Editorial

In all these sixty-seven years, the Indian Constitution has proved to be remarkably enduring and dynamic. On the one hand, our constitutional jurisprudence has pioneered innovative outcomes such as the basic structure doctrine, public interest litigation, etc., despite having waded through multiple crises. On the other hand, constitutional jurisprudence has moved back and forth between progressive and regressive outcomes. Our Constitution should be regarded a project than a complete document. New challenges surface while settled positions often require re-examination. The *Indian Journal of Constitutional Law* has strived to keep track of constitutional developments and to present scholarship that grapple with significant constitutional questions, often from a comparative perspective. This Edition of the journal is no different. It presents an impressive volume of constitutional law scholarship.

This Editorial, in the first part, will discuss key developments in Indian constitutional law, through synopses of important judgments and constitutional amendments. In the second part, the Editorial will discuss the contributions to this Edition of the Journal.

SIGNIFICANT DEVELOPMENTS IN INDIAN CONSTITUTIONAL LAW 2016-17

The last twelve months have witnessed momentous developments in Indian constitutional law. The obvious elephant in the room is the constitutional amendment that has introduced the Goods and Services Tax regime and has sought to create a single market for goods and services in a country as large and diverse as ours. The judicial output, on the other hand, presents an interesting amalgam. The Supreme Court has rendered its judgment on some pressing issues like the political crisis in Arunachal Pradesh and some persistent issues like the power to promulgate ordinances and the constitutionality of entry taxes for goods across state borders. The Supreme Court also came under severe criticism for some of its judgments such as the order that mandated obeisance to the National Anthem in cinema halls and the order that banned liquor stores on highway roads. The various High Courts have also contributed

through well-reasoned judgments on issues such as gender discrimination in religious sites, right against self-incrimination, amongst others. In light of this, we proceed to analyse some of these significant developments.

Amendments to the Constitution

The Constitution (One Hundred and First Amendment) Act, 2016 has introduced the regime on Goods and Services Tax ("GST") in India. After being passed by both houses of the Parliament and ratified by more than half of the state legislatures, the President gave his assent to this constitutional amendment on September 8, 2016. Both the Parliament and the state legislatures were given concurrent powers to enact laws on GST.[1] However, only the Parliament could levy taxes on inter-state supply of goods and services. [2] The amendment act also established the Goods and Services Tax Council (GST Council") consisting of the Union Finance Minister (as the Chairperson), the Union Minister of State for Revenue and nominee ministers from each state government (from among whom the Vice-Chairperson would be elected). The GST Council is empowered to recommend the rates of taxation and to deal with other matters of taxation. [3] The Parliament was also obligated to enact laws to compensate states for loss of revenue owing to GST for five years.[4] In pursuance, both houses of the Parliament passed the Central Goods and Services Tax Act, 2017 recently, and the GST regime was rolled out on July 1, 2017.

The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017 seeks to accord constitutional status to the National Commission for Backward Classes ("NCBC"). Presently, the NCBC operates under the statutory framework of the National Commission for Backward Classes Act, 1993. Only the Lok Sabha passed this constitutional amendment in April 2017. Under the amendment, the President will be empowered to notify "socially and

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1 IND. CONST. ART. 246A(1).
2 IND. CONST. ART. 246A(2).
3 IND. CONST. ART. 279A.
4 The Constitution (One Hundred and First Amendment) Act, 2016, s. 18.

economically backward classes".[5] The amendment will also introduce provisions that lay out the composition of the NCBC and its duties. The NCBC will also be accorded the powers of a civil court while inquiring complaints brought before it.[6]

Constitution Benches of the Supreme Court

The Constitution mandates that at least five judges of the Supreme Court sit in order to decide cases involving "*substantial question of law as to the interpretation of this Constitution*".[7] In the survey period (mid-2016 to present), there have been ten judgments with benches of five or more judges.[8] Four of these judgments were referred to a constitution bench owing to the presence of "*substantial question of law as to the interpretation of the constitution*" in the case.

In *Anita Khushwaha v. Pushap Sudan*,[9] the constitution bench affirmed that the right to life under Article 21 contained an inalienable right to access justice. The Supreme Court was approached with the question of whether a case could be transferred out of Jammu & Kashmir ("J&K"), as the provisions on inter-state transfers in the Code of Civil Procedure and the Criminal Procedure Code were inapplicable in J&K. According to the court, the absence of specific enabling statutory provisions did not prevent it from ordering such transfers in the interests of justice under Articles 32 or 142 of the Constitution.

