

JUSTICE PD DESAI MEMORIAL LECTURE 2020

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## **THE HUES THAT ARE INDIA: FROM PLURALITY TO PLURALISM**

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On occasions such as this when a lecture series commemorates the memory of a distinguished personality, it is conventional to begin with words of tribute. But for me personally, the opportunity to speak on this occasion has a deep personal connect. For me, this is a homage to the Master.

Justice Prabodh Dinkarrao Desai had the unique distinction of being appointed as a Judge of the High Court of Gujarat when he was barely thirty-nine. Over a distinguished career, he functioned as the Chief Justice of three High Courts in succession, those of Himachal Pradesh, Calcutta and Bombay between December 1983 and December 1992. That a person who was appointed as a Judge of the High Court so young and yet was overlooked by destiny or the powers that be (whichever way one looks at it), must remain in contemporary times another aberration in the process of judicial appointments. When the call for higher judicial

office came, Chief Justice PD Desai preferred to retire from the Bombay High Court: so fiercely was he protective of his own independence and integrity.

There are vivid memories of my experiences as a young member of the Bar who frequented his Court with an occasional brief but unfailingly each day as a keen admirer of his court-craft and yearning for justice. Administrative Law flourished under his nuanced understanding just as Labour Law became the source justice to using citizens. This was a unique amalgam: in Administrative Law, Chief Justice PD Desai found an ally for the rigor of his intellectual discipline. In Labour law, he found a bond for his compassion.

The Bombay High Court assembles at 11:00 am. Three quarters of the first hour in his Court room was a sight to witness. As young lawyers, we would remark that the *Darbar* had assembled in PD's Court. This was when he would list cases for mediation before him. The Judge would use everything under his command, from persuasion to authority to bring about just solutions. Chief Justice PD Desai could brook no excuse for unprepared Counsel. His Court had no place for the incompetent and he could never tolerate a fool. But ironically, this strict disciplinarian was benevolent towards young juniors. Their immaturity was a

challenge for him to overcome in finding true justice. Grooming them was his passion.

I had a unique opportunity to interact with him when he was a Member of the Enquiry Committee set up as part of the impeachment process of a Judge of the Supreme Court. I was to return home from New Delhi by an evening flight after attending a hearing in the Supreme Court. To me was tasked the duty of delivering a sealed cover of the report to the residence of the Chief Justice. When I reached his residence at 09:30 in the night, he was waiting in his drawing room. He went inside the house and returned with a glass of tender coconut water. He was a different person, unfailingly kind, but distinctly proper.

Chief Justice PD Desai was a worthy successor in the traditions of the Bombay High Court, a court set in the post-independence histories of remedying injustices and sufferings. Towering behind the Chief Justice in the Chief Justice's Court, are the portraits of Chief Justice Chagla and Sir Lawrence Jenkins. Looking over the shoulders of the Chief Justice, they would, I believe invoke the message of the life of this great Judge to say: "this was indeed a Judge in the path that we set". You will agree that I have a special reason for paying this homage in recognizing the role played by Chief Justice PD Desai in strengthening the institutional position of

the High Court and of the judiciary in the nation. This is a personal homage to someone who shaped the course of my career.

As a young boy, I remember having a toy called the *Russian doll*. They are also called Matryoshka dolls, dating back to 1890. The wooden doll has within it another smaller wooden doll and this continues for ten iterations. When nested together one after the other, the doll is complete. However, if a single iteration is missed, the final form does not take shape. There is a deep lesson that the toy symbolizes – every iteration depends on and supports each other to take the final form. The doll is complete only when the inherent value of each part is recognized. In many ways, the Matryoshka doll is a metaphor for our country. India as a whole, boasts of significant diversity – heterogeneous along a number of intersecting dimensions, including race, class, religion, and culture. This diversity is further defined across several axes: cultural, social, and epistemic<sup>1</sup> and outlays diverse values, opinions, and perspectives. In the plural mansion that is independent India, lies a population of over 1.3 billion people comprising several thousand communities.

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<sup>1</sup> James Bohman, *Deliberative Toleration*, *Political Theory*, Vol. 31, No. 6 (Dec., 2003), at p. 760.

At the framing of the Indian Constitution, questions arose on how independent India was to account for its heterogenous polity. Uday Mehta eloquently elucidates the immense range of social realities that the founding members were called upon to address and how the document they gave birth to sought to unify a divergent India by accommodating all people who called India their home. For the founders, the Constitution was premised on both a deep trust in the tolerant nature of its citizens and an unshakeable belief that our diversity would be a source of strength. As Mehta observes,<sup>2</sup> where the population was largely illiterate, the Constitution conferred universal adult franchise. Where the population was diverse and assorted, the Constitution conferred citizenship without regard to race, caste, religion or creed. Where the people were deeply religious, the Constitution adopted the principle of secularism. Where the Indian State stood united, the Constitution created a federal democracy with all the political instruments necessary for local self-governance. Diversity within the strands of the Constitution is a reflection of the diversity of her people. One cannot exist without the other.

