JUDICIAL CONSTRUCTIONS OF NATIONAL IDENTITY:
A COMPARATIVE ANALYSIS IN SOUTH ASIA

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DECLARATION

I, Arib Ahmad Ansari, do hereby declare that this thesis entitled, *"Judicial Constructions of National Identity: A Comparative Analysis in South Asia"* is the result of the research work undertaken by me and is being submitted in partial fulfillment of the requirements for the award of the degree of **Doctor of Philosophy (Ph.D)** of Jawaharlal Nehru University, New Delhi under the guidance and supervision of Prof Niraja Gopal Jayal. This is my original work. I further declare that this Thesis has not been submitted either in partial or in whole for any other degree or diploma of this University or of any other University or Institution.

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CERTIFICATE

We hereby recommended that this dissertation be placed before examiners for evaluation

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To My Teacher

Niraja Gopal Jayal

An academic beyond compare and a human being extraordinaire

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Introduction

A man must have a nationality as he must have a nose and two ears; a deficiency in any of these particulars is not inconceivable and does from time to time occur, but only as a result of some disaster...

Ernest Gellner[1]

The above description of nationality by one of the most influential thinkers on the issue helps convey the immense and in some ways unusual significance that an individual's national identity has come to acquire in present times. Its significance is immense because it is the fundamental organizing principle under the current inter-national or more precisely inter-state world order. It has become the sole criteria for political legitimacy. Unusual, because, despite so many identities that extract human loyalty and commitment, national identity is seen to be the most fundamental of all. One may feel deeply attached to one's language, religion, ethnicity or even one's village, province or profession, but none of these identities effect one's life chances and opportunities as national identity does. One may lose all attachment to the above ascriptive features and even come to hate them, but one cannot hope to survive without the shelter of some nationality. All this despite the fact that the constructed nature and modern quality of 'nations' as a human collectivity, has been masterfully exposed by a number of authors on the subject. I found national identity a very intriguing concept and this very nature of national identity, especially in context of the recently conceived nations in South Asia, animates the concerns of this project. Three countries: India, Pakistan and Bangladesh are chosen because despite having the same colonial past with same state structures and constitutional framework these countries have shown a remarkable divergence in the nature of national identity that was eventually adopted and professed.

The first chapter tries to unpack the highly multi-dimensional and flexible concept of national identity. The existing universal theories about the origins and nature of the collectivity called 'nation' are discussed as national identity presumes the

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[1] Gellner (1983) '*Nations and Nationalism*', Oxford: Basil Blackwell, p. 6.

identification of an individual with a nation. An attempt is also made to identify the central features of national identity which distinguish it from other identities.

The second chapter traces the origins of national consciousness in the Indian subcontinent region which included the three future nation-states before their inception. An attempt is made to find out the process through which the disparate ethnic, religious and linguistic groups came to imagine themselves in national terms. It is also sought to examine the nature of national identity that developed in this region from ancient times to the demise of the British Empire. After assessing broadly the nature of nationalism understood and then pursued by the people in this region, it is taken as a frame of reference for analyzing the current narratives about the national identity prevalent in the three countries under consideration. This analysis sets up the examination of the interpretations of national identity made by the judiciaries of the three countries.

The third, fourth and the fifth chapter deal with the court judgments which influence the construction of national identity in the three countries respectively. Every chapter follows the same scheme and involves similar methodology. First an investigation is made into the way the courts have interpreted the fundamental features of the constitution in the particular country. The features of a constitution which constitute its identity, in the sense that without those features a constitution would not be the same anymore and it would entail a change in its character, have been protected in varying degrees under the 'Doctrine of Basic Structure'[2] in all the three jurisdictions. This study of the basic structure of the respective constitutions is undertaken because 'constitutions' have been historically as well as in the present been understood to be a reflection of the principles that underpin a nation's national identity. The preamble of the constitution, the important provisions of equal fundamental rights, provisions governing citizenship, and those fixing the eligibility for attaining public offices, all of these reflect the collective will of the people constituting the nation exercised through their chosen representatives. That is what differentiates the nature of political authority in a modern nation state from that of ancient and medieval monarchies and kingdoms. In such a set up where the government is understood to be formed not by force but by consent, a constitution plays the key role in establishing such an order.

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[2] Doctrine of Basic Structure is a judge made doctrine by which certain fundamental features of the constitution as interpreted by the judges are made immune from a legislative amendment.

The term 'constitution' means to set up or to establish. It is connected to the Latin word *statue* and the root of the word is to stand. A constitution lies at the foundation of a group of individuals becoming into a 'people' (Larry P. Arnn, 2005). Article 4(2) of the European Union Treaty provides one example where the relationship between constitution and national identity is clearly stated: "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government..."[3] Elike Cloots has written that this clause protects the features that make a national community what it is (its history, language, values, traditions), and without which the community would no longer be the same" (Cloots, 2016: 90). These aspects of a people's collective identity are best reflected under the constitution. Therefore, when the judiciary interprets the essential/fundamental/salient features of a constitution, it impinges upon the nation's character and identity. Also the fact that the basic structure doctrine has been used by the courts in all three countries to varying degrees makes it an important aspect of comparison in the context of judicial constructions of national identity.

The second theme of comparison is the examination of the judiciary's imprint on the public culture of the three nations-states. Public or mass culture has been identified by Anthony Smith (1991) as one of the essential features of national identity. It is also referred as national culture in common parlance. The significance of judiciary's take on public culture flows from the theoretical findings in the first chapter. In the first chapter, national identity is found to occupy a space which lies at the intersection of culture and politics and the nature of national identity in any particular nation-state is found to be dependent upon the nature of public culture in that nation-state. If such culture is grounded in ethnic or religious terms, then the national identity comes out to be 'thick', ethnically oriented and exclusive. On the other hand if the culture is defined in civic and territorial terms, it engenders a 'thin' national identity which is civic/liberal in orientation and inclusive.

The third theme of comparison is comprised of the citizenship laws and related jurisprudence in the three countries. This theme also flows from the conclusions arrived at in the first chapter. One key feature of national identity identified in the first

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[3] Consolidated version of the Treaty on European Union, available at: https://www.math.uni-augsburg.de/emeriti/pukelsheim/bazi/OJ/2012C326p13.pdf, accessed on 28.08.2017

chapter is the feature where national identity provides an individual with a secure membership in a political community. As the world order in current times suggests, nationhood is the unwritten condition for statehood and state is the only viable political community. This aspect of national identity can be examined in tangible terms only by examining the citizenship laws. National identity supplies the normative basis for membership in a nation-state which is manifested through the legal instrument of citizenship. Thus, an enquiry into the judicial response to the citizenship claims made by different set of people brings out as to how inclusive or exclusive the national identities of the three countries are in comparison to each other. These empirical chapters are followed by an afterword which very briefly summarizes the findings of the research.

CHAPTER ONE
UNPACKING NATIONAL IDENTITY: THEORIES AND CONCEPTS

1.1 Introduction

National identity is one among the many identities that we embody in our lives. Many different identities of say a father, mother, wife, administrator, a wage worker, doctor, footballer, a student, a Telugu, Gujrati, a Christian, an Indian, a Dalit Indian and so on, can be, and usually are, held by us simultaneously. These identities together constitute who we are and how we locate ourselves in our society and the world. More importantly, these identities that we carry necessarily shape the perceptions and responses of people, having other distinct identities, towards us. We generally take these identities for granted as we internalize them over the years and become used to interacting and socializing accordingly. So we go about our identities nonchalantly unless some event or some situation that we are confronted with challenges or puts any of the identities that we carry under stress. For instance, if there is a public outcry against footballers, who lost an important match, alleging them to be chokers and traitors with parts of the media calling for withdrawal of their previously won medals and honors; every footballer who played that match and thinks he/she gave his/her best, albeit in a losing cause, would certainly be more aware of his/her identity as a footballer than any other at that time. He or she may also be a husband or wife, an elected representative of his/her local resident welfare association, a proud Indian, a Hindu, a Muslim or a Sikh, but at that juncture his/her identity as a footballer would surely become 'the most salient' identity in his or her life. That person would in all likelihood mobilize his/her energies in removing the blemish put upon his/her group as footballers and restoring the rights and honors that they used to earlier enjoy. We can think of many such situations where either a sudden event or a continued experience of injustice or discrimination propels certain identities to the forefront of an individual's self consciousness and engenders identity based movements, both social and political. Not all identity based movements, however, start on account of real events or experiences. Sometimes they are indeed created out of nothing more

than some rumors and half truths, and at other times by clever manipulation involving the magnification of certain ideas and diminution of certain others by political elites in furtherance of their own interests. However, the point that is to be made here is that we are all naturally endowed with multiple identities at peace with each other and at peace with our individual self unless this peaceful state is threatened or disturbed by some external factor, whether real or artificial. As Michael Walzer discusses,

> Under conditions of security, I will acquire a more complex identity than the idea of tribalism suggests. I will identify myself with more than one tribe; I will be an American, a Jew, an Easterner, an intellectual, a professor. Imagine a similar multiplication of identities around the world, and the world begins to look like a less dangerous place. When identities are multiplied, passions are divided ([]1992] 1999: 216).

Now the question to ask here is: does our social and political environment promote such conditions of security? If we find that identities of different kinds are routinely threatened, then the heightened passions in people when interacting with social entities with which they identify should not generate any surprise. Consider the fact that a number of organizations as well as state and non-state authorities and departments dedicated to the welfare of women and children have become the norm in most civilized societies, while no such men centric organizations are ever felt to be required, or, are hardly clamored for. Why is it so? One of the plausible ways to answer this question can be to attribute this state of affairs to the constant suppression and targeting of women on the lines of their gender identity over long years in history and even in the present. The extent of discrimination and the attendant disabilities that women bear on a frequent basis merely on account of their gender makes them more conscious about their gender identity and hence they are much less likely to take this identity for granted. The same tendency can be found in other vulnerable groups such as homosexuals, disabled people and indigenous people in some cases as well as national and other minorities. The pattern seems to be – the greater the threat to a collective identity which the members identify with, the more conscious and protective such members tend to become for that very identity under threat. This is very much the case with national identity and also other identities whether religious, regional, linguistic or ethnic. As observed by Hugh Seaton-Watson, "National Identity is passively treasured by nearly all citizens of modern societies, even if they do not

know it, since they take it for granted. But were their identity to be threatened, national majorities would mobilize in just the same way as minorities."[4]

The one difference between gender and other identities listed above is that the basis of gender identity is relatively easier to ascertain than other more contested identities but when it comes to other identities, their basis is much less tangible and difficult to ascertain. The reality of being a national, belonging to an ethnic or linguistic group is more fluid and often contested and it may change character over time; for instance the possibility of escape and recruitment to such groups via sudden migrations, inter cultural marriages, large scale displacement due to wars, natural disasters or other such historical contingencies have always been there and often bring about such changes. Paul Brass (1991), Eric Hobsbawm (1992) and others have pointed out how elites struggling for political power have sometimes sharpened and at other times blurred the ethnic differences among people. The imagined and fictitious nature of such collectivities has been pointed out by many thinkers (Kedourie, 1960; Brueilly, 1982; Anderson, 1983; Gellner, 1983). However, the effect and operation of these other identities on individuals and groups is very much the same as in case of gender identity and the various mobilizations and conflicts involving ethnic, religious or linguistic minorities worldwide are sufficient proof of it. National identity, in particular, has far reaching implications on every individual who is part of the current world order, and confronts all individuals as a hard fact of life which is not at all easy to escape or change, at least in a relatively small time frame. It is the fundamental organizing principle under the inter-national or inter-state order and easily the sole criterion for political legitimacy. The significance which national identity has come to attain since the dawn of the age of nationalism was captured by Gellner nicely when he wrote, "A man must have a nationality as he must have a nose and two ears"; also "A man without a nation defies recognized categories and provokes revulsion" (Gellner, 1983: 6). While comparing a situation of statelessness to being nation-less, he says, "the idea of a man without a nation seems to impose far greater strain on modern imagination" (Ibid). The importance of national identity is also manifest in the numerous national conflicts typically concerning who belongs and who does not and sometimes escalating into acute battles and bloodshed. One reason can be the

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[4] Seaton-Watson, H. (1982) "The History of Nations", *Times Literary Supplement*, 27 August. In Ronal Beiner (ed.) (1999) *Theorizing Nationalism*, State University New York, p. 24.

nature of demands made by groups identifying themselves as nations which almost always includes owning and controlling of the state apparatus; another could be the multi dimensional and ever changing nature of the groups referred to as nations. I will try to bring out and interpret the different lines of thought around the topic of nations and national identities in the course of this chapter.

1.2 National Identity: why it is important and what it does

The term 'National Identity' evokes feelings such as identification with a nation, a feeling of belonging to a nation, a feeling of togetherness with our fellow nationals and a spirit of loyalty and sacrifice. Any kind of identity that human beings are part of necessarily implies questions such as 'who am I' or 'who we are' in the case of group identity. National identity like other social identities also generates feelings of love, pride and emotions. It performs many other functions in the social as well as the political sphere which we shall see later. One thing that immediately comes to mind reading the phrase 'national identity' is the feeling of belonging to and identifying with the nation as a cohesive whole. The second demarcation which national identity immediately creates is the recognition of a difference between 'us' and 'them'. All identities including national identity exert a moral force on the person carrying it and the strength of the moral force exerted depends on the strength and the tenacity of the collectivity they are based on. When we look up the meaning of identity in the dictionary we find two broad meanings. The first is: "sameness in all that constitutes the objective reality of a thing" and the second is: "distinguishing character or personality of an individual".[5] National identity fulfills both these senses inasmuch as individuals belonging to a nation identify themselves with their nation and believe their well being to be bound up with it (Smith, 2009), while also exhibiting the consciousness of being different from others. The term 'national' in national identity is the more complex one because it is completely dependent on the meaning of the term 'nation'. To have any sense of the meaning and attributes of national identity one has to examine the meaning of nation. However, the collectivity called 'nation' which engenders a national identity is highly complex, multidimensional, composed of a combination of a different elements in different cases. It evades a clear definition.

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[5] (https://www.merriam-webster.com/dictionary/identity)

This nature of the national phenomenon has been captured by John Hutchison and Anthony Smith in the following words:

> The field of nationalist phenomena…is vast and ramified. It spills over into any number of cognate subjects: race and racism, fascism, language development, political religion, communalism, ethnic conflict, international law, protectionism, minorities, gender, immigration, genocide. The forms that nationalism takes have been kaleidoscopic: religious, conservative, liberal, fascist, communist, cultural, protectionist, integrationist, separatist, irredentist, Diaspora, pan, etc. The fluidity and variety of national sentiments, national aspirations and national cultural values create another obstacle to systematic research, as do many different national identities (Hutchison and Smith 1994: 3).

However, this should not be taken to adversely affect the power or the strength of national identity and national allegiances. The fluid nature of this concept or doctrine as one may call it has been identified to be a source of strength rather than weakness by some influential political thinkers such as Canovan (1996), Miller (1995) and Smith (1991, 1995, and 1998). This may be the reason why national identity is so flexible, contested and yet a persistent force in the modern world. Its flexibility allows it to combine with different ideologies and movements without losing its own character. Its strength also comes from the important functions it performs in the modern world order. National identity directly influences the nature of politics in a given nation-state from selecting the political personnel to the regulation of governments and general political conduct (Smith, 1991). It legitimizes the common legal rights and duties of all members sharing that identity and by that token also has a decisive imprint on the membership of the nation-state. The roles which legal and political institutions undertake and the processes by which they conduct themselves are derived from the shared historical customs and conventions which, in turn, are often a reflection of the national identity (Ibid). It is also supposed to provide an overarching solidarity between different individuals as well as groups within the nation, but success in this regard depends on how homogenous or diverse populations are and the terms in which national identity is framed in each case. Most importantly it provides a "means of defining and locating individual selves in the world, through the prism of the collective personality and its distinctive culture" (Smith 1991: 17). This function alone has been found to generate the immense power attributed to national loyalties in today's world. It has been well described by Ronald Beiner, himself not a supporter of national loyalties and nationalist impulses, as follows: "the

human desire for a sense of belonging, rootedness, loyalty and collective memory, as well as the desire to seek political support and protection for these feelings cannot be dismissed" (Beiner 1999: 2). Maybe possessing a national identity addresses precisely the aforementioned desires which were left in the lurch with the demise of pre-modern religious societies. When Benedict Anderson (1983) finds nationalism to be more closely associated with religion and kinship rather than ideologies like liberalism or socialism, he certainly lends credence to the view that some of the power that nationalism enjoys today can be attributed to the fact that it addresses questions and human impulses which only religion or other such otherworldly phenomena were able to explain in earlier times. This seems to be even more the case when we consider the persistence of strong national identifications in the face of a number of comprehensive and influential theories by Deutsch (1953), Kedourie (1960), Breuilly (1982), Gellner (1983), Anderson (1983), Hobsbawm (1992) and Nairn (1997) explaining persuasively that national identities are constructed and they are not some naturally occurring phenomenon in the social evolution of human beings. Apart from explaining in detail the origins of nations in their own different ways, the above accounts have commonly highlighted the elements of myth, fabrication and manipulation involved in the creation of national identities. However, it seems that the aforementioned functions that national identity performs for groups as well as individuals are too important to be neglected and make national identity desirable to many. But at the same time these very attributes, when examined critically, also make it a candidate for suspicion and scrutiny. We have witnessed throughout modern history that National identifications when expressed in extreme forms have often turned into chauvinism, xenophobia and even fascism. In the name of national identity people have been found to be willing to give up their own freedoms and suppress that of others whom the nation could not assimilate (Smith, 1991). As the national principle and nationalist ideology spread from the Western Europe to different parts of the world, it spawned confusion, instability, strife and horror especially in regions with mixed ethnic or religious landscapes (Ibid). Many of the East European and Asian national movements proved to be the sites for such national conflicts. In order to have any understanding of these disparate features and effects of national identity we will have to examine the nature of the collectivity on which it is based, that is, the 'nation'.

Before beginning to examine the phenomenon of nations, it would be useful to remind ourselves of the theoretical difficulties inherent in drawing generalizations and universal underpinnings in something so varied and disparate. Yael Tamir reflects on this difficulty in the following words

> Arguing that nationalist expressions could be standardized to fit into a theory presumes that some general trends cut across the myriad of arguments raised by different national groups. Though such trends exist, nationalists typically attempt to disguise them by grounding nationalist demands in the nation's distinct identity, history, culture or religion and by refraining from relying on a general theory that might fit other national groups…In this respect they differ from liberals, socialists, or democrats, who tend to go out of their way to demonstrate that heir values and policies correlate with a general universalizable theory. The preference for the particular and local is the most evident universal characteristic shared by all nationalist movements (Tamir, 1999: 71).

Nevertheless some few universal theories about nations and nationalism do exist and before going into the definitions of nations I will briefly discuss these theories under the following heads:

1.3 When Is The Nation?

The debate on this question which has been continuing at least since the sixteenth century has thrown up two different answers which have been classified broadly into the following themes:

1.3.1 Perennialism

This school of thought believes that nations have been there since antiquity and they are natural units into which humanity has always been divided. An element of divine ordinance is also present in this school with its leading proponent like Mazzini believing that God himself divided mankind into nations. The two key features of this school are the entrenched nature and the divine origin of nations and the belief that each nation has a specific destiny which it is meant to fulfill. The ancient Greeks, Jewish people, ancient Egyptians are cited as examples of ancient nations. This way of thinking has "obvious continuities with the Romantic belief that humanity is

naturally divided into peoples each with its own *volksgeist* creating its own culture and, and destined in the fullness of time to awake to political consciousness and claim its own state" (Canovan 1996:57). The early German nationalists Johanne Gottfried (Von) Herder and Johann Gottlieb Fichte, and Italian nationalist Guiseppe Mazzini represented this approach in their politics and writings. Herder's writings had a big influence on the development of German nationalism and he is considered the first great protagonist of cultural nationalism. However, the cultural nationalism that he professed has been argued by Isiah Berlin (1980, 2000) and John Dunn (1999) to be nothing like the recent aggressive variants that we see in recent times. He was against any hegemonic imposition of one's cultural proclivities on other populations, but he believed in the intrinsic value of cultures and languages. He once remarked:

> The savage who loves himself, his wife and his child…and works for the good of his tribe as for his own…is in my view more genuine than that human ghost, the citizen of the world, who, burning with love for all his fellow ghosts, loves a chimera. The savage in his hut has room for any stranger… The saturated heart of the idle cosmopolitan is a home for no one (as (As reproduced in John Dunn, 1999, p. 43).

He is credited to have coined the term *Nazionalismus* (nationalism). He influenced many later day philosophers such as G.W.F. Hegel, J.S. Mill, Goethe, Neitzsche (Forster, 2015). Fichte's ideas on the nation can be accessed from his *Address to the German Nation* (translations by R.F. Jones and G.H. Turnbull, 1922) in the wake of the subjugation of German territories by Napoleon's empire. Whatever the essence of the theories of the above philosophers, they have been relied upon by the ethnic and cultural nationalists all over the world to suit their own exclusive and parochial nationalisms. Many of the nations in Eastern Europe relied on Herder's thoughts and the Indian ethnic version conceived by Savarkar has been derived from Mazzini and so on.

Smith has identified two kinds of Perennialism: the first is *continuous perennialism* which believes in the continuity of nations over centuries. The second is the *recurrent perennialism* which believes in the recurrence of nations as a general phenomenon. Individual nations might decay and die, but nations as a phenomenon were always there (Smith 1999, 2000). German historian Friedrich Meinecke also subscribed to recurrent perennialism in his *Cosmopolitanism and the Nation state: Studies in the Beginning of the German Nation states* (1908) when he wrote, "it is necessary to

distinguish between an early period in which nations have plant like impersonal existence and growth and a later period in which the conscious will of the nation awakens" (Meinecke as reproduced in Canovan, 1996: 8).

Another perennialist author Adrian Hastings traces the emergence of nations from the time of the Bible. He attributes the formation of nations to the sacred idea of 'chosen people' which in turn got cemented through the dissemination of Biblical verses. According to him the very "act of translating the bible to vernacular languages turned the reading public into *chosen people*" and through such translations, Christianity encouraged the formation of ethnicities and pre modern nations (Leoussi and Grosby, 2007: 20). The vernacular Bibles, according to him, played a key role in the rise of national feelings. He is quoted by Leoussi and Grosby to have stated that "the Bible provided the original model of the nation. Without it and its Christian interpretation, it is arguable that nations and nationalism, as we know them, could never have existed…" (Hastings, 1997 as reproduced in Leoussi and Grosby, 2007: 20). He mentions the English nation, the existence of which he traces back to 1066 AD, as an example of a nation before nationalism. English nationalism, according to him, manifested itself only in the Fourteenth century in the prolonged wars with France, but English national identity was present since 1066. Another thinker Steven Grosby belongs to the perennialist school and he stresses upon the feature of territoriality as essential to all societies and argues for the transcendental and primordial nature of territorial attachments (Grosby, 1995). In support of his argument he offers the fact that the concept of Holy Land has been adopted by most nationalist movements 'either civically or ethnically based' (Leoussi and Grosby, 2007: 20-21). There is some truth in the above arguments as far as territoriality is concerned but not enough examples, other than those of England and France, are provided in support of the claim of antiquity of nations. The overwhelming majority of nations coming into being in the modern era itself points to the inadequacy of the above approach and it has been expectedly criticized by authors identifying as modernists and instrumentalists, as we shall see later. Anthony Smith is also characterized as a perennialist thinker because of his criticism of the modernist school, but when we examine his own approach which he calls Ethno-symbolism, we find that he is not exactly perennialist. This is so because he does not claim that nations existed before nationalism, but he believes that all modern nations have an ethnic core which was

there since ancient times and it is around those pre modern *ethnies* that modern nations could develop. Let us now discuss the school of thought which constitutes a response to the question 'when is the nation' and runs opposite to perennialism.

