



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Nationalism: To be or not To be: A Basic Feature of The Constitution: A Philosophical Conundrum

Ranita Jana^a

^aXIM University, Bhubaneswar, India

Received 05 March 2022; *Accepted* 21 March 2022; *Published* 25 March 2022

“Nations whose Nationalism is destroyed are subject to ruin”

- Muammar al-Gaddafi

With the completion of 75 years of Independence, India has grown as a nation of influence in the global sphere and stands exemplary as a liberal democracy. However, as the country rejoices the freedom struggle of her martyrs, it is pertinent to re-visit the fervor nationalism they had demonstrated to rightfully liberate India and Indians from the prolonged British colonization. The paper attempts to answer the present position of ‘Nationalism’ as a principle in India where rule of law is the ultimate dictum. To deliberate the same with a central focus, the paper has weighed the scope of Nationalism within the Basic Structure of the Constitution by considering both sides of the argument in Part II and Part III of the paper. Nationalism as a part of the Basic Structure must be in tune with the existing features while considering that otherwise, nationalism is inherent to the Constitution and is based on the philosophies of the Freedom struggle. The paper finally concludes that Nationalism needs to shed off the mainstream ideology to be localised for the Indian socio-economic and political scenario. Nationalism in India should take the form of constitutional nationalism. The author has adopted a doctrinal method of research and has analysed several philosophies circumscribing Indian Nationalism in association with the legal doctrines.

Keywords: *nationalism, constitution, basic structure, philosophy, freedom.*

INTRODUCTION

Constitution is no ordinary legal document and the sanctity of the same is ensured by the doctrine of Basic Structure. There is no exhaustive list of features to enunciate the scope of 'Basic Structure of the Constitution of India'. However, through innumerable judgments of the Apex Court, the doctrine has been rendered a descriptive value if not a definitive value and it is pertinent to acknowledge that the "*doctrine of basic structure*" substantiates a hierarchy in legal norms¹ as observed by Patanjali Sastri, J., in *Sankari Prasad* case²:

*"(T)here is a clear demarcation between ordinary law which is made in exercise of legislative power, and constitutional law which is made in exercise of constituent power."*³

The inherent supremacy of the Constitution of India traces its efficacy from the *doctrine of Basic Structure* per se. It is further substantiated by the Pure Theory of Law posited by the legal philosopher Hans Kelson. He introduced the concept of 'grundnorm' which he hypothesised as the basic norm from which all other legal norms seek their validity. Norms, according to Hans Kelson, are prescriptive in nature and therefore, are ought to be obeyed.⁴ In his hierarchical arrangement of such legal norms where each norm traces its validity from another, the ultimate root is found in the grundnorm beyond which no norms are existent. It is at this point that the validity of the grundnorm or the basic norm is established through presupposition and the obedience of the population to the same.⁵ This is in further consonance with the 'rule of recognition' propounded by the legal philosopher H. L. A Hart in his work, "The Concept of Law". The basic norm acquires validity from the fact of social acceptance or

¹ Joseph Minnatur, 'The Ratio in the Kesavananda Bharati Case' (1974) 1 SCC (Jour) <[HTTP://WWW.EBC-INDIA.COM/LAWYER/ARTICLES/74V1A5.HTM#NOTE*](http://www.ebc-india.com/lawyer/articles/74v1a5.htm#NOTE*)> accessed 04 March 2022

² *Sri Shankari Prasad Singh DEO v Union of India and Sate of Bihar*, [1951], AIR 458 (SC)

³ *Ibid*, 463

⁴ Khyati Sharma, 'The Efficacy of Grundnorms in Legal Systems of India and UK: A Comparative Study' (2019) 2 (4) IJLMH <<https://www.ijlmh.com/wp-content/uploads/2019/10/The-Efficacy-of-Grundnorms-in-Legal-Systems-of-India-and-UK-A-Comparative-Study.pdf>> accessed 04 March 2022

⁵ *Ibid*

recognition. Other legal rules assume validity because of their conformity with this basic norm.⁶ The ‘doctrine of basic structure’ is propounded to save the basic features of the Constitution. In India, the basic norm is the “doctrine of basic structure”⁷ because the Parliament can amend the Constitution as authorized under Article 368⁸ but it is subjected to procedural and subjective limitations where the latter is the basic structure doctrine per se. Thus, except for the part implied to form the Basic Structure, the remaining part of the Constitution is amenable and the amendment is validated if it does not encroach these limitations. This concretizes the permanent will of the people instead of the temporary whims and percolates the flow of constitutional justice⁹ as the Supreme Court observed in the *Kesavanandabharti*¹⁰ case, “Court being the custodian of the Constitution, must defend the values propagated by it from the over ambitiousness of the legislature”

