State of the Union

Early elections and full statehood are essential to the total integration of J&K with India

Prime Minister Narenda Modi's address to the nation on Thursday may not have reached its primary audience in Jammu and Kashmir which was in blackout. But he did well by speaking out on his decision to revoke its special status, and divide it into two Union Territories. Considering the secrecy and disinformation that preceded the decision that he rightly characterised as historic, and the triumphalism among his supporters that followed, the address was reassuring. The promises he made will be checked against delivery in the coming months, not only by the people of J&K but also by the rest of India and other countries. In his 37-minute address, Mr. Modi promised restoration of statehood to J&K once normalcy returned, a participatory election, and growth in employment, commerce and opportunities in general for them. The PM urged industrialists to set up shop, and film-makers to shoot in the Valley, and asked people there to integrate with the global community. He even offered a catalogue of products and services that could make the State attractive in the global market. While these are desirable objectives, the PM could start with what is exclusively within his powers to effect – to call for fresh election and restore statehood at the earliest. While an elected government itself will be a sign of improvement in the situation, it will also make normalcy more organic. Revocation of statehood was unjustified in the first place, and its restoration must be immediate.

What actually triggered separatism and terrorism in J&K – whether the special status and autonomy it was granted by the Constitution, or the gradual erosion of these concepts over decades – is a difficult question, but the BJP has always claimed to have known the answer. The PM reiterated that position, stating that Articles 370 and 35A gave only "separatism, nepotism and corruption to the people of J&K". Additionally, he also said these were hurdles in the region's development; and now that these are removed, an era of development and progress could be ushered in. While the charges of corruption and nepotism are true to an extent, there is no reason to suggest that J&K has been any worse than other States in this respect. The implied reductionism in the address that political aspirations may be a price worth paying for material progress may not be a democratic path to progress. No other formation in India is more vociferous than the BJP on questions of culture, heritage and faith. National integration is essential for peace, stability and progress, and uniform development across regions, but this is not synonymous with an enforced cultural homogeneity. J&K needs a representative government and full statehood urgently for normalcy and integration with the Indian Union.

Taking on the mob

Rajasthan's laws on lynching, 'honour killing' are inevitable responses to rising hate crimes

It is possible to argue that there is no need to create new criminal offences for 'lynching' and 'honour killing' because they remain plain murders. These are already punishable with death or life imprisonment. Yet, mob lynching and murderous attacks on young couples in the name of preserving family or community honour have emerged as preponderant social evils. It is but inevitable that societies come up with new ways of combating such hate crimes. Rajasthan has made bold to grapple with these two crimes by passing special penal laws. Vigilante mobs have unleashed a wave of crimes in the name of cow protection and preventing the sale of beef or transport of cattle; the spread of rumour and attempts to establish sectarian dominance have also contributed to this disturbing phenomenon. The Supreme Court zeroed in on the nub of the trend when it spoke of "rising intolerance and growing polarisation" in a judgment last year. It also mooted a special law to criminalise it and "instil a sense of fear" among those too quick to form a lynch mob. The passage of the Protection from Lynching Bill, 2019, makes Rajasthan the second State, after Manipur, to implement the suggestion. A positive feature is that it closely resembles the Manipur law in the way "lynching" is defined. It covers any act of violence, whether spontaneous or planned, by a mob on the grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation or ethnicity. And two persons are enough to constitute a 'mob'.

According to the State's Parliamentary Affairs Minister, 86% of mob lynching incidents reported in India after 2014 were in Rajasthan. The Bill says that when a mob attack ends in death, it is punishable with life imprisonment and a fine of up to ₹5 lakh. There are lesser terms for causing injuries. As directed by the Supreme Court, the Bill provides for appointment of a nodal officer to prevent lynching and for district police chiefs to act as coordinators. It ensures compensation to victims and rehabilitation measures for those displaced. The opposition BJP, on expected lines, contended that the Bill was being brought in a hurry to please a community. However, it is a fact that Muslims have been prime targets of lynch mobs. The party's fulmination against the other Bill that prohibits interference in the "freedom of matrimonial alliances in the name of honour and tradition" was equally bereft of substance, as it cited societal norms and cultural practice to oppose the progressive law. In effect, it was batting for khap panchayats that seek to interdict inter-caste marriages. The Bill provides for both death and life imprisonment for killing in the name of honour, but it is doubtful if courts will look at all such murders as among the 'rarest of rare cases' that warrant the resort to the death penalty.

Incisive interventions that blunt the RTI's edge

With the kernel of the Information Act under threat, the independence of the information commission is in peril

SUHRITH PARTHASARATHY

When we describe India as a democracy what do we really mean? Are we referring merely to a system of popular sovereignty founded in universal adult franchise? Or are we suggesting something more – perhaps an assurance, grounded in the Constitution, of a set of rights, of the rights, among others, to a freedom of expression, life and personal liberty, and equal opportunity and status?