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<sup>2</sup> "...Here was a document which granted universal adult franchise in a country that was overwhelmingly illiterate; where, moreover, the conditionality of acquiring citizenship made no reference to race, caste, religion, or creed ... which committed the state to being secular in a land that was by any reckoning deeply religious; which evacuated as a matter of law every form of prescribed social hierarchy under extant conditions marked by a dense plethora of entrenched hierarchies; that granted a raft of fundamental individual rights in the face of a virtually total absence of such rights ... [and] most importantly, the Constitution created a federal democracy with all the juridical and political instruments of individual, federal, local, and provisional self-governance, where the nearest experience had been of imperial and princely authority." Uday S. Mehta, *History and the Social Problem: The Case of India*, Proceedings of the Seventh Annual Gilder Lehrman Center International Conference at Yale University (2005). Available at [www.yale.edu/glc/justice/mehta.pdf](http://www.yale.edu/glc/justice/mehta.pdf)

During the framing of the Constitution, the framers had to address two strands in political thought – liberalism and pluralism. Liberalism meant that people “order their Actions...as they think fit...without asking leave, or depending on the Will of any other men”.<sup>3</sup> Thinkers from Locke to Rawls agreed on the Fundamental Liberal Principle – that the burden of justification falls upon those who seek to interfere with liberty.<sup>4</sup> This entailed questioning the reason to obey monarchs and led to the idea that rulers are bound by a set of rules as encapsulated in the Magna Carta. The negative conception of liberty which emphasized the absence of interference was soon replaced with a positive conception – that liberty went beyond a guarantee of non-interference. It referred to the creation and sustenance of conditions conducive to the free *exercise* of rights.<sup>5</sup> It was then natural that pluralism – conceptualized as people pursuing a plurality of values, ends and cultural life<sup>6</sup> would seem to conflict with the absolute exercise of freedom by every individual. Take for example a linguistic minority seeking to introduce their language as a compulsory subject in schools established by them. A student could argue against this claiming an absolute freedom of choice.

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<sup>3</sup> John Locke, *The Second Treatise of Government in Two Treatises of Government* (Peter Laslett, ed.) Cambridge University Press (1960), at p. 287.

<sup>4</sup> Liberalism, *Stanford Encyclopedia of Philosophy*, revised on 22 January, 2018 (last accessed on 3 February, 2020). Available at <https://plato.stanford.edu/entries/liberalism/>

<sup>5</sup> Isaiah Berlin, I., 1969, ‘Two Concepts of Liberty’, in I. Berlin, *Four Essays on Liberty*, London: Oxford University Press. New ed. in Berlin 2002; See also Jean-Jacques Rousseau, *The Social Contract* (Victor Gourevitch, ed.), Cambridge University Press (1997).

<sup>6</sup> Isaiah Berlin, *The Proper Study of Mankind*, Chatto and Windus, London (1997) p. 9.

The Constituent Assembly was tasked with expressing the equal worth of every individual,<sup>7</sup> as well as addressing the social reality of diversity along many axes.

Another significant issue called for attention - How was the Indian state to protect cultural and group identity and ensure the prevention of disability that arose from membership of certain groups?

The rights encapsulated in Part III of the Constitution are a good starting point to understand the broad idealism of the framers in crafting a document which sought to balance these seemingly conflicting threads in political thought to ensure a delicate balance, in the guarantee of individual liberty and the protection of a plural polity. The rights are best understood in three broad senses:

The *first* set of rights articulate a commitment to individual liberalism. The right to equality,<sup>8</sup> the right to the freedom of speech and expression,<sup>9</sup> the right to move freely throughout the territory of India,<sup>10</sup> and the right to life and personal liberty<sup>11</sup> ensured a fundamental commitment to individualism in a liberal democracy. Every

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<sup>7</sup> Chakravarthi Ram-Prasad, Pluralism and liberalism: reading the Indian Constitution as a philosophical document for constitutional patriotism, *Critical Review of International Social and Political Philosophy*, 16:5 at p. 681.

<sup>8</sup> Article 14, Constitution of India.

<sup>9</sup> Article 19(1)(a), Constitution of India.

<sup>10</sup> Article 19(1)(d), Constitution of India.

<sup>11</sup> Article 21, Constitution of India.

individual was guaranteed the protection and the free exercise of individual rights for the fulfilment of any end considered to be of fitting value to them. The *second* set of rights are framed in terms of group rights. These include the right of religious denominations to establish and maintain institutions for religious and charitable purposes,<sup>12</sup> or the right of a 'section of the citizens' to conserve a distinct language, script or culture.<sup>13</sup> Another striking example of this is the power of the state to restrict the freedom to form associations or unions or move around freely throughout the territory of India "for the protection of the interests of any Scheduled Tribe."<sup>14</sup> This demonstrates that the Indian Constitution recognizes certain groups as *direct* bearers of constitutional rights.<sup>15</sup> The location of groups as distinct bearers of rights was nested in the understanding that membership of groups had a unique role of crafting and determining individual identity.