Furthermore, the Basic Structure is accommodated within the periphery of the doctrine of Implied Legislation wherein certain features of the same are not explicitly but implicitly laid down in the Constitution nevertheless, they are inviolable and unamenable.¹¹ It further contemplates that there are certain parts or aspects of the Constitution which constitute the core values that if allowed to be abrogated would change completely the nature of the Constitution.¹² It is this unchartered sphere of the doctrine that renders it to expand and accommodate further explicit features where the paper circumscribes particularly for the feature of ‘Nationalism’ within the fundamental norm of the Basic Structure.

The Supreme Court held in the case of *M. Nagaraj v Union of India*¹³,

“For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is

⁶ Joseph Minnatur (n 1)

⁷ *Ibid*

⁸ Constitution of India 1950, art. 368

⁹ Mridushi Swarup, ‘Kelson’s Theory of Grundnorm’ (*Manupatra*)

<<http://www.manupatra.com/roundup/330/Articles/Article%201.pdf>> accessed 04 March 2022

¹⁰ *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225 (SC)

¹¹ *Manoj Narula v Union of India* [2014] 9 SCC 1 (SC)

¹² *I.R. Coelho v State of T.N.* [2007] 2 SCC 1 (SC), 108, para. 140 - 142

¹³ *M. Nagaraj v Union of India* [2006] 8 SCC 212 (SC)

to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure."

In the same case, the twin test of *width test* and the *test of identity* were provided to apply the doctrine of Basic Structure to any amendment to the constitution where "*this amendment is not limited to only articles in the body of the document but any amendment that adversely affect the wider principles of the Constitution.*"¹⁴ It has been alleged that dissent under the regime of the Modi government had faced repercussions from being accused of anti-national activities to terrorism and sedition.¹⁵ However, nationalism in Indian polity is intricately intertwined with religion so much so that its existence is palpable since the Vedic age. Nevertheless, the framework of Indian democratic governance has accommodated dueling nationalism broadly bifurcating into secular and Hindu nationalism with the changing philosophical touchstone of each political party and freedom fighters¹⁶. Their competing visions for what constitutes the identity of India have kept this debate immortal. With the seminal decision of the Apex Court in the *Kesavanandabharti*¹⁷ case, the debate has shifted to the validity of sanctions on citizens' rights owing to national perceptions and therefore had gained predominant ground of further deliberations. To essentially reach an enriched conclusion of this philosophical conundrum of whether Nationalism is constituted as a basic feature of the Constitution, the author will attempt to elaborately deliberate upon the same from a binary perspective, weighing its inclusion from each side one at a time.

NATIONALISM NOT TO BE A BASIC FEATURE OF THE CONSTITUTION

If nationalism is considered as a basic feature of the Constitution, in all reasonableness it should align with the existing features of the Constitution. With this assumption, the following argument is submitted in this paper where nationalism will be tried against the objects

¹⁴ *Ibid*, 268

¹⁵ Meenakshi Ganguly, 'Dissent is 'Anti-national' in Modi's India' (*Human Rights Watch*, 13 December 2019) <<https://www.hrw.org/news/2019/12/13/dissent-anti-national-modis-india>> accessed 05 March 2022

¹⁶ Milan Vaishnav, 'Religious Nationalism and India's Future' (*Carnegie Endowment for International Peace*, 4 April 2019) <<https://carnegieendowment.org/2019/04/04/religious-nationalism-and-india-s-future-pub-78703>> accessed 05 March 2022

¹⁷ Kesavananda Bharati (n 10)

enshrined in the Preamble of the Constitution, the individual rights guaranteed in the same, and the mandate of a welfare state as envisioned for India.

OBJECTS ENSHRINED IN THE PREAMBLE COERCED WITH THE PRINCIPLE OF NATIONALISM

As held in the case of *Re Berubari case*¹⁸, the Preamble even though is not enforceable in the Court of law, states and directs the objectives that the Constitution seeks to establish and promote and also helps in the interpretation of the Constitution where the legal language is obscured by ambiguity. Therefore, Sikri, C.J. while providing the very first list of basic features in the case of *Kesavananda Bharati v the State of Kerala*¹⁹ observed that these features are “discernible not only from the Preamble but from the whole scheme of the Constitution” that would constitute the “basic foundation and structure” of the Constitution of India. The Court enlisted two significant basic features among others in the case of *Smt. Indira Gandhi v Raj Narain*²⁰ which are, “India is a sovereign democratic republic” and “Equality of status and opportunity shall be secured to all its citizens”. To realize these features at their full potential, they cannot be in coherence with the principle of nationalism.