1.3.2 Modernism

The modernist school categorically rejects the claim that nations existed since ancient times. There was nothing like nations existing in antiquity as the conditions prevailing at that time had no scope for entities like nations. The emergence of nations is for them based on material factors ushered in by the advent of modernity which provided the conditions necessary for any kind of nation-like entity to emerge. Factors like spread of secular education, industrialization, capitalism, rapid improvement in modes of communication, rise of vernacular literature, rise of a bureaucratic state and other such factors related to modernity were responsible for the first nationalist mobilizations. They believe that nationalism came before nations instead of the other way round and both nations and nationalism appeared, according to them, in the last two centuries. Let us first examine *Nations and Nationalism* (1983) by Ernest Gellner which till today remains the *locus classicus* of the modernization approach to nationalism.

Gellner before addressing the nature of nation as human grouping defines nationalism in broadly clear terms: "nationalism is a primarily political principle, which holds that the political and the national unit should be congruent" (1983: 1). Then he explains the nationalist sentiment as a feeling either of anger generated by the violation of the above principle or a feeling of satisfaction by the fulfillment of the above principle (ibid). He recognizes at the outset the one weakness of nationalism as a doctrine which has been pointed out by many thinkers on the subject, viz. it has an inherent particularistic tendency by which nationalists make exceptions for their own nationalities and are found to be reluctant in conceding the same rights and privileges by virtue of being a nation to other national communities. Also in the starting pages he makes it very clear that the nationalist principle as defined by him is not easily achievable given the fact that there are a huge number of potential nations in the world and it is just not possible for all of them to have their own political roofs. "Ethnic homogeneity could only be achieved by either killing or expelling or

assimilating the non nationals within a territorial political unit" (ibid, 3). He identifies three fundamental stages that humankind has passed through in its history: pre-agrarian, agrarian and industrial. His main argument regarding the emergence of nations consists in attributing the industrial age with its attendant ramifications to have provided the necessary conditions for nations and nationalism to appear. The needs of industrial society gave rise to a generic and large scale education system including universal literacy, exo-socialization[6] of individuals outside their local units and the inter changeability of individuals across different fields. These developments broke the hierarchical social structures and individuals became atomized. Individuals could now communicate with each other in an unprecedented way and certain high (literate) culture permeated the society at large. According to Gellner the central features of Industrial Society can be summarized as follows:

(i)   Universal literacy and a high level of numerical, technical and general sophistication are among the functional pre-requisites of industrial society.

(ii)   Its members are, and must be mobile, and ready to shift from one activity to another, and must possess that generic training which enables them to follow the instructions of a new activity or occupation.

(iii)   In the course of their work they constantly communicate with large number of other men, with whom they have no previous association...they are also be able to communicate by means of written, impersonal, context free, to-whom-it-may-concern type of messages. Hence these communications must be in the same shared and standardized linguistic medium and script. The educational system which guarantees this social achievement becomes large and indispensable, but it no longer possesses the monopoly of the written word: its clientele is co-extensive with the society at large (Gellner, 1983: 34-35).

Gellner says that nationalism is essentially the general imposition of a high culture on the society, while previously low cultures had taken up the lives of the majority of populations. The "High Culture" that he frequently mentions in the course of his narrative would mean a generalized diffusion of a school mediated, academy

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[6] The terms *exo-socialization*, *exo-training* and *exo-education* have been used by Gellner upon his own illustration 'on the analogy of exogamy' (p.31) and thus exo-socialization would mean socialization outside the community. At one place he describes exo-socialization as the 'production and reproduction of men outside the local intimate unit (p. 38).

supervised idiom, codified for the requirements of reasonably precise bureaucratic and technical communication. This kind of culture replaces the old low and localized culture. Consider this passage from Gellner

> Time was when education was a cottage industry, when men could be made by a village or clan. That time has gone, and gone forever. Exo-Socialization, the production and reproduction of men outside the local intimate unit, is now the norm, and must be so. The imperative of exo-socialization is the main clue to why state and culture must now be linked, whereas in the past their connection was thin, fortuitous, varied, loose and often minimal. Now it is unavoidable. That is what nationalism is about, and why we live in an age of nationalism (ibid: 38).

From the above passage it is clear that Gellner believes a homogenous culture produced by a generic education and carried out by the state, albeit for its industrial needs, to be one of the essential societal changes that the process of industrialization brings about. This argument can have linkages with accounts of nation-states which look at them in primarily cultural terms (Gray, 1988; Kymlicka, 2002; Tamir, 1993; Hutchinson, 1994). Interestingly, according to Gellner it is not nations which bring about homogeneity but the homogenous culture produced by state education which brings nations into being. At one point in his argument, while rejecting the idea of nations being inscribed as entities given in nature, he refers to a certain link between the newly formed nations and some 'pre-national inheritances'.

> Nations as a natural, God given way of classifying men, as an inherent though long delayed political destiny, are a myth; nationalism which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre existing cultures: that is a reality for better or worse, and in general, an inescapable one…nationalism is not the assertion of these mythical, supposedly natural units. It is on the contrary, the crystallization of new units, suitable for the conditions now prevailing, though admittedly using as their raw material the cultural, historical and other inheritances from the pre nationalist world (Ibid: 49).

Here we see that Gellner decimates the perennialist view of nations but his acknowledgement of the importance of pre nationalist cultural materials went on to become a precursor to the Ethno symbolist approach to understand nations, as we shall see later. Anthony Smith, who was Gellner's student at the London School of Economics and Political Science, while agreeing with the modernity of nations, has further elaborated this dependence of modern nations on pre modern cultural sources

in his account of nations and tried to project those very cultural and historical inheritances as the most important factor in understanding the phenomenon of nations.

Another very influential work emphasizing the modernity of nations, and viewing nationalism as essentially a political doctrine rather than a cultural or ethnic doctrine came with John Breuilly's *Nationalism and the State* ([]1982, 1994, 1996). He challenged the then conventional view that nationalism emerges from a sense of cultural distinctiveness and put forward a compelling thesis that nationalism is primarily a form of politics employed to wrest and maintain state power. He mentions that in the existing literature, nationalism has been explained with reference to ideas such as cultural identity, economic modernization, class interest, psychological needs, but according to him these ideas could explain only certain particular nationalisms and not the phenomenon of nationalism generally. He contends that a crucial point about nationalism is always overlooked by the above theories and that is - "nationalism is above all about politics and politics is about power. Power, in the modern world, is principally about control of the state" (Breuilly as reproduced in Ozkirimli, 2010: 85). Just a year before Gellner, he had pointed out that a breakdown of the corporate division of labor and the consequent emergence of a bureaucratic state preceded nationalism. With the new division of labor allocating specific functions to specific institutions, rather than a few institutions discharging multiple functions, the focus shifted to the individuality of people from the earlier focus on their membership of particular groups. This created a new problem of how to establish the connection between state and society. It was at this juncture that nationalist ideas burst onto the scene and according to Breuilly, the answer to the above question assumed two forms: (i) the first answer was political and developed the idea of citizenship under which the society of individuals was to be recognized as a polity of citizens. The commitment to the state was to be generated by the participation of citizens in the democratic institutions of the state (according to Breuilly, the modern state originally developed in a liberal form). According to this view, only the political rights of citizens would matter and not their cultural identities; (ii) the second answer stressed on the cultural aspect of the state- society connection by focusing on the collective character of society. This view, according to Breuilly, was initiated by political elites in order to achieve twin ends of legitimizing state action and securing the support of the masses. This system was relatively successful and because of its

success, it got standardized and this is how a new identity was provided to different social groups (Ibid: 86-87). This brief description will not do justice to Breuilly's monumental work, nevertheless, we can see, with the help of his remarkable analysis, one of the ways how national identity might have been created where it did not exist before.

No account of the modernist approach can be complete without discussing Eric Hobsbawm's contribution to the field. He is not only a modernist but his analysis also provides some basic assumptions of the constructivist and instrumentalist school of thought. Before writing his 1990 book entitled *Nations and Nationalism since 1780: Programme, Myth, Reality*, he gave his thesis – *The Invention of Tradition* in a co-edited book with Terence Ranger in 1983. In this book, in a breakaway from the dominant thinking at that time, he explains persuasively how nation and its paraphernalia are the most widespread of 'invented traditions'. He defines invented tradition as "a set of practices normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past" (Hobsbawm, 1983: 1). He further stresses that wherever possible, the invented traditions normally attempt to establish continuity with a suitable historic past. He gives the example of the deliberate choice of Gothic style for the renovated British parliament in the nineteenth century and the deliberate decision of the British government after World War II to rebuild the parliamentary chamber on the same basic plan as before as an attempt to establish continuity with a suitable historic past. He argued that the idea of national community was invented to secure stability and cohesion in the wake of rapid fragmentation of society caused by large scale industrialization. He identifies the period from 1870 to 1914 as the zenith of invented traditions. This period coincide with the rise of mass politics and the inclusion of hitherto excluded sections of the population into politics created a difficult problem for the rulers of how to get the continued support, loyalty and obedience of their subjects. The ruling elites adopted 'invention of tradition' as their main strategy to counter this form of mass democracy. In his chapter on mass producing traditions in Europe, he identifies three major innovations of that period as particularly relevant: (i) First was the "development of a secular equivalent of the church – primary education, imbued with revolutionary and republican principles and content, and conducted by

secular equivalent of the priesthood" (Ibid: 271); (ii) second was the invention of public ceremonies such as the Bastille day, which can be dated exactly to 1880; (iii) third was the mass production of public monuments. One of his conclusions goes thus:

> What is clear is that nationalism became a substitute for social cohesion through a national church, a royal family or other cohesive traditions, or collective group self-presentations, a new secular religion, and that the class which required such a mode of cohesion most was the growing new middle class, or rather that large intermediate mass which so signally lacked other forms of cohesion. At this point, once again, the invention of political traditions coincides with that of social ones (Ibid: 303).

Let us take the example of language as a test case for invented traditions. Can the so called national languages also be included in the above category? I found it difficult to be absolutely certain about Hobsbawm's answer to this question, but he has argued brilliantly why national languages are almost always 'semi artificial constructs' and why they can never be 'primordial foundations of national culture' as projected by a number of primordialist thinkers (Hobsbawm, 1992). The importance of language in nationalist movements and particularly in the philosophy of German Romantic thinkers like Herder and Fichte can hardly be overstated. Here is what Hobsbawm has written:

> In the era before general primary education there was and could be no spoken national language except such literary or administrative idioms as were written, or devised or adapted for oral use, either as a lingua franca in which speakers of dialects could communicate or perhaps to address popular audiences across dialectal boundaries…national languages are almost always semi artificial constructs…they are opposite of what nationalist mythology supposes them to be- the primordial foundations of national culture and matrices of national mind (Hobsbawm, 1992: 53-54).

The reason he gives for the above is that non-literate vernacular languages were always a complex of local variants or dialects intercommunicating with varying degrees of ease or difficulty, depending on geographical closeness or accessibility. He gives an example from Germany and explains that to this day educated native speakers of German from Kiel may have great difficulty in understanding even educated Swiss Germans speaking the plainly German dialect which is their usual means of oral communication. Thus what these theories by Gellner, Breuilly and Hobsbawm do is to effectively, if not successfully cast serious doubts on the deep historicity of nations as suggested by perennialist thinkers.

1.4 Why Is The Nation?

Just like the above question, this particular question has engaged philosophers and thinkers alike across many centuries. They have given their own different accounts of why and how nations emerged. The reasons given in these accounts range from-divine providence, the order of nature, the basic human need for rootedness and belonging, to modern constructions and sleight of hand performed by the intellectual and political elites. These reasons can be discussed fruitfully by classifying them into three broad and recognizably distinct categories:

1.4.1 Primordialism and Socio-biological approach

This approach answers the above question by attributing the origin and rationale of nations to the inherent nature of human life which causes humans to live in groups and identify with groups. This approach runs parallel to perennialism and traces the origin of nations way back into antiquity. It considers nations as primordial and given in nature. Primordialism regards group identity as a necessary aspect of human life and also that certain primordial, irrational attachments are there in every society. They may be based on blood, language, religion, ethnicity, and so on. It assumes that nationality is a "natural part of human beings, as natural as speech, sight or smell" (Ozkirimli, 2010: 49). Edward Shils (1957) is considered to be the first author to use the term 'primordial' to describe family relations. He has argued that the attachment that family members feel for each other comes from "significant relational qualities which can only be described as primordial" (Shils as reproduced in Ozkirimli, 2010). Clifford Geertz (1973) further elaborated this position by arguing that primordial identities are not only natural or given, but they are "ineffable", that is, something which is too great or extreme to be expressed in words. For him, social interaction is not enough to explain primordial identities but they are coercive in nature they are concerned primarily with sentiment and affection (Geertz, 1973). Consider this excerpt from Geertz:

> By a primordial attachment is meant one that stems from the givens…of social existence: immediate contiguity and kin connection mainly, but beyond them the

givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of language, and following particular social practices. These congruities of blood, speech, custom, and so on, are seen to have an ineffable and at times overpowering coerciveness in and of themselves (Geertz, 1993: 259).

Steven Grosby (2005) is another author who has given a reasonably persuasive primordial account of nations. The interesting feature in his account, as we discussed in the section on perennialism, is that of territoriality. He argues that territorially distinct human societies were there to be found since the first written records (Grosby, 2005: 1). He considers ancient Sri Lanka, ancient Israel, Japan in the eighth century, medieval Poland in the fourteenth and fifteenth centuries, and Korea between tenth and fourteenth centuries as examples of early nations. Nation according to him was "a community of kinship, specifically a bounded, territorially extensive, temporally deep community of kinship (Ibid: 14). He identifies some important factors which helped in the formation of nations in early times. Law and Religion were two such factors which helped Israel attain a sense of nationhood. He states that Israeli legal codes drew a distinction between the natives of the land and foreigners. Religion on the other hand created a distinctive culture as the God of Israel in those times, Yahweh, was different from the Gods of the neighboring countries thereby contributing in the development of a distinct identity. Buddhism played a similar role in early Sri Lanka (Ibid: 67-68). In other cases such as ancient Japan, the Emperor was the formative factor. He argues that in Tokugawa Japan, "the emperor remained an unquestioned object of veneration, transcending regional loyalties…Indicating the existence of a national collective self-consciousness was, during the Tokugawa Period, the combination of the samurai's slogans 'revere the emperor' and 'expel the barbarian'" (Ibid: 67). Language is another such formative factor identified by Grosby and War is the final important factor for him in the 'formation of a distinctive culture'. For the Sri Lankan Sinhalese, it was conflict with the Tamils and the Hindu forces from southern India, for ancient Israel - war with Philistines and Ammonites, for the Japanese, it was the war with T'ang China and for Poland it was the fourteenth century military campaigns against the Teutonic Kings and the Czechs (Ibid: 69).

Thus, this view of nations considers them to have come into existence because of the natural primordial attachments that a group of human beings, most likely, related by

blood or ancestry feel for each other and the tendency of humans since time immemorial to distinguish between 'us' and 'them'. The presence of nations since ancient times is sought to be established by the authors subscribing to the above view in order to prove the naturalness of nations. Primordialism has been criticized, among other things, for not being able to establish that the tendency of humans to distinguish between us and them has actually produced some kind of collective identity throughout history (Ozkirimli, 2010: 70). Hobsbawm (2005) has questioned the authenticity of the much emphasized traditions and symbols of the allegedly ancient nations. According to him, these traditions and symbols, rather than coming from popular memory, are generally products of rulers and ideologists at specific moments in history.

The socio-biological approach developed by Pierre Van Den Berghe goes a step further and argues that social groups like ethnicity, race and nations are essentially defined by common descent and maintained by endogamy. According to this view, ethnicity and race are an extension of kinship ties and nations are an extension of ethnic groups.

> Ethnic and race sentiments are to be understood as an extended and attenuated form of kin selection. To put it differently, Ethnic groups, races and nations are super families of distant relatives, real or putative, who tend to intermarry, and who are knit together by vertical ties of descent reinforced by horizontal ties of marriage" Van Den Berghe, 2001, as reproduced in Ozkirimli, 2010:54).

Van Den Berghe concedes that ethnic groups may disappear, reappear, coalesce or break up due to various reasons but maintains that all the "construction and deconstructions remains firmly anchored in the reality of socially perceived biological descent" (Ibid, 55). Van Den Berghe believed that *ethnies* have existed since the dawn of history and according to him nationalism is to be understood as the transformation of the sense of belonging to an *ethnie* into a demand for political autonomy or independence (Ozkirimli, 2010). Thus nation, according to him, can simply be defined as a 'politically conscious *ethnie*'. This view of nations certainly puts the idea in a narrow perspective according to which nations have to be considered as involuntary communities where it is birth more than choice which governs an individual's nationality. Many other authors, as we shall see in the next section, have supported this view of nations and it used to be the dominant paradigm to understand

nations and nationalism till about 1980s. For instance, Walker Connor has taken a similar view of nations in his *Ethnonationalism: The Quest for Understanding* (1994) where he describes nations as self defined *ethnies*.

On the philosophical map, the above approach is also called the classical nationalist or the radical nationalist approach. Within this approach nations are typically seen as essentially non-voluntary communities to which one belongs by birth and early nurture and this belonging is made complete by one's additional conscious endorsement (Miscevic, 2014)[7]. The radical nationalist vision draws from deep communitarian stances on culture such as the principle that an ethno cultural nation is the most significant community for people. They are different from other communitarian thinkers who prefer more far ranging communities like religious, linguistic or cultural ones. Ozkirimli observes that central thread running through primordial, perennialist and socio biological theories is their "belief in, and representation of, the nation as mystical, a-temporal, even transcendental entity whose survival is more important than the survival of its individual members at any given time" (2010: 52). Even while going through the arguments provided by authors who subscribe to the above view, one is able to prefigure that this view would be subject to a lot of criticism on a number of grounds. First, this approach obviously negates many of the ways of understanding nations as they exist today and makes it impossible to conceive of any voluntary organization of people as nations. Examples like USA, Britain, France, India, Switzerland and others simply do not fit into the above conception. Second, this approach is unable to account for the changes, fluidity and dissolution of ethnic groups and the modern processes of fusion of ethnic groups through intermarriages and also fission of such groups due to various other factors. Third, what happens when the self defining nations as we saw above fail to absorb non-compliant minorities? It is an important question to ask especially when we know that this used to be the primary preoccupation of the many nation-states when the above perspective on nations was dominant, particularly during the build up to the World War II. Leoussi and Grosby, while referring to the above problem have observed: "Dominant nations responded to the challenge of mobilised nationalities by stressing further their primordialist pedigree. Far too often, ethnic cleansing and mass

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[7] Miscevic, N. (2014), "Nationalism" *The Stanford Encyclopedia of Philosophy*, winter edition. URL= <http://plato.stanford.edu/archives/win2014/entries/nationalism/>.

expulsions became the ultimate culmination of denial of difference" (Leoussi and Grosby, 2007: 16). Also from experience of nationalist conflicts in history, one can easily see the possible consequences of sticking with the pure classical vision of nations. Miscevic's words are very apt here:

> In many modern states, citizens of different ethnic backgrounds live together and very often value this kind of life. The very fact of cohabitation seems to be a good that should be upheld. Nationalism does not tend to foster this kind of multiculturalism and pluralism, judging from both theory (especially the classical nationalist one) and experience. But the problems get worse. In practice, it does not seem accidental that the invidious particularistic form nationalism claiming rights for one's own people and denying them to others, is so widespread" (Miscevic, 2014).

One gets reminded of Gellner here when he pointed out that there is far too little territory for all candidate ethnic groups to have a state, and that the same goes for other goods demanded by nationalists for the exclusive use of their co-nationals (Gellner, 1983). Considering the above dangers associated with the classical version, more recent scholarship has argued for more universal and milder forms of nationalism. One such variant is liberal nationalism as developed primarily by Will Kymlicka and Yael Tamir which I will discuss later. Another thin version of national identity has been given by Miller (2000). But the most powerful theories against the above primordial version have been produced by the bunch of thinkers referred to as constructivists and instrumentalists who are discussed in the next section.

1.4.2 Constructivism/Instrumentalism

On the other side of the divide are the Constructivists like Karl Deutsch, Elie Kedourie, Benedict Anderson, Eric Hobsbawm, John Breuilly, Paul Brass, Tom Nairn and Michael Hechter who contend that nations are creations and products of human endeavor rather than natural entities given in nature. This human endeavor came as a response to a certain change in the social and political environment at a certain period in human history. They believe that national communities are a recent development and emerged as a result of material sources brought forth by the advent of modernism along with the inventions and fabrications of history by the nationalists. So, their claims are both chronological and structural. The arrival of constructivist and modernization theories coincided with the anti colonial nationalist movements in Asia and Africa which further enhanced the influence of these theories. For Karl Deutsch,

one of the earliest constructivists, the central factor responsible for the growth of nationalism was the increasing social mobilization and social communications which the western states experienced from 18th century onwards. Other important factors which helped form nations were urbanization, social mobility, rising literacy rates, media exposure and voting patterns, which were all products of modernization (Deutsch: 1953). The debate between primordialism and constructivism has been reframed by Vincent Pecora in terms of 'necessity' and 'will'. He asks the question: "Is the nation including its modern form of nation-state, an inherent, natural and necessary part of human development...? Or is the nation-state a contingent event, a function of historical vicissitudes of power, will, desire and institutions with no metaphysical significance whatsoever?" (Pecora, 2001: 22). Constructivist thinkers certainly find the nation-state to be contingent event brought forth by the forces of modernity.

Here they merge with the modernization theorists and agree with them that nations are recent in origin and it was nationalism which came first and gave rise to nations rather than the other way round. Just as while going through the literature on primordialism and perennialism, one cannot escape the inference that authors cannot be neatly divided into primordialists and perennialists because most of them have overlapping views believing in both the permanence and the primordiality of nations, we will see that most constructivist or instrumentalist thinkers are also modernists who believe in the novelty of nations and that they are a distinctly modern phenomenon. However this is not to say that all modernists are constructivists. As we observed in the works of John Breuilly, Earnest Gellner and Eric Hobsbawm in the section on Modernism, they believe nations to be distinctly modern creations but do not believe them to be purely fictitious or discursive entities. Elements of manipulation and construction, according to them, are indeed central to the making of nations, but the product when it comes out is a real and not merely an 'imagined community'. Gellner has written elsewhere that he is 'deeply sensitive to the spell of nationalism' and that he does not deny or ignore the intensity and genuineness of the feeling of nationalism (Gellner 1997:12). Similarly Anthony Smith, who does not properly fit into the modernist tag, nevertheless agrees to the modern pedigree of nations, but considers them real and powerful entities. He believes them to have emerged out of pre modern ethnic communities that he calls *ethnies*. There are certain other assumptions which the

modernists make: (i) that the nation is a real sociological community and not a discursive formation without substance, and (ii) that nations are historically embedded. Even though they are recent in origin as the material resources required for forming of nations were supplied by modernization, they also required certain historical and cultural materials to work with and build upon.

Coming back to the constructivists, let us first examine the well argued and highly influential account given by Benedict Anderson who constitutes perhaps the sole exception to the aforementioned bunch of modernists who understand nations as real communities. Anderson, in his path breaking account starts with the idea of nations as 'imagined communities' and argues it very convincingly.