It is the *third* set of rights that demonstrate a true understanding of the perceived tension between the liberal and plural strands of the Indian polity. While the framers were awake to the notion that the fulfilment of certain individual rights existed only in relation to groups, it was equally important for them to recognize that

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<sup>12</sup> Article 26(a), Constitution of India.

<sup>13</sup> Article 29(1), Constitution of India.

<sup>14</sup> Article 19(5), Constitution of India.

<sup>15</sup> Gautam Bhatia, Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, in GLOBAL CONSTITUTIONALISM (2016).

membership of certain social groups prevented the fulfilment of the liberal ideal which the Constitution sought to guarantee. This required the recognition that formal equality would only preserve the inequalities faced by individuals by virtue of their membership of groups. Take for example a religious group which prohibits the entry of women into institutions of worship grounded in their physiological characteristics. Here, inequality on the basis of sex is grounded in the membership of the group which seeks to prevent their entry. For this reason, the State was empowered to provide for social welfare and reform by throwing open Hindu religious institutions of a public character to all sections of Hindus. Similarly, the Constitution enacted a complete ban on untouchability and its practice in “any form”. The Constitution also stipulates that no citizen is to be subject to any disability or condition with regard to access to public spaces and the use of public resources on the grounds of religion, race, caste, sex, or place of birth and that the state is empowered to legislate special provisions for the advancement of any socially and educationally backward class of citizens.

In elevating groups as distinct rights holders as well as empowering state intervention to address historical injustice and inequality perpetrated by group membership, the framers located liberalism within the pluralist reality of India and conceptualized every individual as located at an intersection between “liberal

individualism and plural belonging”.<sup>16</sup> In the framing of the Indian Constitution, individual identity was constructed to maintain a delicate balance between the commitment to liberal notions of individualism as well as a pluralist conception which formed and shaped individual identity. While its framing demonstrated a remarkable commitment to liberal individualism, it did not ignore but on the contrary incorporated the force of a pluralist society in constituting individual identity. This was crucial, for then the provisions of the Constitution hold a significance larger than the sum of its parts which is found in two distinct understandings of pluralism in Indian polity – an *ameliorative* dimension and a *constitutive* dimension. These two dimensions are crucial in disregarding misconceptions of the meaning of pluralism in Indian society and also structuring the positive measures required for its protection.

In the *ameliorative* sense,<sup>17</sup> a commitment to pluralism did not imply non-interference where group practices hinder the constitutional vision of an equal citizenship premised on equal dignity, worth and liberty of every individual. The constitutional provisions on the freedom of religion best exemplify this. The

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<sup>16</sup> Chakravarthi Ram-Prasad, Pluralism and liberalism: reading the Indian Constitution as a philosophical document for constitutional patriotism, *Critical Review of International Social and Political Philosophy*, 16:5 at p. 681.

<sup>17</sup> Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, Oxford University Press (2003), at p. 94.

individual right to the freedom of religion is not intended to prevail over but is subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognized in the other provisions of Part III.<sup>18</sup> The scheme of Articles 25 and 26 of the Constitution does not disturb but strengthens the ethos of Part III of the Constitution, which is premised upon individual autonomy and dignity as the central overarching values which infuse all fundamental rights with meaning. In the liberal promise of the Constitution, a balance was struck in relation to the position to be accorded to religion in the public sphere: essential but not impregnable. The Constitution went beyond the classical liberal commitment of disempowering people in power, by enabling those who have traditionally been deprived of power.<sup>19</sup>

In the *constitutive* sense, the Constitution demonstrates an understanding that group identity and cultural difference play a significant role in shaping individual identity. One example of this is found in the linguistic diversity of our nation. Language is understood not merely as a tool for communication, but an identity in itself. Thoughts are not abstract wisps of consciousness, but are in fact conceptualized and grounded in a particular language along with its unique characteristics. In other words, language and its idiosyncrasies fundamentally

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<sup>18</sup> Indian Young Lawyers Association v. State of Kerala and Ors., Indian Supreme Court, SCC OnLine 1690 (2018) (4-1 decision) (Indu Malhotra, J., dissenting), opinion of Dhananjaya Chandrachud at ¶ 219.