These are questions, as Astra Taylor argues in her remarkable new book, *Democracy May Not Exist, But We'll Miss It When It's Gone*, that we must perpetually ask ourselves. If nothing else to remind oneself that while there can be reasonable disagreements over how a republic ought to be structured, seeing democracy as purely an enforcement of majoritarian will, where the only end in mind is the selection of a representative government, leads to self-rule "becoming not a promise but a curse". Evidence throughout history has shown us that just results do not necessarily follow from a simple guarantee of equal status enshrined in a right to vote. The wealthy and the dominant classes find uncanny ways to ensure concentration of power. Democracy, therefore, has to percolate beyond the bare promises of formal political equality.

It is to this end that India's Constitution provides a framework for governance by pledging to people a set of inviolable guarantees. But realising the full value of those guarantees at times requires a parley with the state. It was one such long battle, fought over nearly two decades, driven by the unstinting efforts of the Mazdoor Kisan Shakti Sangathan, that resulted in the enactment in 2005 of the Right to Information Act (RTI Act). By any account, the law proved transformative to India's democracy; it revolutionised the citizen's ability to engage with the state, arming people with a mechanism to ferret out some of the truth from the government's otherwise secretive operations.

Deep-reaching amendments

Today, though, the kernel of the RTI Act is under threat. New amendments have been passed without subjecting the draft law to scrutiny by a parliamentary committee. A feature common to every law enacted by Parliament in its present session, this portends the reduction of governance to a form of democracy by crude acclamation. The changes made include an alteration to the term in office of the information commissioners (ICs) and to the manner of determination of their salaries. In place of the existing five-year term accorded to the Central Information Commissioner (CIC) and the various ICs the law grants to the Union government the power to notify their terms through executive regulations. What is more, the amendment deletes the RTI Act's mandate that the salary paid to the CIC and the ICs ought to be equivalent to that paid respectively to the Chief Election Commissioner and the Election Commissioners (ECs). Now, the salary, allowances, and terms and conditions of service of the CIC and the ICs will be determined by executive guidelines.

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On its face, a reading of these amendments might not strike us as being especially harmful. The changes may appear to be nothing more than matters of legislative niceties. But the RTI Act is not an ordinary statute. It is a law that enlivens and animates the basic right to freedom of information. Although such a right is not enumerated in the Constitution, the Supreme Court has repeatedly affirmed its position as intrinsic to the right to freedom of expression (for example, in *PUCL v. Union of India*, 2004).

It might be difficult to see the merit in this finding if we take democracy to mean governance by the many and nothing more. But as the courts have wisely recognised, information often acts as a great leveller; it helps anchor democratic action. Therefore, for democracy to be valuable, citizens must possess a right to freely express themselves. It ought to follow then that it is only when citizens have a right to know what the state is up to, where governance is transparent, can their speech have genuine meaning; only then can they constructively participate in the veritable marketplace of ideas.

It was with a view to giving effect to these constitutional promises that the RTI Act was formulated. Extensive debate was held both in Parliament and within parliamentary committees before it was decided that public authorities ought to be mandated by law to making a series of voluntary disclosures on their structure, their functioning, and their financial management. Besides this basic directive, citizens are also empowered under the RTI Act to seek and obtain any information from public authorities, barring a few exempted categories such as information which might affect the sovereignty of the country or private information which might have a bearing on a person's right to privacy.

Ferreting out the truth

This freedom to secure information that the law provides has, in many ways, redesigned the structure of India's democratic governance. It has helped open the government up to greater scrutiny. For example, it was through a response to a request made under the RTI Act that it was discovered that between 2006 and 2010 more than ₹700 crore had been diverted from Delhi's special component plan, intended for the development of Scheduled Caste communities, to projects related to the Commonwealth Games. More recently, an exposé by Rohini Mohan into the horrifying processes of the "Foreigners Tribunal" in Assam was made on the back of securing information through the RTI Act. Even there, as Ms. Mohan has pointed out, only five out of the 100 functioning tribunals replied to requests for copies of the orders delivered.

It is when a plea for information goes unheeded that the CIC and the ICs play an especially vital role. Should the initial request for information made to a public information officer, designated by each public authority, fail, the petitioner is entitled to lodge an appeal to an authority within the department concerned. Should that entreaty fail too – and it often does since this is a virtually illusory remedy – a further appeal can be made to the office of the CIC or the State Information Commission.

Until now, the RTI Act granted an acceptable level of independence to ICs. By placing their terms of service on a par with those of the ECs the law insulated the ICs from political influence. This protection was not dissimilar to the autonomy accorded to members of the higher judiciary. The basic idea remained the same: security in office is imperative if members must intervene without fear or favour to ensure that the law's mandate is met.