Anderson's *Imagined Communities*([]1983]1991) dealt a severe blow to the primordialist theories by delineating quite brilliantly how impersonal and non-ascriptive sources were at the heart of the factors responsible for the emergence of national consciousness for the first time. He defines nation as "an imagined political community – and imagined both as inherently limited and sovereign" (Anderson, 1991: 6). The factors which made it possible for this kind of community to be imagined can be summarized as: (i) a demotion or the loss of monopoly of the world's sacred languages like Latin, Arabic, Pali, Chinese; (ii) the impact of reformation which brought about a coalition of Print-Capitalism and Protestantism, and (iii) the use of vernaculars as the instruments of centralization by absolutist monarchs. According to Anderson, the nation took birth on the funeral pyre of large religious communities and dynastic regimes. However, the above three factors were not the only ones responsible for the emergence of national consciousness. What made these factors work, was a certain view, or conception of 'Time'. This conception of time, according to Anderson, emerged in the same period when the visual and aural representations of the sacred were becoming increasingly territorialized and personalized. This novel conception of time stressing upon the 'simultaneity of time', made it possible, in the words of Anderson, "to think the nation" ([]1983]1991: 22). He argues that earlier the time was viewed as a 'Messianic time' (a phrase he borrows from Walter Benjamin) in which 'simultaneity' gets depicted as a continuation of past and future events through an instantaneous present. In this conception, the 'simultaneity' exists vertically along time in a series of happenings, which had to happen in a particular way according to divine providence, each happening

prefiguring the next one and fulfilling the former. He quotes an example from the Bible to explain vertical simultaneity, where the sacrifice of Isaac is interpreted as prefiguring the sacrifice of Christ and the sacrifice of Christ as fulfilling the former. Now, these events are linked neither temporally, nor causally. The connection between these two events can only be established 'if both occurrences are vertically linked to Divine Providence' (Auerbach, 1957 as cited in Anderson, 1991: 24). On the other hand, the novel conception of time which was slowly developing, involved a conception of 'simultaneity' which exists horizontally across time. The instruments which made this kind of simultaneity possible were the 'newspaper' and the 'novel'. The plot of a novel when it unfolds has different characters doing different things without knowing about each others' acts. Two characters may even cross each other on the road but still may not know each other. They are connected to each other only because of the plot of the novel, which the reader, just like God in the above example, watches unfolding while witnessing the activities of all the characters at once or at the same time. That is, the reader knows what all other characters are doing 'in the meantime' while one character is being described. This kind of simultaneity across time makes possible the collective imagination of a world conjured by the author in his readers' minds ([]1983] 1991: 26). This is how, according to Anderson, a nation is imagined because otherwise the 'members of even the smallest nation would not know most of their fellow members, meet them or even hear of them, yet in the minds of each lives an image of their communion' ([]1983] 1991: 6).

Similarly, the almost precisely simultaneous act of newspaper reading by the people of a certain locality is like a daily 'mass ceremony' where they are able to imagine the lives of other people around them. Anderson writes:

> This mass ceremony is performed in silent privacy, in the lair of the skull. Yet each communicant is well aware that the ceremony he performs is being replicated simultaneously by thousands and millions of others of whose existence he is confident, yet of whose identity he has not the slightest notion... At the same time, the newspaper reader, observing exact replicas of his own paper being consumed by his subway, barber shop or residential neighbours, is continually reassured that the imagined world is visibly rooted in everyday life (1991: 35-36).

This idea of 'simultaneity' and the impact of 'Print Capitalism', are central to Anderson's thesis and provide a refreshing perspective on the genesis of nationalism.

It explains how the change in the understanding of time in that era proved crucial for the above factors to be able to be effective. In other words, the earlier religious imaginings which were based on vertical simultaneity gave way to horizontal simultaneity which became the precursor for national imaginings.

Anderson also contends that nationalism as an ideology is incoherent which is why it has not produced any big thinkers. According to him nationalism cannot be understood properly if it is taken to be something like an ideology. It is rather similar to notions like religion and kinship. He wrote, "It would, I think, make things easier if one treated it as if it belonged with kinship and religion rather than with liberalism or fascism" (1991: 5). He highlights this anomaly at another place when he says:

> No more arresting emblems of the modern culture of nationalism exist than cenotaphs and tombs of unknown soldiers...the cultural significance of such monuments becomes even clearer if one tries to imagine, say, a tomb of the unknown Marxist or a cenotaph for fallen liberals. Is a sense of absurdity avoidable? The reason is that neither Marxism nor Liberalism are much concerned with death and immortality. If nationalist imagining is so concerned, this suggests a strong affinity with religious imaginings (1991: 9-10).

He believed that the implications of a national identity are dangerously similar to a religious identity as suggested by the above quoted passage. And this explains the enormous normative pull that national identity exerts on people. His thesis is further vindicated by the South Asian experience where religious imagining is becoming the locomotive for nationalist imaginings to ride on, as we shall discuss later, in almost all the nation states. He is on the same page with Gellner about the supportive role played by cultural materials alongside the primary role played by printing press and capitalism. At one place in his book, he writes that the notions of nation, nation-ness, national belonging are 'cultural artefacts' (1991: 4) and also accords central importance to vernacular languages in the genesis of the nation.

Elie Kedourie is another influential thinker whose explanation of nationalism and formation of nations gave initial boost to instrumentalist accounts of nations in his *Nationalism* (1960). According to him, nationalism was a product of disaffection of intellectuals first in Europe and later in Africa and Asia (Kitromilides, 2005). He traced the origin of Nationalism to German Romantic philosophers and argued that Kant's principle of self determination which was completely universalistic in nature

was twisted by the German Romantic thinkers and in the service of their own parochial and particularistic nationalism. He firmly rejected the Primordialist thesis about the genesis of nations and believed that nationalism as a doctrine was invented in Europe in the beginning of the nineteenth century.

Tom Nairn (1981) and Michael Hechter (1975) have attributed the rise of nationalism to purely economic factors. They both attribute it primarily to the 'uneven development' produced by the rapid implantation of capitalism over backward regions by the Western European states which Nairn calls the 'core' of the capitalist world. This uneven development was experienced by the 'peripheral' part of the world as domination and invasion which intensified group solidarity between the peripheral regions and it got manifested in the nationalist movements (Ozkirimli, 2010). Hechter famously called this process 'internal colonialism' and attributed the rise of nations to internal colonialism. "Internal colonialism refers to the process of unequal exchange between the territories of a given state that occurs either as a result of free play of market forces or of economic policies of central state that have intended or unintended distributional consequences for the region" (Hechter, 1999: xiv). He further mentions that since the 1960s, this term has largely been used to demarcate regions that are simultaneously economically disadvantaged and culturally distinctive from the core regions of the state. This internal colonialism, according to Hechter leads to a 'cultural division of labor' which entails allocation of social roles by the advanced groups in such a way that the more prestigious social roles are reserved for its members and members of the less advantaged group are denied access to those roles (Ibid: 9). This kind of stratification, according to him leads to the development of strong and distinctive ethnic identification. For him, a combination of three factors is the prime moving spirit behind nationalism: economic inequality coupled with cultural difference and a certain degree of intra-group communication. This is of course not a comprehensive account of nations and the usual criticism directed at instrumentalist theories in general is also directed at this. A common criticism is the inability of constructivist versions to account for the high emotional appeal of nationalism and so on.

Paul Brass (1979, 1985, and 1991) has argued in a clinical fashion for the constructed nature of both ethnicities and nationalities. He has worked extensively on South Asia and through his fieldwork in many states of India including Uttar Pradesh, Bihar,

Gujarat, Punjab, Tamil Nadu and Assam, he has inferred that ethnicity and nationalism are social and political constructions. They are not 'givens' but a creation of elites who fabricate and distort cultural materials from groups that they want to represent in order to gain political and economic advantage both for themselves and their groups (Brass, 1991). The cultural forms, values and practices of ethnic groups supply the required political resources for elites who use them in their struggle for power. The study of ethnicity and nationalism, according to Brass is the study of the process by which elites and counter elites within the group select particular aspects and symbols of group's culture, impute new value and meaning to those aspects and use those pre selected aspects of culture as symbols to mobilize the group and compete with other similar groups (Ibid). About the cultural differences forming the basis of ethnic categories and nationalities and encouraging competition between them, Brass unequivocally discards this view and points firstly at the fluid and variable nature of cultural criteria and second the inability of such cultural differences to be able to give rise to ethnic competition on their own (Brass, 1991: 19-20). He explains that ethnic boundaries become clearer and sharper only after the transformation of ethnicities into nationalism has been started by the elites, otherwise on their own the boundaries and distinctions are not as pronounced. He writes:

> Cultural markers are selected and used as a basis for differentiating the group from other groups, as a focus for enhancing the solidarity of the group, as a claim for a particular social status and if the ethnic group becomes politicized, as justification for a demand for either group rights in a an existing political system or for recognition as a separate nation (1991: 63)

The existence of objective cultural markers, according to Brass is a necessary but not sufficient condition for the ethnic transformation (into nationalism) to begin. The other necessary conditions for him would be: (i) elite competition, (ii) the existence of the means to communicate the selected symbols of identity to other social classes within the ethnic group, (iii) the existence of a socially mobilized population to whom the symbols maybe communicated, (iv) the absence of intense class cleavage or other difficulties in communication between elites and other social groups and classes (Ibid: 63-64). Thus his account remains one of the quintessential instrumentalist accounts of nation formation. Now we will examine another interesting approach which addresses our question: 'why is the nation' in yet another different way.

1.4.3 Ethnosymbolism

The 'Ethno-symbolists' led by Anthony D. Smith draw from Gellner's work and promulgate a new approach which tries to study nationalism from the point of reference of ethnic and cultural symbols which form the basis of specific national identities. Before the world wars and the Holocaust, primordialism was the dominant philosophy, but after that it began to be criticized as a highly essentialist and nationalist theory of nations and therefore gave way to the modernist view. But even as these modernist theories were getting built upon, there were differing voices which could be heard. Some other scholars led by Anthony D. Smith came up with a different approach to the study of nations and nationalism which is termed by Smith as the 'Ethno symbolic' approach. This approach is different from both the earlier orthodoxies in that it agrees with the chronological component of modernist philosophy but rejects its basic assumptions and the structural part. The difference emanates from the significance they attach to the cultural and symbolic resources behind the emergence of nations and point towards the inadequacy of the material resources for sustaining a nation so vigorously upheld by the constructivists. Constructivist thinkers consider the role of cultural and symbolic traditions, as for instance Hobsbawm's powerful thesis of the 'invention of tradition' which emphasized the importance of traditions, myths and suitable history invented by the nationalists who with the help of the state institutions gave birth to nations (Hobsbawm: 1990). Similarly, Gellner (1983) placed importance on language and culture, Karl Deutsch (1966) on social communications; Benedict Anderson (1991) on the print media and the vernacular language but according to them, all these factors depended on the material factors of capitalism and industrialism for direction and effect. Here the Ethno Symbolist intervenes and says that even though material factors influence the conditions under which national identities are formed and national movements are forged, they do not determine the content and intensity. In the words of Smith, 'they cannot tell us which communities, ideologies and sense of identity will emerge." (2009:15). Hence, they focus on studying the national communities, and the sense of national identity in terms of their constituent symbolic resources, such as ethnic myths, symbols, values and memories which in turn give rise to and shape their languages, customs, rituals and traditions. Secondly, according

to ethno-symbolists treating nations as created solely by economic and material factors, as merely created and manipulated by states and their elites fails to explain the strong devotion and passionate attachment of so many people to their nations. Consider the following excerpt from Smith:

> Whatever the elements of imagination that go into the making of nations, the result is much more than a construct and a discursive foundation. Because once created, national communities have lives of their own with real consequences...People do not lay down their lives for a discursive formation. Just as the nation is felt, willed and acted out, as well as imagined, so many of the members of today's nations feel that their own interests, needs and welfare is bound up with the welfare and destiny of their nation.(Smith, 2009: 13-14)

This approach has also been termed as a moderate version of the primordialist view (Ozkirimli, 2010). Stanley Hoffman (1966), in his famous article on the Fate of the Nation State compared nations to artichokes, in that they have unimportant leaves which can be eaten one by one, but "even an artichoke has a heart which remains intact after the leaves have been eaten" (Hoffman, 1966: 883-884). This is another description of the nature of nations as a collectivity which is similar to the ethno symbolist approach. Leoussi and Grosby (2007) have further discussed this approach in their edited book and a historical defense has been provided by Azar Gat and Alexander Yakobson (2013).

In a way the ethno-symbolic school represents a middle path between primordial and modernist school and gives a more comprehensive reflection of the diversity of factors which together exercise their influence on the making of a national identity. Although, Smith differs diametrically from Gellner with respect to their opinion on what came first between the state and the nation. According to Gellner, because the nationalist principle is all about the national and the political unit being congruent with each other, if there is no state in existence, then the question of whether the national and political units are co-extensive does not arise. "Not only is our definition of nationalism parasitic on a prior and assumed definition of the state: it also seems to be the case that nationalism emerges only in milieu in which the existence of the state is very much taken for granted" (1983: 4). He further states that the existence of politically centralized units is not a sufficient but necessary condition of nationalism. Smith on the other hand states categorically that nationalism is an ideology of the

nation and not of state and by drawing from earlier as well as recent examples where nationalist movements did not have the acquisition of a state as their goal, he goes on to show that nationalism is primarily a cultural doctrine at its core. He writes:

> The idea that nations can be free only if they possess their own sovereign states is neither necessary nor universal. Early nationalists, as well as cultural nationalists thereafter such as Rousseau, Herder, Achad Ha'am, Aurobindo were not particularly interested in the acquisition of state...nor has every nationalist movement made the acquisition of a state for its nation a priority. Many Catalan, Scots and Flemish nationalists have been more concerned with home rule and cultural parity in a multinational state than with outright independence. The notion that every nation must have its own state is a common but not a necessary deduction from the core doctrine of nationalism; and it tells us that nationalism is primarily a cultural doctrine of, more accurately, a political ideology with a cultural doctrine at its centre. (Smith, 1991: 74)

Nevertheless both of them agree on the proposition that nations were not always there since antiquity. Smith's account of the formation of nations charts the process from the ethnic communities (which he called *Ethnies*) existing in the period roughly before the 16th century which were first mobilized in Europe through 'bureaucratic incorporation' by Kings, ministers and bureaucrats (where they were present) and through 'vernacular mobilization' by the intelligentsia in others (Smith, 1991). Through these two processes nations were first formed in Europe around already existing ethnic communities. Then this process, owing to the impact it had on the other regions of the world, was followed in other continents. In both the above processes that he mentions, he recognizes the role of modern forces and the work of intellectuals, poets, musicians, sculptors, novelists, historians, archaeologists, playwrights, philologists, anthropologists and folklorists in mobilizing the masses and giving language and content to the nations in the making (1991: 54 -98). He concedes that the elements of nations described by him never existed before the modern period, but what he insists is that modern nations certainly contain pre modern features in them because they have been built around pre modern ethnic communities. Here the arguments of Gellner and Smith converge. Both provide completely different routes taken by pre modern empires and kingdoms to transform into modern nations, but both agree on the cultural base of nations. One of the two definitions that Gellner proposes for nations says that only people sharing the same culture can belong to the same nation. Though later he qualifies it by saying that sharing a culture is not enough unless such people actively choose to recognize each other as belonging to the same

nation, but the importance of culture in Gellner's account cannot be missed. Now we move to our next question.

1.5 What Is The Nation?

Let us now try and examine how the collectivity called the nation has been defined and understood by philosophers. Notwithstanding the attendant difficulties in defining this highly complex, multi dimensional and particularistic entity, ever since Anthony Smith's treatise on national identity we have a broad and working definition of a nation. He defined it as "a named human population sharing an historic territory, common myths and historical memories, a mass public culture, a common economy and common legal rights and duties for all members" (1991: 43). Though he has underlined the broad contours of a national community but he himself concedes that any individual example would show considerable variations. However, when we consider Renan's earlier definition where he called the nation "a daily plebiscite", we should only be too aware that any such definition listing out the features peculiar to nations would be subject to further exceptions.

Firstly, let us get it clear that a nation is not the same as a state. The element of territoriality and homeland in a nation makes it vulnerable to be confounded and sometimes overlapping with state. It is important to have this distinction clear because many a times the two are used interchangeably, especially in the naming of international organizations and bodies. For instance, the United Nations is actually not a grouping of nations but politically sovereign states. It needs to be emphasized here that state is a set of public institutions exercising monopoly of coercion and extraction within a given territory whereas a nation is a cultural and political bond uniting all people in a political community who share an historic culture and homeland (Smith: 1991). The difference between these two concepts also gets reflected when we consider the existence of nations without a state. For instance, the Kurds, the Tamils, the Palestinians, the Sikhs, Taiwanese, the Scots, the Catalans, the Armenians in history who lost their homeland but its members retained their attachments to their homelands plus their symbols, memories and their distinct culture. Although one of the definite goals of every nationalist movement is autonomy, not every nation is able to find expression in a nation-state. On the other hand, not all political communities

can be called nation-states even if they are territorially compact and well defined, if the people inhabiting them do not think and express themselves as a nation. For instance, the European Union is one such political community. That's why every kind of identification with a political community is not necessarily nationalist in nature. Here we can see the clear difference between the nation and the state as occupying two different spheres of human organization. So, nations should not be confused with states.

Wayne Norman tells us that all characterizations of the nation in social theories refer to communities and try to distinguish national communities on the one hand from mere ethnic or racial groups, or communities defined entirely by political or territorial boundaries on the other (Norman, 1999). Norman himself endorses Weber's definition of a national community which he called a "community of sentiments". Norman claims the 'community of sentiment' to be the real necessary condition for a community to be called a nation. This definition is redolent of Gellner's second working definition of nations - "nations are the artifacts of men's convictions and loyalties and solidarities" (Gellner, 1983: 4). What these definitions signify is that in order to qualify as a nation, significant proportion of a particular group or community should think of themselves to be such. And once they imagine themselves to be forming a nation, more often than not this 'imagination' in Anderson's terms engenders a strong desire on their part to exercise control over its destiny through political means. When a certain group of people believing themselves to constitute a nation go about claiming autonomy and control over their own fates we see nationalism as an ideology and as a principle in operation.

The nature of our subject of inquiry – 'nation', and the different forms in which it exists in today's world can be classified into two broad categories: the ethnic/ascriptive type and the civic/territorial type.

1.5.1 Ethnic/Ascriptive Type

One of the answers to the question what is a nation takes the Ethnic route and understands nations to be either politically conscious ethnicities or groups sharing a common culture defined by ascriptive features such as race, ethnicity, religion or

language. Generally, an ascriptive community of common origin is the founding basis of nations of such types. The ethnic nationalism that this idea of nation generates derives from the old primordialst school of thought and conceives nations to be primarily, as Van Den Berghe pointed out, 'politically conscious ethnies' (1981). The ethnic type nations need not be conceived upon the view that the people constituting that nation are genetically distinct, but are usually conceived upon the view that ethnicity is transmitted through families and it is a form of identity relying heavily on birth and blood (Canovan, 1996: 57).This type of nations engenders intra-nation loyalties between members based on common ancestry or close kinship ties. The German Romantic thinkers that we discussed earlier in the section on pimordialism are considered to be the founding fathers of this ethnic conception of nationhood. Herder gave the concept of the *volk* into which the humanity is divided. Each *volksgeist* creates its own culture and is supposed to wake up to full political consciousness with time (Ibid). Later, Fichte further developed the idea of *volksgeist* by connecting it to a common language. Max Weber is also said to have entertained this ethnic idea of nationhood (Beiner, 1999, Canovan, 1996, Dahbour 2000). Most of the Primordialist and perennialist thinkers that we discussed earlier are adherents of this type of nationhood. Apart from the early thinkers that we discussed earlier such as Herder, Fichte, Friedrich Maneicke, Van Den Berghe, Adrian Hastings, and Clifford Geertz, a few new-age authors also subscribe to this view. Steven Grosby (1995, 2007), as we have already discussed, holds this view. Alongside him is Walker Connor (1994) who has given a powerful analysis in his *Ethnonationalism* and Roger Scruton (2004, 2006) who has also supported this strict definition of nations. Here I will briefly discuss Connor.

One of the simplest answers to the question 'what is a nation?' has been given by Walker Connor (1994). He writes that the nation is "a group of people who feel that they are ancestrally related. It is the largest group that can command a person's loyalty because of felt kinship ties; it is from this perspective a fully extended family" (Connor, 1994: xi). Connor bases his definition of nation on ethnicity, but much before Connor, Weber provided the link between ethnicity and nationality "in that they both share the vague connotation that whatever is felt to be distinctively common must derive from common descent" (Weber, 1978 as reproduced in Dahbour, 2002: 20). Drawing from Weber, Connor contends that the crucial difference between

ethnicity and nationality consists in self awareness. While the quality of being unique need not be known to the members of the group themselves to be an ethnic group, but the members must be aware of their own uniqueness to be a nation (Connor, 1994). He further clarifies that it is only perception of ancestral or kinship ties that is important and not the reality of them. The objective features of national identity such as language, shared customs and traditions might change with time but if the consciousness of uniqueness is preserved, the national identity sustains itself. However the bond between the members, according to him, has to be around felt kinship or ancestral ties, otherwise the group identity can be anything from religious, class, occupational or racial but not national (Connor, 1994: 102-104).

This is one recognized way of understanding nations but going by this definition many of the nations, old and new, as we understand them today, would not qualify. For instance, USA, Britain, France, India are national communities without the members having any beliefs about sharing ancestral blood. On this count the above definition seems to be a narrow and constricted view of a nation, where most nations as we know them today would not qualify. This conception of nations, however, had to give way to more milder and inclusive conceptions especially after the bloody nationalist conflicts of the Second World War and the Balkan wars which were fuelled in the major part by the classical variant of extreme nationalist forces and leaders in Hitler, Mussolini, Milosevic to name a few. More recent scholars have known the flipside of national passions only too well and have given persuasive accounts of how nationalism need not be understood in its classical form. Now we get to the next category.

1.5.2 Civic/Liberal Type

The other idea of nation which avoids some of the trappings of the ethnic type is the idea of a civic nation which envisages a voluntary grouping with shared citizenship and a civic identity. In the words of Ronald Biener what animates the civic conception of nationhood "is not the absurd notion that language and cultural identity are politically irrelevant", but the "vision of a shared citizenship and civic identity that would be in principle capable of transcending these cultural preoccupations, however legitimate they may be, in a political community…" (1999: 14). The crucial point

here is that the civic/liberal type does not envisage a national community without possessing its own distinct culture. It is the way culture is defined in civic nations that distinguishes them from their ethnic counterparts. It is defined not in narrow ethnic or religious terms; it is instead defined more loosely around certain political principles, patterns of behavior, other common norms, myths and symbols.

Civic nationalists do not dispute the requirement of a common culture because the liberal/civic nationalists also recognize the need for a national identity to be able to demarcate the difference between nationals and non-nationals, or in other words, between 'us' and 'them'. Yael Tamir, a renowned liberal nationalist has claimed that 'two people are of the same nation if, and only if, they share the same culture" (Tamir as cited in Canovan, 1996: 53). Elsewhere she has written, "While there is only one subjective fact necessary for the existence of a nation- a national consciousness, it is also the case that belief in the existence of some shared characteristics, which will allow members to recognize each other, as well as exclude non members, is essential for the formation of a nation" (Tamir as cited in Beiner, 1999). The liberal nationalists have also highlighted the positive aspects of nationalism and tried to reconcile nationalism with liberal and democratic principles.

> Liberal nationalism has brought to the fore more modest, less philosophically or metaphysically charged arguments grounded in concerns about justice. These stress the practical importance of ethno-cultural membership…Liberal culturalists such as Kymlicka have proposed minimal and pluralistic versions of nationalism built around such arguments. In these minimal versions, the project of building classical nation-states is tempered or abandoned and replaced by a more sensitive form of national identity that can thrive in a multicultural society (Miscevic, 2014).[8]

This approach accepts the fact of cultural heterogeneity of nations in current times and the impossibility of all homogenous ethno-cultural units having their own states, or in Gellner's words 'political roofs'. Thus, while acknowledging the importance of national identity for individuals they try to make it more and more inclusive so that even the ethnically different minor populations within a nation may identify with it. All the constructivist and modernist thinkers, as I discussed above, would subscribe to the civic idea of nationhood. I will not repeat a discussion of their ideas here, but I

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[8] Miscevic, Nenad, "Nationalism", *The Stanford Encyclopedia of Philosophy*, Winter edition, 2014. URL = <http://plato.stanford.edu/archives/win2014/entries/nationalism/>.

will discuss a few recent accounts of nation which have added new dimensions to the older accounts.

One such thinker, Ross Poole, has an interesting take on nations. He defines a nation as "imagined political community" on the lines of Anderson, but he differentiates nations from the other groupings on the basis of intentions and future goals of the people constituting them. He does not think that there have to be any ancestral or kinship ties to bind the members of the group for being called a nation. He does recognize the importance of national identity for the personal identity of an individual, but the loyalty and sense of obligation that the members feel toward each other within a national community is due to a common moral agenda set by such a community rather than any ethic connection. He writes, "for those who find their identity in the nation, the nation is the whole which gives meaning to their lives and it is for this reason that it so often inspires them to act in ways which are inconsistent with the demands of formal consistency or instrumental reasoning" (Poole, 1999: 22-23). The one feature which distinguishes a national community from others, according to him, is the moral agenda or as he calls it "intentionality". "Nations are to be understood as collective agents that have particular kinds of goals or intentions" (ibid). The moral agenda of the national community consists in the assumption of special obligations by individuals towards one another within the nation (ibid: 70). When members of a group believe that they have special obligation towards others in the same group, the others constitute a nation if they are not part of some smaller community with similar in group obligations like a family or neighborhood. According to Paul Gilbert in his *Philosophy of Nationalism* (1998), it is the belief in the right of statehood, a political rather than moral belief which differentiates 'national' from other communities. He is also an exemplar of the civic/liberal type and a firm believer in the idea that it is nationalism which leads to nation and not the other way round. A nation for him, therefore, is simply a group of a kind that has a right to statehood. He writes:

> Nationalism as such does not specify what kinds of group have a right to statehood. It claims only that there are groups of such a kind. It claims...only that there are nations and all it tells us about nations is that they are the kind of group that has this right (Gilbert, 1998, as reproduced in Dahbour, 2002: 23).

