



## Not their business

The OIC achieved little other than pleasing Pakistan through its Kashmir pronouncements

The statement issued by the Organisation of Islamic Co-operation's Kashmir Contact Group calling on India to "rescind its actions revoking Article 370", among other stipulations, may not even be worth the paper it is written on. If it has a dubious relevance, it is one that allows the Pakistan Prime Minister Imran Khan to sell the theory back at home that his trip to New York, focused on Kashmir, has met with some success. From the mid-1990s, when this Contact Group was formed, it has issued several statements on behalf of Pakistan, which happens, not surprisingly, to be a member, as does Turkey, Niger, Azerbaijan and Saudi Arabia. The Saudi Crown Prince Mohammed Bin Salman had Imran Khan flown on his private jet to Saudi Arabia for a two-day visit before speeding him on the same plane to New York and the UNGA. It is also no coincidence that OIC is headquartered in Jeddah and receives its financial raison d'être from its chief benefactor, Saudi Arabia. Further, though it boasts of a membership of 57 countries, its influence on world affairs has always been marginal. It is also extremely doubtful if the statement issued by the Contact Group reflects faithfully the national positions of the individual member states. The United Arab Emirates, for instance, conferred the Order of Zayed, its highest civilian award on Prime Minister Narendra Modi, more than a week after New Delhi's moves on Article 370, and declared that Kashmir was India's internal matter.

The OIC's record of conflict resolution when it comes to issues between OIC member states is poor. In practical terms, its fatuous attempts to meddle in Kashmir, including by appointing a so-called special envoy on Jammu and Kashmir, have amounted to nothing. The organisation, constituted on religious lines, but seeking to fulfil geopolitical interests, needs reforms from within. It could begin by asking Pakistan to change its state policy on terrorism. Imran Khan did admit at various fora that Pakistan had backed entities such as the al-Qaeda, but he should ensure that Pakistan abjures support to Kashmir-centric groups such as the Jaish-e-Mohammed and the Lashkar-e-Taiba. It serves no useful purpose for the OIC to paint Kashmir in communal and religious political colours. India, though not a part of the OIC, has the second largest numbers of Muslims in the world, perhaps more than Pakistan and some of its most ardent backers put together. The OIC would do a lot better if it did something useful to better the lot of its members or mediate between warring Saudi Arabia and Yemen, for instance. In the meanwhile, New Delhi must demonstrate to the world that its new Kashmir policy is in the larger interest of all Kashmiris.

## Running for President

A second Premadasa is against a second Rajapaksa in race for Sri Lanka's presidency

In fielding Sajith Premadasa, Sri Lanka's United National Party (UNP) has chosen arguably its strongest candidate to take on former Defence Secretary Gotabaya Rajapaksa in the presidential election to be held on November 16. The party chose to back the claims of Mr. Premadasa, its deputy leader, over those of Ranil Wickremesinghe, its leader and the Prime Minister. The party may have reckoned that Mr. Premadasa, son of the late President Ranasinghe Premadasa, with a lineage not drawn from the urban elite, is its best bet while facing Mr. Gotabaya, a rival from another Sinhalese political family from the same southern region. The latter has the image of a strongman who guided the armed forces, as defence secretary, to victory over the separatist LTTE, and the UNP may need all the grassroots support that Mr. Premadasa can mobilise to recapture the presidency it lost in 1994. For Mr. Wickremesinghe, it will be the third consecutive election in which he has had to step aside from the contest in favour of another. In the 2015 election, as part of a grand opposition plan to unseat Mr. Rajapaksa, he backed Maithripala Sirisena, who recorded a historic victory on the promise of good governance, economic revival and ethnic reconciliation.