Nationalism, as one of the prominent Freedom Fighters and philosopher, Rabindranath Tagore noted,

“By this device people who love freedom perpetuate slavery in a large portion of the world with the comfortable feeling of pride of having done its duty; men who are naturally just can be cruelly unjust both in their actions and their thought, accompanied by a feeling that they are helping the world in receiving its deserts; men who are honest can blindly go on robbing others of their human rights for self-aggrandizement, all the while abusing the deprived for not deserving better treatment.”²¹

¹⁸ *The Berubari Union and Ors. v Unknown* [1960] 3 SCR 250 (SC)

¹⁹ *Ibid*

²⁰ *Smt. Indira Gandhi v Raj Narain* [1975], AIR 2299 (SC)

²¹ Nitin Pai, ‘Patriotism without Nationalism’ (*The Hindu*, 23 February 2016)

<<https://www.thehindu.com/opinion/op-ed/jnu-row-patriotism-without-nationalism/article8268143.ece>>

accessed 24 February 2022

Tagore's political views on nationalism are concentrated on universal humanism.²² His writings predominantly percolate the criticism for blind nationalism which slowly grips the man with an amoral, narrow perspective of a nation where violence is justified under the garb of fanaticism for the organization and political connotation of a nation. It is pertinent to clarify that Tagore was not against the struggle for freedom nor did he criticize the progressive modernism imbibed in his protests time and again, but he was vehement against this self-ravaging system that devours a man of his human sensibilities and puts a nation above people and humanity. The idea of nationalism propagated by Dr. B. R. Ambedkar was in consonance with that of Tagore where Ambedkar disapproved of the notion of mainstream nationalism.²³ Ambedkar, in his ideology, emphasized Humanism, with its values of equality and liberty, as above nationalism. While Hinduism tends to be considered as the national religion of India in the contemporary time, Ambedkar looked at it as scornful of human dignity, as opposed to Buddhism.²⁴ The author, therefore, submits that Dr. Ambedkar has perceived nationalism coherent to India as religious nationalism where both religion and nationalism cannot be practised in isolation. This pertains to the ethics, practices, and beliefs of Hinduism which in his opinion is the cause of inequality and casteism and therefore anti-thesis to the idea and principle of equality and opportunity which prima facie contravenes the objectives enshrined in the Preamble to the Constitution. The association of religion and nationalism in India is scarcely novel. The essence of which is significantly dominated in the ideologies of Veer V. D. Savarkar. He propounded that commitment to the nation cannot be without an essential confluence with the commitment to one's religion.²⁵ He popularised and strongly advocated for Hindu Nationalism. Hindu, as he perceived, must fulfill the two pre-conditions of their genesis at the cradle of Bharat and thus, share a common undivided allegiance to her, both

²² Poulami Chakraborti, 'The Notion of a Nation: Tagore's Idea of Nationalism, Spirituality and Indian Society' (2019) 4(4) IJLHM <https://ijels.com/upload_document/issue_files/9IJELS-JUN-2019-28-TheNotion.pdf> accessed 05 March 2022

²³ S.M. Gaikwad, 'Ambedkar and Indian Nationalism' (1998) 33(10) EPW <<https://www.jstor.org/stable/4406493>> accessed 05 March 2022

²⁴ Christophe Jaffrelot, 'Ambedkar against Nationalism' (*Carnegie Endowment for International Peace* 14 April 2016) <<https://carnegieendowment.org/2016/04/14/ambedkar-against-nationalism-pub-63331>> accessed 05 March 2022

²⁵ Bindu Puri, 'Hinduism – A Legacy in Dispute: Savarkar and Gandhi' (*Uni Pune*) <<http://www.unipune.ac.in/snc/cssh/ipq/english/IPQ/26-30%20volumes/30-2/30-2-8.pdf>> accessed 05 March 2022

politically and religiously.²⁶The non-Hindus, as per him, have divided loyalty. Religiously they are loyal towards their holy land where their religion was born and politically they are loyal towards the territorial land, Bharat, where they were accepted to reside. Indian nation and Hindu nation are the same for him and he further justified his parochial and communal outlook on nationalism by arguing on the need for survival of the Hindu nation as a cultural and political entity and not as a social entity. This is because according to him, liberal humanism and universalism are distant ideals while India needs the preservation of Hindutva owing to its historical background. Such a conservative idea of nationalism distorts the visions embedded in the Preamble to the Constitution per se.