However, this definition is again problematic in the sense that it creates two implausible corollaries. One, every claim to statehood is necessarily nationalist in nature, which in turn means that every group making such a claim is necessarily a nation. Two, groups which may otherwise have all the features of national community would not be considered so if they do not claim a state for themselves, or if they are content to exist without a state of their own. The Basque nationalists and the Catalans in Spain, the Quebecois in Canada, Arab minority in Israel, Scots, Welsh and Northern Irish in Great Britain serve as examples of people who express their awareness of their distinct nationality but willfully choose to remain within the multinational design of their polities, notwithstanding a small proportion within each of the populations which adopts secessionist stances. Moreover several claims to statehood as we have witnessed in the anti colonial movements in Asia and Africa had no pre existing national identities, but these claims were made against the backdrop of severe economic exploitation and discrimination. Gilbert's definition seeks to do away with the difficult task of examining the nature of beliefs, myths, historical memories that have helped nationalists in many regions to rally people around for various nationalist movements. Two more, relatively recent, books, one by Michael Ignatieff – *Blood and Belonging: Journeys into the new nationalism* (1995) and second by William Pfaff – *Wrath of Nations* (1994) have also set up their arguments on the basis of the distinction between civic and ethnic nations. They find ethnic nationalism a pernicious version and the civic version as completely benign. This innocuousness of civic nationhood has, however, been challenged by Kymlicka (1999), an ardent liberal nationalist himself and Smith (2001). Kymlicka especially has reminded us how the process of nation building in civic nations has been accompanied by a destruction of entire ethnic communities. Also, that there have been instances of civic nations-states such as the ex-authoritarian regimes in Brazil, Argentina, Peru and Chile which defined their citizenship in civic terms but embraced anti-democratic values. While it is nobody's argument that civic nations will necessarily be democratic in nature, it is quite plausible to say that they are generally, exceptions apart, more inclusive in their membership norms and engender loyalties which tend to transcend 'ethnic preoccupations'.

The work of Will Kymlicka and Yael Tamir has been particularly important in shaping and giving content to the discourse on Liberal Nationalism. It has been

argued by both Kymlicka (1995, 2000) and Tamir (1993) that national identity contributes to the personal identity of the members and provides them with context of choices. Kymlicka equates national groups with his "societal cultures". Societal culture, according to him, is "a culture which provides its members with meaningful ways of life across full range of human activities, including social, educational, religious, recreational and economic life, encompassing both public and private spheres" (Kymlicka, 1995: 76). These societal cultures or national cultures, as Tamir would call them, have been argued by both the above authors to be important not only for the groups concerned, but for individuals themselves. They posit the existence of these cultures as a precondition for individual autonomy because these cultures provide their members with a 'context of choice' which, in turn, not only supplies options (across the full range of human activities) but makes those options meaningful to the individual members. Yet again, we should remind ourselves that the culture that they emphasize is open-ended and inclusive of different ethnic groups within a political community that is the nation-state. For instance in liberal nation-states such as America, in order to adopt an American national identity and a full membership of that nation, which in legal terms would mean citizenship, one does not need to belong to any particular ethnic or cultural group. The only condition for immigrants and their children applying for citizenship is to learn the English language and American history (Kymlicka, 1999). Thus, there is a cultural component even in civic/liberal nationalisms inasmuch as the citizenship applicants are required to be conversant with American history and language which are nothing but aspects of her culture. However, the cultural component involved is not narrow and exclusive. Ronald Beiner brings out this point beautifully. He argues that civic nations just like ethnic require cultural markers of identity. However, according to him the crucial difference is:

> "…according to the civic vision, these markers of identity are relevant for every member of the civic community, whereas the national (ethnic) vision applies only to the members of the nation (ethnic group). So the difference is not the existence of a politically relevant shared culture, but the class of citizens among whom this culture is shared" (Beiner, 2003: 203).

Thus, in order to identify the kind of national identity that a particular nation has come to attain - civic or ethnic, inclusive or confined – one has to examine the initial

conception of nationhood when its identity was in the making, that is, whether it was civic or ethnic.

1.6 "Thick' and 'Thin' National Identities

It would be useful to consider that this distinction between civic and ethnic national identities has also been characterized by some authors as the distinction between 'Thick' and 'Thin' national identities. According to Kymlicka a national identity typically based on common ethnic descent or religious faith and which promotes certain particular conceptions of good can be termed as a thick national identity (Kymlicka, 2002). On the other hand, a thin national identity is also not lacking in cultural norms, distinct histories, myths and symbols, but generally states with a thin national identity do not promote a particular conception of good and pursue a nationalism that has a variety of conceptions of a good life. In Kymlicka's own words,

> Thin national identity is not grounded in a particular conception of good, and the state is not engaged in ranking the intrinsic merits of different ways of life. The liberal nationalist state remains an anti perfectionist state, which leaves the evaluation of the merits of competing conceptions of good life to individual choice (and revision) in civil society… the liberal nationalist state simply attempts to develop and sustain the sense that citizens belong together in an ethical community, so that we are more likely to fulfill our obligations to our co-citizens (Ibid: 266).

In such states citizens may not only have different ideas of a good life but also different interpretations of their past. According to Kymlicka, despite having different interpretations of past, in states with thin national identity, citizens would still recognize and identify each other as belonging to the same ethical community because "they share a sense of belonging to an intergenerational society which has same historical reference points and a common future" (Ibid: 265). This observation is particularly interesting in the context of the subcontinent. The three countries under consideration in this thesis all have their historical reference points in the freedom struggle that they waged against the British rule. In case of India and Pakistan, they had a common reference point but due to different conceptions of nationhood (civic and ethnic respectively) as discussed above they went on to construct starkly different national identities for their citizens. Bangladesh also has its reference point in the war

of liberation it waged with erstwhile West Pakistan which has again caused her to construct a completely different national identity from that of Pakistan.

According to David Miller, the difference between thick and thin national identities is the same as the difference between "National Identities that emerge through open process of debate and discussion to which everyone is potentially a contributor and identities that are authoritatively imposed by repression and indoctrination" (Miller, 1995: 39-40). He further says that national identities may evolve spontaneously or as a result of political imposition. In this context, it would be interesting to see whether the national identities under construction in the above three countries are spontaneous or a result of political imposition.

Therefore, going by the above binary between thick and thin identities, if we reconsider the whole previous discussion on nations, we can safely infer that the primordialist, perennialist and ethnic ideas of nationhood will engender a 'thick' national identity whereas the modernist, constructivist and civic conceptions will generally engender a thin national identity. It can also be said from the above discussion that national identities which derive their constitutive elements from a pre conceived historical community of origin would be less fluid and ethnically oriented. On the other hand a national identity that is based upon a voluntary association of people with specific political and civic purposes will be more open and inclusive in nature.

1.7 Conclusion

There is a broad agreement about the idea of a nation on at least three things. First, that there are objective as well as subjective criteria needed for constituting a nation and that objective features are not sufficient on their own. The objective criteria have been enumerated well by Anthony Smith in his definition of the nation which includes a named human population, a shared historic territory, common myths and historical memories, a mass public culture, a common economy and common legal rights and duties for all members (Smith 1991: 14). The subjective part which was first identified by Renan in his *Qu'est-ce qu'une nation?* (1882) when he defined the nation as a 'daily plebiscite' was later endorsed and further elaborated by Weber

(1968)[9], Gellner (1983) and Hobsbawm (1991). One of the conditions that Weber considered necessary for a group to exhibit nationality was what he called the 'community of sentiments' referring to the belief of a certain people about their fellow members and the group which qualifies them to be called a nation (Weber, 1968 as reproduced in Beiner, 1991: 53). Second, the element of myth has been accepted by most writers across the spectrum. Even the primordialist thinkers concede that the ethnic communities that they trace from ancient history do not retain the same features and they do undergo changes induced by manipulations by powerful elites throughout history. What they claim is that despite these changes, ethnic groups are perceived to be uniform and continuous by the members themselves. Third, nations are formed and the doctrine of nationalism operates at the intersection of culture and politics. Consider the Venn diagram given below:
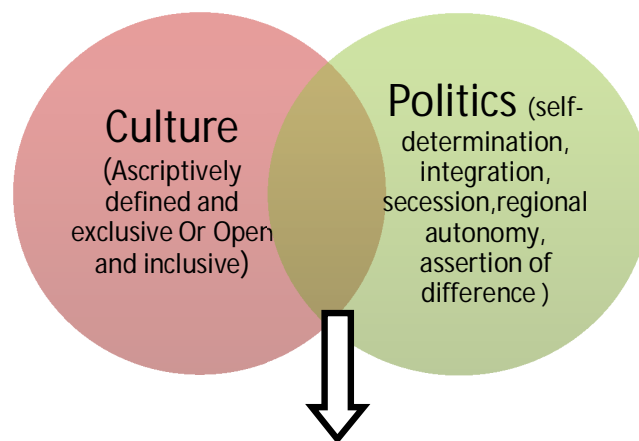
Nations and Nationalism

The distinctly dark region in the Venn diagram at the centre, where the circles of Culture and that of Politics intersect, denotes the space occupied by nations and nationalism. The culture embodied and expressed by a people could either be ethnic, religious and ascriptively defined, or it could be based on purely civic and territorial notions such as certain civic traditions and political principles (*a la* Habermas's Constitutional Patriotism) or a certain way of organization and conduct in the public life. Nevertheless, some sort of culture there always is in all kinds of national projects.

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[9] Weber, M. (1968), C. Roth and G. Wittich (ed), *Economy and Society*. New York: Bedminster Press.

Thus, wherever such a living culture is accompanied by a politics of autonomy and self determination we get to see the phenomenon of nations. The politics of autonomy could express itself in the form of secession from a culturally different political unit or it may want to integrate culturally similar people living in different political units into one. Such a politics might either set high standards for autonomy such as a demand for complete sovereignty or might be content with a simple recognition of difference embodied in a culturally distinct people by the larger political unit. Therefore, the nature of culture and politics will differ from case to case, but an interplay between the two shall always be present whenever we encounter nations or nationalism.

Recalling the above discussion, we know that there are a variety of ways in which nations can be imagined and conceived. In such circumstances it becomes obvious that there is no one precise way that can be claimed to be the standard recipe for the formation of national identities. In order to ascertain what kind of national identity is professed by particular nation-states one has to examine the social and political environment at the time of formation of those nation-states as also what kinds of tools and sources were used by the nationalists in each particular case. The sources can be very different in each case; they can be shared historical memories, distinct historical myths, shared customs and cultural symbols, common religion, common language, ancestral relations, felt kinship ties, a bureaucratic state with common institutions or just an experience of exploitation from, or war with, a common enemy. We have examples where ethnicity and other ascriptive markers have been the paramount force behind the making of a nation, for instance Israel, Japan, Ireland, Finland, Pakistan and others. Then there are other nations like Serbia, Poland where the memories of a military defeat have, more than anything else, worked to instill a sense of national belonging in people. In case of early nations like England and France, it has been the political and civic traditions, common institutions of a powerful state which proved pivotal in forging the nation. In some other cases, people have derived the fuel for nationalism from the colonial rule which they were subjected to and against which they united. At the heart of the above variations lie the distinct ways in which the nation was imagined and the distinct material as well as ascriptive sources that went into the making of different nations. In order to understand the nature and content of the national identity that has come to prevail in particular nations, we have to ask: (i) precisely what kinds of distinct historical myths, shared historical memories were

relied upon by the political elites and intelligentsia in the process of constituting those nations, and (ii) what is the definition of the mass public culture, or the national culture that is professed by those nations. I shall be dealing with the above questions in context of India, Pakistan and Bangladesh in the next chapter.

One last concluding observation about national identity that needs to be highlighted here is that despite the variety of ways in which it is conceived, the variety of forms it takes and the multiple functions that it performs, one feature that is commonly accepted by all thinkers is that it distinguishes 'us' from 'them'. This demarcation forms the basis of membership and the conferment of rights in a nation-state. Tamir made this point in a succinct manner when she wrote that the belief in the existence of some shared characteristics which will allow members to recognize each other as well as exclude non members, is essential for the formation of a nation (Tamir, 1999). This is also what differentiates national identities from other cultural identities. It is true that cultural identities also perform the function of distinguishing between 'us' and 'them', but the communities that they form are never firmly bound and territorial, unless they transform into national communities. Cultures and languages can create a large network of mutual recognition (Poole, 2001) but they do not create an 'ethical community' in Kymlicka's words or a 'moral community' in Poole's words to which all the members belong. The fact that a national identity provides its bearers with a homeland and with membership in a political community which they can call their own separates it from other forms of affiliations. This aspect of national identity makes it equivalent to citizenship in the modern day context of nation states. This is why a bearer of a national identity who is referred as a 'national' in the international law, for instance an 'American National' or an 'Indian national', comes to be referred as a citizen in the domestic laws, unless he/she has been disqualified for some reason. Also, if we remember, one of the essential elements of national identity that Smith listed out was – 'common rights and duties for all members'. This shows firstly that he is already assuming a defined community which has 'members' and not just individuals and secondly he assumes the existence of a state or state like institution which can grant and maintain such common rights and duties. This feature can sustain itself only when equated with citizenship rights and duties which go hand in hand with modern nation-states.

It is this feature of National identity which I shall analyze in my third, fourth and fifth chapter with regard to India, Pakistan and Bangladesh respectively. The constitutions of India and Bangladesh start with the words 'we the people' and the constitution of Pakistan also has 'we the people' mentioned at many instances in its preamble signifying the community that bestows to itself the constitution. I will try to find out who are these people that the respective constitutions of the three countries are referring to. More precisely, who are included and who are excluded. Because, 'we the people' can have two different interpretations: one 'ethnic' and the other 'civic'. In the words of Michael Mann, "the people can be either the 'ethnos' sharing putative descent, or the 'demos' simply sharing citizenship and hypothetically equal rights, irrespective of their descent" (Mann, 2005: 55). As we know from the working of constitutional democracies the world over, the job of interpreting the constitution and the intentions of the legislature lies with the highest Law Courts in the country. Hence, the determination of who is a citizen and who is not is also primarily performed by the highest Law Courts. Therefore, I shall also be looking at such cases in the three countries attempting to find out how the courts have defined the limits of national identity by adjudicating upon the citizenship of impugned individuals.

CHAPTER TWO

GENEALOGIES OF NATIONAL BELONGING IN THE INDIAN SUBCONTINENT

2.1 Introduction

The emergence of modern nations in South Asia, it is often said, is a result, primarily, of its colonial past like in many other regions of the world having a colonial past. What is interesting though in South Asia is the emergence of three different national units expounding their own versions of a nation out of the same historical circumstances. India, Pakistan and Bangladesh constituting most of what used to be the British Empire inherited same colonial legacy with same state structures, bureaucratic organization and constitutional framework. However, the nationalist movements which resulted in their independence were different in that they espoused different kinds of nationalism. Before embarking on the kind of nationalism pursued by the people of the subcontinent, let us go a little bit into the historical evolution of the subcontinents' national consciousness.

Was there indeed no Indian nation prior to the coming of British on the subcontinent? This is an intriguing question because many colonial era historians and thinkers suggested that there was no such entity as India with which people could identify and that India is just a geographically separated subcontinent inhabited by a loose conglomeration of people of different cultures with no sense of belonging to a nation (James Mill: 1817, Anil Seal: 1968). However, this is but one side of the story as proved later by many Indian thinkers that although India was not a nation in the modern western sense of the term, but Indian people very much exhibited a distinct culture and possessed common traits despite the outward differences. The numerous different people coming to settle in India from distant lands also acquired those very traits unique to India and the Indian way of life, thereby getting absorbed in the ocean like expanse of Indian ethos. Nehru, in his Discovery of India, while taking stock of India's past and trying to understand the phenomena of India as to how people

seemingly different, speaking different languages come to possess such similarity of thought and manners, explains this beautifully. Under the chapter entitled 'The Quest: The Panorama of India's Past', he writes:

> There is little in common to outward seeming between the Pathan of the North-West and the Tamil of the far South. Their racial stocks are not the same, though there may be common strands running through them; they differ In face and figure, food and clothing, and of course, language…yet with all these differences, there is no mistaking the impress of India on the Pathan, as this is obvious on the Tamil…Pathans and the Tamils are extreme examples, others lie somewhere in between…It is fascinating to find how the Bengalis, the Marathas, the Gujratis, the Tamils, the Andhras, the Oriyas, the Assamese, the Canarese, the Malayalis, the Sindhis, the Pathans, the Kashmiris, the Rajputs and the great central block comprising the Hindustani speaking people, have retained their peculiar characteristics for hundreds of years, have still more or less the same virtues and failings of which old tradition or record tells us, and yet have been throughout the ages distinctively Indian, with the same national heritage and the same set of moral and mental qualities (Nehru [1946] 1989: 61).

It is true that India always had a geographically distinct and separate existence with the lofty mountains on both sides in the north and large oceans on the south, but does that necessarily imply the existence of a separate nation? One of the pre-requisites for a nation to qualify as such is that its people should have a consciousness of the separate existence and a belief that the people together constitute a nation. Irfan Habib gives the example of the Australian people, who were equally distinguished geographically, to bring home the point in the context of India.

> Even where geographical features set seemingly natural limits to a territory, the latter's recognition as a country has not automatically followed. The several indigenous inhabiting the Australian continent, did not know because of lack of sufficient exploration, that they were all on the same island; they were also not aware, since they did not know of any people outside Australia, that they as a group were distinct from inhabitants of other countries in certain important cultural ways. Thus there was no country like Australia before the 19th century (Habib, 1999: 19).

The question now confronting us is: if despite the geographical situation, which made the people of the Indian subcontinent live alongside each other and develop a certain common culture, people could not automatically develop a consciousness of belonging to a national community, or in Anderson's terms – did not 'imagine' themselves to be a nation, then when did the feelings of nationhood arise in Indian people? If truly and actually there existed some notion of the 'idea of India' prior to

the coming of British, then when did it get formed and how did it come about? A comprehensive historical analysis is outside the scope of this project, but a few important milestones in the journey of development of the 'Idea of India' will be attempted here.

2.2 First Signs of a Potential Nation

Although the process of inter-cultural contacts and contacts with different people goes back a long way in the context of India, at least from 2nd millennium BC (D.D Kosambi 1987, G. Possehl, 1982), but as seen in the Australian example, the geographical knowledge of being together on a distinct territory was not there until much later. As seen in the earlier example that geographical knowledge of being together on a distinct part of the land as well as knowledge of being different from people inhabiting other foreign lands is a pre-requisite before any conception of a country could arise, the concept of India as country was not present in the time of Vedas (Habib 1999:19). The first evidence of the idea of India according to Habib is no older than during the time of Budhha, which is dated back to 500 B.C. It is at this time that we hear of the Sixteen Mahajanpadas which covered the whole of North India and parts of Afghanistan. One of India's early names can be found in Ashoka's Rock Edict I. The rock edict refers to the country as a whole as "Jambudipa", the Pali form of Jambudvipa (Ibid: 19). This is the first time that the vast lands contained within the subcontinent were referred as one by the ruler. Later, these lands were referred to as *Indoi* (people of the Indus) by the Greeks which later got popularized as 'India'.

The example of Australia reminds us what Benedict Anderson said about 'imagined communities'. While trying to make sense of the origins of national consciousness among people of this world, he emphasized on the necessity of imagining that there are other people similarly situated and having similar thoughts about their past and future without meeting or knowing them in any way. According to him this kind of imagining became possible in Europe through the medium of newspapers and novels.

Elsewhere, this imagining became possible through direct trade contacts, foreign travelers' accounts and invasions.

In case of India, since ancient times, from the 2nd millennium BC to be more precise, there was immigration into its territories and several groups of people came to India from different parts of the world. Aryans are said to have come by 2000-1500 BC not long after the demise of the Indus valley civilization. Even before the time of Indus valley civilization there were cultural contacts of North Western India with Central Asia and Iran. The process of cultural mixing goes back to the third millennium BC. Ancient Indian astronomical knowledge was influenced by Babylonian arithmetic system as well as Greek geometrical system (Jairajbhoy 1963). This shows that people inhabiting India had contacts with people inhabiting territories farther west than Iran and Central Asia. After the Aryans, these people came to India in batches. First came the Greeks, then Scythians (Sakas) and Bactrian and then the Persians and Central Asians. It is in this period around the time of Asoka (300-200 BC) when swathes of foreigners came that the cultural affinities of the Indian people could be marked more clearly. The Greeks being referred to as "yavanas" in the Mahabharata and Asoka referring to the Greeks as "Yonas" can be said to be the first recordable milestone in the evolution of the inhabitants of India as people different from others. In his Rock Edict XIII Asoka says that Yonas were different because they had no Samanas (Buddhist Priests) and Brahmanas among them" (Habib 1999:19). A similar distinction is found when the foreigners are referred to as "Mlechhas" in the Manusmriti (c. 100). The listing of India's regions in the Mahabharata and the treatise written by Kalidasa – *Meghaduta* portray India as a distinct geographical and cultural entity. The next milestone can be said to be Alberuni's *Kitab-ul Hind* (1035) which is the first comprehensive study of Indian civilization in any language including Sanskrit (Ibid). Historian K.M. Panikkar has described it as an important milestone in the evolution of India as a cultural unit (Panikkar, 1954). Amir Khusrau, the prolific sufi poet, musician and scholar who came along with the Ghoris and Turks, wrote about the peculiarities of India with lavish praises for its, people, its languages, its vegetation and so on. In his book *Nuh Sipihr* (1318), he argues for the superiority India over other countries. Historian Irfan Habib refers to it as the first patriotic account of India. "He speaks of the superiority of India's fruits, animals, the beauty of its women, the learning and the piety of the Brahmanas and India's numerous cultural

achievements such as the invention of numerals and chess, the compilation of the *Panchatantra,* etc" (Habib 1999: 21). More importantly Amir Khusrau while praising Sanskrit as a language of the learned and having a rich literature recorded that Persian too has become a language of India because people have learned it after the coming of the Ghorians and Turks. Moreover, the words 'Hind', Hindu', and 'Hindustan' were of purely Iranian origin and at the time of Khusrau these were predominantly used to refer to India. Khusrau writes in his book that his country (Hind) is a land of several languages and he gave a collective name: 'Hindwi' for all these Indian languages. He gave an understanding of Indian people with their various languages yet constituting a single whole (Ibid: 21). He gave a picture of India's culture which was innovative, open and tolerant. After Alberuni, the most detailed account of India's society, culture, religious schools and arts came in the form of *Ain-i-Akbari* by Abul Fazl in 1595. Commenting upon the long and stable unity given to India by the Mughal Empire, Tara Chand (1928) has argued that such dominance by a single power gave political uniformity to India and a sense of larger allegiance necessary for sustaining the sense of a single country. "The underlining concept of India as a country with a distinct history of its own could now be restored by the long and stable unity given to India by the Mughal Empire – an instrument of unity visible to the non literate and ordinary people as well" (Habib 1999: 21-22). Remarkably, the word 'Hindu' originally was not associated with religion, but rather used by the Persians and the Greeks to refer to the people living beyond and around Indus. It acquired religious color after the Vijayanagar rulers and later the ruler of Mewar were found styling themselves as Hindu Sultans. Another evidence of this is the fact that in many of the early British documents there are plenty of references to 'Hindoo Muslims' and 'Hindoo Christians', distinguishing them from the Muslims and Christians living outside India (Sen, 1993: 2).

