

# FRATERNITY AND THE CONSTITUTION: A PROMISING BEGINNING IN *NANDINI SUNDAR V. STATE OF CHATTISGARH*

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*Fraternity as an ideological concept finds its birth in the French Revolution, as well as an express mention in the Preamble to the Indian Constitution. Despite this clear constitutional space, little has been said or done in its furtherance. This paper seeks to account for the development of fraternity from both a historical and judicial perspective. In looking towards the history of the French Revolution and the Supreme Court's treatment of the same, we intend to provide some clarity as to the true purpose and meaning of fraternity. In analyzing the history of the Preamble and its legal status, the authors seek to understand how courts employ the Preamble as a mechanism to interpret the Constitution. This paper concludes that the decision of the Supreme Court in *Nandini Sundar v. State of Chhattisgarh*,<sup>1</sup> is a remarkable improvement in the judicial use of fraternity, and presents certain compelling prospects for the use of the Preamble in the process of constitutional adjudication.*

## I. INTRODUCTION

Fraternity is indicative of a common bond or a feeling of unity between people or communities acting either within the private or public sphere.<sup>2</sup> A fraternal bond is one that does not relate to the shared use of goods but rather a shared feeling that is intrinsic to the existence and functioning of the agents themselves.<sup>3</sup> As an ideological concept, fraternity emerged during the French Revolution, against a totalitarian and absolutist monarch and was accompanied by claims of 'liberty and equality'. Jurists have argued that the non-existence of fraternity would render the other two concepts meaningless, or worse, unfettered in their application. Liberty without fraternity, for instance, would bestow upon individuals unlimited powers to pursue individual aspirations, without

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<sup>1</sup> (2011) 7 SCC 547 ('*Nandini Sundar*').

<sup>2</sup> Katherine A. Chandler, *A New Idea in Social Fraternity*, 8(4) AMERICAN JOURNAL OF SOCIOLOGY 442- 455 (1903).

<sup>3</sup> Andreas Esheté, *Fraternity*, 35 JOURNAL OF METAPHYSICS 27- 44 (1981).

regard to community sentiments and considerations.<sup>4</sup> Equality without fraternity is characterized as a ‘barbaric’ equality, as individuals would have no consideration for the standing of other disadvantaged persons.<sup>5</sup>

The idea of fraternity finds mention in the Preamble to the Indian Constitution, where “... fraternity assuring the dignity of the individual and the unity and integrity of the Nation” is declared to be a constitutional goal.<sup>6</sup> Despite such a central reliance on the idea of fraternity in the Constitution, both courts and scholars have rarely engaged with the concept of fraternity.<sup>7</sup> In doing so the judiciary has neglected a substantial and meaningful aspect of the Preamble. This paper aims to remedy this deficit by providing a historical and judicial account of the idea of fraternity. In Part II, we seek to provide a historical account of the evolution of the idea of fraternity during the turbulence of the French Revolution. In discussing the social and political milieu of French society, we conclude that the idea of fraternity arose in response to an inert monarchy, and that the idea of fraternal bonds was perceived as a means of exercising individual rights. In Part III, we undertake a judicial and historical account of the Preamble, and discuss primarily, the framing, legal status and interpretative value of the Preamble. Judicial decisions reveal an interesting dichotomy, between both a cautious as well as a liberal use of the Preamble in the interpretation of the Constitution. In Part IV, we discuss Supreme Court decisions that engage with the principle of fraternity. In doing so, we conclude that judicial engagement has been limited, and has resulted in minimal constitutional significance of the idea of fraternity. In Part V, we detail the various contexts in which the Supreme Court employed the idea of fraternity in *Nandini Sundar*. We conclude that by using fraternity in a varied sense, the Court has made significant progress in the conceptualization and understanding of fraternity.

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<sup>4</sup> ANNIE BESANT, LIBERTY, EQUALITY, FRATERNITY 7 (1880); B. J. Diggs, *Liberty Without Fraternity*, 87(2) ETHICS 97-112 (1977). See also, Kenneth D. Benne, *The Uses of Fraternity*, 90(2) ETHNIC GROUPS IN AMERICAN LIFE 233-246 (1961). Benne argues that fraternity may either serve as a tool for the alignment of both individual and group aspirations, or may serve as the reason for its incompatibility.

<sup>5</sup> BESANT, *supra* note 4, 7.

<sup>6</sup> The idea of fraternity also finds mention in Art. 51A(e), where it is the duty of every citizen “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practice derogatory to the dignity of women”.

<sup>7</sup> Tarunabh Khaitan, *Fraternity*, Outlook (New Delhi) May 15, 2009, available at <http://www.outlookindia.com/article.aspx?240443> (Last visited on August 22, 2011); Tarunabh Khaitan, *Fraternity in the Constitution: Cultural Policing in Dakshina Kannada*, April 5, 2009, available at <http://lawandotherthings.blogspot.com/2009/04/fraternity-in-constitution-cultural.html> (Last visited on August 22, 2011). For an interesting use of fraternity by advocacy groups see, People’s Union for Civil Liberties, *Cultural Policing in Dakshina Kannada: Vigilante Attacks on Women and Minorities*, Karnataka (2008-2009).

## II. FRENCH REVOLUTION AND FRATERNITY

The French Revolution of 1789 is considered a key referral point in the history of the world, as it witnessed the birth and proliferation of modern ideologies<sup>8</sup> that were subsequently recognized in several constitutions. Fraternity was one of many ideologies that came to be recognized in the Revolution, alongside claims of liberty, equality and sovereignty.<sup>9</sup> The concept of fraternity was, however, marginalized during the Revolution, which may be attributed to the prevailing social and political milieu.

### A. SOCIAL AND POLITICAL MILIEU OF FRENCH SOCIETY (1638-1789)

The absolutist monarchy in France transformed into an administrative monarchy in the 18<sup>th</sup> century<sup>10</sup> and as a result was driven to initiate a certain degree of decentralisation in administration to generate greater revenue and maintain internal peace. These reforms were undertaken with the aid of ministers and administrative functionaries (*intendants*) specially appointed for this purpose.<sup>11</sup> This political transition, gave rise to the growth and consolidation of various social groups in France, which aided the development of fraternity as a political ideal. This transition, however, was not smooth owing to flawed royal policies, which resulted in an array of social, political, economic and ideological challenges to the monarchy.

The primary flaw in the royal policies was the unplanned nature of the feudal land organization system in the early 18<sup>th</sup> century. Provinces which constituted the nation grew in size and witnessed frequent rivalry between the monarchy and the church, regarding issues of governance.<sup>12</sup> Conflicts in jurisdiction over the provinces and the absence of uniform administrative laws implied that the people, especially the rural peasantry, enjoyed a significant degree of autonomy.<sup>13</sup> As a result, the weak and understaffed central administration was forced to negotiate with the provinces and exempt some of them from taxation.<sup>14</sup> The differential rate of taxation that emerged further alienated some provinces from the monarchy, thereby weakening the monarchy further.<sup>15</sup>

<sup>8</sup> See generally, GEORGES LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION*, translated by R.R.Palmer vii (1<sup>st</sup> ed., 2005).

<sup>9</sup> GEORGES LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION*, translated by R.R.Palmer, 219-220 (1973).

<sup>10</sup> FRANCOIS FURET, *REVOLUTIONARY FRANCE 1770-1880* 4-5 (2004).

<sup>11</sup> *Id.*, 6-7.

<sup>12</sup> See WILLIAM DOYLE, *THE OXFORD HISTORY OF THE FRENCH REVOLUTION* 2, 4 (1989).

<sup>13</sup> *Id.*, 4.

<sup>14</sup> *Id.*; see also Goff & Sutherland, *The Revolution and the Rural Community in Eighteenth-Century Brittany* in *FRENCH SOCIETY AND THE REVOLUTION* 30-31 (Douglas Johnson ed., 1976).