India is constituted into a “sovereign, democratic republic” to secure to all its citizens, *fraternity* assuring the *dignity of the individual* and the *unity of the nation*.²⁷ Sovereignty under the Preamble besides empowering the State to legislate on any subject as an independent authority without being subjected to any external power also encompasses adherence to the Commonwealth without the allegiance to Crown which is construed as a free association of independent nations.²⁸ Furthermore, Article 51²⁹ of the Constitution substantiates India’s pledge to contribute ‘to the promotion of world peace. Attaining the same essentially negates the essence of nationalism in favoring or striving after the unity, independence, interests, or domination of *a nation*³⁰and not the world as a whole. This further contradicts the ideology of *VasudhaivaKutumbakam* or the world is one family, where striving or favoring one nation alone would not contribute to attaining this objective enshrined under “Fraternity” read with “Liberty” and “Equality” in the Preamble. Mainstream Nationalism cannot be juxtaposed with this ideology for the sustenance of social democracy³¹ and the fulfillment of its international obligations emphasized thereupon.

²⁶ *Ibid*

²⁷ M. Nagaraj (n 13) 247

²⁸ D. D. Basu, *Introduction to the Constitution of India* (24th ed. LexisNexis 2020) 22

²⁹ Constitution of India 1950, art. 51

³⁰ *Nationalism*, (5th ed.P Ramanatha Aiyar: The Major Law Lexicon, 2019)

³¹ Vedant Tiwari & Esham Karanjikar, ‘VasuDhaivaKutumbakam: Indian Concept of Unity in Diversity’ (2021)

2(2) Burnished Law Journal <<http://burnishedlawjournal.in/wp-content/uploads/2021/03/VASUDHAIVA->

Fraternity under the Preamble encircles *universal brotherhood* and is not merely limited to the *bounds of the national territory*³² to align with the vision of Pandit Jawaharlal Nehru on “**one world**”³³ and not merely the interest of one nation. Further, the author submits that the *democratic republic* envisioned under the Preamble is not to confer political democracy or merely a democratic form of government but social democracy via an establishment of a democratic society.³⁴ Pandit Nehru wrote,

"...nationalism by itself seemed to be definitely a narrow and insufficient creed. Political freedom, independence were no doubt essential, but they were steps only in the right direction. Without social freedom and a socialist structure of society and the State, neither the country nor the individual could develop much".³⁵

When the Constitution is amended, the width test or effect test is applied to determine if it is violative of the basic structure of the Constitution. The width test is primarily based on the consequence of the amendment and not its form as the ‘determinative factor’ for the same.³⁶

To determine the consequence an amendment, with nationalism affecting major rights of the citizens, would pose, a dig into the history will be more exemplary.

After the First World War, Germany under its Weimar Constitution was presumed to not only survive but thrive with democratic principles because it was one of the most democratic constitutions in the world then. However, after signing the treaty of Versailles and the subsequent economic crisis that it had to undergo, raised national groups in the nation who associated hurt to national honor or sentiments with Democracy.³⁷ This was further bolstered by the incitement of Adolf Hitler resulting in the second World War eventually and one of the

[KUTUMBAKAM-INDIAN-CONCEPT-OF-UNITY-IN-DIVERSITY-Author-Vedant-Tiwari-Esham-Karanjekar.pdf](#)> accessed 05 March 2022

³² D. D. Basu (n 28) 23

³³ Constituent Assembly Debates, Vol. II, p. 321

³⁴ D. D. Basu (n 28) 23

³⁵ K. R. Narayanan, ‘Nationalism and Democracy in India’ (*The Economic Weekly*, 10 April 1965)

<https://www.epw.in/system/files/pdf/1965_17/15/nationalism_and_democracy_in_india.pdf> accessed 05 March 2022

³⁶ M. Nagaraj (n 13)

³⁷ C. H. Matterson, ‘The challenge to democracy V. Democracy and nationalism’ (*Iowa State University*, 1 August 1941)<<https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1024&context=bulletin>> accessed 5 March 2022

worst Human Rights crises ever witnessed. With the decline of the liberal democracy in India to electoral autocracy³⁸ with substantial curtailment in civil liberties particularly against journalists, human rights groups, and minority community since the NDA government came into power in 2014³⁹ hold reasonable possibility to deteriorate the democratic ideals of India to the world with Nationalism in its basic structure. This is because the present government has invoked national security as a limiting tool for judicial intervention time and again in major cases like the Rafale scam, ban of the internet in Kashmir, Bhima Koregaon controversy, staying of the Rohingya refugees in India, and most recently the Pegasus scandal.⁴⁰ Further, 96% of the seditions cases between 2010 and 2021 were filed after 2014 against alleged anti-national activities and criticism of the government.