In *Nabam Rebia and Baman Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*,[10] the constitution bench was faced with the political crisis in Arunachal Pradesh. Mr. Nabam Tuki, belonging to the Indian National Congress, was the Chief Minister of Arunachal Pradesh. Factions had emerged from within the party, and a

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5 The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017, s. 4.

6 *Supra* note 5, s. 3.

7 IND. CONST. ART. 145(3).

8 This data has been presented on the basis of the reported judgments in the print version of Supreme Court Cases (SCC).

9 Anita Khushwaha v. Pushap Sudan, (2016) 8 SCC 509.

10 Nabam Rebia and Baman Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1.

disqualification of fourteen MLAs (including the Deputy Speaker) under the Tenth Schedule of the Constitution was pending. Members of the revolting faction within the party also moved a resolution for removal of the Speaker of the legislative assembly around the same time. Meanwhile, the Governor of Arunachal Pradesh intervened and passed an order bringing the session of the legislative assembly to an earlier date. He also passed a message to the legislative assembly stating that the removal of the Speaker be taken up under the helm of the Deputy Speaker, who had been disqualified by the Speaker of the legislative assembly. In the early session, the Deputy Speaker set aside the disqualification of the MLAs and passed a no-confidence motion against Mr. Nabam Tuki's government. The controversy largely revolved around Article 163 of the Constitution. Article 163(1) provides that a state's Governor shall act according to the aid and advice of the Chief Minister and the Council of Ministers, except where required to exercise her discretion. Article 163(2) provides that any question regarding whether a Governor has the discretion over a particular matter was to be determined by the Governor herself, and such decision would be final. However, the majority judgment listed a number of situations where the Governor would have discretionary authority. Anything outside these situations would amount to discretion exercised beyond the Governor's authority, and would be subject to judicial review. On this basis, the Supreme Court held that the Governor's actions in this case were outside his authority under Article 163(1), and the Governor could so act only with the aid and advice of the Chief Minister and the Council of Ministers. On this basis, the Court invalidated the Governor's actions and the steps taken in pursuance. Therefore, Mr. Nabam Tuki was reinstated as the Chief Minister of Arunachal Pradesh. Though it furthers an important cause to preserve the federal character of the Indian state, the judgment ought to have shed more clarity on Article 163(2) and the scope of judicial review.

In *Jindal Stainless Steel v. Union of India*,[11] the Supreme Court upheld the constitutional validity of 'entry taxes', which is a levy on the inter-state movement of goods, charged by the receiving state. A nine-judge constitution bench had been constituted to examine this question, and a majority of seven judges held that imposing such

[11] Jindal Stainless Steel Ltd. v. Union of India CIVIL APPEAL NO. 3453/2002.

taxes were not violative of principles of free trade guaranteed in Article 301, and that individual states were well "within their rights" to impose it. The majority verdict, framed by Chief Justice TS Thakur, and the concurring opinions also delved into the ancillary concepts of 'non-discriminatory taxation' and 'compensatory taxes', holding that: a) only such taxes which are non-discriminatory in nature are valid; b) the specific case of an entry tax being discriminatory or not has to be examined by the respective benches hearing the same; c) The concept of compensatory tax is flawed and has no legal basis. However, the principles settled by this judgment were undercut by the introduction of the Central Goods And Services Tax Act, 2017, which will be rolled out from July 1, 2017 as per the Constitution (122nd Amendment) Bill, 2014. The GST has subsumed the levy of entry taxes - among a host of others - and the impact of the *Jindal* judgment will be primarily on retrospective cases.

In *Krishna Kumar Singh v. State of Bihar*,[12] a seven-judge bench of the Supreme Court was called upon to determine the constitutionality of ordinances that were promulgated repeatedly without having been ratified by the state legislature. In particular, the dispute concerned a series of ordinances promulgated by the Governor of Bihar, through which the Bihar Government took over several hundred private schools. None of these ordinances were placed before the State legislature as mandated under Article 213 of the Constitution. The last of these ordinances was allowed to lapse. However, the employees of these schools brought this writ petition demanding payment of salaries by the government. Justice D.Y. Chandrachud, writing the majority opinion, held that repeated promulgation without legislative ratification constituted a "constitutional fraud" and that the ordinances did not create any rights or liabilities. Further, it was held that the satisfaction of the President or the Governor in promulgating an ordinance would be subject to judicial review.

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12 Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1.