<sup>19</sup> Rajeev Bhargava, *Politics and Ethics of the Indian Constitution*, Oxford University Press (2008), at p. 15.

structure the way we think. Whenever I meet someone who speaks many languages, I sometimes ponder upon which language they think in. In a historically multilingual society like India where language is so intrinsic to one's own self of history and identity – the plurality of language is the plurality of thought itself. George Orwell in his classic *1984* highlighted the significance of language. In his dystopian world, the fictional language “Newspeak” was a controlled language of restricted grammar and limited vocabulary. It was meant to be a vehicle of thought control, meant to limit personal identity, self-expression and free will.<sup>20</sup> For example, the only meaning of the word ‘free’ in Newspeak was to denote the absence of something – this field is *free* of weeds. Politically, the word was not envisaged to denote free will. Consequently, any such political notion was eliminated from society. Other words that were deliberately omitted from the Newspeak language included justice, science and democracy. Liberty and equality were reduced to a single word – ‘crimethink’ which referred to thought which was considered not in line with the principles of society. This highlighted the political value of controlling language and diversity.

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<sup>20</sup> Open Culture, George Orwell Explains How “Newspeak” Works, the Official Language of His Totalitarian Dystopia in 1984 (last accessed on 3 February 2020). Available at: <http://www.openculture.com/2017/01/george-orwell-explains-how-newspeak-works.html>

Our sense of group belonging is a significant factor in the formation of identity and provides members with a sense of individual as well as collective forms of identity.<sup>21</sup>

We identify with and recognize one another as members of the same group on the basis of shared and divergent values, and have a more or less settled desire that the group should survive and flourish in the future.<sup>22</sup> This unique sense of constituting identity was well understood by the British who attempted to make such diversity 'manageable'. For example, the notorious Vernacular Press Act of 1878 enacted by Lord Lytton targeted 'certain publications in oriental languages'.<sup>23</sup> The *Amrita Bazar Patrika* in Calcutta had to convert itself into an all-English weekly within a week of the Act being passed.

Historian Ramchandra Guha in 'India After Gandhi' stated in the book's epilogue titled 'Why India Survives' that the two cornerstones to the foundation of the Indian Republic are the pluralism of religion and language. He takes the example of our currency notes, which have denominations printed in Hindi and English along with fifteen other languages printed on the reverse side of the note.<sup>24</sup> With each language and each script, he says, comes a distinct culture and regional ethos,

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<sup>21</sup> Stephen May, *Misconceiving Minority Language Rights: Implications for Liberal Political Theory* in Will Kymlicka and Alan Patten (ed.), *Language Rights and Political Theory*, Oxford University Press (2003).

<sup>22</sup> Alan Patten, *Political Theory and Language Policy*, *Political Theory*, Vol 29, No 5 (2001) at p. 697.

<sup>23</sup> Abhinav Chandrachud, *Republic of Rhetoric*, Penguin Viking (2017), at p. 49.

<sup>24</sup> Reserve Bank of India, *Bank Notes* (last accessed on 3 February 2020). Available at [https://www.rbi.org.in/scripts/ic\\_languagepanel.aspx](https://www.rbi.org.in/scripts/ic_languagepanel.aspx)

nesting with the idea of India as a whole.<sup>25</sup> Today, the 8<sup>th</sup> Schedule houses 22 languages which represents the mother tongue of 96.7% of the Indian population.<sup>26</sup> The decision to shift Article 29, which includes the right to conserve distinct languages from the Fundamental Duties chapter to the Fundamental Rights chapter also elucidates the effort that was taken towards the realization and not just a recognition of pluralism.<sup>27</sup>

This understanding of the role of group life is crucial for the recognition that cultural diversity and pluralism cannot be adequately addressed merely by a principle of non-interference. In the aftermath of the European wars of religion, reformation liberalism emphasized on the virtue of *toleration*.<sup>28</sup> However, a commitment to true pluralism implies that the sources of diversity and the claims made by cultural minority groups today are not reducible to the early accounts of religious toleration which aimed only to promote civil peace and order. Compared to the western notions of pluralism and multiculturalism which are limited to state sponsored

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<sup>25</sup> Ramachandra Guha, *India after Gandhi: The History of World's Largest Democracy*, Macmillan (2007), at p. 752.

<sup>26</sup> G Seetheraman, *Why does the Census of India focus on mother tongues? How does it make linguistic minorities invisible?*, *The Economic Times*, 5 May, 2019 (last accessed on 3 February 2020). Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/why-does-the-census-of-india-focus-on-mother-tongues-how-does-it-make-linguistic-minorities-invisible/articleshow/69178250.cms?from=mdr>

<sup>27</sup> Shiva Rao, *The framing of India's Constitution*, (Sweet & Maxwell) 281. However, this is just a first step. The right to conserve distinct languages is distinct from their active promotion. For example, Article 6 of the South African Constitution stipulates that the "state must take practical and positive measures to elevate the status and advance the use of these languages." In addition, a "Pan South African Language Board" must 'promote and ensure respect for' all languages commonly used by communities in South Africa, which includes, amongst others, Gujarati, Hindi, Tamil, Telegu and Urdu, and Sanskrit.