NATIONALISM SUFFOCATES CONSTITUTIONALLY GUARANTEED INDIVIDUAL RIGHTS

The golden triangle of the Constitution, **Articles 14, 19, and 21**⁴¹, assures the people of this country of an *egalitarian era* as envisioned in the Preamble through the discipline of fundamental rights. Rights to liberty and equality are inevitable in preserving the dignity of the individual. These elementary rights are *sine qua non* to the functioning of a democratic nation as evident from their international recognition as Human Rights.⁴² Nationalism is inherently contradictory to human rights because it prioritizes national interest above all other concerns⁴³ which is an antithesis to the fundamental rights under Part III of the Constitution that upholds individual rights and liberty as paramount. The democracy of India is characterized by inclusiveness and pluralism which is central in Article 15⁴⁴ and therefore, it

³⁸ 'Autocratization Turns Viral Democracy Report 2021' (V-Dem Institute, 2021) <https://www.v-dem.net/static/website/files/dr/dr_2021.pdf> accessed 05 March 2022

³⁹ Soutik Biswas, 'Electoral Autocracy: The Downgrading of India's Democracy' (BBC, 16 March 2021) <<https://www.bbc.com/news/world-asia-india-56393944>> accessed 05 March 2022

⁴⁰ 'Five Cases in which Central government invoked 'national security' argument' (Bar and Bench, 17 August 2021) <<https://www.barandbench.com/news/litigation/five-cases-in-which-central-government-invoked-national-security-argument>> accessed 05 March 2022

⁴¹ Constitution of India 1950, art. 14, art. 19, and art.21

⁴² *Minerva Mills v Union of India*, [1980] 3 SCC 625 (SC)

⁴³ Emir Yazici, 'Nationalism and Human Rights' (2019) 72(1) Sage Journals <<https://doi.org/10.1177%2F1065912918781187>> accessed 05 March 2022

⁴⁴ Constitution of India 1950, art. 15

facilitates the Court to exercise its institutional authority to prioritize the same in our constitutional identity.⁴⁵ In the case of *Bijou Emmanuel v the State of Kerala*,⁴⁶ the religious right of the Jehovah community permitted them not to sing the National anthem upholding article 25⁴⁷ of the Constitution which essentially shows that even fundamental rights are conferred individually and exercising them is the *sine qua non* to the idea of individual liberty which would be negated on imposing nationalism because it demands adherence to certain restrictive actions for the demonstration of the same. However, it is pertinent to realize that not conforming to these norms of showing nationalism does not pose a threat to national security but only offends the national sentiments which are subjective to each individual. To render their citizens the liberty to enjoy human freedoms, several nations in the civilized world has parted with their sovereignty.⁴⁸ Substantiating the same, it has been held in the case of *Board of Education v Barnette*⁴⁹ and was affirmed in the case of *Union of India v Naveen Jindal*⁵⁰

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Furthermore, the existence of statutes and provisions to deter and criminalise acts against anti-national activities render declaring nationalism under a vaguely defined doctrine redundant and opens a potent scope of misuse.

INDIA AS A WELFARE STATE IS EXCLUSIVE OF NATIONALISM

⁴⁵ Tarunabh Khaitan, 'Guest Post: Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are' (*Indian Constitutional Law and Philosophy*, 9 July 2018) <<https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/>> accessed 05 March 2022

⁴⁶ *Bijou Emmanuel v State of Kerala* [1986] 3 SCC 677 (SC)

⁴⁷ Constitution of India 1950, art. 25

⁴⁸ *Minerva Mills* (n 42), 656, para 61

⁴⁹ *West Virginia State Board of Education v Barnette* [1943] SCC OnLine 134 (US SC)

⁵⁰ *Union of India v Naveen Jindal* [2004] 2 SCC 510 (SC)

Fundamental rights are there to ensure political democracy and to prevent authoritarian rule while directive principles are to establish a welfare state as a mandate and are one of the Basic features of the Constitution⁵¹. The principle of nationalism is fittingly appropriate for a nation-state while it is contradictory to a welfare state where the former focuses on a sovereign rule over a homogeneous nation. Article 38⁵² is pertinent as it ascertains a welfare state by providing justice in all forms – social, economic, and political which cannot be realized by the principle of nationalism which keeps the interest of the nation ahead of society. It is not any constitutional body that is supreme but the Constitution per se and therefore nationalism should be the constitutional nationalism⁵³ and not adherence to any other forms of nationalism based on ethnicity, religion, history, etc. as inherent in the Nationalism propagated in India.