It is quite uncommon that the battle lines in a presidential election appear to be drawn even before it is known whether the incumbent will seek re-election or his party will field a candidate. In recent times, President Sirisena has been marginalised in the political arena, and his Sri Lanka Freedom Party (SLFP) is no more the organisation it was in its heyday. He has had a bitter parting of ways with Mr. Wickremesinghe, even though both have shared power for nearly five years. Last year, the president ousted Mr. Wickremesinghe from his post, but the courts reinstated him. Former President Mahinda Rajapaksa, who cannot run for president now because he has already completed two terms, was walked away with a significant part of the SLFP's support base, and leads the Sri Lanka Podujana Peramuna (SLPP). He has fielded his brother, Gotabaya Rajapaksa, on its behalf. It will be primarily a contest to win the support of the majority Sinhalese. The leftist Janatha Vimukti Peramuna has chosen its leader Anura Dissanayake as its candidate, whose prospects may not be high, but can make a dent in the vote share of the two principal candidates. Lost in the perennial jockeying for power is the promise of abolishing the executive presidency, something that has been heard for the last 25 years. Sri Lanka will be holding one more election for the post, even while the idea of scrapping it remains a key issue. That there is no sign of the promised inclusive Constitution for the multi-ethnic country is another disappointing feature of recent Sri Lankan history.

# The top court and a grave of freedom

The corpus of judgments by the highest court is replete with cases where the bogey of security has trumped basic rights



SUHRITH PARTHASARATHY

The most powerful court in the world? A protector of fundamental rights? One's heart sinks. There are scores of shibboleths that need dispelling in India, but foremost among them is the notion that the Supreme Court acts, in the words of its second Chief Justice M. Patanjali Sastri, as a "sentinel on the qui vive".

### Rights in Kashmir

If the court's handling of the cases concerning the unending suspension of human rights in Jammu and Kashmir should tell us anything it is this: freedom is of dispensable merit. Nothing else can explain the court's disdain for the writ of habeas corpus, which has now been stripped of all meaning, and the court's dogged refusal to so much as review the prevailing suspension of liberty in the region, simply because "security matters" are involved. Yet, for some reason, even otherwise sagacious commentators continue to place special faith in the judicial process. They see the condonation of the continuing wrongs inflicted in J&K — including the judges' failure to account for the practical freezing of the J&K High Court's functioning — as a mere aberration. But when we probe deeper what we see is a court that has so often in the past been a grave of freedom.

Ordinarily, when we think about the Supreme Court and its record in preserving civil liberties, our collective minds hark back to the dark days of the Indira Gandhi-imposed Emergency. Then, the court's status as a check on demo-

cratically obtained authority reached its nadir, when it ruled in *ADM Jabalpur v. Shivkant Shukla* that fundamental rights could be validly negated during a period of the Emergency. But this judgment is scarcely an outlier — it is merely an extreme exposition of the court's default frame of mind.

### Faulty trade-off

Throughout history the court has consistently seen individual liberty as an expendable value. Its corpus of judgments is replete with cases where it has allowed the bogey of security to trump freedom. That such a trade-off is neither constitutionally mandated nor rooted in a logic of the rule of law has barely placed any constraints on the court. This has meant an upholding of a plethora of legislation, including The Preventive Detention Act, 1950; The Armed Forces (Special Powers) Act, 1958 or (AFSPA); Maintenance of Internal Security Act, 1971; The Terrorist and Disruptive Activities (Prevention) Act, 1985, or TADA; and The Prevention of Terrorism Act, 2002. Although some of these statutes have since been repealed, each of them allowed, among other things, the political executive of the time to define and cite "security of the state" as a legitimate reason for limiting a citizen's rights. As Ujjwal Kumar Singh has argued, these judgments have resulted in the exception becoming the norm, and in the creation of a seemingly permanent state of emergency.

The groundwork for this record, however, was laid at the very founding of the Supreme Court. Today, we are prone to offering encomiums to the court's earliest years, but nowhere is its inherent and deeply felt distrust of fundamental freedoms more apparent than in its first big constitutional verdict.

