control over the states. So, if you go by the Seventh Schedule, the Ministry of Agriculture, Ministry of Health have no business to exist. *Ram Kapoor* said that the executive power is co-existing with the legislative power. These ministries are able to exist because in interpretation, they are an extension of the Ministry of Finance. They decide all policies, all conditions of grants. Now the standard custom was that they used to be seventy-thirty. Most Central schemes are funded by the Central government (70%) and the State is supposed to

pay thirty per cent. It has now become sixty-forty, I think. And in some special cases, in the north-east and certain union territories, it is ninety-ten. So now, you have this scheme where Centre refuses to release this sixty per cent till certain conditions are met. They hold a real Damocles sword over the States, the State cannot act.

Then they use this innocuous thing called the All India Civil Services Rules. I know Alok is a proponent that, and probably rightly so- it might be time to do away with these All India Services and strengthen the State Public Services Commissions. I mean these State Public Services Commissions are presently atrocious, so you strengthen them, have some system of institutional integrity and let them select their own officers. Then, we need that third tier very badly. And there should be no shared taxation entry. I mean the Indian Constitution was lauded for the fact that we did not have a shared taxation entry in the concurrent list, so it was supposed to be clear. One more point I wished to make was that federalism was supposed to grow in the original Constitutional scheme because local government was in the state list and it was thought that every State will, at the time, decide the manner in which they should go about it because there might be unique features to every state. With the 73rd and 74th amendment, because states were not doing it, you thought you would force it upon them, which did not happen because the two amendments put a lot of bluster but not actual obligations, because they accepted the problems with it. Tamil Nadu did not have panchayat elections for five to seven years. So, the States are permitted to not hold Panchayat elections, appoint Panchayats, dismiss them and of course, they do not give them money, so these problems are there.

The institution of the governor has to be strengthened. It has to be reformed. The manner of removal and the manner of appointment have to be changed. I think it is still a useful office to have. It is not completely superfluous. It is useful to have a person who need not be appointed by the state, but somebody in the Centre who can manage. Because we have situations where the governors can play constructive roles. I think that a little more independence to that office will only come about if you bring certain changes. Otherwise, going by the current roster of governors and most public offices in recent times that we will very quickly conclude Ambedkar's test that, "Man is wild." Unless you provide those protections, I see no changes in the office of the governor or its relevance. But I think the office should be preserved. There is a cause for federalism to be further strengthened by decentralisation.

Q. [Rohit De] *Would it be easier to sort of specify what kinds of reasons the Centre should have a control on? the older Government of India Act basically said that the governor would have veto powers on certain kinds of things: rights of minorities, rights of corporations, and rights of British citizens for living in India. So, can we think of what might be like a narrower field of operation for the governor or someone who occupies that kind of role, than the kind of expansive, almost vice-legal role that many of them are playing.*

A. A good function of the governor is to keep the Centre informed if his security of tenure is kept. One reason they wanted the governor is because they thought him to be an apolitical person who would do inaugurations and such stuff. But as politics developed, the local MLA or MP had to do such inaugurations because they became so important. To have a figurehead who is away from the political color is a good thing. The problem is that this system needs to be reformed. Because today, the position of a governor has a political colour.

ROHIT DE[1]

Thank you to all the panelists and for having me on the panel. I realized, listening to all the speakers speak, that this is actually a talk on legal, political, and institutional history and one that is a very familiar ground to work on.

I think the central problem that comes across is that it is actually very difficult to make a political case for federalism in India. This is despite the fact that last year has seen several significant events that affect how federalism is conceived and built by regional parties and civil society organizations. We have talked about, of course, the destruction of a state. But there has also been a sort of public calling into question of the role played by the CBI. I think both Andhra Pradesh and West Bengal have withdrawn permissions to CBI officers to enter their jurisdictions. There have been new reports, which suggest that the new Parliament that India is going to build in central western Delhi has the capacity to house over 2000 MPs. Where we are going to get these 2,000 MPs, it is probably going to be a kind of result of the new delimitation, which would mean that the representation across states would look very different. Finally, the shifting patterns of demographics show not just a reduction of native-born populations in South India, but also increasing migration from the north to the south, which means that the regional parties that won in the southern and western states are not going to win those seats that easily anymore. So, the sentiment that one sees in Assam could be being replicated across the country.