<sup>28</sup> Monique Deveaux, *Toleration and Respect*, *Public Affairs Quarterly*, Vol. 12, No. 4 (1998), at pp. 407-409.

allocation of resources, the democratic inclusion and protection of a wide range of cultural minorities and diversity is premised on the inculcation of mutual respect between different communities and the creation of positive spaces for these identities to thrive. In moving beyond merely tolerance, celebrating and protecting diversity is linked with justice, equal concern and respect for every individual.<sup>29</sup>

How then does the Indian nation-state ensure the creation and sustenance of spaces conducive for realizing the ideals of pluralism? I wish to highlight three things: *first*, the realization of the deliberative ideal; *second*, the continuous process of defining 'India' and *third*, realizing the constitutional trust placed on every individual through a sense of fraternity.

An essential aspect of any successful democracy is its commitment to the protection of deliberative dialogue. Citizens manifest their equality not only by refraining from interference with the freedom of expression of others; they also do so by sustaining conditions conducive for free communication.<sup>30</sup> At the first level, this is nested within the institutional structures that give the country its laws. Deliberation within the legislature furthers a commitment to the fundamental liberal

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<sup>29</sup> John Rawls, *Political Liberalism* (1993) at p. 122.

<sup>30</sup> James Bohman, *Deliberative Toleration*, *Political Theory*, Vol. 31, No. 6 (Dec., 2003), at p. 760.

principles that political outcomes must be justified not by reference to self-interest and power, but to *reason* and the ability to convince one another as to why a proposed course of action is beneficial. Beyond the rights-based procedures and goal-based outcomes of the Constitution, is a commitment to a deliberation that incorporates the diverse views of all stakeholders concerned, including those who do not support a proposed law. The fine balance between majoritarianism and liberal democratic governance is marked by constitutional principles wedded to the rule of law, the guarantee of individual freedoms and ensuring freedom from discrimination. A democracy wedded to the ideal of *reason* and *deliberation* ensures that minority opinions are not strangled and ensures that every outcome is not a result merely of numbers but of shared consensus.

Where on the one hand due deliberation and consideration within institutional spaces underlines a commitment to pluralism, deliberation by individuals in public spaces on the other hand is of equal, if not more importance. The true test of a democracy is its ability to ensure the creation and protection of spaces where every individual can voice their opinion without the fear of retribution. Inherent in the liberal promise of the Constitution is a commitment to plurality of opinions. However, the litmus test of any claim of commitment to deliberation is assessed by the response of two key actors - the *state* and other *individuals*. If you wish to

deliberate you must be willing to hear all sides to the story. A legitimate government committed to deliberate dialogue does not seek to restrict political contestation but welcomes it.

As early as the 19<sup>th</sup> Century, Raja Ram Mohan Roy protested against the curtailing of the press and argued that a state must be responsive to individuals and make available to them the means by which they may safely communicate their views. This claim is of equal relevance today. The commitment to civil liberty flows directly from the manner in which the State treats dissent. A state committed to the rule of law ensures that the state apparatus is not employed to curb legitimate and peaceful protest but to create spaces conducive for deliberation. Within the bounds of law, liberal democracies ensure that their citizens enjoy the right to express their views in every conceivable manner, including the right to protest and express dissent against prevailing laws. The blanket labelling of such dissent as 'anti-national' or 'anti-democratic' strikes at the heart of our commitment to the protection of constitutional values and the promotion of a deliberative democracy.

Protecting dissent is but a reminder that while democratically elected governments offer us a legitimate tool for development and social coordination, they can never claim a monopoly over the values and identities that define our plural society. The

employment of state machinery to curb dissent, instils fear and creates a chilling atmosphere on free speech which violates the rule of law and detracts from the constitutional vision of a pluralist society.

The destruction of spaces for questions and dissent destroys the basis of all growth — political, economic, cultural and social. In this sense, dissent is the safety valve of democracy. The silencing of dissent and the generation of fear in the minds of people go beyond the violation of personal liberty and a commitment to constitutional values – it strikes at the heart of a dialogue-based democratic society which accords to every individual equal respect and consideration. A commitment to pluralism requires positive action in the form of social arrangements where the goal is “to incorporate difference, coexist with it, allow it a share of social space”.<sup>31</sup>

There is thus a positive obligation on the state to ensure the deployment of its machinery to protect the freedom of expression within the bounds of law and dismantle any attempt by individuals or other actors to instil fear or chill free speech. This includes not just protecting free speech, but actively welcoming and encouraging it.

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<sup>31</sup> James Bohman, *Deliberative Toleration*, *Political Theory*, Vol. 31, No. 6 (Dec., 2003), at p. 758.