The year was 1950, and the



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communist leader A.K. Gopalan, who had been detained without trial, even after Independence, was incarcerated under a freshly minted Preventive Detention Act, a legislation that was passed hot on the heels of the Constitution's inauguration. Supporting the statute, the state cited Article 22, which provided, among other things, a set of procedural guarantees to persons detained pre-emptively. But what the government failed to see was that the provision was primarily incorporated to ensure that even those persons confined in exigent circumstances were entitled to a set of basic rights.

The article, it ought to have been clear, hardly provided a carte blanche to Parliament permitting it to legislate and allow for preventive detention on arbitrary grounds. Indeed, as M.K. Nambyar, who represented Gopalan in court, argued, "no amount of fine phrasing could disguise the fact that preventive detention without trial is utterly repugnant to the universal conscience of civilized mankind".

But the court endorsed the law. It saw the Constitution's provision of a framework for preventive detention as a parliamentary licence. What is more, even more damagingly, the court held that the guarantee of a right to life and personal liberty under Article 21 could be denied so long as there existed

a validly enacted piece of legislation. To the majority on the court (which included Justice Sastri), the various freedoms that Article 19(1) guaranteed — such as the rights to freedom of expression, freedom of assembly and the freedom to move freely throughout India — were simply not available to a person detained under a penal law. Therefore, in its belief, the state had no obligation to show the court that a statute providing for preventive detention was otherwise reasonable and grounded in one of the constitutionally stated exceptions. The upshot was catastrophic: the court had effectively held that so long as a law providing for preventive detention conformed to the procedural requirements of Article 22, it could mandate confinement without trial on any arbitrary basis.

### A disconnect

This idea, that fundamental rights exist in a silo, has since been overruled in R.C. Cooper's case (1970). But the court's ostensible change in attitude has not translated into actual rulings limiting the government's ability to detain people without reason. Quite to the contrary, the rationale employed in the judgment in *Gopalan* was applied when the court upheld the Maintenance of Internal Security Act, or MISA, a few years later in Haradhan Saha (1974). The Constitution, the court wrote there, conferred rights under Article 19, but it also "adopted preventive detention to prevent the greater evil of elements imperilling the security, the safety of a State and the welfare of the Nation".

Gopalan's logic persisted through the ensuing decades when the court upheld the TADA and the AFSPA, respectively, in *Kartar Singh* (1994) and in *Naga People's Movement of Human Rights* (1997). In the former, a di-

vided bench found little wrong with allowing custodial confessions to be considered admissible as evidence. In the latter, the court granted to the government a warrant to extend and apply the legislation with impunity to any area designated as "disturbed" for any unlimited period the government thought fit.

The ritual burying of *Gopalan* has, therefore, had little practical consequence. Despite the ostensible change in the law, the court has continued to uphold statutes that treat basic civil liberties as a trifling inconvenience merely because they deal with a special class of offences. As Justice R.M. Sahai noted in his dissenting opinion in *Kartar Singh*, the court has effectively taken the "law back once again to the days of Gopalan".

### Almost a template

That the Constitution requires pursuance cannot be doubted. The Supreme Court, even in recent times, has intervened to resuscitate some of the document's most foundational guarantees. Notably, in *K.S. Puttaswamy* (2017), a nine-judge bench unanimously ruled that a promise of a right to privacy is embedded in Article 21. There, in his concurring opinion, Justice R.F. Nariman affirmed, among others, Justice Fazl Ali's dissenting opinion in *Gopalan*, the foresight of which, he held, "simply takes our breath away". Yet, as we have seen time and again, when the stakes are at their highest the Supreme Court reverts to type, bringing to mind Sir Edward Coke's aphoristic appeal in the House of Commons for the Petition of Right: "Shall the soldier and the justice sit on one bench, the trumpet will not let the crier speak."