Thus we see that Indian civilization did not develop in isolation right from ancient times. From the earliest of times the geographic territory beyond the river Indus which came to be known later as 'India' has provided and sustained a variety of people speaking different languages and possessing different cultures, which ensured that the resultant culture after centuries of mixing of different people did not turn out to be plain and uniform but rather turned out to be a delightful assortment of different shades and influences. The fact of many languages existing on the same soil did not

pre-empt India from developing a national consciousness of its own. It has been convincingly argued by Eric J. Hobsbawm that a common language is an important but not the necessary condition for any people to constitute a nation. He writes that though language is an important and decisive marker of cultural consciousness and identity, but it is only one, and not the primary way of distinguishing between cultural communities (Hobsbawm [1990] 1992: 58). Yet, this is not to say that every time India's people got exposed to a new culture, there was a complete renaissance, because something of the old tradition was always retained which is why India's culture shows a remarkable continuity. In other words, there was never a complete break with the past instead there was a constant attempt to harmonize the old with the new. Nehru sees this kind of continuity only in Chinese civilization, apart from India. In his *Discovery of India*, while reflecting upon the reasons why India fell behind European nations in the march of technology and progress, he writes that indeed the early spirit of adventurism which caused Indian culture to spread to the far east, was taken over by taboos of crossing the seas and the rational spirit of enquiry so evident in the early times was replaced by irrationalism and blind idolatry. In such a condition of mental stupor, Nehru says that, India deteriorated and "remained rigid and immobile, while other parts of the world marched ahead" (1989: 54). In the very next line, Nehru writes that this may not be a correct picture because if there indeed was a long period of rigidity and stagnation, then it must have resulted "in a complete break with the past, the death of an era and the erection of something new on its ruins" (ibid). Instead, according to Nehru, India had not seen such a break and there was a definite continuity exemplified by a 'vital and living' urge driving people for a 'synthesis between the old and the new'. He goes on to say, with some caution though, that just like every other nation has some belief or myth about a national destiny, India had some "deep well of strength" which supplied the belief or the myth of India with the power to mould hundreds of generations without break and with the enduring vitality to keep that belief or myth alive from age to age (Ibid: 55).

It is also a remarkable achievement of India's civilization that it accommodated diverse characteristics and "facilitated the creative synthesis of diverse identities"

(*IGNCA*, 1996)[10] which in turn ensured the continued survival and resilience of Indian civilization. To be sure, this kind of pluralistic and syncretic tradition in Indian culture was present even before its interaction with Islam and Christianity. Within the local religion and culture of the people there were myriad beliefs and practices and many ways to understand God as well as the society. Romila Thapar most assiduously brings home this point when she writes that Hinduism, since its very inception is "rather a mosaic of distinct cults, deities, sects and ideas" (Thapar 1992: 68). This very character of the existing religious ethos and belief system of the people was one of the important causes for high level of accommodation and syncretism displayed by the ancient people inhabiting India. The Indian culture of ancient times was both porous and compact at the same time: Porous, inasmuch as it took from foreign cultures and absorbed many elements of them within itself, and compact because it did not lose itself completely either, and instead imparted something of its own to every other culture that came in contact.

2.3 The Struggle for Freedom: A Defining Milestone in the Construction of National Identity

After the Mughal Empire, the struggle for independence from the British rule which transformed into one of the biggest mass struggles that history has ever seen, was certainly the most defining, if not the last, milestone in the making of the nation that is India. The struggle for independence which came to be known later as the 'national movement' engendered a lot of intellectual thought on India's origin and identity. This was a time when the leaders of the national movement wanted to inculcate a sense of dignity and self respect in the masses of India who were morally as well as materially weakened by the continuous subjugation of the exploitative foreign rule. The disparate masses of India also had to be wielded into a 'people' with a sense of common identity and a common destiny so that they would participate in more and more numbers in the struggle against the British rule. Even without the above objective there was to be found a quest in the lay people of India about their history and their identity so as to make sense of their then miserable situation, their true worth and their real destiny. Answers to questions such as - what is India? What are the

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[10] Momin, A.R. (1996) "Cultural Pluralism, National Identity and Development: Indian Case". In: Baidyanath Saraswati,(ed.), *IGNCA Culture and Development Series*, No. 1, pp. 99-107. Available at: http://ignca.nic.in/eBooks/Culture_n_Development_01.pdf [accessed on 16.5.2016]

constitutive elements of India? Is India a nation justified to make a claim for self-rule? - were sought by the intellectuals of those times in conversation with the thoughts and practices of the general people.

2.4 Two Routes to Imagine the Nation: Ethnic/Racial and Civic/Territorial

There were two broad currents flowing through the nationalist imaginings at that time. One was put forward by the influential leaders of the Congress, which formed the primary political opposition to the colonial rule, and the other was propagated by the communal and sectional interests in the form of Hindu Mahasabha including the Rashtriya Swamsevak Sangh(RSS) and the Muslim League. The two aforesaid currents needed to draw upon heavily from history in the absence of other adhesives to place the varied colors embodied by the people of India onto the canvas of one identity. The frantic dive into the depths of India's origins were taken by both the two lines of thought and they both came out with different versions of India's past to suit their own versions of India's future to be.

The first current embodied by the Indian National Congress leaders and many other non congress intellectuals of that time drew a pluralistic and layered picture of India's past and India's culture. They refused to define it in exclusivist cultural or racial terms. In fact no attempt was made by the leaders of the Congress to impose a uniform Identity upon the new nation-state that India was going to be. A constitutionally defined national identity was sought to be built which recognized cultural and religious differences in the Indian society and also recognized that an Indian national identity could at best be nested and plural in character. In the words of Khilnani,

> No attempt was made to impose a single or uniform 'Indian' identity upon the new nation. This, seen as a potential weakness from the perspective of the western theories of nationalism which guided the thinking of nationalist Hindus, was actually the most remarkable achievement…Language and Religion, those elementary markers that are generally used to ease any awkwardness of fit between the individual and the nation, were not given this assignment in India: neither was adopted as an effortless badge of Indianness… Indianness was defined not as a singular or exhaustive identity but as one, which explicitly recognized at least two other aspects. Indian citizens were also members of linguistic and cultural communities: Oriyas or Tamils, kashmiris or Marathis. India's federal arrangements

were intended to embody this Idea of a layered Indianness, an accretion of identities (Khilnani [1997] 2016: 173-175).

The story of India's past as a tale of cultural mixing and fusion having a "civilizational tendency towards unification" (Khilnanai, 1997: 166) was carefully told and enacted by the Congress leadership. Jawaharlal Nehru's 'Discovery of India' is, perhaps, the best example of this approach. Niraja Gopal Jayal calls it "the *locus classicus* of the unity in diversity approach" (Jayal 2006: 3). At a time of much deep thought and churning about the meaning of India, Nehru came up with a comprehensive assessment of the contours and contents of India's identity and the civilizational bond that had developed out of centuries of cultural continuity. The building blocks of India's identity, according to him, were made up by a variety of cultural factors and influences which when combined together produced some unique qualities specific to the inhabitants of the subcontinent, to which Nehru collectively referred as the "impress of India" (Nehru, 1989: 61). While dwelling upon the many features of India's past which gave India its special personality, he wrote:

> India with all her infinite charm and variety began to grow upon me more and more, and yet the more I saw of her, the more I realized how very difficult it was for me or for anyone else to grasp the ideas she had embodied. It was not her wide spaces that eluded me, or even her diversity, but some depth of soul which I could not fathom, though I had occasional and tantalizing glimpses of it. She was like some ancient palimpsest on which layer upon layer of thought and reverie had been inscribed, and yet no succeeding layer had completely hidden or erased what had been written previously. All of these existed in our conscious or subconscious selves, though we may not be aware of them, and they had gone to build up the complex and mysterious personality of India (Nehru [1946] 1989: 58-59).

The above lines give an indication of Nehru's conception of India's past which in turn shaped his stance towards the question of India's Nationalism. Drawing from his researches into India's history, he imagined and proposed a civic nationalism for India which would base its identity not on the clear markers of one culture, one religion or one language, but on the shared, interspersed and civic attribute of Indianness which would be consolidated by the modern nation state and its institutions once India gets independence. Gandhi's reading of India's history was similar to Nehru especially

with respect to the evolution of India's National Culture and the nature of the identity of its people. Gandhi is quoted as having said the following about India's culture:

> The Indian culture of our times is in the making…No culture can live if it attempts to be exclusive. There is no such thing as pure Aryan culture in existence in India. Whether the Aryans were indigenous to India or were unwelcome intruders does not interest me much. What does interest me is the fact that my remote ancestors blended with one another with the utmost freedom and we of the present generation are a result of that blend (Gandhi, 1959:156).[11]

As can be inferred from the above passage, Gandhi was equally against uniformist and homogenizing views of India's nationhood and was "equally committed to civic nationalism as Nehru" (Jayal, 2013:210). His difference with Nehru seemed to be on the question of consolidation of India's civic identity, as to how this consolidation would come about. For Nehru, it could only come about through a strong centralized state based upon a constitution which would, in turn become the nucleus around which the civic identity of India's people would crystallize. Gandhi, on the other hand believed more in constructive work and grassroots activism. It involved promotion of khadi and spinning and village industries to make people self dependant, promotion of national education suited to the needs of Indian society, promotion of Hindu-Muslim unity, the struggle against untouchability and the social upliftment of the Harijans. Although Gandhi had shown his aversion to the modern state by describing it as an institution representing concentrated and organized violence, a soul-less machine claiming to be a moral institution but in actuality only an arena of conflict between organized interests played out by the powerful people[12], but recent scholarship on Gandhi has shown that his strong views against the modern nation state had undergone a change and he became more accepting of the state when he started thinking of it as an institution which could guarantee and protect the rights of the vulnerable sections of the society (Jayal, 2013: 213) .

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[11] "All men are Brothers, Life and Thoughts of Mahatma Gandhi as told in his own words", UNESCO/Orient longman: Paris and Calcutta, 1959, pp. 156.

[12] The Modern Review (Oct., 1935), edited by Ramananda Chatterjee, reproduced in the online booklet of B.A. (History) undergraduate course, School of Open Learning, Delhi University. Available at: http://sol.du.ac.in/mod/book/view.php?id=358 Accessed on 28.05.2016.

Dr. S. Radhakrishnan, a distinguished scholar of comparative religion and philosophy, whose writings influenced a generation of western scholars of eastern religions and made Hinduism more accessible to the west, dispelled many uninformed criticisms of Hinduism and Indic religions. He too reiterated the value of diversity in India's culture. He said:

> Too much blood has been unnecessarily and unjustly shed in the name of dogmatic obsessions. We want a world order which preserves regional cultures and not a world where everyone wears the same clothes, speaks the same words and cherishes the same beliefs. The conception of a great family of nations living together in peace, practicing their own belief and regulated by justice within the law remains our common objective (Radhakrishnan 1957).[13]

Maulana Azad, another nationalist Congress leader and Congress president in 1923 and then from 1940 to 1946 also reflected on India's cultural past and in his presidential address delivered at the 53rd session of Indian National Congress at Ramgarh, March 19, 1940, he delineated quite brilliantly how the composite culture of India came into being and how it has become a reality which cannot be denied. He said:

> It was India's historic destiny that many human races and cultures and religions should flow to her, finding a home in a hospitable soil, and that many a caravan should find rest here. Even before the dawn of history, these caravans trekked into India and wave after wave of new comers followed. One of the last of these caravans was that of the followers of Islam. They came here and settled for good. Full eleven centuries have passed since then. Eleven hundred years of common history have enriched India with our common achievements. Our languages, our poetry, our literature, our culture, our art, our dress, our manners, and customs, the innumerable happenings of our daily life, everything bears the stamp of our joined endeavor. There is indeed no aspect of our life which has escaped this stamp. Our languages were different but we grew to use a common language, our manners and customs were dissimilar, but they acted and reacted on each other and produced a new synthesis. Our old dress maybe seen only in ancient pictures of bygone days; not one wears it today. This joint wealth is the heritage of our common nationality… These thousand years of our joint life have moulded us into a common nationality. This cannot be done artificially. Nature does her fashioning through hidden processes in the course of centuries. The cast has now been moulded and destiny has set her seal

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[13] Occasional speeches and writings (second series) by S. Radhakrishnan, The Publications Division, Ministry of I & B, Govt. of India, Delhi, 1957, reproduced in Geeti Sen, "India: A National Culture?", 2003, Sage Publications, New Delhi, p. 9.

upon it. Whether we like it or not, we have now become an Indian nation, united and indivisible. No fantasy or artificial scheming can break this unity. (Azad: 1940).[14]

This civic definition of India's Nationhood formulated by Gandhi, Nehru, Azad and other public leaders of those times had to be constantly protected and harnessed, for the other conception of India as containing two nations, one Muslim and one Hindu was very much present during the freedom struggle. The other current flowing through the nationalist imagination during the freedom struggle was embodied by the ethnic/cultural definition of India's nationhood. The Hindu Mahasabha and the Muslim League were the two primary wheels of the then bandwagon of communal thought. It is hard to say who among the aforesaid was first to proclaim that there are two nations in India, but both were equally committed to their own exclusive versions of India's culture and India's destiny. It is indeed surprising to see the forces of communalism causing such a huge impact on Indian psyche and politics, considering the thousands of years of shared and peaceful existence of the two communities on the same soil, not to mention the recognition of this shared heritage by the top leadership of the national movement. This is not to suggest that prior to the coming of British Indian society was conflict free. Indeed there were conflicts, but, as recognized by the prominent historians of India, none of the conflicts had a Hindu-Muslim axis. The contingencies of the political scene at that time and the availability of shrill community based interests, the espousal of which guaranteed shortcuts to advantageous bargaining positions to both British and the Indian communalists seems to have accounted for the unprecedented rise of communal politics in India. All the three independent countries of the subcontinent that are the subject of study in this thesis continue to bear the brunt of communalism till the present day.

There were many factors behind the rise of such communal narratives of nationhood and national identity. The ruling Britishers themselves played a very important role in fanning the communal way of thought. Communal ideologues were encouraged by the ruling dispensation so as to weaken the increasingly mass base of the freedom struggle and the British found willing allies in the land holding and propertied classes

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[14] P.N Chopra, Maulana Abul Kalam Azad, Unfulfilled Dreams, Appendix III, 'The Musalmans and a United Nations', pp. 149-50, reproduced in Geeti Sen, "India: A National Culture?", Sage Publications, New Delhi, pp.11-12.

among Hindus as well as Muslims who sought protection of their own interests from the British against the growing peasant and worker mobilization by the national movement. Irfan Habib aptly sums up this tendency:

> As the National movement grew in scale and assumed a truly mass character, its mobilization of peasants and workers, and women and other socially and economically oppressed strata…this resulted in growing inclination of propertied interests, especially landlords to shift to communal positions in order to oppose the freedom struggle. This received due encouragement from imperialism and the Simon Commission Report(1930) labored to deny on the basis of its religious and linguistic diversities that India was a nation at all. The ground was thus being created for a full blown 'two nation' theory (Habib, 1999:27).

In addition to the above, the policy measures brought about by the British through changes in the existing laws, particularly in the system of representation of different groups of Indians in the government were also instrumental in the ossification of group based identities. The provision of separate electorates in the Government of India Act, 1909 is a prime example of such a policy. The impact of such policies comes out starkly in this passage:

> Separate electorates, along with reservations and weightages, gave birth to a sense of Muslims being a religio-political entity in the colonial image of being unified, cohesive and segregated from the Hindus. They were homogenized like 'castes' and 'tribes' and suitably accommodated within political schemes and bureaucratic designs. Self styled leaders were emboldened to represent an 'objectively' defined community and contend with others for patronage, employment and political assignments. In this way separate electorates created space for reinforcing religious identities, a process which was, both in conception and articulation, profoundly divisive…The ideological contours of the future Pakistan were thus delineated by the British opinion and policy makers long before Jinnah burst upon the political scene with his insistence on having a Muslim nation (Hasan, 1997: 35 reproduced in Jayal, 2006: 47).

From then on this habit of thinking in terms of communities has become so entrenched in the Indian mind and politics, that the sphere of rights and entitlements even after the departure of the British, has always been dominated by group based demands and allocations (Jayal, 2013).

The encouragement of communal positions by the colonial government was a major but not the only factor behind the spread of communalism on the national scene. Another reason was the use of religion and religious symbols used to mobilize people in the early stages of freedom struggle. It goes back to the appeal to religion by the sepoys of 1857 against the use of greased cartridges on religious grounds and then goes on to Tilak's invocation of religion to develop a nationalist ideology by positioning medieval India as a dark phase in comparison to the glorious ancient India and V.D. Savarkar and Aurobindo Ghosh giving a philosophical basis to Hindu Nationalism. Similarly on the other side Jamaluddin Afghani and Muhammad Iqbal developed their respective theories of Muslim nationhood at the same time. Political agents on both sides of the communal divide started to identify their national past as well as national destiny in religious terms.

Vinayak Damodar Savarkar provided the philosophical moorings to Hindu Nationalism by coining the term 'Hindutva' in his 1923 pamphlet – 'Hindutva: Who Is a Hindu'. Hindutva had a much broader meaning according to him than just the religious creed of Hinduism, and he identified the term 'Hinduness' rather than 'Hinduism' to be the closest parallel in meaning to the term Hindutva (Savarkar, 1923: 4). He defined it "in terms of the geographical unity of the Indian nation and its association with territory, race, and culture" (Jayal, 2013: 217). Savarkar defined Hindu as a person "who regards this land of Bharatavarsha from the Indus to the seas as his fatherland as well as his holy land that is the cradle land of his religion" [Savarkar 1923: (i)]. He conceived the above defined people, that is, the Hindus as essentially a nation in themselves. Although, he professed that religious minorities should enjoy equal formal rights of citizenship (Jayal 2013), but his definition of Hindu and the Hindu Nation excluded the Muslims and the Christians by necessary implication inasmuch as their holy land did not lie between the 'Indus and the seas'. Savarkar's thought inspired many future organizations wedded to the objective of bringing the idea of India in tune with the idea of a Hindu nation. Khilnani writes:

> The special frisson of Savarkar's ideas lay in their translation of Brahmanic culture into the terms of an ethnic nationalism drawn from his reading of western history. This created an evocative, exclusivist and recognizably modern definition of Indianness, with rich potentials to sustain future political projects and to induce direct political effects. It was contact with these ideas that in 1925 led another Brahmin,

K.B. Hedgewar, to found the Rashtriya Syamsevak Sangh(RSS), to this day the backbone of Hindu nationalist organizations (Khilnani, 1997: 161).

The appeal of Savarkarite definition of Hindutva also lay in its dispensation with the uncertainties and complexities of India's past and the clear cut definition of Nationhood in ethnic and racial terms. That it was perfectly congruent with the idea of a nation in the western concept of nationhood, only added to its appeal. Savarkar drew enormously from the history of European nationalism and was an admirer of Mazzini, who spearheaded the Italian revolutionary movement which helped bring about the unification and independence of Italy from separate states under French and Austrian control. In his "genealogical equation between the Hindu and the Indian, members of Indian political community were united by geographical origin, racial connection and a shared culture based on Sanskritic languages and common laws and rites" (Khilnani 1997: 161). Just as Jinnah meticulously articulated the demand for a Muslim nation on the political arena, Savarkar's vision was assiduously carried forward by the RSS with its second supreme leader Golwalkar dispelling whatever pretence Savarkar had maintained about non-Hindus by arguing that "non-Hindus who did not respect and revere the Hindu religion and adopt its culture and language could stay in the country in subordination (Jayal, 2013: 217). Professor Jayal very aptly differentiates between the Gandhian and Nehruvian idea of citizenship on one hand and the and the Savarkarite idea of citizenship on the other by characterizing the former as a "substantive inclusionary universalism" and the later as "descriptive exclusionary universalism" (Jayal 2013: 208, 215).

Some years later, the poet, philosopher, Muhammad Iqbal put forward the idea of a separate Muslim state constituting the Muslim majority provinces of the west and the north-west for the first time at the All India Muslim League session at Allahabad in 1930. Most of his thinking on the subject and the reasons as to why he reached this particular conclusion for the destiny of Muslims of the subcontinent can be assessed when one goes through his complete Allahabad address and the two letters that he wrote to Jinnah in 1937. In the first part of his long address he tries to show how Islam has affected every sphere of life of Muslims in the subcontinent and how it has provided certain homogeneity to Muslims. On the question of the future of Muslims in India he consistently appears to be in favor of autonomous regions of Muslim

majority within a loose overarching Indian federation, where Muslims will be able to protect their culture, live according to a social order animated by Islam and be free from the dominance of the Hindu majority. This sentiment comes out in the following words:

> And as far as I have been able to read the Muslim mind, I have no hesitation in declaring that if the principle that the Indian Muslim is entitled to full and free development on the lines of his own culture and tradition in his own Indian homelands is recognized as the basis of a permanent communal solution, he will be ready to stake his all for the freedom of India (Sherwani, 1977: 4).[15]

However, at the same time, Iqbal is not confident of the strength of the bond that has developed between the two communities unlike Nehru or Azad. Using the definition of nation given by Ernst Renan as a "moral consciousness created by a great aggregation of men, sane of mind and warm of heart", he says that such kind of moral consciousness which constitutes the essence of a nation "demands a price which people of India are not prepared to pay" (Ibid: 3). He goes on to say that various caste units and religious units have shown no inclination to sink their respective individualities into a larger whole and that each group is intensely jealous of its collective existence. Interestingly, according to him the required moral consciousness constituting the essence of a nation could have developed in India had the "teaching of kabir and the divine faith of Akbar seized the imagination of the masses of this country" (Ibid: 4). He believed that without the fullest cultural autonomy, it would be difficult to create a harmonious nation. He called this cultural autonomy and the freedom to develop according one's own culture as a "higher communalism" without ensuring which, in his vision, there would be constant civil war. In protecting this higher form of communalism he went to the extent of suggesting that Muslims of the North-West and Bengal should be considered nations in themselves. Clearly, much of his disagreement with the Congress, as also Jinnah's at this point in time on the issue of residuary powers going to the central government. Both him and Jinnah wanted residuary powers to be vested with the states. In the later part of his address he says,

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[15] Latif Ahmed Sherwani (ed.) *Speeches, Writings, and Statements of Iqbal.* Lahore: Iqbal Academy, 1977 [1944], 2nd ed., revised and enlarged, pp. 3-26. Available at: http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_iqbal_1930.html. Accessed on 20.06.2016.

> To my mind a unitary form of government is simply unthinkable in a self governing India. What is called residuary powers must be left to the self governing states, the Central Federal State exercising only those powers which are expressly vested in it by the free consent of the federal states. I would not advise the Muslims of India to agree to a system whether of British or Indian origin, which virtually negatives the principle of true federation, or fails to recognize them as a distinct political entity (Sherwani, 1977: 6).

The above disagreement was also one of the key reasons for the rejection of the Nehru report by the Muslim league because the constitutional scheme proposed by the report, even when it provided for federal distribution of powers between the centre and the states, vested the residuary powers unconditionally with the central government. That a strong centre was also vehemently supported by the Hindu nationalist faction made Iqbal and the Muslim league more suspicious of such a scheme. Apart from the aforesaid beliefs due to which Iqbal demanded a separate Muslim state, he justified his demand expressly in his presidential address by posing it as a solution which is in the best interests of both India and Islam. For India, "it means security and peace resulting from an internal balance of power" and for Islam "an opportunity to rid itself of the stamp that Arabian imperialism was forced to give it, to mobilize its law, its education and culture and to bring them in closer contact with its own original spirit and the spirit of modern times"(Ibid: 5). In his first letter (28th May, 1937) to Jinnah, he cites Muslim poverty as the central problem upon whose solution the future of Muslim League depended. According to him the solution lied in the application of Islamic Law which in turn could only be possible in a free Muslim state. He writes, "After a long and careful study of Islamic law I have come to the conclusion that if this system of law is properly understood and applied, at least the right to subsistence is secured to everybody. But the enforcement and development of the law of Islam is impossible in this country without a free Muslim state or states."[16]In his letter dated 21st June, 1937, he again stressed on the question of Muslim poverty and explained how the constitutional scheme suggested by the Congress and the communal award granted by the British would be unable to solve it. He writes:

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[16] G. Allana, *Pakistan Movement Historical Documents*. Karachi: Department of International Relations,
University of Karachi, 1969, pp. 129-133. Available at: http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_iqbal_to jinnah_1937.html. Accessed 20.06.2016.