<sup>15</sup> See generally, RICHARD COBB, *REACTIONS TO THE FRENCH REVOLUTION* (1972). Cobb in drawing upon judicial records during 1795-1804 offers a wider social perspective of the Revolution on

The second flaw in the royal policies was the diminishing control exercised by the King over the aristocracy, clergy and other social groups. When the returns from the taxpayers proved inadequate to fund the monarchy's incessant warfare for territorial expansion, the shortage was funded by various social groups.<sup>16</sup> In return, the King would confer 'privileges'<sup>17</sup> or extend already existing privileges on the members of these social groups. This process gradually diminished the control of the monarchy over public offices, many of which were hereditarily owned by 'privileged' members.<sup>18</sup> The monarchy's steady dependence upon the aristocracy and its successive failure to deal with the newly-born nobility after the death of Louis XIV led to the decline of absolutism even before the launch of the Revolution.<sup>19</sup>

The third flaw in the royal strategy arose out of the monarchy's management of proprietary interests. Prior to the 17<sup>th</sup> century, proprietary interests were kept separate from judicial and political interests and the *Parlements* (sovereign judicial bodies)<sup>20</sup> exercised limitations on the power of the King. The administrative policy of 'fusion of social and political purposes'<sup>21</sup> in the late 18<sup>th</sup> century created nobles out of *Parlementaires*. Consequently, efforts by royal administrators to limit the power of the *Parlements* were strongly resented.

The monarchy also faced ideological challenges, as politics began to get disassociated from religious connotation. With the help of a political ideology that was based on reason and the participation of liberal theological factions like the Jansenists,<sup>22</sup> the religious influence on politics was reduced. Popular opinion rejected the staunch Catholicism prevalent in the 16<sup>th</sup> and 17<sup>th</sup> centuries, which was accompanied by disapproval of the monarchy's role that had helped revive the clerical establishment in the late 17<sup>th</sup> century.<sup>23</sup> Consequently, 'anti-clerical' and anti-absolutist ideas formed the substratum of social and political discussions that rejected anything associated with the old order.<sup>24</sup>

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various social institutions.

<sup>16</sup> FURRET, *supra* note 10, 7.

<sup>17</sup> *Id.*, 7-8. 'Privileges' included concessions granted to a group. The rights conferred on the group could be pecuniary, political or social in nature. For e.g., tax exemptions, sale of administrative and judicial posts and benefits granted to the nobility amounted to privileges.

<sup>18</sup> *Id.*, 7-8, 11.

<sup>19</sup> *Id.*, 13-14.

<sup>20</sup> THE NEW ENCYCLOPAEDIA BRITANNICA, MACROPAEDIA, Vol.7, 640 (15<sup>th</sup> ed., 1974).

<sup>21</sup> *Id.*, 640-641.

<sup>22</sup> THE NEW ENCYCLOPAEDIA BRITANNICA, MACROPAEDIA, Vol.10, 33 (15<sup>th</sup> ed., 1974). Jansenism was a Catholic reform movement drawing upon the works of Jansen Otto and Saint Augustine. It emphasized upon divine grace as a means to achieve salvation. In the 18<sup>th</sup> century the Jansenist group started pursuing political and social goals, instead of purely religious aspirations.

<sup>23</sup> FURRET, *supra* note 10, 15.

<sup>24</sup> *Id.*, 14-15, 17.

Several reforms were introduced by the monarchy during 1770-1774, in response to the various prevailing challenges. Chief among them, Louis XV temporarily took away the Parlements' right of remonstrance,<sup>25</sup> restricted the sale of judicial offices and introduced new courts.<sup>26</sup> Conditions had further deteriorated in rural provinces where the aristocrats, performing quasi-judicial functions had the authority to change the feudal land-holding patterns as they desired. France also witnessed a demographic boom and inflation during the 1770s but the monarchy remained largely inert.<sup>27</sup> Thus, the rural gentry as well as the urban intelligentsia ceased to trust the monarchy and this feeling of alienation was further augmented in the 1780s by the King's continued inaction.<sup>28</sup>

When the monarchy finally attempted to revise its political and administrative policies, its efforts were foiled by the vested interests of the *Parlement*. In the ensuing tussle between the monarchy and the *Parlement*, the latter was exiled and recalled several times during 1787-88.<sup>29</sup> The monarchy, however, could not afford to alienate popular representative groups and hence convened the Estates General,<sup>30</sup> on May 1, 1789.<sup>31</sup> A transition from a social to a political understanding of representation in the Estates General came about after long political debates and the Third Estate's demand that all three estates vote as a singular National Assembly. This objective attained success when the Third Estate assumed the role of the National Assembly on June 17, 1789. Soon after, the nobility and the clergy, in recognition of the demands of the Third Estate, joined the Assembly.<sup>32</sup> Meanwhile, a popular insurrection against the monarch in form of the storming of the Bastille on July 14, 1789 forced the King to concede to constitutional limitations.

The change in the processes of political representation emphasizes that the French placed individual liberty above corporate identity. Perhaps this provides a compelling explanation for the inclusion of 'liberty' and a corresponding exclusion of fraternity in a subsequent document, the Declaration

<sup>25</sup> MACROPIEDIA *supra* note 22, 640. The *Parlement* through the exercise of the right to remonstrance could forestall royal legislations. Although this power could be surpassed, the King usually did not do so.

<sup>26</sup> FURRET, *supra* note 10, 17.

<sup>27</sup> MACROPIEDIA *supra* note 22, 642.

<sup>28</sup> *Id.*, 647.

<sup>29</sup> *Id.*

<sup>30</sup> FURRET, *supra* note 10, 45, 51. The Estates General is a body representing the three estates, i.e., aristocracy, clergy and the common people (Third Estate) that would convene at the orders of the King. It was primarily used as a consultative and advisory body. Although traditionally represented by one-third of the total membership of a particular group, there were no standard laws guiding the sessions of the Estates-General and customary practices prevailed in some cases.

<sup>31</sup> It must be noted that Estates General traditionally functioned on the basis of corporate representation. An individual's membership in the group determined his position in the Estate. But the Estate meeting in 1789 attempted to ensure greater representation to an individual.

<sup>32</sup> MACROPIEDIA *supra* note 22, 649.

of the Rights of the Man and Citizen, that reshaped the history of revolutionary France.

### B. NATIONAL ASSEMBLY AND REVOLUTIONARY IDEALS (1790-1946)

The National Assembly drew up three crucial legal documents. By virtue of the August decrees passed during August 5-11, 1789, feudalism was abolished in France.<sup>33</sup> The second document was a declaration and had a more positive effect to the extent that it recognized a body of rights for the citizens.<sup>34</sup> The Declaration of the Rights of Man and Citizen, adopted on August 26, 1789 gave people a set of ‘natural and imprescriptible rights’.<sup>35</sup> The National Assembly’s third contribution was framing the Civil Constitution of the Clergy in 1790.<sup>36</sup> Both the first and the third document aimed at abolition of vested interests of the landed aristocracy and the clergy.<sup>37</sup>

The Declaration was used as a preamble with some minor modifications to the successive Constitutions of 1791 and 1793. Like most declarations preceding a treatise, the Declaration was indicative of the prevailing situation at the time of its creation.<sup>38</sup> Emphasis was placed upon ensuring the freedoms of an individual but the document remained silent with respect to the right of association. This was in line with the erstwhile administrative inclination to abolish hereditary bodies such as the clergy and propertied judicial rank holders.<sup>39</sup> Thus, the Declaration discouraged the formation and consolidation of fraternal bonds amongst the members of any social group.<sup>40</sup> If the Declaration is considered to be a ‘direction of intention’,<sup>41</sup> it imposes obligations on individuals to ensure the ‘welfare of the community’. This end can be achieved by an unselfish participation in community activities that helps in the formation and furtherance of a common interest.<sup>42</sup>

Despite the Declaration’s lofty ideals, the 1791 Constitution failed. In a bid to divert attention from internal conflicts and establish military supremacy, the aristocracy and the National Assembly launched France into

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<sup>33</sup> *Id.*, 650.