NATIONALISM TO BE A PART OF THE BASIC STRUCTURE

To weigh the deliberations for recognizing ‘Nationalism’ as a part of the Basic Structure, it is predominant to establish that it is consistently read into the Constitution. This can be accomplished when the framework of perceiving nationalism is connoted with a liberal scope.

Justice P. N. Bhagwati observed in the case of, *Pradeep Jain v Union of India*⁵⁴,

“...today the integrity of the nation is threatened by the divisive forces of regionalism, linguism and communalism and regional, linguistic and communal loyalties are gaining ascendancy in national life and seeking to tear apart and destroy national integrity. We tend to forget that India is one nation and we are all Indians first and last”.

The author opines that Nationalism for the Republic of India should be defined *not in western liberal terms*, but the terms of *ancient civilizational values*. However, appreciating the rich history and freedom struggle of the nation against British colonialism, it is pertinent to note that the present patriotic sentiments of the people of India and the National Security should be

⁵¹ Kesavananda Bharati (n 10)

⁵² Constitution of India 1950, art. 38

⁵³ Sidharth Luthra & Nivedita Mukhija, ‘Nationalism Debate, Concerns, and Constitutional Response’ (2018) 30 NLSI Rev <<http://www.sconline.com/DocumentLink/Kna1W742>> accessed 05 March 2022

⁵⁴ *Pradeep Jain v Union of India* [1984] 3 SCC 654 (SC)

considered under the scope of nationalism. The brand of nationalism for the Republic of India must be based on Constitutional nationalism as it demands a citizen's allegiance *not to any religion or school of thought, but only to the constitutional ethos* upholding the basic feature of Supremacy of the Constitution⁵⁵. Most importantly, this idea of nationalism is in line with the idea of the nation of India as was envisaged in its National Movement that molded the common nationality of the Republic of India for the first time and has been informed by the history of the nation's rich pluralistic civilization⁵⁶ which is further deliberated in the paper.

NATIONALISM OF INDIA IS LIBERATING & CONSTRUCTIVE

Nationalism in India has to be understood in the sense of a *constructive and liberating force*. It is also a comprehensive concept transcending the boundaries of ordinary political usage in the West. The nationalism of India although traced its roots to political independence and was synonymous with the freedom struggle against the British subjugation, nevertheless, circumscribed a liberating force and incorporated within its scope a developing and progressive spirit in all aspects – social, economic, political, and cultural.⁵⁷

This is evident from a resolution adopted by the *All-India Congress Committee* in 1931 is of particular importance which was on Fundamental Rights and Economic policy. It stated that "*in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions*". In setting down the content of economic freedom the resolution enumerated a series of social and economic measures most of which, after independence, found a place in the Constitution.⁵⁸ Therefore, the principles adopted in the struggle for independence align with the framework of the present Constitution. Nationalism in India, unlike in the West, under Mahatma Gandhi employed ideas of non-violence and non-cooperation with the colonial subjugation and thereby employed the *swadeshi* approach to rightfully establish political sovereignty in the nation which predominantly defined its

⁵⁵ Kesavananda Bharati (n 10)

⁵⁶ Sidharth Luthra & Nivedita Mukhija (n 53)

⁵⁷ K. R. Narayanan (n 35)

⁵⁸ *Ibid*, 634

founding nationalism by *secularism, linguistic plurality, and non-violent self-determination*⁵⁹. Therefore, during the worst democracy crisis in the nation of India when the emergency was imposed from 1975 to 1977, it was the *centrality of non-violent self-determination of the nationalism of the people of India* that the opposition mobilized against a populist Prime Minister to restore peaceful transfer of power. Further, the Counsel humbly submits, that the 'effect and impact' test laid down in the case of *I.R. Coelho v State of Tamil Nadu*⁶⁰ which provides that the determinative factor about an amendment to the constitution should be based on the consequence of such amendment and not the amendment per se. The test when read with the *width test* laid down in the case of *M. Nagaraj v Union of India*⁶¹ that comprises all probable *wider ramifications* of such amendment (amendment to any article or any principle of the Constitution), it can be substantially deduced that without the consciousness about nationalism and nation the peaceful restoration of power to equilibrium could not have been culminated by the people.