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# As Xi comes a-calling, a footprint without traction

Nepal will gain little from China's outreach unless there is a recalibration in its long-term vision of development



SUJEEV SHAKYA

Earlier this week, on September 24, in a two-day event attended by the top brass of the ruling Nepal Communist Party (NCP) which included the Prime Minister, a memorandum of understanding (MoU) was signed by the NCP with the Communist Party of China. Signed on the sidelines of the programme, "Communist Party of China's Opinion about Xi Jinping Thought and Ideological Discussion between Nepal Communist Party and Communist Party of China", it was in preparation for the visit of the Chinese President, Xi Jinping in October, his first since assuming presidency in 2013. The last time a Chinese President visited Nepal was 23 years ago, in 1996.

### Looking north

In August 2014, when the Indian Prime Minister Narendra Modi had visited Nepal, Kathmandu shut to welcome him. It was called a historic visit by an Indian Prime Minister after more than a decade-and-a-half. It felt as if the India-Nepal relationship would undergo changes as a number of sops were announced. Less than a year later, when a big earthquake struck Nepal, India was quick to respond

with help and relief materials. This made everyone feel that the changes in ties were for real. But months later, India which was dissatisfied with the Nepal Constitution imposed a blockade that changed the perception about Mr. Modi and India forever. It was an act that alienated a whole generation of Nepali youth, and Nepali leaders played the nationalism card to reach out to China. Chinese interest grew after the earthquake and the blockade. With the announcement of the Belt and Road Initiative (BRI), exchanges and interactions between the two countries grew. Nepal signed agreements with China to ensure it was not "India locked", in turn opening transit and trade opportunities through its northern border.

### Inertia in reaching out

Nepal, in its nearly 70-year journey after the Rana autocracy ended in 1950, has yet to leverage its bilateral or multilateral ties. From the days of the Shah kings who ruled directly till 2006 to the current form of a federal democratic republic, Nepal's engagements with the outside world have been more of theatrics, speeches and little action. After the 2015 earthquake, China, India and other countries pledged approximately \$4-billion for reconstruction; India pledged more funds, but Nepal has been tepid in utilising these funds. Scouring for grants remains key while there has not been much traction on agreed projects being



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implemented. It has never been about seeking investments and get into a partnership model such as what Bangladesh has been able to do successfully with both China and India.

With a strong patriarchal and feudal culture embedded in Hinduism, rituals dominate Nepali life. With people from the Bahun (Brahmin) community dominating the bulk of leadership in politics and bureaucracy, there is much emphasis on rituals rather than an understanding of the deeper issues. Therefore, there is little expectation about the upcoming visit apart from keeping nationalism alive from an electoral point of view: in general about creating doubts about India to making anti-India statements.

### Nepali politics

The biggest feature of the Nepali communist ignored by parachute analysts is that communism to Nepal came through Calcutta and not straight from China. Therefore, what we see in Nepal is the West Bengal version of communism rather than a Chinese one. First, the communist movement like the

one in West Bengal has been about multiple factions that keep splitting and coming together rather than it being about one single and unified party. At one point in time, people had lost count of how many communist parties in Nepal were overground and underground.

Second, the communist movement in both India and Nepal has been about rent-seeking on positions and selling rhetoric and hypocrisy. It has been about talking about Red Book during the day and on other diametric subjects later. This is in stark contrast to the Chinese societal model of hard work and encouraging entrepreneurial pursuits.

Third, Nepali communists, especially the former insurgents, still talk about Mao and the Maoist ideology. In China, Mao is a word best avoided and is jarring for the current key leadership. Finally, in China, over the years, when a majority group within the party decides on an issue, people with opposing views accept the decision and do not challenge them in the future. You can debate on an issue but after a decision is made, you abide by it. Nepali communism has been about continuous infighting and creating fiefdoms rather than accepting an individual's leadership.

The recent rise of the Nepali communist has been due to the empathy of and support from the Communist parties of India that were part of the United Progressive Alliance. The Maoists, while

underground, received tacit support. With the communist parties in India in disarray now, the Nepali communist leaders are looking for options. With the co-chair of the NCP, Pushpa Kamal Dahal, in line to succeed Prime Minister K.P. Sharma Oli, other leaders such as Madhav Nepal and Jhala Nath Khanal who became Prime Ministers earlier with Indian support are trying to look for options in China.