<sup>34</sup> FRANCOIS FURRET, *THE FRENCH REVOLUTION 1770-1814* 87 (1998); *MACROEDIA supra* note 22, 650.

<sup>35</sup> *See* Declaration of the Rights of the Man And Citizen, 1789, Art. II in GEORGES LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION*, translated by R.R. Palmer 221 (1973).

<sup>36</sup> *MACROEDIA supra* note 22, 651.

<sup>37</sup> *Id.*

<sup>38</sup> LEFEBVRE, *supra* note 36, 173.

<sup>39</sup> *Id.*, 176.

<sup>40</sup> *Id.*, 171-219.

<sup>41</sup> *Id.*, 217, 219.

<sup>42</sup> *Id.*

warfare.<sup>43</sup> An external invasion in 1792, however, witnessed an unprecedented rise in revolutionary ideals.<sup>44</sup> The monarchy was overthrown by a popular insurrection on August 10, 1792 with the voluntary contribution of *federes*,<sup>45</sup> and the 'passive citizens' who had been deprived of their suffrage for not meeting property qualifications.<sup>46</sup>

It was only in the Third Republic, established after France's defeat in the Franco-Prussian war, that the republican ideals were clearly established. The election to the National Assembly resulted in a monarchist majority.<sup>47</sup> Despite the democratic process of election, the French were dissatisfied with the verdict and the ensuing policies adopted by the National Assembly to deal with the post-war situation. The formation of the Paris Commune in March, 1871 was an outcome of this popular discontentment.<sup>48</sup> The Commune's membership was varied but was organized on the basis of self-regulating units aimed at benefiting the community. The rise of these autonomous bodies posed a threat to the government and was brutally repressed. Amidst such strong undercurrents of anti-institutional opinion, the National Assembly enacted the Constitution of the Third Republic. The Constitution *inter se* instituted a bicameral legislature, a Council of Ministers and a President as the head of the Republic.<sup>49</sup> The concept of 'fraternity' found place in the declaratory part of the Preamble to the Constitution of the Third Republic that was adopted on September 28, 1946.<sup>50</sup> Art. 2 of the Constitution recognised '*liberté, égalité, fraternité*' as the motto

<sup>43</sup> MACROPEdia *supra* note 22, 652.

<sup>44</sup> *Id.*, 653.

<sup>45</sup> *Id.*, Guards of the national army.

<sup>46</sup> *Id.* Thus, it is clear that the anti-monarchical revolution was sustained by the voluntary participation of the people united by their need to overcome the oppressive and incompetent administration. The monarchy was subsequently replaced by a series of revolutionary governments and constitutional republics and finally by Napoleon Bonaparte's 'personal dictatorship'. His regime was built around complete centralization of power. The Napoleonic system of administration was based on 'opportunism' rather than republican values and ideals. Quite predictably, fraternity as a concept disappeared from the French society. Napoleon's absolutist rule was replaced by a constitutional monarchy in 1815. In the meanwhile, the country had radically transformed itself into one of the forerunners of economic reform. The changed economic order was not ready to accept the ultra-conservatism of the Louis rulers. Subsequently, inefficiency in ministerial appointments aroused popular antipathy and resulted in an insurrection in July, 1830. Constitutional monarchy was retained, but the monarch was replaced with a more liberal one. The urban populace, however, inspired by Socialism and plagued by unemployment, pressed for changes. They took significant initiative by participating in 'political banquets' and began clamouring for their rights. It resulted in an abdication of the monarchy and institution of the Second Republic in 1848, which was subsequently dissolved in 1852.

<sup>47</sup> MACROPEdia *supra* note 22, 668.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, 669.

<sup>50</sup> K.C. MARKANDAN, THE PREAMBLE, KEY TO THE MIND OF THE MAKERS OF THE INDIAN CONSTITUTION, 10 (1984).

of the Republic.<sup>51</sup> This was the first notable recognition of the triumvirate of republican ideas after the Revolution of 1789.

In order to trace the evolution of the principle of fraternity, it is imperative to study it in light of the prevailing societal<sup>52</sup> and governmental order. In pre-revolutionary France, the masses were striving to realize the goals of popular sovereignty and representation as a means to counter the absolutist rule. The French *sans-culotte*<sup>53</sup> perceived sovereignty as a direct exercise of their rights through public bodies and councils.<sup>54</sup> This was possible primarily through the mobilization of ‘popular clubs and fraternal societies’.<sup>55</sup> These bodies emerged as centres for the germination and exchange of ideas that influenced the social and political scene. The clubs encouraged participation from several sections of the society and further aided in the promotion of fraternal concord.

The extreme form of such fraternal feelings was channelized through popular insurrections. Both the invasion of Bastille on July 14, 1789 and the 1792 rebellion were aided by various communes and federations.<sup>56</sup> Even after the Revolution of 1789, corporate groups formed by the *sans culottes* continued to play an active part in shaping France’s history.<sup>57</sup> The ideal of fraternity also helped promote a feeling of national consciousness among the citizens of France.<sup>58</sup> Fraternity, therefore, was crucial for the realization of liberty and equality of persons in the French Revolution.

### III. THE PREAMBLE AND THE JUDICIARY

To fully comprehend the judicial treatment of the Preamble to the Indian Constitution, it is first necessary to understand the history behind its formulation. In looking towards the history of the Preamble,<sup>59</sup> we not only seek

<sup>51</sup> *Id.*, 13.

<sup>52</sup> *See generally*, MONA OZOUF, FESTIVALS AND THE FRENCH REVOLUTION translated by Alan Sheridan (1988). Ozouf describes social life during the French Revolution, and how various festivals aided in the solidification of a community bond.

<sup>53</sup> *See generally*, RICHARD COBB, THE FRENCH AND THEIR REVOLUTION 8-23, 235-47 (David Gilmour ed., 1998). Cobb details the role played by the *sans culottes* (revolutionary masses) in the formation of various radical societies and its ultimate impact on the French Revolution. He also argues that the *sans culottes* may at times have been driven by purely individualistic motives, as opposed to the claims of a ‘popular movement’.

<sup>54</sup> ALBERT SOBOUL, UNDERSTANDING THE FRENCH REVOLUTION 43 (1989).

<sup>55</sup> FURRET, *supra* note 35, 93.

<sup>56</sup> *Id.*, 68-69.

<sup>57</sup> COBB, *supra* note 53, 234 (The White Terror movement and other counter-revolutionary movements during 1792-1795 saw popular participation in large numbers). *See also* above discussions on the Third Republic and Paris Commune.

<sup>58</sup> FURRET, *supra* note 35, 69.

<sup>59</sup> For a historical account of Part III of the Constitution, *see*, GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50-83 (2010).

to provide a brief historical account, but also endeavour to elucidate the aims and objectives of the Preamble, as is apparent from the drafting history.

## A. DRAFTING OF THE PREAMBLE

### 1. Objectives Resolution

The principles outlined in the Preamble have their sources in several constitutions of the world. The foremost attempt at consolidating these ideals in the Indian context was through the Objectives Resolution ('Resolution'). A draft declaration of objectives prepared and moved by the Experts' Committee<sup>60</sup> and approved by the Constituent Assembly in 1946 came to be recognized as the Objectives Resolution.<sup>61</sup> Several parallels have been drawn between the Resolution and the Preamble, to the extent that the former has been termed as the 'Spiritual Preamble'<sup>62</sup> to the prospective Constitution. The members of the Constituent Assembly accorded such high respect to the Resolution because it envisaged a future 'pledge'<sup>63</sup> for the realization of constitutional values and aspirations.

The Resolution was, however, not the sole document that was tabled by the framers. A preamble drafted by Dr. Ambedkar that laid special emphasis on guaranteeing the rights of the 'submerged classes', although noble in its intention, was rejected.<sup>64</sup> B. N. Rau, on behalf of the Union Constitution Committee, also submitted a draft of the Preamble that was acknowledged in the Committee's Report of July 4, 1947.<sup>65</sup> Jawaharlal Nehru, as the spokesperson of the Assembly, however, made it amply clear that the august body intended to found the Preamble on the lines of the Resolution.<sup>66</sup> Further, his decision to defer the amendments to the Resolution which would subsequently find place in the Preamble reaffirms the intention to retain the basic structure of the Resolution, subject to certain changes.<sup>67</sup>

<sup>60</sup> MARKANDAN, *supra* note 50, 29. The experts committee was appointed on July 8, 1946 by the Congress Working Committee. It constituted of 8 members under the Chairmanship of Jawaharlal Nehru.