It could well be argued that the RTI Act, in its original form, was far from flawless, especially in that it did not do enough to open up public authorities to complete scrutiny. But the present amendments, far from strengthening the existing regime, subvert the independence of the information commission. The delegation of the power to fix the tenure and the salaries of the CIC and the ICs to the political executive places the information commission's autonomy in a state of peril. With the withering of that independence, the right to freedom of information also begins to lose its thrust. Ultimately, therefore, the new amendments represent a classic piece of totalitarian legerdemain. Democracy, to borrow the American philosopher Cornel West's conception, demands a "leap of faith". If the new amendments are allowed to stand, making that leap becomes all the more implausible.

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Not the final word from Islamabad and Delhi

There are already signs that the Kulbhushan Jadhav case between Pakistan and India might return to the ICJ

VANSHAJ RAVI JAIN

The publication of the International Court of Justice's award in the Kulbhushan Jadhav case on July 17, 2019 was heralded by both India and Pakistan as a victory to their side; the truth probably lies somewhere in between. The award vindicated India's claims on merit, concurring that Pakistan was guilty of multiple violations of the Vienna Convention on Consular Relations (VCCR): by failing to inform Mr. Jadhav of his rights under Article 36 of the treaty, by neglecting to notify India of his arrest without delay, and by denying him consular access. Nonetheless, the ICJ rejected India's claims on two crucial grounds: fair trial rights and remedy.

The bedrock

Much of India's case hinged on Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees individuals the right to a fair trial. By convicting Mr. Jadhav through a military tribunal, using video evidence of a confession obtained under coercive circumstances, and by denying Indian consular officers the opportunity to arrange for his legal representation, India argued that the Pakistani state had employed an unjust procedure in his trial. Predictably, however, the ICJ chose to hinge its jurisdiction in this case on Article 1 of the Optional Protocol to the VCCR, which grants the ICJ compulsory jurisdiction only over disputes arising out of the application or interpretation of the Consular Convention. The unfortunate consequence of this choice was that disputes pertaining to violations of other international law norms, such as the human rights obligations under the ICCPR, were ruled to be outside the remit of the ICJ's jurisdiction. India's attempts to have the ICCPR piggyback on the VCCR, by claiming that the latter was also, in essence, a human rights treaty and by asserting that the inclusion of the ICCPR was necessary for an effective remedy, were rejected out of hand.

Issue of remedies

The more troubling aspect of the ICJ's award, from the Indian perspective, concerns the ICJ's decision on remedies. It denied India's prayer to set aside Mr. Jadhav's conviction by the military tribunal, and for his release. Instead, it ruled that the appropriate remedy would be for Pakistan to carry out an "effective review and reconsideration" of the tribunal's conviction and sentence. What this means, in simpler terms, is that Pakistan will have to provide Mr. Jadhav a judicial mechanism to assess the prejudice caused to him by a denial of consular access, and

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to reconsider (and possibly alter) his sentence and conviction based on its findings.

While not entirely unforeseeable, this decision is worrying for several reasons. First, this remedy carries a fraught history: it has only ever been used before by the ICJ in *LaGrand* and *Avena*, which involved an identical denial of consular access to nationals of Germany and Mexico, respectively, by the United States. Crucially, the unsatisfactory implementation of this remedy and the weak review mechanisms provided by the U.S. in response to the ICJ's decision in both cases have been widely noted in academic literature. Second, the remedy does little to account for the violation of Mr. Jadhav's fair trial rights. This means that the review procedure Pakistan opts for might well be one carried out by a military tribunal, and also one that continues to rely on the allegedly-forced video confession. But perhaps the most troubling aspect of this remedy, and the one that makes it most ripe for further litigation, is that it is intrinsically ambiguous.

Apart from asserting that the review and reconsideration of Mr. Jadhav's conviction "must be effective", the ICJ has offered little guidance on how it must be carried out. It is known, from the *Avena* judgment, that providing Mr. Jadhav access to a clemency petition (as Pakistani law does) is an insufficient form of review, since it does not entail the use of a judicial mechanism. The Pakistani Supreme Court, in *Said Zaman Khan v. Federation of Pakistan*, ruled that the state's civilian courts could only review the decision of a military tribunal on the narrow grounds of *coram non judice* (i.e., an absence of jurisdiction) or *mala fides* (bad faith). It is unlikely that Mr. Jadhav's denial of VCCR rights falls under either category. However, the decision in *Said Zaman Khan* is under review, following the Peshawar High Court's attempts to widen it in 2018, in the Abdur Rashid case.

Heading back to The Hague?