> The only thing that the communal award grants to the Muslims is the recognition of their political existence in India. But such recognition granted to a people whom this constitution does not and cannot help in solving their problem of poverty can be of no value to them. The Congress president has denied the political existence of Muslims in no unmistakable terms. The other Hindu political body, the Mahasabha, whom I regard as the real representative of the masses of the Hindus, has declared more than once that a united Hindu-Muslim nation is impossible in India. In these circumstances it is obvious that the only way to a peaceful India is the redistribution of the country on the lines of racial, religious and linguistic affinities (Allana, 1969: 2).

His growing belief in Islamic law being the solution to the question of Muslim poverty drew him closer to the demand, which he made in the later part of his address, for a separate Muslim state. The above lines written by Iqbal also reveal one important assumption made by him. It is that he already considered Muslims as constituting one 'people'. In UNESCO's deliberations, the word 'people' has been given two definitions. The first says that to qualify as a people they should have a distinctive culture and those sharing a culture should think of themselves as collectively possessing an enduring separate identity, and they are likely to be predominantly of common descent" (Van Dyke, 1980: 2-3). The other definition defines people as a group inhabiting a sovereign state or a dependent territory having an international status (Ibid: 3). Even otherwise whenever we refer to a group of individuals as one 'people', we are already assuming that they at least have common cultural traits, whether it is their common language and customs or food, festivals and dresses. Iqbal can be seen to be considering Muslims of India, at least the north and north - west as a 'people' which, with the privilege of hindsight, we can say turned out to be a wrong assumption as the people of that region comprising the Pathans, the Sindhis, the Balochis and the Punjabis all claim to be a people in themselves distinct from one another. Another inference that can be drawn from the above quoted text is that he considered the Hindu Mahasabha as the real representative of the masses of Hindus. This shows his belief that because the Mahasabha also saw Hindus as constituting a nation in themselves, it would, sooner or later, become the party behind which the Hindus would rally, which in turn fuelled his fear of Hindu domination. He also says in the last quoted line that the Mahasabha has "declared more than once that a Hindu-Muslim nation is impossible In India" which shows that by the year 1937, the Mahasabha had already made its vision of an exclusive Hindu nation clear in the public realm.

All the aforesaid discussed reasons and justifications which Iqbal gave for reaching the conclusion that a separate Muslim state was in the best interests of India and Islam would not have been enough had he not nurtured a firm conviction about the Muslims being a homogenous community because this conviction alone gave him hope for the viability and future sustainability of the Muslim nation. He firmly believed that Muslims are a nation on the basis of their Islamic solidarity and that North West Indian Muslims are a homogenous whole. He expressly mentions this belief in the greater homogeneity of Muslims in his 1930 address. Towards the end of his address he says, "We are 70 millions and far more homogenous than any other people in India. The Hindus, though ahead of us in almost all respects, have not yet been able to achieve the kind of homogeneity which is necessary for a nation, and which Islam has given you as a free gift" (Sherwani, 1977: 10). It shows how wedded he was to the idea that Islam would be a fixative strong enough to keep the Muslim nation intact. He was warned by Muslim intellectuals like Maulana Azad and some other religious clerics, particularly those from the Deoband School, that there is not a single instance in the history of Muslims where a nation was proclaimed on the basis of Islam. His attention was drawn to the fact that despite having the same glue of Islamic solidarity, Arabs at that time were divided into as many as twenty-two nations. Nevertheless, Iqbal only grew stronger in his convictions and had, though not immediate, but a long term impact on the politics of the Muslim League.

Jinnah did not get attracted to Iqbal's scheme until well after Iqbal's death. When Iqbal was delivering his presidential address, Jinnah was away in London at the round table conference pressing for constitutional safeguards for Muslims within a unitary India.[17] Jinnah suffered huge losses in the 1937 elections to provincial legislatures where his party got a meager 4.6% of the Muslim vote. Even in regions like Punjab where separate electorates were in operation he could win only 1 out of 175 seats (Naim, 1999:6). This dismal showing coupled with the refusal of Congress to form coalitions with the Muslim League and the fear of political irrelevance made Jinnah to chart out a new course in a complete break with his past politics of minority safeguards and power sharing. It is in this phase of the national movement that Jinnah

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[17] C.M. Naim (1999), Iqbal, Jinnah and Pakistan: The vision and the Reality, *Ambiguities of Heritage*. Available at: http://www.columbia.edu/itc/mealac/pritchett/00litlinks/naim/ambiguities/13iqbaljinnah.html Accessed 20.06.2016.

turned to the idea of Iqbal and found traction in it. Iqbal needed the League to carry forward his vision and the League adopted Iqbal's vision to remain a force to reckon with in the national politics. Jinnah had already seen how successfully Muslims were brought on a common plank in the name of religion during the Khilafat movement launched by Mahatma Gandhi. So, Jinnah decided to adopt the same strategy of 'mixing religion into politics', against which he had protested vocally during much of his political career and went about mobilizing Muslims in the name of religion. In the words of C.M. Naim: "their politics of protecting separate electorates and reservation of seats turned into a program to protect Islam" (Naim, 1999: 6). In the year 1940 at the Lahore session of the Muslim League, Jinnah declared for the first time that their goal was to carve out separate independent states for the Muslims. By producing the rallying cry of Islam in danger, Jinnah was able to cut through the support base of formidable regional parties reaping rich dividends as the league polled 75% of the Muslim votes in 1946 elections as compared to just 4.6% in 1937. However, after the success of his strategy, Jinnah showed flexibility in his demand for Pakistan when he agreed to the Cabinet Mission plan of 1946, perhaps the last hope for an undivided independent India, but by that time the call for Pakistan had already taken roots in the minds of Indian Muslims and the Congress rejected the Cabinet Mission Plan as it went against its cherished objective of a strong unitary Central government with a legislature based on proportional representation of different communities according to their population. Naim writes:

> The Pakistan that came into existence in August 1947 was not the consolidated state that Iqbal had envisioned in 1930; it certainly did not consist of the "Independent States" that the resolution of 1940 called for; in its cut-up form it was not even the "independent state" of the resolution of 1946. Neither did it come about through some smooth transition that Jinnah may have envisaged. It was a truncated Pakistan and its emergence was preceded by the worst communal carnage that the subcontinent had ever experienced. Jinnah may have had near-dictatorial powers within the Muslim League, but he had himself become a prisoner of the rhetoric about Pakistan that he had allowed to be let loose around him… Inflamed communal passions, the urgency of the British to conclude their rule in India, the resolve of the Sikhs to ensure their own right of self-determination, the growing determination of the Congress leaders to obtain a strong unitary India, no matter what its size -- on all this Jinnah had no control. Pakistan became inevitable, not because that was the destiny of Islam in India, but because of the particular configuration of a number of diverse forces at a certain moment in history (Naim, 1999: 7).[18]

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[18] Op Cite, C.M. Naim

It is considered a routine fact that since it was Jinnah led Muslim League demanding a separate nation and not the Hindu Mahasabha, the responsibility for the break-up of India lies squarely on Muslim communalism. However, many eminent historians dealing with the subject of partition have shown that the progression of the Muslim League from demanding safeguards and internal power sharing mechanisms within a unified independent India, which are secular claims in themselves, to the proclamation of a Muslim nation was not a natural one. It was brought about by the truculent positions taken by the Hindu nationalist opinion both within and without the Congress. Khilnani states this in the following words:

> Secular and Hindu nationalisms have invariably assigned primary responsibility for partition to Muslim 'communalism' and separatism. Yet recent historical research has complicated the conventions of this picture…The Muslim insistence on a separate state crystallized only in the decade before 1947, and there is real force to the point that practical experience of Congress rule in the Indian provinces after the elections of 1937 was instrumental in encouraging Muslim political alienation. Congress governments, subject in many cases to the influence of nationalist Hindus, lost the trust of Muslims and so helped to kindle support for the Muslim League. It was this erosion of trust that fanned a desire to redescribe a 'minority' within British India as a separate 'nation', and to take it outside the boundaries of India. The political and intellectual weight of Hindu nationalist imagination, with its desire for a clear definition of Indianness based on an exclusive sense of culture and of an historical past, was decisive in imposing artificial cohesion to the diverse Muslim identities on the subcontinent (Khilnani, 1997: 162-163).

Irfan Habib has written that the slogan "Hindu, Hindi, Hindustan" coined by the Hindu communal groups had a much older history than the coining of the term "Pakistan" as a separate nation for Muslims by Choudhary Rahmat Ali in 1930s (Habib, 1999). The RSS founded in 1925 had openly declared the ideal of a Hindu Rashtra which "by excluding the Muslims and other minorities, necessarily implied that there are two nations in India."(Ibid: 27) He goes on to say that contrary to the legend that Muslim communalism was solely responsible for the two nation theory; Hindu communalism had essentially the same aim of breaking the nation's unity.

Hormasji Maneckji Seervai, a renowned jurist and an expert on Indian constitutional law, whose monumental 'Constitutional Law of India' in three volumes on the Indian constitution is an authority and considered as the finest on the subject, has also given a different picture of the circumstances leading to the partition. He has argued cogently with the help of detailed references from the twelve volumes of the 'Transfer

of Power Papers' that the real cause of partition was the insistence of the Congress leadership on not accommodating Muslims to share power and not accepting parity in power sharing. Congress's refusal of the League's offer to form coalitions in the ministries formed by it after securing victory in the elections to the provincial legislatures in 1937 is cited as a significant moment in the national movement as it gave credibility to League's repeated assertions that 'Congress is committed to safeguarding the interests of the Hindus alone' and did nothing to allay the Muslim fear of dominance by a Hindu majority (Seervai, 1989).

However, it has to be remembered here that Congress faced accusations from both Muslim League and the Hindu nationalist faction that it was not doing enough to further the interests of their particular communities and it had to listen to both to a certain extent in order to keep the mantle of opposition against the British rule intact. Also, Congress had some big Muslim leaders within its ranks which from time to time gave reason to believe to the Congress leaders that they would be able to marginalize the support for Muslim League within the Muslim masses. The situation that Congress found itself in was indeed tough and despite their best of intentions, the leaders in Gandhi and Nehru could not prevent communalism, which had already taken strong roots, to eventually break the unity of the idea of India. It can be said that both Hindu and Muslim communalists were responsible in equal measure for the disintegration of the 'Idea of India' and the concretization of the two nation theory.

Also, the fact that the Congress leaders successfully won the hegemony of ideas against, and sidelined, the Hindu nationalist vision, once they formed the government after partition and once they had the power to chart the course for a new born India and laid its foundations as a secular liberal democracy, proved their commitment to the idea of India as inclusive and encompassing of all it had acquired over thousands of years of cultural blending.

2.5 Legacy of the Freedom Movement

The above discussion gives a picture of the nationalist vision of the national leaders of India and the other vision of the communal forces which led to the partition. Apart from this what also transpired during the freedom struggle was an enormous social

movement of the people which involved a contact with the western revolutionary ideas, socio religious reform movements, rise and awakening of the peasant and the working classes and political activity among women. All these movements which were both engendered by the freedom struggle and contributed back to it were instrumental in bringing a kind of national awakening on a mass scale which was never seen before on the subcontinent. The immense historical work done by the intellectuals at that time including Gandhi, Nehru, Tagore and Azad gave the philosophical basis to the Indian nation. Initially what seemed as the mobilization of a people only on the grounds of economic exploitation later on developed into a full blown battle for self realization and self determination. Because of the enormous diversity within the people of India, the initial thrust for coming together and waging a collective struggle was provided by the knowledge that the foreign rule was responsible for the economic misery of the people and the resulting protest and resentment against it. In the words of Philip Oldenberg:

> Indians were Indians because they were collectively exploited economically and suppressed politically by the British... being an Indian made sense as someone who was part of the economy, even if there was cultural and social fragmentation. It was clear that the cause of economic harm and the suppression of India's ability to make economic progress lay in the political injustice of the colonial rule (Oldenburg, 2010:23).

The fact of economic exploitation was brought out and popularized by early national leaders like Dadabhai Naoroji, R.C.Dutt and others and they played a very important role in awakening the masses. Naoroji's '*Poverty and Un-British rule in India*' (1901) shook the very foundations of colonial empire in India and embarrassed it in front of the international community. Similarly R.C. Dutt's '*Economic History of British rule in India*' in two volumes provided a detailed critique of the economic performance of the British in India. As quoted very aptly by Habib, "India's transformation as a nation received impetus from yet another and more deliberate source: the vision of national destiny as one of deliverance from exploitation and impoverishment" (Habib, 1999: 24).

Just when a strong impetus to the national movement was provided by the collective upsurge against the fact and experience of British economic exploitation, the socio religious reform movements were bringing the people closer together by removing the

age old barriers that had been constructed by past traditions. This part of the freedom struggle stood out as the most effective in developing a national consciousness among the people of India.

The socio-religious reform movements were brought about by spirited intellectuals such as Ram Mohun Roy, Keshab Chandra Sen, Ishwar Chand Vidyasagar, Rabindranath tagore and Syed Ahmed Khan in the second half of the 19th century. They sought to break the social barriers of Caste and Community and thereby paved the way for the people, despite the differences, to see themselves as being tied together by one national identity. The influx of modern ideas such as the ones disseminated by the American Revolution and the French revolution did have their impact on the Indian intellectuals and the above reform movements were in part influenced by the exposure to such ideas. Organizations were made to ideologically combat the socially retrograde and divisive practices like untouchability, sati, other forms of discrimination and renewed focus was given to the equal rights of men and women. Rabindranath Tagore started his University called '*Visva Bharati*' at Shantiniketan near Kolkata where emphasis was given to learning from all different cultures and knowledge systems of the world be it from the east or the west and emphasis was laid on the essential unity of mankind. Tagore remained against nationalism of the kind seen in the west as reflected in his numerous literary works because he believed that unless the people of India learn to treat each other with respect and equality and unless there is universal brotherhood, no real purpose would be solved by mere political self determination. However his writings and thoughts influenced other reform organizations in the country and inculcated a humanist vision in them. In a similar approach to that of Gandhi, he also believed in constructive work making people self dependent, educated and free of social biases. Ram Mohun Roy's organization called the 'Brahmo Samaj' tried to work on similar objectives and was very successful in bringing important social reforms such as abolition of sati and legalizing widow remarriage. Irfan Habib has termed these social reform movements as the "building blocks of the Indian nation" as they made people "feel one by overcoming the frontiers created by our past culture" (Habib, 1999: 24). Thus we can see how the final thrust to the historically evolving national consciousness of Indians was provided by the colossal movement against colonial rule.

The idea of India as a 'Nation' as reflected in India's Constitution is largely a legacy of the freedom movement. The basic principles of Liberty, Equality, Justice, Fraternity, Socialism and Secularism which became the basis of the social contract between the Indian masses and newly found Indian State were all a result of the lessons learnt and the principles pursued by the national leaders during the struggle for independence from foreign rule. In order to know the contents and the contours of the idea of India we have to look into the outstanding features of our freedom struggle and the vision of the leaders. According to the eminent Historian Bipan Chandra, the broad socio-economic and political vision of the leadership of the national movement "was that of a democratic, civil libertarian and secular India, based on a self reliant, egalitarian social order and an independent foreign policy" (Bipan Chandra, 1989: 2-3). During the freedom struggle, the nationalists fought vehemently for protecting the freedom of expression and association and made the struggle for these freedoms a central part of the national movement. The congress leaders, right from the start of their activism and throughout the freedom struggle put their weight behind enlarging the scope and protecting the civil liberties of general public. It was perhaps one of the only social movements which combined both constitutional as well as non constitutional means to achieve its objectives. The Indian National Congress itself was organized on a democratic basis and most of the important decisions were taken after long debates and open voting. Different ideological groups such as moderates, extremists, communists, socialists, capitalists and conservatives existed within the congress. They all had a say in the congress policies and they defended the civil liberties not only of their own ideological brethren but also of the people on the other side. For instance, the moderates defended Tilak (who was from the extremist faction) during his sedition trial and also the other radical revolutionaries and communist during their trials. And on the other hand conservatives like Madan Mohan Malviya and M.R. Jayakar opposed the Public Safety Bill and Trade Disputes Bill alongside communist and extremist faction of the congress (Bipan Chandra, 1989: 3). Such a civic libertarian and democratic tradition of the freedom movement is seen in part III of our constitution where basic civic freedoms are given guaranteed protection. Another important feature of the National movement was the emphasis on the freedom from economic exploitation which required not only a substitution of the British rule by native rule but also a change in the economic structure which had to be purged of the exploitative character it acquired during the years of the British rule.

Various pledges for improved conditions of the peasants and workers were made by the national leaders. The strong socialist strand in the Indian National Congress during 1920s and 30s had an effect on the framers of our constitution and various protective measures for peasants, small industries and working classes were incorporated into it. The Karachi resolution passed by the Indian National Congress in 1931 is perhaps, the best document which tells us about the collective vision shared by all streams of people in the national movement as to how they wanted independent India to be. The goals set out in the Karachi resolution were reiterated in the Congress manifesto for the 1937 elections. Under the heads entitled 'Fundamental rights and Duties and, Social and Economic Program' the resolution laid down the framework for rights of citizenry and the future policy of the state. Endorsing the Gandhi Irwin pact and reiterating the long standing Congress demand for 'Swaraj', the Karachi resolution started with the following lines:

> This Congress is of opinion that to enable the masses to appreciate what " Swaraj," as conceived by the Congress, will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them. In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Congress therefore declares that any constitution which may be agreed to on its behalf should provide, or enable the Swaraj Government to provide, the following…[19]

Then it went on to enumerate the goals which were taken to be indispensable by the leadership and which they thought any constitution coming into force on their behalf should provide. They included universal adult franchise, protection of small peasant and industry, government control of key industries like mineral resource, and transport, minimum wages for workers and humane working conditions, reduction in taxes and land revenue, change in land tenure and land reforms, equality of men and women, state neutrality in the matters of religion and protection of minorities and so on. In many ways Karachi resolution can be said to be the precursor of Indian constitution,

The combined effect of the reading of India's past as a story of cultural mixing and synthesis and the values developed during the freedom struggle led the founders of

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[19] Available at: http://www.gktoday.in/karachi-session-of-congress-1931/ Accessed on 29.06.2016.

Independent India to adopt a founding document which is reflective of such a layered past and democratic values. As Professor Jayal puts it:

> The project of the founders of the republic was therefore the creation of a society whose citizens shared a strong sense of national identity despite cultural diversity; the protection of historically disadvantaged ethnic groups; and the management of diversity within a democratic framework. Unlike many nation states which are premised on the claim of a unique language, culture or race, the founding idea of India was an idea of the nation state as intrinsically diverse and plural (Jayal 2006: 2).

The framers of our constitution ensured that the above vision is implemented in the national life of the people by providing adequate rights and safeguards in the constitution. For instance, in the article 25, the Indian Constitution guarantees the right to freedom of conscience and the right to practice, profess and propagate religion as a fundamental right enforceable by the courts of law for all its citizens. Further it provides safeguards to such sections of people who have a distinct language or culture to protect their language, script and other cultural aspects. As a large number of differences in India's society are on religious and linguistic lines, religious and linguistic minorities have been provided special rights to protect their distinctive culture. Although as argued by some scholars such as Rochana Bajpai (2014), the minority safeguards that found place in our constitution were in an attenuated form as compared to the ones provided under the British rule, but the bitter experience of partition and the need to construct a strong national identity, which involved a reduced focus on the need to preserve other distinct identities, accounted for the attenuated form of safeguards. The constitution of India represents one of the finest human endeavors to achieve a balance between the need of a strong national identity and cultural pluralism on one hand and between group rights and individual rights on the other. The constitutions of Pakistan and Bangladesh have also tried to achieve the above balance but with slightly different notions of national identity as derived from their specific national movements having their own specific content. We shall examine in the upcoming chapters how far this balance has been maintained under political pressure from various sources and how and on which side the Higher Judiciaries have intervened in the constant struggle between different versions pulling the narrative of national identity in different directions.

CHAPTER THREE

JUDICIAL SITES OF CONSTRUCTIONS OF NATIONAL IDENTITY IN INDIA

3.1 Introduction

As we discussed in the second chapter, India's foundations were laid during the freedom struggle with modernist, civic and liberal moorings. Right from the Lucknow Pact of 1916, through the Karachi resolution of 1931 to the Sapru Committee Report of 1945, the principles adopted by the political leadership throughout the freedom struggle were modern, pluralist and inclusive of all religious, linguistic and ethnic communities at once. The national movement exemplified the resolve of India's towering national leaders to conceive India as a modern nation-state with a civic/liberal sense of nationhood as opposed to an ethnic/ascriptive sense. India's past was interpreted by its national leaders to have been shaped by a mixture of different cultures, languages and religions and therefore the nationalism that they invoked while laying the foundations of India took the form of a civic/liberal nationalism in contradistinction to the classical ethnic form. Khilnani has expressed the same in the following words: "Language and Religion, those elementary markers that are generally used to ease any awkwardness of fit between the individual and the nation, were not given this assignment in India: neither was adopted as an effortless badge of Indianness…" (1997: 173).

The constitution of India, in a remarkable continuity with the spirit of the national movement and in a break with India's social realities adopted refreshingly modern and inclusive principles in the matters of membership, status and rights. It does not differentiate between people on grounds of any of the ascriptive markers like race, religion, language or color. It does not place any section of people in a position of authority over the rest. Indian nationhood as reflected in its constitution does not base itself on some historical community of origin and hence the national identity sought to be constructed is forward-looking and inclusive. India's national identity tries to weave together and construct a national community whose members relate to each other not in ethnic, ancestral or kinship terms, but in terms of a common national

vision informed by the principles of liberty, equality, fraternity and justice. India's constitution tries to develop and sustain a sense that "citizens belong together in an ethical community" (Kymlicka, 2002: 266) in such a way that its members are "more likely to fulfill their obligations to their co-citizens". (Ibid) Its preamble and the salient features exemplify a civic and territorial conception of the idea of India. The starting words 'we the people' do not speak of an 'ethnos', sharing putative descent, in Michael Mann's words but they embody the 'demos', sharing equal citizenship and equal rights, irrespective of descent (2005: 55).

From a theoretical perspective, India adopted a thin national identity at the time of its birth both as per Kymlicka's (2002) and Miller's (1995) definition. India's national identity does not promote particular conceptions of good and it evolved as a result of debate and participation of all stakeholders during the long struggle for independence from the British rule.In chapter one, we identified a shared 'mass or public culture' and 'membership' as the two core features of national identity. Since India's national identity derived its constitutive elements from civic principles and values, it remained open and inclusive with respect to both the 'culture' that it spawned and the 'membership' that it entailed. The civic ideal implicit in the constitution and the transformative vision of achieving a civic community in a deeply hierarchical and fragmented society has been explained in the following words:

> This civic ideal immanent in the Indian constitution was the aspiration that nourished not only a liberal regime for determining the legal status of membership, but also the principles of social citizenship and group differentiated citizenship, as conditions that would facilitate the fullest realization of a unique civic community in a diverse society marked by multiple and deep inequalities (Jayal, 2013: 23-24).

The fact that India's constitution did not accord a special place to any one religion or language speaks for the avowedly liberal and civic nature of India's national identity[20]. Also, the fact that the citizenship laws of the country were based on the principle of *jus soli* (where the right of citizenship accrues by the fact of birth rather than that of descent) in the newly adopted constitution affirmed the liberal character of India's national identity. Though, the consensus on citizenship principle was not easily achieved and there were plenty of contestations, as we shall see later, but the larger political opinion in favor of the progressive principle of *jus soli* over the rival

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[20] The Constitution of India does not declare a 'national language'. It merely declares Hindi and English as India's official languages.

principle of *jus sanguinis* (where the right of citizenship accrues not by birth but by parental descent) held its ground.