<sup>61</sup> *Id.*, 31.

<sup>62</sup> 2 CONSTITUTIONAL ASSEMBLY DEBATES 259 (*per* N.V. Gadgil) as cited in APARAJITA BARUAH, PREAMBLE OF THE CONSTITUTION OF INDIA, AN INSIGHT AND COMPARISON WITH OTHER CONSTITUTIONS 12 (2007).

<sup>63</sup> 1 CONSTITUTIONAL ASSEMBLY DEBATES 57-8 (1950) (*per* J. Nehru); SUBHASH C. KASHYAP, THE FRAMING OF INDIA'S CONSTITUTION – a STUDY 121-22 (2004).

<sup>64</sup> MARKANDAN, *supra* note 50, 32.

<sup>65</sup> See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶507 (*per* Shelat & Grover, JJ.) ('Kesavananda Bharati').

<sup>66</sup> *Id.*, ¶508 (*per* Shelat & Grover, JJ.).

<sup>67</sup> MARKANDAN, *supra* note 50, 35, 37.

## 2. Drafting Committee and the Preamble

The Drafting Committee of the Constitution deliberated the provisions of the draft Preamble on several occasions,<sup>68</sup> and while doing so substantially relied upon the recommendations suggested in the Resolution.<sup>69</sup> The Preamble was the subject of extensive discussion, as a result of which, it was tabled only after the Assembly had concluded discussions pertaining to other substantive parts of the Constitution.<sup>70</sup> This followed from the decision of the Drafting Committee that the Preamble should be in compliance with the rest of the Constitution.<sup>71</sup>

A comparison between the final draft of the Preamble<sup>72</sup> and the Resolution will reveal that the latter was suitably modified<sup>73</sup> in light of the changed circumstances<sup>74</sup> to formally shape the Preamble. In that regard two primary changes are discernible. The words ‘Independent Sovereign Republic’ were substituted with ‘Sovereign Democratic Republic.’<sup>75</sup> Second, the concept of ‘Fraternity’ was incorporated.<sup>76</sup> The Preamble was finally adopted by the Assembly on October 17, 1949. The Constituent Assembly gave official recognition to the Preamble on November 26, 1949 and enforced it on January 26, 1950.

## 3. Aims and Objectives of the Preamble

The Preamble was used as a keynote to understand the Constitution.<sup>77</sup> The Preamble is a concise reflection of the constitutional ideals as well as the parameters within which the Constitution shall operate.<sup>78</sup> The aims and objectives of the Preamble can be best understood by analyzing the text of the Preamble itself. The sequence in which the phrases have been used in the Preamble also highlights its objectives. It can accordingly be characterized into three parts: declaratory, obligatory-objective and descriptive.<sup>79</sup>

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<sup>68</sup> February 9, 10 and 21, 1948.

<sup>69</sup> *Supra* note 65, ¶488, ¶513 (*per* Shelat & Grover, JJ.).

<sup>70</sup> *Id.*, ¶511.

<sup>71</sup> *Id.*; R.C. LAHOTI, PREAMBLE- THE SPIRIT AND BACKBONE OF THE CONSTITUTION OF INDIA 34 (1<sup>st</sup> ed., 2004).

<sup>72</sup> As concluded by the Drafting Committee on February 21, 1948.

<sup>73</sup> BARUAH, *supra* note 62, 12.

<sup>74</sup> MARKANDAN, *supra* note 50, 35-37 (discusses the political changes that caused the Assembly to substitute certain provisions in the Resolution).

<sup>75</sup> *Id.*, 107-108.

<sup>76</sup> *Id.*, 41-42. Inserted on February 6, 1947, amended on February 9 and 21, 1948.

<sup>77</sup> *Id.*, 99.

<sup>78</sup> *Id.*, 98-99. For a critical perspective on the unfulfilled promises of the Preamble, *see*, JUSTICE V.R. KRISHNA IYER, THE INDIAN LAW: DYNAMIC DIMENSIONS OF THE ABSTRACT 166 - 172 (2009).

<sup>79</sup> *Id.*, 99.

The first or the declaratory part<sup>80</sup> of the Preamble avows that the authority of the people is supreme and has been vested with the Constituent Assembly for the purpose of framing the Constitution.<sup>81</sup> The order, in which the text mentions ‘the people’ and the Constituent Assembly, further emphasizes that the people possess the ultimate authority and the constituent power is derived from them.

The Preamble mandatorily seeks to “constitute” the nation on the basis of certain broad principles. The second or the obligatory-objective part<sup>82</sup> enumerates these principles. It obligates the formation of the country in line with objectives such as “Sovereign, Democratic, Republic”. The realization of these objectives, however, was not simple. For instance, there existed reservations over India’s sovereign status due to its membership in the Commonwealth of Nations. Such doubts were put to rest by expressly mentioning sovereignty as an objective that must be achieved by the State.

The third or the Descriptive Part<sup>83</sup> of the Preamble is also useful in elucidating the manner in which the objectives can be achieved. It comprises a set of promises that the framers intended to guarantee to the citizens such as liberty, equality and fraternity among others.<sup>84</sup>

#### 4. Fraternity and the Preamble

The ideals contained in the Preamble have been harmoniously constructed in order to realize the aims and objectives in the Preamble. The incorporation of fraternity in the descriptive clause is a useful example to illustrate the manner in which the Preamble reflects the needs of the people. As has been mentioned earlier, fraternity did not appear in the Resolution but was later incorporated as a means to promote ‘fraternal concord and goodwill’ in the nation.<sup>85</sup> After several amendments to the clause, its current form pursues two goals: promoting ‘dignity of the individual’ and ‘unity and integrity of the nation’. The Preamble assures the dignity of a person before ensuring the unity

<sup>80</sup> See Constitution of India, 1950, Preamble: “WE, THE PEOPLE OF INDIA... IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

<sup>81</sup> MARKANDAN, *supra* note 50, 102-104 (discusses the various amendments proposed to the ‘Declaratory’ part and the reasons behind their rejection).

<sup>82</sup> See The Constitution of India, 1950, Preamble: “... having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC”.

<sup>83</sup> *Id.*: “to secure to all its citizens JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation”.

<sup>84</sup> MARKANDAN, *supra* note 50, 129-130.

<sup>85</sup> B.R.Ambedkar’s Letter to the Draft Constitution, February 21, 1948 as cited in MARKANDAN, *supra* note 50, 134.

of the nation, thereby emphasizing that the nation can be united only if the State has guaranteed individual dignity.<sup>86</sup>

Scholars, however, have been sceptical regarding the inclusion of the idea of fraternity within the Constitution. H.M. Seervai has argued that a fair and just executive can promote the idea of fraternity far better, than a constitutional mandate.<sup>87</sup> Seervai also argues that the concept of fraternity is a moral and political ideal that has no relevance in understanding and interpreting the Constitution.<sup>88</sup> Additionally, he posits that the ideals of the Preamble themselves are ambiguous and without a proper understanding these ideals prove useless in the constitutional scheme.<sup>89</sup>

Seervai raises two distinct criticisms, both of which require separate consideration. First, he raises the pertinent question of whether the Constitution is competent to make a promise of fraternity when the executive through its policy would be able to have a more definite impact on fraternal relations. We agree that the executive branch of the government is in a more competent position to ensure friendly relations between communities but this does not automatically eliminate the role of the Constitution. The judiciary, through a constitutional mandate, would then not act as the primary guarantor of fraternity but would scrutinize those policies which are potentially divisive and have adverse impacts on fraternal relations. It would then be highly simplistic to assume that merely because the executive is competent to promote fraternity, that the executive will undertake this responsibility faithfully, without any digression. To the extent that the judiciary must supplement the obligation of fraternity of the executive, we respectfully disagree with the view of Seervai. This view also finds support in the envisioned scheme of the Constitution where each organ of the state is to act as a check on the other.<sup>90</sup>

An objection is also raised that the ideal of fraternity is vague in itself and therefore cannot prove useful in interpreting other provisions of the Constitution. We submit that having regard to the historical context to the introduction of fraternity, and the sentiments of the drafters, there is substantial clarity as to the role of fraternity within the Indian Constitution. In

<sup>86</sup> MARKANDAN, *supra* note 50, 137- 139; *see also*, Govind Mishra, *The concept of Human Dignity and the Constitution of India* in *COMPARATIVE CONSTITUTIONAL LAW* 353, 361 (M.P. Singh ed., 1989).