Other Decisions of the Supreme Court

In *Board of Control for Cricket in India ("BCCI") v. Cricket Association of Bihar*,[13] the Supreme Court reiterated its earlier judgment in *Zee Telefilms Ltd. v. Union of India*[14] and held that the actions of the BCCI were amenable to judicial review under Article 226. In *Zee Telefilms*, the majority of judges on the constitution bench held that though BCCI was not "state" under Article 12 of the Constitution, parties aggrieved by its actions could pray for a writ before the High Courts under Article 226. In this case, the court accepted the recommendations of the Justice R.M. Lodha Committee, which was appointed by the Supreme Court to look into the management of the BCCI. Reviewing the actions of a private organisation, such as the BCCI, using public law standards is a step in the right direction. However, whether this allows the judiciary to essentially redraw the internal rules of an organisation has to be treated with scepticism, and is a topic ripe for debate.

In an appeal of a Bombay High Court judgment in *Hiralal P. Harsora v. Kusum Narottamdas Harsora*,[15] the Supreme Court was called to adjudicate upon the constitutionality of Section 2(q) of the Protection of Women from Domestic Violence Act, 2005 ("PWDVA"). This provision defined "respondents" in domestic violence cases, and stipulated that only an "adult male person" could be a respondent in such cases. In this Article 14 challenge, the court applied the reasonable classification test and held that the restrictive definition of "respondent" did not rationally further the legislative purpose to outlaw all kinds of violence against women in domestic settings. Therefore, the Supreme Court *read down* Section 2(q) to exclude the words "adult male person". However, two points should be noted. While this judgment has proposed its own cure for the restricted application of PWDVA, it has done so by extending the legislation to those who have historically been at the weaker end of gendered power relations in Indian society. This judgment also poses

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13 Board of Control for Cricket in India ("BCCI") v. Cricket Association of Bihar, (2016) 8 SCC 535.

14 Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

15 Hiralal P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165.

the serious challenge of PWDVA being misused against women and minors through frivolous complaints.

Possibly the most widely debated case from the past year was a PIL filed by Shyam Narayan Chouksey[16] calling for the national anthem of the country to be played before a movie in cinema theatres across the country. The Supreme Court passed an overreaching order, mandating that all citizens stand up when the anthem was played. Further directions were ill conceived, impracticable, and often contradictory. For example, it was ordered that the entry and exit doors of the theatres be shut for the course of the anthem, which was against the letter of the directions made in the aftermath of the Uphaar Cinema tragedy.[17] This particular order, and another one obligating even physically and mentally disabled persons to stand, was later clarified; but, they demonstrated the lack of application of mind evident in the judgement. The Supreme Court based its rationale on a questionable application of the theory of "constitutional patriotism". In doing so, it has effectively overruled the *Bijoe Emmanuel* case,[18] which had held that it was "*not mandatory to sing the national anthem*" and no one could "*be compelled by law to do so*", as this would be against the fundamental right to speech and expression.[19]

In *State of Tamil Nadu v. K. Balu*,[20] a three-judge bench of the Supreme Court ordered states and union territories to cease granting licenses for sale of liquor along highways. It also ordered that the existing licenses would cease by 1 April 2017, and the removal of liquor shops up to 500 m from the highways. The Supreme Court justified this intervention under Article 142 of the Constitution, which authorises the Court to do "complete justice" in any case before it. The court rejected arguments for the right to trade in liquor

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16 Shyam Narayan Chouksey v. Union of India, (2016) 5 KHC 886.

17 Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy, (2011) 14 SCC 481. In this case, a fire had broken out in the theatre during a movie screening, resulting in the death of 59 patrons, due to the lack of operational exit doors.

18 Bijoe Emmanuel v. State Of Kerala, (1986) 3 SCC 615.

19 The applicability of Article 19(1)(a) was brushed aside: "It (sic) does not allow any different notion or the perception of individual rights, that have individually thought of have no space."

20 State of Tamil Nadu v. K. Balu, (2017) 2 SCC 281

under Article 19(1)(g) by relying on the *res extra commercium* doctrine. The judgment has been criticised much on the basis that it interferes into the domain of the executive and the legislature, and for not adequately weighing the costs and benefits of such a blanket order.

Decisions of the High Courts

In *Noorjehan Safia Niaz v. State of Maharashtra*,[21] the Bombay High Court was faced with a petition challenging the order of the Haji Ali Dargah Trust prohibiting women from entering the sanctum sanctorum of the dargah. The Court applied the "essential practices" test to determine if the exclusion of women from entering the dargah was part of the Trust's freedom of religion under Article 25(1). The High Court held that Islamic doctrines did not recognise any essential practice that disallowed women from entering mosques/dargahs. Further, the High Court recognised that the Haji Ali Dargah was a public charitable trust. Hence, it could seek protection of being a denomination under Article 26 of the Constitution. Rejecting other peripheral justifications offered by the Trust, the Bombay High Court held that the entry prohibition was unconstitutional.