The outcome of the latter case may well portend the use of a civilian review mechanism for Mr. Jadhav's case. Even if the Rashid case fails, Pakistan could potentially be required to alter their laws to provide a more effective review mechanism for decisions of military tribunals: a fact alluded to by the ICJ, which stated that "Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation" [emphasis added].

Ultimately, though neither state will admit it, the Jadhav decision will be a bitter pill to swallow for both India and Pakistan. For Pakistan, making a significant alteration to its legal system would amount to an admission that the ICJ's judgement was a public admonition of Pakistan's judicial review mechanism: a prospect Pakistan is unlikely to welcome. For India, any review mechanism that fails to acquit Mr. Jadhav will be seen as procedurally unsound, and an attempt by Pakistan to further shirk its international legal responsibilities. It does not help that both countries have dug themselves into holes by thoroughly politicising the ICJ's verdict.

The likely consequence is that, irrespective of what review mechanism Pakistan implements, both nations will be soon be back, knocking on the door of the International Court: the ICJ's Statute allows parties to approach the court again, asking it to interpret its judgment. Signs of this outcome can already be witnessed, with Pakistan refusing India unimpeded access to Mr. Jadhav through a note verbale issued mere weeks after the ICJ's decision. India's counsel, Harish Salve, has publicly stated that the state will not hesitate to return to the ICJ if Pakistan's conduct proves to be unsatisfactory. It is increasingly likely that we haven't heard the last of the Jadhav litigation. For now, however, the ball remains in Pakistan's court.

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LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Pakistan's stance

Strange as it might seem, the reverberations over the Central government's decision to abrogate Articles 35A and 370 and re-designate Jammu and Kashmir as a Union Territory appear to be felt more in neighbouring Pakistan than in the Kashmir Valley itself (Editorial, "Knee-jerk", August 9). A flurry of activity has been witnessed in Pakistan – expulsion of the Indian envoy, bilateral trade coming to a halt, and even a refusal to grant consular access to Kulbhushan Jadhav. What is even more of an oddity is Pakistan which has absolutely no locus standi as far as Kashmiri affairs are concerned also threatening to take the matter to the United Nations Security Council. India has to thwart all efforts by Pakistan to meddle in our internal affairs.

C.V. ARAVIND,
Bengaluru

■ Before it rushed ahead with snapping trade ties with India, debt-ridden Pakistan should have understood that trade is a basic need for employment and income generation for its people. Also reorganising its own State is India's internal matter. Even on the diplomatic front, the rest of the subcontinent has recognised this as fact. Pakistan must shun its policy of state-sponsored terrorism as it is already on the grey list of international donor agencies for terror-financing. It should continue to engage in talks with India at the bilateral level and resolve all pending issues.

HARVINDER SINGH CHUGH,
Jalandhar City, Punjab

Bank nationalisation

None can dispute the beneficial impact of bank nationalisation on the Indian economy but let us not forget that everything is transient in its time and place (Editorial page, "Economic milestone and a poignant anniversary", August 9). There are obvious unwanted consequences and developments that call for change now. The recommendations of the Narasimham Committees on banking sector reforms in the 1990s deserve a closer look. The point of non-performing assets, the inherent deficiency of public sector banking in many areas and new issues require a holistic look. Other issues include mergers of banks, the structure of non-banking financial companies and small- and medium-enterprises, holistic consolidation in banking and industrial structures. Change is of the essence.

K.U. MADA,
Mangaluru

■ The fact that much of the growth of agricultural credit since 2001 has been cornered by "big agri-business farms and corporate houses located in urban and metropolitan centres" goes against the basic credo of nationalisation. Other points in the article highlight the need to expand the rural banking network and instructional credit. That privatisation of nationalised banks is a panacea for all the ills of the banking sector would spell disaster for the rural economy. It would be far more prudent to correct systemic faults that have crept in the sector in the course of the last 50 years than reversing a policy measure that has made financial inclusion a reality. Even merger to create a few leviathans may prove to be counter productive.

KOSARAJU CHANDRAMOULI,
Hyderabad

Green ambassador

Striking a balance between environmental concerns and development is no doubt difficult, but the photograph of a nine-year-old girl in Manipur crying over felled trees as a result of a road widening project in that State is anguish and distress that anyone who is environmentally conscious can understand ('Life' page, "Girl who cried over felled trees is Manipur's green ambassador", August 9). However, the gesture of the Manipur government in making her a green ambassador, offering 20 saplings to her and extending her other concessions, will go a long way in not only assuaging her distraught feelings but also making it clear that there exists a government that cares for its citizens. That the Chief Minister himself intervened in the matter is gratifying. The incident needs to be highlighted in all educational institutions so that the younger generation is encouraged to do its bit in the protection of the environment.

V. SUBRAMANIAN,
Chennai

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