<sup>87</sup> H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA VOLUME I* 281 - 282 (1996) ('Seervai'); *see also*, Peter Sack, *Legal Technology and Quest for Fraternity: Reflections on Preamble of Indian Constitution* 32 *J. INDIAN L. INST.* 294 (1990). Sack argues that fraternity has merely an instrumental value in assuring equality and liberty, accordingly, the ideal of fraternity should only be an aspiration of citizens and not the state. Sack also argues that the arrangement of the State is incompatible with the promise of fraternity.

<sup>88</sup> SEERVAI, *id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See* GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 633-666 (2004).

particular, the sentiments of Dr. B.R. Ambedkar prove useful in providing ample clarity as to the need and function of fraternity. Dr. Ambedkar was of the view that owing to the socially tense situation due to religious, linguistic and caste based differences, the constitution should strive towards the creation of unity amongst citizens.<sup>91</sup> Dr. Ambedkar also saw the promise of fraternity as a means of improving relations between different castes and religious communities.<sup>92</sup> Additionally, it has been argued that a certain degree of ambiguity is desirable in perambulatory principles, as it allows for judicial craft making the Constitution suit the needs of a changing social order.<sup>93</sup>

## B. LEGAL STATUS OF THE PREAMBLE

The legal status of the Preamble first arose for determination through a presidential reference under Art. 143(1) of the Constitution in *Re: Berubari Union and Exchange of Enclaves*.<sup>94</sup> In *Berubari*, the presidential reference related to the constitutional propriety of an Indo-Pakistan Agreement to the extent that it transferred a part of Indian territory to Pakistan. Justice Gajendragadkar, in delivering the unanimous opinion of the Court, observed that although the Preamble serves to throw light on the historical and ideological context of the Constitution, it was not a part of the Constitution.<sup>95</sup> The Court further went on to add that since the Preamble was not a part of the Constitution, it could not in itself be a source of substantial constitutional power or a limitation therein.<sup>96</sup>

The decision of the Supreme Court in *Berubari* has been criticized owing to the Court's ignorance of the history surrounding the enactment of the Preamble. The Preamble was expressly voted upon by the framers and having done so they demonstrated their intention that the Preamble be a vital part of the Constitution.<sup>97</sup> In ignoring the constitutional history of the Preamble the Court in *Berubari* committed the fundamental mistake of equating the preamble to an ordinary statute with a preamble to a constitutional document.

The weakness of the decision in *Berubari* was questioned in *Sajjan Singh v. State of Rajasthan*<sup>98</sup> by Justice Mudholkar in a separate, yet concurring opinion. Justice Mudholkar argued that if the Preamble was a reflection of the broad values embodied in the Constitution, it must logically follow that the Preamble too must be part of the Constitution. Justice Mudholkar also clearly

<sup>91</sup> B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, VOLUME III 510 (2004).

<sup>92</sup> *Id.*

<sup>93</sup> B Sivaramayya, *Reflections on the Preamble of the Constitution* 17 INDIAN BAR REV. 32, 40 - 42 (1990).

<sup>94</sup> AIR 1960 SC 845.

<sup>95</sup> *Id.*, per Gajendragadkar. J., ¶ 28.

<sup>96</sup> *Id.*, ¶ 29.

<sup>97</sup> 10 CONSTITUENT ASSEMBLY DEBATES 429 - 456 (1999).

<sup>98</sup> AIR 1965 SC 845.

explained the difference between a preamble to an ordinary legislation and a preamble to a constitution. In explaining the difference Justice Mudholkar remarked that the Preamble to the Indian Constitution was a product of deep deliberation by the framers and consequently was drafted with the highest level of care and precision.<sup>99</sup> The decision in *Berubari* has also been criticized on a technical point as the decision was merely an advisory opinion, the observations of the Court are not binding.<sup>100</sup>

The decision in *Berubari* came to be expressly overruled by the Supreme Court in *Kesavananda Bharati v. State of Kerala*.<sup>101</sup> When the constitutional history surrounding the enactment of the Preamble was brought to the attention of the Court, it was observed that the Preamble was a definite and meaningful part of the Constitution.<sup>102</sup> In relying on the Constituent Assembly debates, the Court further observed that the Preamble is a reliable means to discern the intention of the framers and must play a central role in the interpretation of the Constitution.<sup>103</sup> The reasoning of the Court has been affirmed in later decisions<sup>104</sup> and the Supreme Court has even asserted that the Preamble is indicative of the basic structure of the Constitution.<sup>105</sup>

The decision of the Supreme Court in *Kesavananda* has an important bearing on the status of the Preamble for two distinct reasons. First, in properly appreciating the drafting history of the Constitution, it has correctly asserted that the Preamble is a part of the Constitution. Second, in recognizing the Preamble as part of the Constitution, the Court has recognized the distinguishing features between an ordinary preamble, and the preamble to a constitution. The distinction is important, as ordinary rules of statutory construction exclude the use of the preamble in interpreting the provisions of an enactment.<sup>106</sup> In recognizing that the Preamble to the Constitution is of a special nature, the Court has concurred with the opinion that the Preamble should be used as a meaningful mechanism to understand and interpret the Constitution.

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<sup>99</sup> *Id.*, per Mudholkar, J., ¶ 62.

<sup>100</sup> SIVARAMAYYA *supra* note 93.

<sup>101</sup> (1973) 4 SCC 225.

<sup>102</sup> *Id.*, per Sikri, C.J. at ¶ 94-98, Shelat & Grover JJ., at ¶¶ 518-522, Hegde & Mukerjee JJ., ¶¶ 647 - 651.

<sup>103</sup> V.N. SHUKLA, CONSTITUTION OF INDIA 2 (M.P. Singh 11<sup>th</sup> ed., 2008); DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, VOLUME I 383-386 (2007).

<sup>104</sup> Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85.

<sup>105</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>106</sup> S.G.G. EDGAR, CRAIES ON STATUTE LAW 199-207 (1999); G. GRANVILLE SHARP & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 44 - 50 (1953). For an Indian perspective *see*, JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 144 - 150 (2004).

### C. THE PREAMBLE AND THE INTERPRETATION OF THE CONSTITUTION

The Preamble to the Constitution primarily serves three interpretative functions.<sup>107</sup> First, it may be implemented to interpret the Constitution itself.<sup>108</sup> Second, the Preamble may be used to interpret statutes framed under the Constitution.<sup>109</sup> Third, the Preamble may be used to justify and elucidate the application of international human rights treaties, for domestic purposes.<sup>110</sup> For the purposes of the discussion to follow, the authors would confine the use of the Preamble as a means to interpret the Constitution itself.