In *Sankalp Institute of Education v. State of UP*,[22] questions concerning the rights of minority educational institutions and the interpretation of the Supreme Court decisions in *T.M.A. Pai Foundation v. State of Karnataka*[23] and *P.A. Inamdar v. State of Maharashtra*[24] were brought before the Allahabad High Court. Briefly, the issue was whether minority educational institutions had a right under Article 30 of the Constitution to admit minority students through their own admission process, instead of complying with the statewide university admissions process. The court reiterated the conclusions in the above-mentioned Supreme Court judgments, and held that it was not permissible even for a minority education institution to opt out of the standardised admissions process. However, such minority institutions were free to admit only students

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21 Noorjehan Safia Niaz v. State of Maharashtra, [2016] 5 ABR 660.
22 Sankalp Institute of Education v. State of UP, (2017) 1 ADJ 304.
23 T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.
24 P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 357.

belonging to the respective minority communities from the statewide admissions process.

In *Natvarlal Amarshibhai Devani v. State of Gujarat*,[25] the accused in a corruption case brought a writ petition before the Gujarat High Court challenging the validity of the voice spectrograph test. The only evidence against the accused was a telephonic conversation, and the investigating agency had required a voice spectrograph test to match the accused's voice with the recording. On the constitutionality of this test, the court read down the Supreme Court's decision in *Selvi v. State of Karnataka*[26] noting that the voice spectrograph test did not amount to testimonial compulsion, which is unconstitutional under Article 20(3). Instead, voice spectrograph test was deemed to be "physical" and not testimonial evidence. On this basis, the Gujarat High Court held that the voice spectrograph test did not violate Article 20(3) of the Constitution. However, the Court did not authorise such a test in this case, as the test lacked statutory bases.

CONTRIBUTIONS

This Edition begins with Mathilde Cohen's fascinating article on the constitutional status accorded to cows and milk in India and the United States. She argues that cows/milk have been accorded a "quasi-constitutional" status in both these jurisdictions. Further, she makes two important arguments. *First*, she argues that bovine laws in both India and the US are tilted towards protecting the economic value/nutritional benefits from cows, rather their welfare. *Second*, she situates cows/milk as important components of exclusionary politics in both countries: exclusion along racial lines in the US and along religion/caste lines in India. Her article becomes all the more relevant in the recent times when cows are at the centre of an increasingly polarized Indian society.

Kartik Chawla's article makes the case for an implicit recognition of the "right to internet access" in Indian constitutional

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25 Natvarlal Amarshibhai Devani v. State of Gujarat, Gujarat High Court, Special Criminal Application (Direction) No. 5226 of 2015.

26 Selvi v. State of Karnataka, (2010) 7 SCC 263.

jurisprudence. In doing so, he draws from international opinions on the content and necessity of this right, and Supreme Court judgments on free speech-related issues that provide validity to a claim for Internet access.

In his article, Shantanu Dey studies the evolution of the "commercial speech doctrine" in American and Indian constitutional jurisprudence. He brings to the fore fundamental issues with the doctrine such as ambiguities in its definition and the advertisement-centric judicial discourse. Dey also engages with the question of whether commercial speech ought to be protected under the freedom of speech and expression (Article 19(1)(a)) or under the freedom of trade (Article 19(1)(g)). He argues for a "gradation model" of free speech to be adopted in India, much like under the First Amendment. He concludes his article by engaging with "reasonable restrictions" on freedoms in the Indian Constitution, and their application vis-à-vis the commercial speech doctrine.

Mohammed Zahirul's article revolves around the "political question doctrine" in Bangladesh's constitutional law. He argues for the rejection of this doctrine and naturally for a more significant role for the judiciary in Bangladesh. He builds his argument on the judiciary's active duty to promote constitutionalism in the country. Zahirul carries out a study into the origins of the political question doctrine in the United States, and its application in India and Pakistan, in addition to Bangladeshi cases and scholarship.

The note by Ivan Jos and Anandhapadmanabhan Vijayakumar details the domestic and international dimensions of privacy rights. Specifically, it traces the development of the right before the Supreme Courts of the United States and India, while discussing the content of the complimentary "right to be forgotten", and data protection regimes.

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