THE CONSTITUTION OF INDIA IS BASED ON IDEALS OF FREEDOM STRUGGLE

The Indian Constitution is a *Social Document* that derived its essentiality from the socio-economic ideals of the freedom struggle⁶² against the subjugation of the British Colony. Therefore, the formulation of the Constitution is influenced by the pre-independence norms and its colonization. In attaining such a socio-economic vision, the founding fathers themselves had incorporated the provision of judicial review to advance other basic features of the Constitution such as the fundamental rights, fundamental freedoms, equality, etc. among which creating a healthy nationalism also found the place.⁶³ The legal system, as Chief Justice R.V. Ramana, highlighted, needs Indianisation so that it can adapt the practical realities of the

⁵⁹ Maya Tudor, 'How Nationalism can actually help Democracy' (*The Washington Post*, 25 April 2018) <<https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/25/how-nationalism-can-support-or-divide-democracies/>> accessed 05 March 2022

⁶⁰ *I.R. Coelho v State of Tamil Nadu* [2007], AIR 861(SC)

⁶¹ *M. Nagaraj v Union of India* [2006] 8 SCC 212 (SC)

⁶² Kesavananda Bharati (n 10)

⁶³ *S.S. Bola v B.D. Sardana* [1997] 8 SCC 522(SC)

society and localize the justice delivery systems to the people of India⁶⁴. These principles have become an indispensable part of the people of India and therefore, it is high time, Nationalism is recognised as a basic structure read from the provisions of the Constitution implicitly assuring the same. The *mandate to build a welfare state* contained in the Directive Principles of State Policy, *Unity and Integrity of the nation* and *Sovereignty of the country* were added as features of Basic Structure.⁶⁵ India is a multi-religious country and for the real exercise of Sovereignty, the people of India must be integrated as one united nation and be identified as one nationality of India than individual people. This would facilitate the realization of fraternity and declination of the religious or other communal disparities to advance towards a welfare state. To meet the Basic Features of the Constitution, enshrining the principle of Nationalism is inevitable. India is identified as a Union of States⁶⁶ where, in coherence with the *unity and integrity of the nation*, component states cannot secede⁶⁷ which is further endorsed by the concept of *Single Citizenship* under Part II of the Constitution⁶⁸.

Further, Part IVA encompassing Fundamental duties was introduced by the 42nd Constitutional Amendment which indicates the desire of the Parliament to inculcate the spirit of nationalism amongst its citizens tracing its contours from the Constitution solely. Article 51A⁶⁹ enjoins the citizens to uphold duties which can be termed as elements of nationalism and consciously abjures reference to the culture of any individual community or its history and instead focuses on the rich heritage of our composite culture. These include respecting the Constitution and its ideals, as well as symbols such as the National Flag and the National Anthem, cherishing the ideals that formed the freedom struggle, and protecting the sovereignty, unity, and integrity of India.⁷⁰ Several judgments of the Supreme Court have held

⁶⁴ Krishnadas Rajagopal, 'Supreme Court's views on 'Indianisation' of the legal system have varied' (*The Hindu*, 29 December 2021) <<https://www.thehindu.com/news/national/supreme-courts-views-on-indianisation-of-the-legal-system-have-varied/article38057819.ece>> accessed 05 March 2022

⁶⁵ Kesavananda Bharati (n 10)

⁶⁶ Constitution of India 1950, art. 1, cl. 1.

⁶⁷ *Hinsa Virodhi Sangh v Mirzapur Moti KureshJammat*, [2008] 5 SCC 33 (SC), 53, para 62

⁶⁸ Constitution of India 1950, art. 5-11

⁶⁹ Constitution of India 1950, art. 51A

⁷⁰ Sidharth Luthra & Nivedita Mukhija (n 53), 5

that **Article 51A**⁷¹ casts upon citizens similar duties as Part IV of the Constitution enjoins upon the State.⁷² Conversely, although Article 51A does not impose any fundamental duty upon the State, the individual duties it imposes upon the citizens have been creatively read to cast a collective duty upon the State.⁷³ By extension of which incorporation of Nationalism as a constitutional basic feature is therefore implicit. Article 51A has also come to be used by the Apex court as an interpretative aid. The Court in furtherance of the same also held the principles enshrined therein should be kept in mind while interpreting statutes.⁷⁴ The Supreme Court while addressing the issue about the doctrine of Basic Structure, which was vaguely defined in the case of *Kesavananda Bharati v the State of Kerala*,⁷⁵ laid down a test providing