Since the enactment of the Constitution, courts have been in agreement that the Preamble reflects the aspirations of the framers and to that extent must be used to interpret and understand the Constitution.<sup>111</sup> The Supreme Court in *A.K. Gopalan v. State of Madras*<sup>112</sup> observed that in construing the nature of fundamental rights guaranteed under Part III, the high purpose and significance of the ideals contained in the Preamble must be borne in mind.<sup>113</sup> The Court, however, qualified the use of the Preamble to the extent that the plain meaning of the words must not be distorted and the spirit of the constitution must be gathered from the provisions themselves.<sup>114</sup> The observations of the Supreme Court in *Gopalan* reveal a very cautious judicial response to the use of the Preamble in interpreting the Constitution, which find echoes in subsequent decisions. The Court has advocated the use of the Preamble only in those situations where the provision of the Constitution under consideration is ambiguous, and the Preamble may be used to aid in the removal of such ambiguity.<sup>115</sup> If, however, there is no uncertainty as to the meaning, purpose or scope of the provision the Preamble would have no role to play in the interpretation.<sup>116</sup>

The Supreme Court has, however, used the Preamble in a more liberal fashion in ascertaining and applying the ideologies that pervade it. For instance, the Preamble has been used to decide whether fixing of wages is violative of equality, and consequently undermines the promise of an egalitarian

<sup>107</sup> LAHOTI *supra* note 71, 63.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; see, *Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society Ltd.*, (1999) 6 SCC 82; 1999 SCC (L&S) 1054; *Sanjeev Coke Mfg. Co v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

<sup>110</sup> LAHOTI, *supra* note 71, 63; see, *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; 1997 SCC (Cri) 932; *Kirloskar Brothers. Ltd. v. ESI Corpn.*, (1996) 2 SCC 682; 1996 SCC (L&S) 533.

<sup>111</sup> D.J. DE, *THE CONSTITUTION OF INDIA Vol I* 82-85 (2005); M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 12-14 (Justice Ruma Pal & Samaraditya Pal eds., 2010).

<sup>112</sup> AIR 1950 SC 27; 1950 Cri LJ 1383.

<sup>113</sup> *Id.*, per Patanjali Sastri ¶ 108.

<sup>114</sup> *Id.*

<sup>115</sup> *Burrakur Coal Co. Ltd v. Union of India*, AIR 1961 SC 954.

<sup>116</sup> BASU *supra* note 103, 380-383.

society.<sup>117</sup> The Preamble has also been used as a means to justify the inter-relationship between different fundamental rights. The Supreme Court, in *Minerva Mills Ltd. v. Union of India*,<sup>118</sup> while asserting that Arts. 14, 19 and 21 formed the golden triangle, observed that the Preamble was a concrete assurance that the Constitution strived towards the establishment of an egalitarian society. The Court in justifying its reliance on the Preamble noted that the Preamble to the Constitution laid out certain core ideologies that the framers were committed to and which were particularized and given effect to in various subsequent provisions of the Constitution.<sup>119</sup>

In contrasting the two primary means by which the Supreme Court makes use of the Preamble, one practice becomes clearly discernible. When the Preamble to the Constitution is perceived in strictly legal terms, the Court's use of the Preamble is limited by natural rules of statutory interpretation. This implies that the Court does not resort to the Preamble in the normal process of interpreting the Constitution, but takes its aid only in those cases where uncertainties and ambiguities arise. When, however, the Preamble is not seen within a legal paradigm, but as a document evidencing certain core ideological commitments, the Court has the liberty to make wide use of the Preamble.<sup>120</sup> Although such a liberal and strictly non-legal interpretation seems unjustified, there are in fact various compelling and credible justifications for the same. First, it has been long recognized that courts which deal in the interpretation of constitutional documents must not adopt a narrow and pedantic attitude towards the Constitution.<sup>121</sup> A more liberal interpretation taking into account the historical context and ideologies of the framers, would ensure that the Constitution remains an organic and flexible document.<sup>122</sup> Second, it has been noted that the Supreme Court, in its treatment of Constitution has moved away from a strict positivist stance to a more liberal reading of the Constitution.<sup>123</sup> Against such a backdrop a liberal use of the Preamble is not only justified but also mandated.

<sup>117</sup> *Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore*, (1969) 3 SCC 84: AIR 1970 SC 2042; *Randhir Singh v. Union of India*, (1982) 1 SCC 618: 1982 SCC (L&S) 119: AIR 1982 SC 879.

<sup>118</sup> (1980) 3 SCC 625.

<sup>119</sup> *Per Justice P.N. Bhagwati*, ¶ 83.

<sup>120</sup> See Liav Orgad, *The Preamble in Constitutional Interpretation*, 8(4) INT'L JOURNAL OF CONSTITUTIONAL LAW 714-738 (2010). Orgad in employing a comparative perspective argues that courts in India have made use of the Preamble in a meaningful manner, and such a practice lies between an interpretative and substantive model of adjudication.

<sup>121</sup> *Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938*, In re, AIR 1939 FC 1; *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India* (1981) 1 SCC 246: 1981 SCC (L&S) 50.

<sup>122</sup> See AUSTIN-CORNERSTONE *supra* note 59, 164-185.

<sup>123</sup> S.P. Sathe, *India: From Positivism to Structuralism* in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 215-265 (Jeffrey Goldsworthy ed., 2008). Sathe argues that the Supreme Court has moved away from a positivistic reading of the constitution, to a more liberal and organic means of interpreting the constitution. The decision of the court in *Keshavananda Bharati v.*

#### IV. JUDICIAL RESPONSE AND THE IDEA OF FRATERNITY

The ideal of fraternity, clearly contained within the Preamble, has seldom been used by the Supreme Court<sup>124</sup> in arriving at its decisions. In the discussion to follow, we seek to throw light on the cases that use the principle of fraternity in the judicial process. In doing so, the authors do not simply intend to provide a factual account of the Court's tryst with fraternity, but intend instead to expose certain patterns that emerge from the cases which are discussed.

##### A. FRATERNITY AND AFFIRMATIVE ACTION

The first and most extensive discussion on fraternity took place in *Indira Sawhney v. Union of India*.<sup>125</sup> The question that arose for determination in *Indira Sawhney* related to the constitutional validity of two governmental office memoranda that implemented the recommendations of the Mandal Commission.<sup>126</sup> In reaching its conclusion, fraternity was used by the Court in two distinct, yet related fashions: to defend the practice of reservations under the Constitution on the basis of fraternity, and also to warn of its effects on fraternal relations when undertaken in an unguided manner.

The idea of fraternity was used to justify the constitutional practice of reservation for backward classes to bring about progress for marginalized sections of society.<sup>127</sup> The use of fraternity, in this context is interesting, as the justification for affirmative action is not based in the conventional theory of substantive equality,<sup>128</sup> but rather, the assurance of fraternity is seen as a means to achieve equality. The Court's attention in deciding the merit of reservation then is not focused on the end, but the constitutional means through which that end may be guaranteed. In approving the practice of reservation within the constitutional scheme, however, the Court provided certain qualifications. It asserted that reservation was merely a means to achieve an egalitarian society

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State of Kerala, (1973) 4 SCC 225 and *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597, evidence such a practice.

<sup>124</sup> For the use of fraternity by a High Court *see*, *Rajasthan State Electricity Board v. Sultan Mohd.*, (2000) 3 LLJ 691 (Raj).

<sup>125</sup> *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1922) 22 ATC 385.

<sup>126</sup> For a detailed discussion *Indira Sawhney see*, ANIRUDH KRISHNAN & HARINI SUDERSAN, *LAW OF RESERVATION & ANTI-DISCRIMINATION* 271-278 (2008). For a comparison between Ambedkar and the Mandal Commission *see*, Dipankar Gupta, *Positive Discrimination and the Question of Fraternity: Contrasting Ambedkar and Mandal on Reservations*, 32 *ECONOMIC AND POLITICAL WEEKLY* (August 2-8) 1971 (1997).

<sup>127</sup> *See* Thommen J., ¶ 256. Although Thommen J., dissented in this case, the comments relating to the ideal of fraternity find echoes even in the decisions of the majority judges.