While Chinese engagement in Nepal has increased post the BRI phase and with revamping of outreach policies, those backing the few projects with Chinese investments have not been happy with the government as they now face the same problems that other investors are experiencing. Foreign direct investments to Nepal are low and the way government has functioned does not really encourage large Chinese investors to look at Nepal seriously enough. The increase in Chinese businesses in Nepal has remained mostly low level examples being operations in hotels and restaurants. Till there is a complete recalibration in Nepal's long-term vision of development, a willingness to implement investor-friendly policies and enable concrete steps towards efficiency, President Xi's visit will be once again be one made by a "friendly neighbour or cousin", who brings some gifts, exchanges pleasantries and then moves on.

Sujeev Shakya is Chair of the Nepal Economic Forum and the author of 'Unleashing Nepal'

## 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.

### Childhoods lost

The slew of reports regarding the violation of child rights in Jammu and Kashmir are indeed worrisome. The atrocities that are being inflicted upon the children amount to the most brutal form of child abuse. Ganchiji said, "If we are to teach real peace in this world... we shall have to begin with the children."

It is shameful and an irony that at a time when the nation is celebrating the 150th anniversary of the Mahatma, such misconduct and anarchy prevails in our own backyard (Editorial Page, "Childhoods lost in troubled paradise", September 27)

L. PRASAD,  
Kalyan, Maharashtra

■ The situation in Jammu and Kashmir is worrying. Even though the government may have justified the lockdown of 50 days citing security reasons, independent reports on human rights cannot be ignored. The data on children and the total population as such being affected by mental trauma are alarming. Lack of access to proper health care, locked down schools and Internet blockage cannot be glossed over as those affected include children and women. The government will have to make sure the availability of basic needs. The judiciary needs to take note.

AHMAD HUSSAIN,  
Mangaluru

■ The article is an eye-opener for the rest of India. It is not

only physical torture but the serious long-term mental torture that will probably create another class of Kashmiris who can be easily radicalised. The havoc that is waiting to happen will be very fatal for India. The gross violation of human rights in the cases of these young children must be taken seriously. We should not be carried away by ultra nationalism. What is the government trying to do? Erase a complete generation from the pages of history? The Kafkasque fear that every Kashmiri keeps in his mind will never be in favour of India. By doing this, the government is only further alienating a whole generation. This will also encourage Pakistan to further complicate the

Kashmir issue. The rest of India needs to highlight the abuse of basic rights.

DURGA PRASAD DASH,  
Berhampur, Odisha

### India's legacy

The writer of the letter ("Letters to The Editor", "Award for Modi", September 27) needs to ponder over the tone and language of utterances of the Prime Minister and the right wing when it comes to the legacy of India of the last 70 years. I wonder why the political opposition to Jawaharlal Nehru should descend to the level of unrelenting hostility that seeks to discredit and delegitimise his actions no matter what the international opinion has been on his policies such as atomic energy, space

science, irrigation dams, science and technology and pioneering education. The letter writer says there are "unsubstantiated and indefensible theories about the perceived loss of liberty", which according to him, it is a "demonstration of intolerance". How far it is from the truth. Has the letter writer also forgotten the hostile environment in which large sections of the media function?

D.M. MOHUNTA,  
Chennai

### Verdict and complexes

Justice appears to have been, at least partly done, in the Maradu flats demolition case as the top court has ordered interim compensation to the flat owners. Right from first order, the innocence of

buyers, when compared with the builders, bureaucrats and politicians, was highlighted but did not seem to have got the attention of the judiciary. How far the order to pay the amounts using the builders' accounts would get final legal sanction must be watched. The roles of politicians are sure to surface in due course. The government, if experience is anything, cannot be expected to take an impartial and bold stand. If the developments lead to the demolition of illegal constructions and an end to any unholy builder-bureaucrat-politician nexus, that would be welcome.

P.R.V. RAJA,  
Pandalam, Kerala

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