I think we are at a moment of a certain kind of political turmoil and we do not really have a language to answer this. I often find that we end up turning to history when there is a crisis and we cannot find anything else to explain it. We go back to the beginning and try to sort of point in the original story. I am going to actually build on what many of the panelists said, to try and present the case for why it is hard to make federalism a political question and in my questions to the panelists, I will sort of push them to come up with other ways to think about it.

In the 1940s, the constituent assembly was quite reluctant to embrace this idea of a federation. The Cabinet Mission Plan which was proposed in 1946 was a supra-supra federal system. It basically gave very limited powers to the Center but granted everything else to the states

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* Transcribed by Pranav Mihir Kandada, Edited by Gayatri Gupta.

and to these groupings based on the religious demographic of provinces. So of course, one of the motivating factors in the Assembly was this kind of fear of fissiparous tendencies. But there were other reasons why they wanted to sort of push a centralized state. One, of course, was the idea that you cannot have economic development in the kind of imagined Soviet model without centralized planning and a kind of central government's investment in building up industries. You cannot have social transformation without centrally applicable laws. It is interesting how in the 1950s, irrespective of which social question you are interested in: whether women's groups were concerned about trafficking laws or cow protectionists were concerned about protecting the cow, everyone kept demanding a central law for it even though something is in a state subject. The problem there is that once the cow or something else leaves the state, the state effectively has no longer any control over it. So, there was sort of a fear of what a federation would imply.

The large talk about federation in Indian history was in the 1930s with the creation of the Government of India Act. The federation that was being proposed was going to include princely states that were not popularly representative and create a kind of counterweight to British Indian provinces which would have elected representatives. So, the idea always was that the federation is a way of tying the hands of an elected government.

Perhaps that is why I actually would sort of push back a little bit to the description of the governor because the office of the governor is an office that is rooted in deep distrust of an elected government in a state. The fact that some of the places like Delhi and Pondicherry continue with the office of the Lieutenant-Governor, which is an even more ambiguous position seems a little inexplicable. Many of the excellent things that Suchindran Baskar Narayan pointed out could easily be done by other functionaries without requiring this kind of “our man in Havana” sitting there and looking at what the state is doing.

Interestingly again, the Muslim League was initially a committed Federalist Party. Famously in the Pakistan Declaration, the reference is not to a state for Muslims in South Asia but *states* for Muslims in South Asia. The Bengali members often believed that they were going to be sort of two independent states that would come out. Interestingly of course, after Jinnah becomes the governor-general of Pakistan, the Muslim League federalism dissipates very quickly and what we see is the Government of India act on steroids running in Pakistan through the 50s.

To broadly go over the history that many of the panelists describe, the turning moments are in the 1950s around the reorganization of linguistic states. One of the reasons why the Congress is okay with not having a highly federated Constitution is that there is a belief that "we are a broad tent party, we are in power in absolute majority, we are going to be in power for a long period of time". Many of the disputes were resolved inside the Congress party. So, we see this particularly in the 1960s when regional strongmen worked with each other to create a kind of consensus in the center. Mrs. Gandhi completely changes that and destroys the Congress party's federal roots.

In the 1990s, the second federal moment really arose from regional parties. So Telugu Desam party was mentioned [earlier]. One of the early things N.T. Rama Rao does, is to have these dinners and lunches for non-Congress chief ministers. Attending one of them results in Farooq Abdullah getting arrested in the 1980s and it is viewed with great deal of suspicion. But we now see that has become a kind of recurrent practice every time there is an opposition party that is winning in the States, all the other opposition leaders are showing up. There is a kind of political case that seems to be coming out. The 1990s are interesting as it was the time of coalition governments and a real transfer of resources to States. It is often seen as something that is antithetical to a strong national government or a strong national economy. Interestingly, when the United Front governments managed to push through radical economic reform, there is a certain amount of redistributed growth, and it is the first time we have a Prime Minister coming up with a new kind of foreign policy doctrine which wins it some credit amongst its neighbors. Sanjay Ruparelia in his book called Divided We Govern shows the way a broad coalition of different regions are able to put together a positive government.

The early 2000s saw the BJP picking up this argument about cooperative federalism and pushing back at consecutive UPA regimes. Interestingly, while there is a critique of Kerala and West Bengal today for refusing to follow the Centre's mandate, the government of Gujarat very early on said it refused to give any minority specific scholarships irrespective of what the Central government's policy on this was. So there has been a kind of older episodic story of states resisting Central government by refusing to put in manpower but I think it is emerging as a larger kind of political tactic.