<sup>128</sup> *See generally*, WOJCIECH SADURSKI, *EQUALITY AND LEGITIMACY* 93-145 (2008); TAKING RIGHTS SERIOUSLY, RONALD DWORKIN 223-239 (2005). For an Indian perspective *see*, M.P. Singh, *The Constitutional Principle of Reasonableness*, (1987) 3 SCC (Jour) 31.

as contemplated under the Constitution and thus is transient in nature.<sup>129</sup> Reservation accordingly is a temporary concept that must be conditional and specific in its application.<sup>130</sup>

The Court was also mindful of the adverse impact that reservation could pose on the relationships between various social groups and thereby undermine the promise of fraternity.<sup>131</sup> The discussion of fraternity in *Indira Sawhney* is also refreshing to the extent that it explores the conceptual linkages between fraternity and equality. The Court observed that where inequality persists unity between several social groups cannot exist. Accordingly, the Court reasoned that so long as inequality or lack of equal access to opportunity existed, unity of the nation would remain a distant dream thereby additionally hindering the promise of fraternity.<sup>132</sup>

In *Shri Raghunathrao Ganpatrao v. Union of India*,<sup>133</sup> the Court used the principle of fraternity to reject an argument that the erstwhile princes formed a separate class under the Constitution and were therefore entitled to special privileges. In abolishing privy purses, the Court, adverted to the sentiments of Dr. B.R. Ambedkar regarding the inclusion of fraternity within the Constitution. In agreeing with Dr. B.R. Ambedkar, the Court noted that, in a country such as India, with several disruptive forces, such as religion, caste and language, the idea of fraternity is imperative to ensure the unity of the nation through a shared feeling of common brotherhood.<sup>134</sup> In *Ganpatrao* the Court perceived the privileges of the Princely class as a threat to this common brotherhood as the unequal treatment of the Royal class did not have any constitutional basis.

In *AIIMS Students' Union v. AIIMS*,<sup>135</sup> the Supreme Court held that reservation for post-graduate students in AIIMS was not supported by the Constitution and was accordingly obnoxious. In drawing upon the logic of *Indira Sawhney*, the Court perceived such reservation as having no constitutional basis and therefore militated against the idea of fraternity. The Court stated that the Preamble assured to every citizen the idea of fraternity as a means to achieve national unity and dignity.<sup>136</sup> This assurance of fraternity would, however, be substantially undermined by reservation which is incompatible with the Constitution or any of its values.<sup>137</sup>

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<sup>129</sup> Justice Thommen, ¶ 255.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Justice Sawant, ¶ 412.

<sup>133</sup> 1994 Supp (1) SCC 191; AIR 1993 SC 1267.

<sup>134</sup> *Per* Justice Ratnavel Pandian ¶ 108.

<sup>135</sup> (2002) 1 SCC 428; AIR 2001 SC 3262.

<sup>136</sup> *Per* Justice R.C. Lahoti ¶52. *See also*, H.V. HANDE, AMBEDKAR AND THE MAKING OF THE CONSTITUTION 47-51 (2009).

<sup>137</sup> *Id.*

In *Indian Medical Association v. Union of India*<sup>138</sup> multiple petitions were filed challenging exemptions granted under a legislation<sup>139</sup> that authorized a private non-aided educational institution to only admit wards of army personnel. The notification under the impugned Act empowered the college to deny education to backward classes. The petitioners' challenge was based on Art. 15(5) to the extent that it violated the basic structure of the Constitution by interfering with private unaided educational institutions. The constitutionality of the impugned provision was ascertained by subjecting it to several tests.<sup>140</sup> One of the determining factors was whether the provision fulfilled the constitutional commitment of good governance by adhering to the directive principles of state policy and promoting fraternity among the citizens. In this regard, the Court emphasized the need for providing widespread access to education as greater access to education would promote the ideal of fraternity. A connection was also drawn between equality and fraternity in the given manner: in the absence of substantive equality or equality of means to access resources, various social groups could never achieve the requisite dignity necessary for the promotion of fraternity.<sup>141</sup> The Court accordingly perceived this restrictive admission policy as a barrier to achieving fraternity.

## B. FRATERNITY AND SECULARISM

In *S.R. Bommai v. Union of India*,<sup>142</sup> amongst the several conclusions the Court arrived at, it declared that the principle of secularism was an essential feature of the basic structure of the Constitution.<sup>143</sup> In arriving at that conclusion, the Court employed the principle of fraternity in a variety of contexts to assert that the ideal of fraternity is a pre-cursor to the attainment of secularism. The Court explained that the inclusion of secular ideals in constitutional provisions was not a product of mere chance but was consciously deliberated upon by the framers in response to the religious foundations of Pakistan.<sup>144</sup> In substantiating this claim, the Court stated that India was historically a country where religious tolerance and a culture of fraternity existed,<sup>145</sup> and the inclusion of secular provisions was accordingly a natural one.

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<sup>138</sup> Civil Appeal No. 8170 of 2009 & Writ Petition (Civil) Nos. 320 of 2009 & 192 of 2010.

<sup>139</sup> Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence) Act, 2007.

<sup>140</sup> *Supra* note 142, ¶98.

<sup>141</sup> *Id.*, 99, 100.

<sup>142</sup> (1994) 3 SCC 1.

<sup>143</sup> See Soli Sorabjee, *Decision of the Supreme Court in S.R. Bommai v. Union of India: A Critique* (1994) 3 SCC (J) 1.

<sup>144</sup> *Per* Justice Jeevan Reddy ¶ 309.

<sup>145</sup> *Id.*

The Court also, established that “secularism is the bastion to build fraternity”,<sup>146</sup> and therefore asserted that secular practice and thinking between diverse religious groups, would aid in the fraternal relations between those communities. The outcome of such religious tolerance would have a double impact on fraternity: it would ensure both the unity of the nation through peaceful interaction and the dignity of each citizen. The Court also viewed the principle of fraternity as a means of achieving the promise of social revolution that is implicit in the constitutional text. In this regard, the Court perceives a certain ideological sequence. The Constitution first strives towards the promotion of secular ideals that would ensure fraternal relations. This culture of fraternity would then in turn aid in the establishment and sustenance of an egalitarian order which according to the judges was the ultimate goal of the framers.<sup>147</sup> In the context of the foregoing reasoning, it is clear that the Court had no hesitation in asserting that religious tolerance and fraternal relations are basic postulates in the envisaged constitutional scheme.<sup>148</sup>

In analyzing the judicial decisions that actually deal with the idea of fraternity, it is clear that the judiciary has made scant use of the idea of fraternity. In the few instances where the court has engaged with the concept, such engagement has been limited. In light of this practice, two observations merit further consideration.

In the cases discussed above, the idea of fraternity is discussed by the Court by way of its *obiter*. Although such remarks prove useful in ascertaining the undercurrents of the judicial decision making process, they have little significance on the final verdict of the Court. Even in those cases where the principle of fraternity is located within the actual ratio of the case, it is used not as a means at arriving at the decision of the Court, but rather as a means of justifying an already concluded decision. For instance, in *AIIMS*, the Court arrived at the conclusion that reservation for in-house students was unconstitutional independent of the idea of fraternity. The jurisprudence that underlies Art. 15 was used as the basis of the decision. The idea of fraternity was instead only used as a means of justifying this decision by outlining the adverse impacts unguided reservation could pose to the promise of fraternity.

Second, when courts have adverted to the principle of fraternity, they have done so in connection with other constitutional goals and values. For instance, in *Indira Sawhney*, the Court employed the idea of fraternity in connection with the aspiration towards social and economic equality. In *Bommai*, the Court employed the idea of fraternity in relation to secularism. In these cases, the idea of fraternity has no independent constitutional significance, but rather an associational value in relation to other, more widely and clearly used

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<sup>146</sup> *Per* justice K Ramaswamy, ¶176.

<sup>147</sup> *Id.*, ¶186.

<sup>148</sup> *Id.*, ¶252.

constitutional principles. Although these concepts do have a clear constitutional nexus with each other, it is regrettable that the judiciary has been unable and often unwilling to develop an independent discussion around the constitutional significance of the idea of fraternity. In this regard the decision in *Ganpatrao* is commendable, for its recognition of the drafting history and the compelling need of the inclusion of fraternity in the Indian context.