An equal obligation to thwart attempts to curtail diverse opinions rests on every individual who may not agree with opposing views. Mutual respect and the protection of a space for divergent opinions is the process of viewing every individual as an equal member of a shared political community where membership is not premised on sharing a unanimous opinion. As Professor Scanlon puts it, toleration recognizes that common membership is deeper than conflicts and recognizes that others are “just as entitled as we are to contribute to the definition of our society.”<sup>32</sup> When we look at each other, we do not just see fellow citizens entitled to our individual liberties. We perceive a mind and consciousness which is not our own, which has its own view of the world and its own account of how it should treat people who it sees as “the other”. Taking democracy seriously requires us to respond respectfully to the intelligence of others and participate vigorously – but as an equal – in determining how we should live together. Democracy then is judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard, respected and accounted for. The great threat to pluralism is the suppression of difference and the silencing of popular and unpopular voices offering alternate or

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<sup>32</sup> TM Scanlon, *The difficulty of tolerance: Essays in political philosophy*, Cambridge University Press (2003), at p. 193.

opposing views. Suppression of intellect is the suppression of the conscience of the nation.

This brings me to the second threat to pluralism - the belief that homogenization presupposes the unity of the nation. Alongside the ideals of securing to every individual justice, liberty and equality, the Constitution envisages the unity and the integrity of the nation. However, there is a belief that this ideal is achieved by the eradication of diversity and the assimilation of all identities. At the time of its birth, the nation was conceptualized as incorporating its vast diversity and not eliminating it. A member of the Constituent Assembly, Rev. Jerome D'Souza described the conception of Indian pluralism when he said that:

“I do not think that the great majority communities of India or any of their most honoured representatives would be guilty of all that unfair overriding of privileges and safeguards; but by a genuine, though mistaken love of country and desire for unanimity and homogeneity, which it is not possible to have and which perhaps is not even necessary.”<sup>33</sup>

As I have stated before, the framers demonstrated a commitment for the protection of India's pluralist strands. For this reason, amendments to delete the right to propagate religion and to include a ban on dressing that identified with a religion were negated in the Constituent Assembly. By negating these amendments, the

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<sup>33</sup> Statement by Rev. Jerome D'Souza, CONSTITUTIONAL ASSEMBLY DEBATES, 7.69.114 (Dec 8, 1948).

Constituent Assembly asserted the place of plural expression in the public sphere and signalled a clear departure from the 'singular unification' model. Similarly, even though it was unanimously agreed that the freedom to propagate religion was included within the freedom of speech, the assembly found it necessary to include a specific provision in Article 25 also stating that a heavy responsibility would be cast on the majority to see that minorities feel secure.<sup>34</sup>

A united India is not one characterized by a single identity devoid of its rich plurality, both of cultures and of values. National unity denotes a shared culture of values and a commitment to the fundamental ideals of the Constitution in which all individuals are guaranteed not just the fundamental rights but also conditions for their free and safe exercise. Pluralism depicts not merely a commitment to the preservation of diversity, but a commitment to the fundamental postulates of individual and equal dignity. In this sense, pluralism furthers the basic postulates of the Constitution and nourishes and provides content to the goal of national unity.

In the creation of the 'imagined political community' that is India, it must be remembered that the very concept of a nation state changed from hierarchical

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<sup>34</sup> Statement by Hukam Singh, CONSTITUTIONAL ASSEMBLY DEBATES, 8.92.15 (May 26, 1949).

communities to networks consisting of free and equal individuals. India, as a nation committed to pluralism, is not one language, one religion, one culture or one assimilated race. The defence for pluralism traverses beyond a commitment to the text and vision of the Constitution's immediate beneficiaries, the citizens. It underlines a commitment to protect the very idea of India as a refuge to people of various faiths, races, languages, and beliefs. India finds itself in its defence of plural views and its multitude of cultures. In providing safe spaces for a multitude of cultures and the free expression of diversity and dissent, we reaffirm our commitment to the idea that the making of our nation is a continuous process of deliberation and belongs to every individual. No single individual or institution can claim a monopoly over the idea of India.

Defining the national identity in a collective and inclusive manner is crucial for, as Bhikhu Parekh says – “our sense of identity or who we think we are informs our values, guides our small and large choices, and gives our lives a sense of direction and coherence”<sup>35</sup> The idea of a plural India guides and dictates how the institutions envisaged by the Constitution as well as individuals in the society respond to diversity. In a polity committed to the protection of a plural identity, there is a

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<sup>35</sup> Rajeev Bhargava, *Politics and Ethics of the Indian Constitution*, Oxford University Press (2008), at. p. 43.

positive obligation on every actor to create conditions conducive to the flourishing of diverse identities. These conditions must exist in the very structure of our institutions as well as the public sphere. This idea is put succinctly by Nobel laureate Amartya Sen when he states that “our plural heritage is [thus] socially enriching as well as politically crucial”.<sup>36</sup>

Finally, the commitment to pluralism lies in the constitutional trust expressed by the framers on every individual. The Preamble sets forth the founding vision of securing to all its citizens justice, liberty and equality. However, the founders recognized that a commitment to pluralism went beyond its guarantee in the Constitution and in its institutions – it lay in how it was worked. In this sense, the guarantees of equality and liberty stipulated only a restricted pluralism. For this reason, the framers postulated that “fraternity” presupposed the recognition of its ideals – a sense of brotherhood and sisterhood that went beyond the guarantee of equality and liberty. Dr Ambedkar put it eloquently when he said that “without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.”<sup>37</sup>

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<sup>36</sup> *ibid.*

<sup>37</sup> Rahul Rao, The CAA protests shake the old bounds of Indian secular morality, *The Caravan*, 30 January 2020 (last accessed on 5 February 2020).