The first section of this chapter discusses the doctrine of 'basic structure' as spelled out by the Supreme Court in India. The basic structure doctrine identifies certain fundamental features of the constitution and puts them at a high pedestal by making them immune from amendment at the hands of the supreme legislature, that is, the parliament. It is important for our purposes because such demarcation of fundamental or salient features, which are considered unassailable for all times to come, not only derives from an underlying concept of national identity and but also inflects the national identity with its own essence. The identification of such fundamental features is also an act of declaration of the principles the nation stands for, and thus contributes in its own way in constructing its national identity. The second section dwells upon the Indian judiciary's imprint on the debates concerning India's public culture. As we discussed in the conclusion part of the first chapter, any national identity is always formed at the intersection of culture and politics and the nature of national identity in a given nation primarily depends upon the nature of 'mass public culture' (Smith 1991) in that nation. If the public culture is defined and interpreted in ethnic, religious or racial terms then the national identity is ethnically/religiously oriented, whereas if such culture is defined in civic or territorial terms and derived from certain civic traditions or high political principles, as in case of India, then the national identity is civically oriented. According to Kymlicka, these variations in the definition of culture "are crucial to understanding why some nationalisms are peaceful, liberal and democratic, while others are xenophobic, authoritarian and expansionist" (1999: 133). Therefore, to assess the nature of national identity in a given nation state, one has to ask the question as to what features, conventions and symbols of mass public culture are adopted and perpetuated by the elites including state institutions. In India's case, as we have seen in chapter two, the founding idea of Indian nationhood as a civic, territorial and liberal nationhood was not the only idea prevailing during the genesis of the Indian nation. The rival conception of a thick national identity built around a religiously informed culture was always available and presented a constant challenge to the above civic/liberal conception. We will see how courts have addressed the question of India's public culture and mediated the above tussle when it came before them in cases primarily involving secular character and election malpractices.

Because public culture is such a significant and formative feature of national identity, courts' pronouncements impinging upon India's public culture have, by necessary implication, a bearing on her national identity.

In the third section, I shall examine the membership norms of the Indian nation, which can be best illustrated by analyzing the citizenship laws and the Judiciary's stance on the claims for citizenship from different set of people. The rationale for studying case law on citizenship again comes from the theoretical conclusions drawn in chapter one. We identified one distinct feature of national identity as its ability to provide its bearers with membership in a political community which they can call their own. No other identity, whether cultural, religious, linguistic or professional can perform such a function. Other identities can create networks of mutual recognition and they do perform the task of differentiation between 'us' and 'them', but it is only the possession of a national identity that can give an individual a secure connecting link with a political community in the current world order. This seems likely to be the case in foreseeable future as 'nation' continues to remain the only organizing principle and the only human collectivity which is considered to be a valid source of political legitimacy. It is also evident from the fact that in order to make a legitimate claim to statehood in the international arena, the claimants have to show themselves to be constituting a nation first. Nationhood has become the unwritten condition for statehood. This feature of national identity which deals with the issues of political membership and belonging can only be analyzed by examining the citizenship laws in a given nation-state. This is partly because national identity does not have a tangible existence of its own. It is an abstract subject which gets manifested through legal instruments such as citizenship status certificates, national identity cards and passports depending upon the jurisdiction and context. Thus, while national identity supplies the normative and philosophical basis for political membership and eventually political rights in abstract terms, this philosophical basis manifests itself in tangible terms in the form of the legal category of 'citizenship' with its associated paraphernalia.

3.1 Kesavananda Judgment and the Basic Structure

In the famous case of *Kesavananda Bharati v. State of Kerala[21]*, the Supreme Court held *inter alia* that Parliament while exercising its powers to amend the constitution of India cannot make such amendments which tend to change the basic structure of the Constitution. By spelling out the basic structure doctrine, the apex court set limits to the Indian Parliament's power to amend the constitution and made itself the final arbiter on the question of modifiability of the constitution. The background for this doctrine was already made in the early years of independence, when the Nehru government tried to push through the land reforms and the parliament inserted Art 31A and Art 31B through the first amendment to the constitution. Art 31A gave vast powers to the state to acquire private property in public interest and contained provisions securing the constitutional validity of the various Zamindari Abolition acts put into force in different states. Art 31B provided for the establishment of the Ninth Schedule, a new constitutional device which was supposed to accord immunity from judicial scrutiny to all laws prescribed by the parliament to be falling under the said schedule. Art 31 B provided, "none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act or Regulation takes away or abridges any of the fundamental rights". It further provided complete immunity to the legislations falling under the ninth schedule from any judgment, decree or order of any court or Tribunal to the contrary. In effect, it took away the power of judicial review from the judiciary with respect to laws that legislature chose to put under Ninth Schedule. The first amendment was immediately challenged in *Shankari Prasad v. Union of India[22]* on grounds that it violated the fundamental right to property and also Art 13(2) which proscribes the state from making any law which abridges or takes away any of the fundamental rights given under part III of the constitution. The important question of law that had to be decided by the court was whether the amending power of the parliament given in Art 368 of the constitution includes the power to take away fundamental rights. The court answered in the affirmative and upheld the constitutional validity of the first amendment saying that parliament had unlimited power of amendment. The court was again confronted with the same important

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[21] AIR 1973 SC 1461
[22] AIR 1951 SC 458

question in *Sajjan Singh v. State of Rajasthan*[23] where Justice Gajendragadkar speaking for the majority ruled that the power to amend the constitution conferred by Art. 368, includes the power to take away fundamental rights given under part III of the constitution. However, two years later in *L.C. GolakNath v. State of Punjab*[24], Chief Justice Subba Rao ruled that the fundamental rights under Part III have been "given a transcendental position under our constitution and are kept beyond the reach of parliament".[25] The central government reacted by getting the two houses of parliament enact the 24th Amendment Act which expressly provided that parliament has the power to amend any provision of the constitution including the provisions in Part III. Along with the above amendment, three more amendment acts were passed, one of which, the Twenty-Fifth Amendment declared that the fundamental rights can be abrogated by the state for the purpose of giving effect to certain Directive Principles[26]. It is in this background that when His Holiness Kesavananda Bharati, Sri Padagalavaru of Kerala filed a writ petition for the enforcement of his fundamental rights, primarily, right to property, the court in order to decide the immediate issue had to first sort out the constitutional questions raised by the above amendments and previous judgments of the Supreme Court. Some of the important questions before the court were: (i) the nature of the amending power envisaged in the constitution, (ii) the extent to which legislative purpose could override the fundamental rights and (iii) the relationship between Part III (Fundamental Rights and Part IV (Directive Principles). And since the question of the extent of amending power of the Parliament had been previously adjudicated upon by a Bench of 11 Judges in *Golaknath*, a constitutional bench of 13 judges was constituted for this case. On the power of Parliament to amend the constitution, the Supreme Court in *Kesavananda* adopted reasoning different from *Golaknath*. In *Golaknath* the court had put a limitation on the power to amend with respect to fundamental rights saying that the source of the power to amend is not found in Article 368, which is only a procedural article laying down the

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[23] AIR 1965 SC 845
[24] AIR 1967 SC 1643
[25] AIR 1967 SC 1656
[26] Directive Principles contained in Articles 39(b) and 39(c) were given that position by the 25th amendment. Art 39 reads as: "the state shall, in particular, direct its policy towards ensuring – (b)that ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Both these clauses stood as strong allies of the state in its endeavor to wrest supervening rights over property and to bring in massive redistribution of material resources.

procedure for amendment, but the residuary power clause found in Article 248 and since Art 248 was subject to other provisions of the constitution, the protection given to the fundamental rights against the legislative power of the parliament under article 13(2) would apply to an amendment brought about under article 368. In *Kesavananda*, the court rejected the above argument and declared that power to amend the constitution is not a legislative power but a 'constituent power' derived from Article 368. Though, the decision of the 13 judges was divergent in many ways but nine out of the thirteen judges managed to sign a summary order laying down the major operative part of the judgment. There they upheld the validity of the four amendment acts except the clause which abrogated the power of Judicial Review. By giving the 'constituent power' argument the court also upheld parliament's power to amend fundamental rights overruling *Golaknath*. Court said that residuary powers were only contemplated for issues and subjects that were not anticipated or could not have been anticipated by the constituent assembly, whereas a subject as important as constitutional amendment was vigorously discussed in the Constituent Assembly. That is why the above subject was not put into the Part XI which deals with the legislative powers of the parliament but given a separate place in Part XX. Therefore, since the power of amendment is derived from Article 368 and the nature of the power is constituent and not legislative, the parliament had the competence to take away fundamental rights, but importantly only those fundamental rights and in such a way that it does not disturb the 'basic structure' of the constitution. The verdict was given by a majority of 7:6 with the decision of Justice Khanna and six other judges becoming the majority judgment. Six judges had decided the case in favor of the petitioners and six in favor of the state and Justice Khanna gave his own independent judgment in disagreement with all others.

The irony surrounding the *Kesavananda* verdict has been beautifully captured by Satya Prateek, who writes, "It can only be attributed to an old foible of fate that in a case involving thirteen judges where six decided for and six against the state, judgment of Justice Khanna with which none of the 12 judges completely agreed has become the law of the land" (Prateek, 2009: 430). Justice Khanna held:

> The power of amendment was limited and it did not enable the parliament to alter the basic structure or framework of the constitution. The substantive part of Article 31-C which abrogated the FRs was valid on the ground that it did not alter the basic structure of the

constitution. However the later part of Article 31-C which ousted the court's jurisdiction was invalid (Das, 2000: 73).

Thus, what *Kesavananda* did was to accept Parliament's power to abridge or take away Fundamental Rights on one hand but at the same time set up limits on the power of the Parliament to amend the constitution which were bigger and stricter than any of the earlier judgments of the Supreme Court had ever put. It not only circumscribed parliament's power with respect to those fundamental rights which the Supreme Court considered a part of the basic structure but also with respect to other provisions of the constitution considered to be falling within the 'essential features' of the constitution. *Kesavananda* later gained popularity as the 'Essential Features Case'. It also resolved a question left unresolved in *Golaknath* case: whether the Parliament under the exercise of its powers of amendment in Art 368 can abrogate the constitution or rewrite a constitution different from the one existing? The Supreme Court in *Kesavananda* categorically denied this power to the Parliament as abrogating the constitution would surely violate its basic structure. Parliament, according to the verdict, could only change the provisions of the constitution as long as and to the extent that they do not alter the basic structure.

Upendra Baxi has remarked that the Supreme Court is "probably the only court in the history of humankind to have asserted the power of judicial review over amendments to the constitution" (Baxi, 1985: 64). However, before this judgment starts to appear as another case of Judicial overreach, an examination of the constitutions of some other countries reveals that such a limitation on the legislature's power to bring about changes has been inbuilt within the text of the constitutions. For instance, article 139 of the new Italian Constitution, adopted after the Second World War in 1948, entrenches Republican form of government as an immutable feature of the constitution after laying down a rigid process of constitutional amendments in Article 138. "The Republican form [of the state] cannot be a matter of constitutional revision"[27] declares the text of art 139. The German constitution in its article 79 which lays down the procedure of amendments, declares in clause 3 that amendment of certain basic features and organizing principles "shall be inadmissible". It

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[27] Constitution of Italy, available at: http://www.constitutionnet.org/files/Italy.Constitution.pdf. [Accessed 20.07.2016]

particularly lists article 1 and 20 as immutable.[28] These two countries, unlike India, adopted these provisions as intrinsic parts of their constitutions, because they had the experience of fascist and authoritarian regimes completely abrogating the constitutional law in their respective countries. In India such a situation was perhaps not envisaged by our framers because the Indian constitution was adopted after a long struggle against colonial rule and that is why no such provisions were inserted in the text of the constitution by the constituent assembly. However, when one goes through the constituent assembly debates, one finds in the draft constitutions proposed by the K.M. Munshi, K.T. Shah and the one prepared by the Sapru Committee Report all carried certain implied limitations on the amending power of the parliament (Austin,1972: 257-58). In other words, the Supreme Court in India made explicit what was left implicit by the framers of our constitution and it adopted an approach similar to the one adopted by the Sapru Committee Report. Almost in all countries which had a constitutional history have deemed it proper to have such clause or clauses in the text of their constitutions which have the effect of entrenching certain basic principles to be followed at all times. Article 97 of the Japanese constitution also reflects the same constitutional philosophy displayed by the Indian Supreme Court in its Basic Structure Doctrine. It states:

> The fundamental human rights by this constitution granted to the people of Japan are fruits of age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolable.[29]

Further this article finds place in Chapter X of the Japanese constitution which is entitled, "Supreme Law". The inviolability of basic structure in India, though having

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[28] Constitution of Germany, available at:
https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.
[Accessed 20-07-2016]. Articles 1 and 20 state the following:
Article 1 [Human dignity – Human rights – Legally binding force of basic rights] (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.
Article 20 [Constitutional principles – Right of resistance] (1) The Federal Republic of Germany is a democratic and social federal state (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available. (Ibid)

[29] Constitution of Japan, available at: http://web-japan.org/factsheet/en/pdf/09Constitution.pdf.
[Accessed 20th July, 2016]

taken birth as a judicial innovation, stands on the same footing as the aforementioned inviolability of fundamental human rights in the Japanese constitution. This view rests on the argument that the word 'amend' is generally taken to be synonymous with 'correct' and 'improve' and not 'reconstruct', 'replace' or 'abandon'. Valid amendments can only operate within the given polity, whatever be its nature, they cannot replace the nature of the polity itself (Prateek, 2009: 439). A.G. Noorani (1982) and R. Sudarshan (2005) have argued that the source of inspiration for the Supreme Court in both *Golaknath* and *Kesavananda* judgments, was the writings and speeches of German scholar Dietrich Conrad. He had prefigured the difficulty inherent in giving unbridled amending powers to the parliament and raised uneasy questions such as "if two-thirds majority changed Article 1 by dividing India into two states of Tamilnad and Hind proper… if a constitutional amendment abolishes Article 21, to the effect that forthwith a person could be deprived of his life and personal liberty without authorization by law, could it still be considered a valid exercise of amendment power conferred by Art. 368" (Sudarshan, 2005: 166).

There was some criticism of the judgment for not giving a clear picture as to which portions or provisions of the constitution constitute the basic structure. The individual judges identified different principles to be a part of the basic structure. In fact, the sheer diversity of views and reasons that the judges advanced to come to their varied conclusions, kept the legal and the academic world groping for its real import until the Supreme Court in later cases clarified and consolidated the doctrine. The momentous nature of the questions involved in the case resulted in the case proceedings continuing for sixty-nine consecutive days. In Chief Justice Sikri's judgment he mentions one of the contentions that the Attorney General made before him: "that every provision in the constitution is essential otherwise it would not have been put in the constitution." The Chief Justice replied, "It is true. But this does not place every provision of the constitution in the same position. The true position is that every provision of the constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features: (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the legislature, the executive and the judiciary; (5) Federal character of the Constitution." (AIR 1973 SC 1461, para 315).

In the next paragraph he goes on to say, "The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed"[30]. Justice Shelat and Justice Grover while agreeing to the above five features mentioned by Sikri CJ, added three more features to the list: (1) Sovereignty of the country; (2) The dignity of the individual secured by various freedoms and basic rights in Part III and the mandate to build a welfare state contained in Part IV; and (3) The unity and Integrity of the nation. They also pointed out that while determining the essential features, the whole constitutional scheme including its history and its preamble will have to be considered. Hegde J. and Mukherjea J. also echoed the same essential features as demarcated by Shelat J and Grover J. Justice Jagmohan Reddy said that the elements of the basic features are to be found in the Preamble to the Constitution and the provisions into which they are translated: (1) Sovereign democratic Republic; (2) Justice – social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and opportunity and Fraternity. (Ibid, paragraph 1680). The judges have basically tried to outline the broad principles which they thought to be the soul of the constitution. By doing so, they brought a sense of constitutionalism driven by a strong constitutional morality into the everyday political discourse of the nation. It would be futile to pin point the specific articles and provisions falling in that category. Basic structure is a much more holistic concept which encompasses all that is "necessary to serve the constitutional ends and therefore cannot be reduced to particular set of provisions taken from the text of the constitution (Sudarshan, 2005: 166)[31]. Thus, the Supreme Court of India through the *Kesavananda* Judgment not only clothed the essential framework of our constitution with a veneer of sanctity but also became the ultimate custodian of the constitution of India.

The discussion of the Kesavananda case, which till today remains the most significant intervention by the Supreme Court in almost seventy years of the working of Indian Constitution, is significant for our purposes because it included liberty, equality, secular character and fraternity within the haloed ambit of the basic structure. The

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[30] Available at: https://indiankanoon.org/doc/257876/ Para 316-317.
[31] See A.G.Noorani (1982) "The Supreme Court and Constitutional Amendments" in A.G.Noorani (ed.), Public Law in India. New Delhi: Vikas Publishing House.
Also see the *Frontline* article by Noorani, "Behind the Basic Structure doctrine: On India's debt to a German Jurist, Professor Dietrich Conrad", vol. 18, Issue 9, 28th April-11th May, 2001 discusses Professor Conrad's contribution to India's basic structure jurisprudence in detail.

identification of the above features as constituting the 'basic structure' by the Supreme Court has come like a reminder by the court of the constitutive elements of India's identity as a nation, elements which are to be protected and preserved for all time to come. P.B. Mehta in a recent essay on the Supreme Court has written, "the Supreme Court may have overstepped its bounds, but it has deepened democracy by protecting India's political identity, expanding the scope of democratic justice, and producing a modicum of accountability" (Mehta, 2015: 243).[32]

3.2 Judiciary's impress on India's public culture

We all know that one feature that is both pervasive and conspicuous about public culture in all the South Asian countries is religion. The history of the subcontinent is full of public ceremonies, festivals and important political events being anchored around religiously auspicious occasions. Even in period of the British rule the significance common Indian people attached with religion gave the foreign rulers readily available resources for manipulating and managing a large and diverse population in India. At times the leadership of the national movement had to make use of religious symbols to gather mass support against the British rule, though the appeals of national leaders, unlike the British, were always intended to unite rather than divide the diverse Indian people. Development of any nation's public culture, as we discussed earlier, has a formative and constitutive influence on the national identity in that nation. However, public culture also derives content from the conception of nationhood in which the nation is imagined and conceived. Thus it is a two way exchange between national identity and public culture which is commonly referred as national culture. As we discussed earlier, India has two rival conceptions of nationhood – first the civic conception which is reflected in the constitution and second the religious conception which has always lurked behind ready to provide convenient answers to the difficulties inherent in nurturing a newly conceived civic ideal in a society with high ethnic fragmentation. These two rival conceptions of nationhood derive from their own versions of India's public culture. While the ethnic Hindu nationalist vision invokes a public culture anchored around the Hindu religion

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[32]Mehta, P.B. (2015), "The Indian Supreme Court and the art of Democratic Positioning". In Mark Tushnet and MadhavKhosla (ed.), *Unstable Constitutionalism: Law and Politics in South Asia*. Massachusetts: Cambridge University Press.

and its glorious ancient past, the other modern civic version shuns association with any one religion and invokes a culture built around modern principles and values. Ideally, in order to generate civic solidarities among citizens across ethnic differences, a public culture which is 'national civic' in contrast to 'national ethnic' (Beiner, 1995: 8) should be invoked as well as encouraged by the political elites. However, India's overwhelming majority being Hindu and the political party having an ethnic vision of nationhood ascending in power causes a constant turf war between the two ideas defining culture in their own ways. The civic version in India commonly adopts the vocabulary of secularism and secular character to differentiate its stand from the other religious version. Therefore we will analyze some landmark cases involving the debate on religion and secularism in order to appreciate the judicial impress on India's public culture.

In the case of *Syedna Taher Saifuddin vs. The State of Bombay*[33], the Supreme Court of India for the first time referred to the secular nature of the Indian Democracy and interestingly, described Indian secularism as a principle of 'Religious Toleration'. Although Justice Ayyangar, speaking on behalf of the majority, did not dwell upon the scope of the term religious toleration, he remarked that the principle of toleration has been the characteristic feature of Indian civilization from the start of history. The judgment also did not deal with the concept of secularism in any detail but used it in a short comment in order to justify granting autonomy to a religious denomination as to regulation of the conduct of its members. Referring to the articles in the constitution of India which guarantee the fundamental rights to freedom of conscience, belief, faith and worship, Justice Ayyangar wrote:

> I would add that these articles embody the principle of Religious Toleration which has been the characteristic feature of Indian civilization from the start of history, the instances and periods when the feature was absent being merely temporary aberrations. Besides they serve to emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the constitution (Indian Kanoon, p. 26, para 25).

Here we can discern the meaning of secularism as a principle of tolerance of different religions and an equal footing to be given to all religions. The emphasis on the aspect of toleration is laudable but it becomes clear at the very outset that this understanding

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[33]AIR 1962 SC 853

of the term secular nowhere implies strict separation of religion from the activities of the state thereby furthering the Indian understanding of secularism as equal treatment of all in contrast to the European definition of strict separation of church and state. However, the motive for the court to reiterate the Indian secularism in this particular case was to grant immunity to a religious denomination in the conduct of its own affairs. This case, also popularly known as the 'excommunication case', involved the challenge brought by the religious head of the Dawoodi Bohra community to overturn the Bombay High Court's striking down of the excommunication and validating the implementation of the law enacted by the Maharashtra government making the practice of excommunication prevalent in some communities as an offence. The Supreme Court in a surprising decision overruled the High Court's decision and held the right to ex communicate as a lawful part of the right of the denominations to manage their own affairs. Among the reasons relied upon by the court were: (i) religious denominations have a right to maintain unity and continuity in their community and in order to do so the power of ex communication vested in the religious head is a necessary power, (ii) The practice of excommunication is covered under the freedom of religion because the Article 25 not only protects freedom to profess but also to practice a religion which protects acts done in pursuance of religion. Ex communication being one such act, it also gets the above protection, (iii) even if there is a loss of civil rights on the part of the person expelled like inability to be buried in community graveyard, inability to worship at designated places, such loss of individual civil rights is acceptable as a necessary consequence of ex communication. Most interestingly, on being confronted with the question whether the practice of ex communication, which involves a loss of rights for the person subjected to it and puts him in the position of an untouchable, should be considered as an essential tenet of the religious denomination, the court interpreted the article 26(b) of the constitution[34] as giving complete autonomy to the denomination or the

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[34]Art. 26 Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
(*a*) to establish and maintain institutions for religious and charitable purposes;
(*b*) to manage its own affairs in matters of religion;
 (*c*) to own and acquire movable and immovable property; and
(*d*) to administer such property in accordance with law.

organization itself to decide what rites and ceremonies are essential to the tenets of the religion they hold and that no outside authority has any jurisdiction to interfere with their decisions in such matters.[35] Here the court unequivocally places the group rights or the community rights exercised through the head of the community above the individual rights of a member of such a community. This is one of the earliest examples where the court, when given an opportunity to give its own stance on religious rights and pluralism, placed the group rights of the religious community above the individual rights of a member of such community. Will Kymlicka calls this the 'group rights model of religious tolerance' (Kymlicka, 1992: 38) which he contrasts with the liberal model of individual freedom of conscience that gives precedence to the individual over the community. He gives the example of the Millet System of the Ottoman Empire as one system where the group rights model of religious tolerance was successfully practiced when one considers the peaceful coexistence of three major religious communities –Muslims, Christians and Jews – over many centuries. Kymlicka, while admitting that the results of the group rights model as practiced by the Ottoman rulers were good and the communities not only lived peacefully but also thrived individually, also points to the poor state of individual rights in Ottoman Empire which were mostly at the mercy of group leaders. He shows that the group model became possible only because of the poor concern shown for the individual rights and then goes on to suggest the individual freedom of conscience model to be a better way to go (Kymlicka, 1992).

The Supreme Court in the current case certainly seems to be promoting a group rights model of religious tolerance. Although the Indian constitution has tried to strike a balance between the individual and the community by carefully delineating enforceable fundamental rights vested in the individual and some guarantees to minority groups including various religious denominations, but the Supreme Court here read the fundamental right granted to religious denominations under art 26(b) as prevailing over the fundamental right to freedom of conscience and association granted under Art 25 and 19(c) respectively. More importantly though, the idea of secularism conveyed by the court in this case, which belongs to the early years after independence, is that of *Sarva Dharma Sam-bhava,* a Sanskrit phrase meaning equal respect for all religions.

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[35]http://indiankanoon.org/doc/510078/, pg 16.