## V. NANDINI SUNDAR AND ITS USE OF FRATERNITY

The decision in *Nandini Sundar* arose out a writ petition challenging the practice of appointing Special Police Officers ('SPOs') to constitute a private militia (*Salwa Judum*), the purpose of which was to control Maoist activities in the Chattisgarh. The petitioners challenged certain provisions of the Chattisgarh Police Act, on the basis of Arts. 14 and 21 of the Constitution. The Court held that §9 of the Chattisgarh Police Act, which provided for the appointment of SPOs was violative of Arts. 14 and 21 of the Constitution.<sup>149</sup> The judgement of the Supreme Court in *Nandini Sundar* has to an extent had a polarizing effect on scholarly opinion. Some commentators have appreciated the decision for the Court's commitment to human rights and constitutionalism and the language of the judgement that allows no room for the government to evade responsibility.<sup>150</sup> Critics of the judgement, however, have raised serious question relating to the Court's extensive discussion of economic policy and its impact on governance and human rights.<sup>151</sup> Larger questions regarding the effect of the judgement on the Government's anti-Naxal operations are also being asked.<sup>152</sup> Reports have also emerged that the government has filed a review petition before the Supreme Court against the decision of *Nandini Sundar*.<sup>153</sup>

<sup>149</sup> Per B. Sudershan Reddy ¶ 55.

<sup>150</sup> Devesh Kumar, *NHRC gives thumbs-up to Salwa Judum movement*, available at [http://articles.economictimes.indiatimes.com/2008-08-26/news/28484120\\_1\\_salwa-judum-nhrc-villagers](http://articles.economictimes.indiatimes.com/2008-08-26/news/28484120_1_salwa-judum-nhrc-villagers) (Last visited on August 30, 2011); Tarunabh Khaitan, *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547, available at <http://lawandotherthings.blogspot.com/2011/07/nandini-sundar-v-state-of-chhattisgarh.html> (Last visited on August 30, 2011); Lawrence Liang, *A beacon of light in the heart of darkness: SC holds Salwa Judum unconstitutional*, available at: <http://kafila.org/2011/07/06/a-beacon-of-light-in-the-heart-of-darkness-sc-holds-salwa-juddam-unconstitutional/> (Last visited on August 30, 2011).

<sup>151</sup> Akshaya Mishra, *Your Honour, mind your brief, please – for the law's sake!*, available at: <http://www.firstpost.com/politics/your-honour-mind-your-brief-please-for-the-laws-sake-38181.html> (Last visited on August 30, 2011). For an interesting perspective on the current state of affairs see, Bela Bhatia, *Judging the Judgment* 30 ECONOMIC AND POLITICAL WEEKLY (July 23, 2011); Can Courts enforce ideology, Arun Jaitley, available at <http://www.outlookindia.com/article.aspx?277663> (Last visited on August 30, 2011).

<sup>152</sup> Akshaya Muku, *Salwa Judum Necessary*, available at [http://articles.economictimes.india-times.com/2008-10-06/news/27733412\\_1\\_salwa-judum-naxalites-human-rights-abuses](http://articles.economictimes.india-times.com/2008-10-06/news/27733412_1_salwa-judum-naxalites-human-rights-abuses) (Last visited on August 30, 2011).

<sup>153</sup> Firstpost, *Salwa Judum review decision soon, says Chidambaram*, available at <http://www.firstpost.com/fwire/salwa-judum-review-decision-soon-says-chidambaram-53198.html> (Last visited on August 30, 2011); Firstpost, *Centre to file review petition in SC on Salwa Judum*

Although each of these questions merit serious academic consideration, we confine our analysis of *Nandini Sundar* to the extent that it actively engages with the constitutional principle of fraternity.

The Court in *Nandini Sundar* employed the idea of fraternity in three distinct fashions: as a buffer to unchecked state power; as a mechanism to promote more inclusive economic policy in consonance with directive principles of state policy and finally to reinforce the Centre's responsibility of upholding human rights in a federal structure.

The primary characterization of fraternity was perceived as a means to check uncontrolled state power that was inconsistent with the constitutional vision of a responsible State.<sup>154</sup> The judges clearly stated that governmental policies that disempower and dehumanize its citizenry, are against the constitutional vision which mandates that power must vest in the State for the welfare of all.<sup>155</sup> The constitutional vision of welfare must be achieved, according to the judges, through the assurance of dignity and the promotion of fraternity.<sup>156</sup> The judges further added that when state power is not exercised in a responsible manner, then there is an inevitable breach of Arts. 14 and 21.<sup>157</sup> In using fraternity in such a manner, the Court has elevated the idea of fraternity to a constitutional principle and located it within the idea of constitutionalism and not merely a noble declaration. In drawing a clear link between unchecked state power and Arts. 14 and 21, the Court has created a nexus between the threat to fraternity and a consequent breach of fundamental rights. In doing so, the Court has brought the principle of fraternity in the Preamble and the fundamental rights under Part III closer together.

The Court also employed the principle of fraternity as a means to advocate a more equitable and inclusive economic policy of the Government. The judges stated that it was the responsibility of the Government to ensure the security and integrity of the nation by means which were within the four corners of the Constitution.<sup>158</sup> One of many ways to achieve a unified nation, where a culture of fraternity flourished would be to ensure that the economic policy of the Government did not give rise to "disaffection and dissatisfaction" from its citizens.<sup>159</sup> The justification for such an opinion, the judges held, was evident from Part IV of the Constitution.<sup>160</sup> The Court further went on to qualify its sentiments by stating that only when social, political and economic justice

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*Order*, available at <http://www.firstpost.com/fwire/centre-to-file-review-petition-in-sc-on-salwa-judum-order-52921.html> (Last visited on August 30, 2011).

<sup>154</sup> *Per* B. Sudershan Reddy, ¶3.

<sup>155</sup> *Id.*, ¶18.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Per* B. Sudershan Reddy, ¶ 20.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

was ensured, would the constitutional promise of fraternity be realized.<sup>161</sup> The Court stated in unambiguous terms that the State would not be able to promote fraternity, so long as it pursued a predatory form of capitalism that was inconsistent with the idea of directive principles of state policy.<sup>162</sup>

The Court also used the principle of fraternity as a means to remind the Centre of its responsibility in protecting fundamental rights. The Court expressed its displeasure that the Central Government was aware of the practice of appointment of SPOs in Chattisgarh and was also involved in the reimbursement of such individuals. In response to an argument that law and order is a state subject and hence the Centre could not interfere, the Court asserted that despite the federal structure India is committed to the Central Government has an obligation to protect fundamental rights and ensure fraternity.<sup>163</sup> The use of fraternity in this manner is indicative that the idea of fraternity not only binds all the organs of the State, but also binds all levels of the state to certain constitutional limitations.

## VI. CONCLUSION

The use of fraternity in *Nandini Sundar* is significant as it is a marked departure from previous patterns of judicial treatment of fraternity. In locating the principle of fraternity within the ratio of the decision, and in developing a clear link between fraternity, fundamental rights and directive principles of state policy, the Court has contributed substantially to its constitutional significance. The fact that the Court equates respect for fraternity as an aspect of constitutionalism is refreshing and is likely to contribute to its further development. The most interesting development will, however, have to be the clear link established between the promise of fraternity within the Preamble and Part III and IV of the Constitution. It is here that the principle of fraternity would prove useful in the interpretation of the constitution.

Fraternity as a principle arose in response to an absolutist monarch and was perceived as a socially desirable mechanism through which individuals, by means of a corporate existence, could demand individual entitlements. The importance of fraternity, in both a historical and a legal sense, would then be in the recognition of the importance of a group's identity, as well as the fundamental rights of the persons constituting such groups. In recognizing a group, and the need for friendly relations between multiple groups, both the executive and the judiciary in particular, would be taking cognizance of the principle of fraternity and, would then be looking at the rights contained in Part III of the Constitution in a new light. These developments pose interesting

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*, ¶12-13.

<sup>163</sup> *Id.*, ¶ 41.

prospects for the interpretation of the Constitution and merit serious academic attention in the future.