An example of this constitutional trust and obligation is evident in the divergent view of the relations between majorities and minorities upon India gaining her independence. During the colonial rule, the Morley-Minto reforms recommended separate electorates for 'minorities'. This recommendation for the first time introduced identity politics into the Indian regime by classifying groups as majority and minority. Minto justified the provision of separate electorates for Muslims because according to him they were 'a separate community, distinct by marriage, food and custom, and claiming in many cases to belong to a race different from the Hindus'. The emphasis was on the magnification of differences between different groups on the assumption by the British that a group will only protect its own interests. However, the Constituent Assembly dealt with the question of 'plurality' in a significantly different manner. When the Constituent Assembly was called to decide the fate of separate electorates in independent India, they decided that its inclusion was not essential to and even contrary to the requirements of a pluralistic society. They rejected separate electorates and dismissed the relevance of numerical disadvantage in a polity. The framers of the Constitution rejected the notion of a Hindu India and a Muslim India. They recognised only the Republic of India. As one member<sup>38</sup> of the Constituent Assembly said – "we should proceed

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<sup>38</sup> Hukam Singh, 8.92.14, Speech in the Constituent Assembly.

towards a compact nation, not divided into different compartments” but one where “every sign of separatism should go”. As another member<sup>39</sup> said – “There will be no divisions amongst Indians. United we stand; divided we fall.” The framers provided safeguards for the protection of individual identity as a part of a group and placed trust in future generations to create a common bond of what it meant to be Indian that shunned homogeneity and celebrated diversity in a manner that is not divisive. It is that trust of the framers that we strive to live up to today.

Fraternity can only be realised when there exists a nation where different groups do not merely coexist, but also share a common thread of tolerance, love, respect and affection. For example, the Rakhi protest called by Rabindranath Tagore<sup>40</sup> prevented the partition of Bengal with people exercising a token of solidarity and harmony. Historian Arnold Toynbee sums up this message when he says that we must learn to recognize and understand the different cultural configurations in which our common human nature has expressed itself. However, we must move

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<sup>39</sup> Tajamul Hussain, 8.92.50, Speech in the Constituent Assembly.

<sup>40</sup> Deepanjan Gosh, In Bengal, the bond of Rakhi once symbolised eternal protection- between Hindus and Muslims, Scroll, 7 August, 2007 (last accessed on 4 February, 2020). Available at: <https://scroll.in/magazine/846275/in-bengal-the-bond-of-rakhi-once-symbolised-eternal-protection-between-hindus-and-muslims>.

beyond understanding them and value them and love them as being parts of mankind's common treasure and therefore being ours too.<sup>41</sup>

The transgender community in India is traditionally self-organised in a system of *gharanas* and enjoys a vastly different form of *chosen* familial bonds, reflecting an age-old culture.<sup>42</sup> However, their lifestyle and culture has been treated as an aberration and has faced systematic stigmatisation. As a result, these communities are pushed to the fringes of society which affects their access to opportunities despite having received legal protection by the Court<sup>43</sup>. On the ground, these communities still suffer greatly. Similarly, the lifestyle and culture of LGBT persons has been treated as an aberration, facing systematic stigmatisation. As a result, these communities are pushed to the fringes of society, affecting access to opportunities. The judgments in **NALSA**, recognizing transgenders as a third gender, and in **Navtej Johar** decriminalizing consensual sexual activities between people of the same sex, do not directly translate to complete freedom and equality of members of the LGBT community in India.<sup>44</sup> There is much to be done in the

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<sup>41</sup> Arnold Toynbee, *A Study of History in Approaches to Islam in Religious Studies* (Richard C. Martin, ed.), Oxford: Oneworld Publications (2001), at p. 105.

<sup>42</sup> Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, *Women's Studies Quarterly* Vol. 42, No. ¾ (2014), at pp. 286-291.

<sup>43</sup> *National Legal Services Authority v. Union of India* [Writ Petition (Civil) No. 400 of 2012].

<sup>44</sup> Zainab Patel, *The long road to LGBT equality in India*, UNDP India, 17 May 2019 (last accessed on 4 February, 2020). Available at: <https://www.in.undp.org/content/india/en/home/blog/lgbtequalityindia.html>

project of fully integrating these communities in Indian society, the least of which is recognizing their entitlements to all civil rights.