*“...the ultimate purpose of the Constitution is the conservation of unity and integrity of the nation as also the dignity of the individual. This can be assured only by promoting fraternity. Any principle of law which is taken away from the Constitution would result in a loss of fraternity and unity and integrity of the nation and the dignity of the individual would be considered to be an essential feature of the Basic Structure.”*⁷⁶

Therefore, nationalism is inherent in the Constitution of India. Moreover, in the seminal case of *Kesavananda Bharati*⁷⁷, Sikri, C.J. acknowledged the secular character of the Constitution in 1973 however, *secularism* was explicitly introduced in the Preamble through the 42nd Constitutional Amendment in 1976. It is pertinent to note that secularism was insisted to be included in the Constitution since the beginning by Prof. K.T. Shah⁷⁸ in the Constitutional Assembly Debates. However, its applicability was held speculative at that time in the context of India given its Western connotation of complete severability of religion from the governance which would not appropriately serve the cause of the people of India owing to their historical

⁷¹ Constitution of India 1950, art. 51A

⁷² *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* [2005] 8 SCC 534 (SC), para. 51

⁷³ *AIIMS Students' Union v AIIMS* [2002] 1 SCC 428 (SC), para. 58

⁷⁴ *State of W.B. v Sujit Kumar Rana* [2004] 4 SCC 129 (SC), para. 21

⁷⁵ *Kesavananda Bharati* (n 10)

⁷⁶ Badar Ahmed, 'The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique' (2015-16) 23 ALJ

<<http://www.scconline.com/DocumentLink/kb8z55ZE>> accessed 05 March 2022

⁷⁷ *Kesavananda Bharati* (n 10)

⁷⁸ Constituent Assembly Debates, Vol. VII, p. 400

adherence to religion and customs.⁷⁹ Therefore, it was left subsequently to the people of India who would resolve the ideal of secularism in the context of India resulting in its incorporation in 1976 with a localized interpretation for acknowledging no State Religion but respecting and protecting equally all religions followed⁸⁰. Similarly, after 75 years of independence of the Republic of India, the nation has acquired and sustained a form of *civic nationalism* which endorses liberating forces and adherence to the Constitutional nationalism than any form of 'mainstream nationalism contrary to human rights which in the humble contention of the Counsel should be acknowledged as a Basic Structure of the Constitution of India.

In the case of *Ram Manohar Lohiya v the State of Bihar*⁸¹ the Supreme Court while distinguishing among 'law and order, public order and security of State' provided that,

"One has to imagine three concentric circles. Law and order represent the largest circle within which is the next circle representing public order and the smallest circle represents the security of State."

Therefore, any harm caused to the Security of State will eventually harm and inviolate the law and order as well as public order which are *sine qua non* to the stability of a nation and thus the Nationalism integral to National Security and unity and integrity of the Nation should be a Basic Structure of the Constitution of India as encroaching it would be a contravention to the law and order per se.

CONCLUSION

With regard to the aforesaid contentions analyzed and deliberated on both sides of the research question, it can be conclusively inferred that Nationalism in India demands an exclusive definition, localized to the genesis of the nation as an independent dominion. The indelible principles of the Constitution reasonably accommodate nationalism within its periphery through the ideals of unity and integrity of the nation as well as from its genesis

⁷⁹Adrija Roychowdhury, 'Secularism: Why Nehru dropped and Indira inserted the S-word in the Constitution' (*The Indian Express*, 27 December 2017) <<https://indianexpress.com/article/research/anant-kumar-hegde-secularism-constitution-india-bjp-jawaharlal-nehru-indira-gandhi-5001085/>> accessed 05 March 2022

⁸⁰ D.D. Basu (n 28), 28

⁸¹ *Ram Manohar Lohiya v State of Bihar* [1996] 17 AIR 1966 (SC)

based on the philosophies of the struggle for Freedom. Thus, mainstream nationalism in Indian parlance is anathema to its liberal and welfare structure. Therefore, it needs to be interpreted through the Constitution as constitutional nationalism where people pledge their allegiance to the ethos of the Constitution and not to the factions of regionality, ethnicity, or religion. Only when it accentuates the existing features of the Basic structure, it can be implicitly found in their scope until the judiciary declares it as an explicit feature of the Basic Structure.