The Constitution in its reformative spirit made major efforts to ameliorate the effects of the historic injustices founded in caste discrimination by making provisions for affirmative action, with the ultimate goal of giving meaning to the Constitution's promise of substantive equality. As one member of the Constituent Assembly said - 'If any kind of appeal to individual liberty and freedom is construed to mean an appeal to the continuation of the existing inequality, . . . then you become static, unprogressive.'<sup>45</sup> Selection of socially and educationally backward classes for the purpose of affirmative action has been a continuing process,<sup>46</sup> and has increased representation of these classes.<sup>47</sup> There is, however, a need to go beyond the mere representation of caste identities. A solution to deeply embedded forms of caste discrimination must come from within society. Dr Ambedkar advocated for inter-caste marriages,<sup>48</sup> which even today are resisted by the shackles of tradition. While the law makes stringent punishment for all acts of discrimination and the courts

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<sup>45</sup> Parliamentary Debate, XII, 16 May 1951.

<sup>46</sup> Frank de Zwart, The Logic of Affirmative Action: Caste, Class and Quotas in India, *Acta Sociologica*, Vol. 43, No. 3 (2000), at pp. 235-249.

<sup>47</sup> Press Trust of India, Representation of SCs, STs in government jobs above prescribed percentage, *Hindustan Times*, 18 July 2019 (last accessed on 4 February, 2020). Available at: <https://www.hindustantimes.com/education/representation-of-scs-sts-in-government-jobs-above-prescribed-percentage/story-9PWz5wqf2cdkdRxcwLQdII.html>

<sup>48</sup> Bhalchandr Mungekar, Annihilating Caste, *Frontline*, Volume 28 - Issue 15, 16-29 (2011). Available at: <https://frontline.thehindu.com/static/html/fl2815/stories/20110729281509500.htm>

guarantee constitutional protection, the need is for an all-embracing social movement<sup>49</sup> to embrace, respect and empower people from all segments irrespective of ascribed identities. It is in our seeking answers to difficult questions that the true battle for a plural India is waged.

Cultural values and political pluralism serve as a moniker to encompass the Indian idea of pluralism which cuts across religious, linguistic and regional differences. India, in keeping with her immense territorial diversity, contains within varying cultures that influence our ways of life including food and lifestyle, non-religious beliefs and practices, which are not exclusive to any single religion or language. This shared sense of 'culture' is unique, for it is simultaneously distinct, but also overlapping and lends itself to the idea of a layered 'Indianness', rather than a singular characterisation.

This 'layered' conception has remained guarded and preserved through Indian history. It has over the years represented a rejection to calls for assimilation. To put it differently, this 'layered' identity, in itself, is what makes it 'Indian' and must be central to our understanding of pluralism and efforts to foster it. We must

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<sup>49</sup> Suhas Broker, How to be free of caste in India, The Hindu, 13 Apr 2016 (last accessed on 4 February, 2020). Available at: <https://www.thehindu.com/opinion/op-ed/how-to-be-free-of-caste-in-india/article8467518.ece>

endeavour to broaden the scope of the mainstream and bring forth voices that have often been side-lined or worse, been disapproved. The celebration of difference is not merely a step towards cultural tolerance. Going beyond tolerance, it forms the basis for equal treatment both socially and legally, in relation to opportunities and identities within the public sphere. We must embrace a participatory form of pluralism. Rather than being a mere acknowledgement of difference, it strives earnestly towards engaging and facilitating diversity in the public sphere.

What is of utmost relevance today, is our ability and commitment to preserve, conserve and build on the rich pluralist history we have inherited. Homogeneity is not the defining feature of Indianness.

M A Kalam, a celebrated anthropologist wrote in a piece that: “a visible, discernible, lively and successful engagement with diversity, is pluralism indeed”. This definition calls upon us to look at each other and recognise that our differences are not our weakness. Our ability to transcend these differences in recognition of our shared humanity is the source of our strength. Pluralism should thrive not only because it inheres in the vision of the Constitution, but also because of its inherent value in nation building.

Today I have attempted to share with you the vision and spirit of pluralism that I believe has always defined India. India is a sub-continent of diversity unto itself. The mere mention of 'India' evokes in every person a different idea which they associate with the nation. Anybody truly conversant with Indian history will tell you that the single defining hallmark of 'ancient India' was its divergent, scattered and fragmented nature. It has been for centuries a land of vibrant diversity of religion, language and culture. Pluralism has already achieved its greatest triumph – the existence of India. The creation of a single nation out of these divergent and fragmented strands of culture in the face of colonial tyranny is a testament to the shared humanity that every Indian sees' in every other Indian. The nation's continued survival shows us that our desire for a shared pursuit of happiness outweighs the differences in the colour of our skin, the languages we speak or the name we give the almighty. These are but the hues that make India and taking a step back we see how altogether they form a kaleidoscope of human compassion and love surpassing any singular, static vision of India. Pluralism is not the *toleration* of diversity; it is its celebration.