The question of secularism was put before the Supreme Court again after the huge communal upsurge in North India due to the Ram Mandir agitation which led to the demolition of a medieval Muslim structure, Babri Masjid. The Congress government at the centre through its governors imposed President's rule on three states governed by the Bhartiya Janata Party (BJP) at the time of the build up to the communal frenzy, apart from three other states - Karnataka, Meghalaya and Nagaland. The Chief Minister of Karnataka at that time, S.R. Bommai challenged the President's rule and the suspension of his government before the Supreme Court in *S.R. Bommai v. Union of India*[36]. The Supreme Court gave a detailed explanation of the Article 356 under which the power of President acting on behalf of his cabinet of Ministers to issue a proclamation of President's rule in a state on his satisfaction that a failure of constitutional machinery has taken place is laid out. It is considered a landmark judgment inasmuch as it gave definitive guidelines and curtailed the power of the Central government to dissolve the elected state government on mere whims. However, for our purposes, interestingly, the court while striking down the imposition of President's rule in Karnataka, Meghalaya and Nagaland, upheld it in the BJP ruled states of Madhya Pradesh, Himachal Pradesh and Rajasthan on ground of the failure of these state governments to uphold the constitutional basic feature of secularism. It was shown by the central government counsels before the court that huge number of volunteers called 'karsevaks' were sent from these three states of Madhya Pradesh, Himachal Pradesh and Rajasthan for the demolition of the mosque and were welcomed back by the Chief Ministers after the demolition was completed. It was also stated in the proclamation of President's rule that since the Chief Ministers of the three states and many other ministers of the ruling party belonged to banned organization RSS (it was banned in the immediate aftermath of the Babri demolition), they cannot be trusted with the security of people in general and minorities in particular. The central government also couched its reasoning in terms of secularism by positioning itself as the protector of the basic constitutional feature of secularism and giving it as a reason for proclaiming breakdown of constitutional machinery in the above three states, the governments of whom actively supported the communal build up. The Supreme Court upheld the suspension of BJP led governments in the above three states and reaffirmed secularism as the basic feature of the constitution of

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[36] (1994) 3 SCC 1

India. The court declared: "Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution" [(1994) 3 SCC 1, p. 74, Para 153]. The court in trying to explain the real import of secularism in the Indian context, quoted with approval excerpts from Mahatma Gandhi's *Hind Swaraj (1909)* and Dr. Radhakrishnan's *Recovery of Faith (1956)* to bring home the point that Indian secularism does not mean atheism and a license of material comfort but it means equal status to all religions and that no religion should be given preferential status in national life. The majority judgment delivered by Justice Pandian on behalf of the other concurring judges mentions the guarantees of Liberty, Equality and Justice given in the Preamble to the constitution, Articles 25-28 guaranteeing freedom of religion, Articles29-30 laying down cultural and educational rights for religious and linguistic minorities and fundamental duties, particularly, the duty to promote harmony and the spirit of brotherhood between different people of India as providing a framework for a secular polity. Pandian J. observed: "These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favoring any particular religion or religious sect or denomination … The State is enjoined to accord equal treatment to all religions and religious sects and denominations" (ibid, p. 70, Para 146). This statement points to the age old Indian concept of *Dharma Nirpekshta*, or state neutrality in the matters of religion.

On further reading of the extensive exposition of Indian secularism by Pandian J., it appears to be a relationship of two-way tolerance between the State and religion. A relationship where state tolerates religion and religion tolerates the state. State tolerates religion inasmuch as it does not attempt to wipe out religion completely, but accepts its existence and influence till the point where religion does not transgress the barricade of 'morality, public order and health'[37]. On the other hand religion also tolerates the state as despite having a no interference guarantee from the state, it cannot have any say in secular matters of the state or of religion itself. The ambit of

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[37] Articles 25 and 26 make the rights to freedom of religion and freedom of religious institutions to manage their affairs subject to morality, health and public order.

the free play of religion has been restricted to a considerable extent. The following excerpt from the judgment seems to suggest the same:

> The state's tolerance of religion or religions does not make it either a religious or a theocratic state. When the state allows citizens to practice and profess their religion, it does not allow them to explicitly or implicitly to introduce religion into non religious activities of the state. This is also clear from sub-section (3) of Section 123 of the Representation of the People Act, 1951 which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols (Ibid, p. 72, para 148).

The above passage shows the court spelling out the constitutional scheme according to which the state is required to maintain a principled distance from religion and it supplies section 123(3) and section 123(3A) later in the paragraph, which talks about disqualification on grounds of promoting enmity or hatred between different classes of citizens of India, in its support. The mention of section 123 of the Representation of People Act by the court proved to be ominous as only a year later there were a batch of petitions filed in the Supreme Court praying for disqualification of election candidates for contravening precisely the above sections. These petitions collectively known as the Hindutva judgments, as discussed later in the chapter, marked a shift in court's stance on the notion of principled distance from religion as spelled out in *Bommai* which also had a huge bearing on the understanding of India's public culture.

Ramaswamy J. in a later part of the judgment says something interesting in furtherance of his exposition of Indian secularism and connects it with the history of Indian civilization. He writes:

> Secularism teaches spirit of tolerance, catholicity of outlook, respect for each other's faith and willingness to abide by the rules of self discipline… At moments of testing times people rose above religion and protected the victims. This cultural heritage in India shaped that people of all religious faiths, living in different parts of the country are to tolerate each other's religious faith or beliefs and each religion made its contribution to enrich the composite Indian culture as a happy blend or synthesis. Our religious tolerance received reflections in our constitutional creed (Ibid, p. 90, Para 182).

This particular excerpt again shows a peculiar understanding of secularism in Indian context which is equated with a certain kind of higher religiosity that brings out the best components from different religions and instead of becoming a source of rift,

unleashes cohesive forces yielding a composite culture and society. In the later part of the above passage, the reference to a 'composite Indian culture as a happy blend or synthesis' also shows a continuity in the thinking on the interpretation of India's culture from the days of the freedom movement where national leaders from Gandhi and Nehru to Tagore and Azad all emphasized on this very composite culture bequeathed by India's past.

Just a year after the in-depth exposition of Indian Secularism by the Supreme Court in *Bommai,* which not only consolidated the Court's hitherto varied stand on secularism but also vindicated the understanding of India's past adopted by the leaders of the national movement as layered and pluralistic, the court showed a shift in its stance on the important questions of secularism and India's national identity. This moment came when a batch of seven verdicts were handed down by the Supreme Court all of which involved allegations and prayers for the disqualification of certain candidates for the Maharashtra Assembly, belonging to Hindu Nationalist parties BJP and Shiv Sena, on grounds of infringing the provisions of section 123 and 123(A) of the Representation of People's Act, 1951. As seen earlier section 123 talks about the disqualification of a candidate if he or his agent appeals for votes based on his religion, race, caste, community or language or the use of or appeal to religious symbols. Section 123(A) disqualifies a candidate if he or his agent is found to be spreading feelings of enmity or hatred between different classes of citizens of India based on religion, race, caste, community or language for furtherance of prospects of that candidate or for prejudicially affecting the candidature of another candidate. The main opinion of the Supreme Court was given in *Dr. Ramesh Yashwant Prabhoo V. Shri Prabhakar Kashinath Kunte and Others.*[38] In this case Dr. Ramesh Yeshwant Prabhoo, the mayor of Bombay and his election agent Thackeray were sought to be penalized under the Representation of People's Act for appealing for votes on grounds of religion and promoting enmity on religious grounds. The court first went into the question of constitutional validity of the section 123 of RPA as it was challenged by the appellants. The court upheld the validity on grounds that these sections were 'enacted so as to eliminate from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our constitution

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[38][1996 SCC (1) 130]

and indeed of any civilized and political social order'[39]. The election candidate, the mayor himself and his agent, Bal Thackeray were shown to have asked for votes on the basis of the candidate being a Hindu and to have used derogatory and offensive references against the Muslims. The Court in its final verdict held both Prabhoo and Thackeray to be guilty of corrupt practices, but not before giving its opinion about the meaning of the words 'Hindutva' and 'Hinduism' which were used generously in the campaign speeches by the above candidate. The Court made it clear that the mere reference to the words Hindutva and Hinduism in an election speech does not by itself attract sub section 3 and 3A of section 123 of the RPA, unless speech can be construed as an appeal to vote for the candidate on grounds of him being a Hindu. The court relying on earlier decision of the Supreme Court in *Yagnapurushdasji v. Muldas*[40] , Dr. Radhakrishnan's *Indian Philosophy*, *volume 1* (1923), his *Hindu view of Life* (1926) and Monier William's *Religious Thought & Life in India* (1885) reached a peculiar understanding of the words Hindutva and Hinduism which is very different from what the man who coined the term – Savarkar– implied. Justice Verma speaking for the bench wrote:

> These Constitution Bench decisions, after a detailed discussion, indicate that no precise meaning can be ascribed to the terms `Hindu', `Hindutva' and `Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term `Hindutva' is related more to the way of life of the people in the sub- continent. It is difficult to appreciate how in the face of these decisions the term `Hindutva' or `Hinduism' per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3A) of Section 123 of the R.P. Act (Ibid p. 21).

Here Justice Verma can be said to be legitimizing Hindutva by giving it a different meaning from that of Savarkar's definition. Hindutva is equated with the 'way of life of the people of the subcontinent. In the next paragraph of the judgment after quoting from *Indian Muslims: Need for a Positive Outlook* by Maulana Wahiduddin Khan, Justice Verma declares that "hindutva is used and understood as a synonym for 'Indianisation', i.e. development of uniform culture by obliterating the differences between all the cultures co-existing in the country" (Ibid: 21). At another place in the judgment, Justice Verma reiterates- "Unless the context of a speech indicates a

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[39]http://indiankanoon.org/doc/925631, p. 13, para 26.
[40] 1966 (3) SCR 242

contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith (Ibid: 23).He goes on to write:

> Considering the terms `Hinduism' or `Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, if in spite of the liberal and tolerant features of `Hinduism' recognized in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly (Ibid: 23-24).

Here he mentions the need to protect the 'secular creed of the nation' but at the same time opens up a massive space for precisely the same danger, as stated in the above excerpt - the misuse of the terms 'Hindutva' and 'Hinduism' to promote communalism. Also, this was the first time that 'Hindutva' was equated with 'Indianisation'. This was undoubtedly a huge departure from what was understood of 'Indianisation' in the days of freedom struggle exemplified by Nehru as the "impress of India" to be found in like manner and like quantity in the Muslim Pathan of North West India and the Hindu Tamil of the extreme South. Remarkably, the judgment was silent on the antecedents of the word Hindutva itself. It did not consider the racial and territorial component inherent in the concept of Hindutva as propounded by Savarkar and then improved upon by Golwalkar by making the components of sacred soil and race even more exclusive. It was commented by Brenda Cossman and RatnaKapur that by conflating Hindutva with Hinduism, the court had 'obscured the historical background as well as the contemporary political context' of Hindutva (Cossman and Kapur, 2001: p. 33). It was also pointed out by the same authors that the one of the major implications of the judgment was that Hinduism, which is the religion of majority of Indians, but not all, comes to reflect the way of life of all Indians (Ibid: 34).

In *Manohar Joshi V. Nitin Bhaurao Patel & another[41]*, another of the Hindutva cases, the Supreme Court restored the election of Maharashtra Chief Minister Manohar Joshi after it was struck down by the Bombay High Court on account of election malpractice. The question was whether his statement in the election speech to the effect that first Hindu State will be established in Maharashtra if he gets elected amounted to an appeal of votes on ground of religion. The Court led by Justice Verma observed, "In our opinion, a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of religion, but the expression at best of such a hope". This reasoning was understandably found strange by many legal commentators as the expression of hope that the voters will succeed in creating the first Hindu state in Maharashtra was not treated as an appeal to vote for the formation of such a state. It does not seem to have given enough consideration to the fact that India had always been thought of as an essentially plural politico-legal entity with different cultural communities coexisting. More than that, this decision again worked to homogenize Hinduism depriving it of its plural character. Ronojoy Sen, commenting on Hindutva judgments, has written: "this was a silent acceptance of the inclusive brand of Hinduism propounded by the Neo-Hindus which can be characterized as an appropriation of differences rather than recognition of differences (Sen, 2010: 27). He further says, "Justice Verma's move to equate Hindutva with 'Indianization' gave the Courts seal of approval to the Hindu Nationalists' conception of the nation (Sen, 2010: 28). The Right wing Parties in India have jubilantly welcomed the Hindutva verdicts and have understood them to be a definite approval of their stance on Indian nation and have also expressed this in their manifestoes. For instance, BJP's vision document, following the Verma judgment says under the sub-heading 'Cultural Nationalism', "contrary to what its detractors say and as the Supreme Court itself has decreed, Hindutva is not a religious or exclusivist concept. It is inclusive, integrative and abhors any kind of discrimination against any section of the people of India on the basis of their faith...Indianness, Bhartiyata and Hindutva must be treated as synonymous."[42]

The Court derived the 'way of life' metaphor for Hinduism and then equated it with Indianness and Indian culture, by Justice Verma's own admission, from the 1966

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[41] 1999 SCC (1) 169

[42] (http://www.bjp.org/index.php?option=com_content&id=136&Itemid=548, accessed on 23.07.2016)

verdict in *Yagnapurushadji and others Vs Muldas Bhudarda Vaishya and another*[43]. In this case, the followers of Swaminarayan known as *Satsangis* claimed that their temples did not fall under the Bombay Harijan Temple Entry Act. They also prayed for a declaration that *satsangis* are a sect distinct from Hinduism and Hindu Religion and therefore their temples were not under the purview of the above Act. They gave the following grounds for their claim: (i) That Swaminarayan, the founder of their sect was to be worshipped as the Supreme God, (ii) their temples cannot be regarded as Hindu temples as no traditional Hindu deity was worshipped there, (iii) that for them worship of any deity other than Swaminarayan was against their faith, (iv) that there was a ceremony or a procedure for induction into the sect and as a result of that the devotee acquired a distinct identity. Chief Justice P.B. Gajendragadkar who was heading the bench had shown in some earlier cases his zeal to reform Hindu religion and bring it into line with the modernist agenda of the Nehruvian state. He rejected the claim of *Satsangis* and deliberated upon the nature of Hinduism and why it is distinct from other religions concluding that the *Satsangis* are well within the ambit of Hinduism. He wrote:

> When we think of Hindu religion, we find it difficult, if not impossible to define Hindu religion or even adequately describe it…Unlike other religions in the world, Hindu religion does not claim any one prophet; it does not worship any one god; it does not subscribe to any one dogma; it does not follow any one set of religious rites and performances; in fact, it does not satisfy the traditional features of a religion or creed. It is a way of life and nothing more.[44]

But as argued *inter alia* by Ronojoy Sen (2010) and Gary Jacobson (2005), Justice Gajendragadkar's point of describing Hindu religion as a way of life was an inclusive stance taken to include as many sects and sub sects related to Hinduism as possible under the realm of reform. He was ready to break the conventional boundary between religion and state and justify state intervention into the spiritual domain in order to create a more egalitarian society. His intention was not to subsume all other faiths existing in India under the umbrella of a Hindu culture derived from 'Hinduism as a way of life' metaphor, or to equate it with Indianness or Bhartiyata. Jacobson had the following comment: "Gajendragadkar's discussion of Hinduism was appropriated by Verma in order to advance an understanding of religion and politics that is sharply

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[43]1966 (3) SCR 242
[44] (http://indiankanoon.org/doc/145565/, pp. 3-4).

divergent from the intentions of the earlier jurist" (Jacobson, 2005 as reproduced in Sen, 2010). In an interesting example of Judges getting affected by the politics of the time, Sen remarked: "It could be argued that Justice Verma's ruling was representative of the politics of the time when Hindu Nationalists had acquired a legitimacy and popular support unrivalled since Indian Independence" (Ibid: 195). He then quotes Jacobson: "Verma's unwillingness to delegitimize all Hindutva campaign advocacy is accordingly a reflection of his intention to reinforce what he saw as the legitimate socio-political aspirations that many people associate with the use of the term" (Ibid: 195). Therefore, we can say that the change in the political climate of the country from the times when dominant political rhetoric used to celebrate differences and take pride in diversity to the times when obliterating and homogenizing differences under the umbrella of a uniform culture became a national imperative got reflected in the Supreme Court's decisions as well. The court, instead of playing a spoilsport in reminding the political class about the old ideals of 'unity in diversity', accepted the change in the public imagination of India brought about to a large extent by Hindu nationalist political parties.

In a recent case decided on 2[nd]January, 2017 - *Abhiram Singh v. C.D. Commachen (Dead) By Lrs. And Ors.*[45], the Supreme Court had an opportunity to overrule or revise its earlier decisions in the *Hindutva* judgments. When this case came up for hearing, many observers were palpably excited as it provided a rare opportunity for the apex court to undo the harm caused to the provisions of the Representation of People's Act by *Hindutva* verdicts and restore their vitality, but unfortunately the Supreme Court stopped short of annulling or revising the earlier judgments. The case was regarding the correct interpretation of Sec 123(3) of the Representation of Peoples' Act. As a five judge bench had already gone into the question as discussed above, a seven judge bench was constituted and the main question was the interpretation of the word 'his' in the section 123(3) –whether it included an appeal to the religion of the candidate alone or it included such appeal to the religion of the voters as well. The Supreme Court in a laudable move broadened the scope of corrupt practice by including any reference to race, caste, religion or language of the candidate, his agent, his rivals, or voters for influencing the voters for or against anyone as a corrupt practice within the meaning of the Act, but did not entertain the

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[45] (2017) 2 SCC 629

pleas of revising *Hindutva* judgments and consequently they remain the 'law of the land'.

3.3 The 'we' in 'we the people': Citizenship claims and their adjudication in India

In keeping with the civic conception of nationhood, the membership in the new political community was decided by the framers of the constitution to be based on the principle of *jus soli* over the rival principle of *jus sanguinis. Jus soli* was recognized by the framers as an enlightened, modern and democratic form of citizenship, whereas they considered *jus sanguinis* to be a racial conception of citizenship (Jayal, 2016). It is not that this adoption of a progressive citizenship law came about smoothly without tensions. The communally charged atmosphere of partition echoed in the constituent assembly during the drafting of provisions related to citizenship. Especially Art 7 which dealt with the citizenship rights of those Muslims who had left for Pakistan in the wake of communal riots and returned to India later was highly contested. It was also termed by some members as the 'obnoxious clause' as the loyalty of such Muslims was suspect and engendered heated debates in the constituent assembly (Jayal: 2013, 2016). The religious basis of India's partition, and the hardening of religious identities that it spawned, played a huge role in shaping the citizenship laws in both India and Pakistan. It has been argued by Jayal that the trajectory that citizenship law and jurisprudence have taken after independence, as visible in the amendments to the citizenship Act 1955 (basic law governing citizenship in India), is reflective of the legacy of partition. However, it is to the credit of the constituent assembly that at the time of the framing of the constitution the saner voices won the day and such people were ensured citizenship under the constitution provided they had an intention to permanently settle and register themselves before the competent authorities. The Citizenship Act of 1955 continued the above progressive ethos in the matters of citizenship as shown by the framers of the constitution.

> The Citizenship Act of 1955 encapsulates that innocent moment after the physical and emotional upheaval of the Partition has settled and a fresh attempt is made to legislate citizenship in a way that does not reflect this legacy. However, the legacy creeps in again after the break-up of Pakistan and the influx of immigrants on the eastern border of India. It also becomes more evident on the western border with the influx of Hindu refugees from Sindh and Punjab in Pakistan in the 1990s and beyond (Jayal, 2016: 425).

Contentious, as this issue was, it was bound to come before the courts very soon after the adoption of the constitution. The open and inclusive citizenship policy was put to test immediately and the courts were called upon to adjudicate the citizenship claims of Muslims who had fled to Pakistan initially because of widespread communal riots but returned afterwards to "reclaim their lives, livelihood and property" (Jayal, 2016: 431). We will traverse the trajectory mentioned by Jayal in the above extract by examining the amendments and judicial decisions on the above issues through the course of this section.

In one of the first cases after independence, the Supreme Court echoed the aforementioned inclusive view of citizenship and supported the argument that people who fled to Pakistan did so because of the widespread communal riots and violence and thus their loyalties should not be suspect on their return. In *Central Bank v. Ram Narain*[46], Justice Mahajan observed:

> Minds of people affected by this partition and who were living in those parts were completely unhinged and unbalanced and there was hardly any occasion to form intentions requisite for acquiring domicile in one place or another. People vacillated and altered their programmes from day to day as events happened. They went backward and forward; families were sent from one place to another for the sake of safety. Most of those displaced from West Pakistan had no permanent homes in India where they could go and take up abode. They overnight became refugees, living in camps in Pakistan or in India. No one, as a matter of fact, at the moment thought that when he was leaving Pakistan for India or vice versa that he was doing so for ever or that he was forever abandoning the place of his ancestors[47].

In *Abdul Khader v. state of Andhra Pradesh*[48], the respondent had been convicted under section 14 Foreigners Act for having overstayed in India and committing a breach of the order of deportation. His possession of a Pakistani passport was construed to be an act of disowning the Indian nationality on his part by the Magistrate's court. He had successfully appealed against the Magistrate's order in the Andhra Pradesh High Court and the State of Andhra Pradesh had gone in appeal against the High Court's order. The Supreme Court upheld the High Court's order and declared the conviction under foreigners Act illegal. The court reasoned that the

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[46]AIR 1955 SC 36
[47]https://indiankanoon.org/doc/426664/
[48] AIR 1961 SC 1467

authority to decide whether an individual has relinquished his Indian citizenship by the act of acquiring passport of another country vests only with the government of India under section 9(2) of the Citizenship Act and under Rule 30 of the Citizenship Rules, 1956. The fact that no such inquiry by the central government had taken place meant that the respondent could not be considered to have relinquished his Indian citizenship. The facts showing that he continued to pay the rents of his shop in Adoni, Andhra Pradesh and that his family continued to live there proved that he did not migrate to Pakistan. The court held that merely a short visit to Pakistan, despite his possession of a Pakistan passport does not divest him of his Indian citizenship unless so decided by the central government.

In *Govt of AP v Mohd Khan*[49] the Supreme Court of India was petitioned by 22 persons who had come to India from Pakistan on the passport of the Government of Pakistan and were asked to remove themselves from out of India on that account. The fact of them being citizens of India at the time of commencement of the constitution was established and it was not in dispute. The only question before the court was regarding the effect of their acquisition of Pakistan passport and its implication on their citizenship. Gajendragadkar, J., speaking for the Court, categorically over-ruled the view that possession of such passport operated as automatic cession of the Indian citizenship and observed that unless the enquiry envisaged in section 9(2) of the Citizenship Act is made by the central government and a conclusion thereof is reached, petitioners cannot be considered to have voluntarily acquired foreign citizenship within the meaning of the Act. Referring to an earlier decision in *Izhar Ahmed Khan v. Union of India*[50] by the same court where the fact of entering India with a Pakistan passport was considered to have deprived the appellants of Indian citizenship by virtue of rule 3 of citizenship rules, 1956 which raises a conclusive presumption to that effect, Justice Gajendragadkar reminded the court that in the aforementioned case the enquiry contemplated by sec 9(2) of the Act had been conducted and the results thereof were produced before the court. Thus, in this case also India's highest court granted relief to the petitioners who had temporarily gone to Pakistan under the peculiar circumstances prevailing in the wake of partition but returned later.

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[49] AIR 1962 SC 1778
[50] AIR 1962 SC 1052

In *Mohd Ayub v. Commissioner of Police, Madras*[51] the Supreme Court read a salutary provision into the legal process determining the citizenship of an individual. In facts similar to those as in the above cases, the appellant was convicted under the Foreigners Act by the Commissioner of Police relying on the result of the inquiry conducted by the central govt under the sec 9(2) of the act. However, it was shown by the appellant that he was not afforded an opportunity of being heard by the central government before reaching an adverse decision against him. He also argued that he did not acquire Pakistani passport voluntarily but was forced to do so. Agreeing with the contentions of the appellant, the court made the provision of opportunity of being heard to the indicted individual mandatory and read it into the scheme of the inquiry. The court held: "it is ordered that the order of deportation passed by the Commissioner of Police, Madras shall not be enforced until the Central Government determines the status of the appellant according to law".[52]

In all these cases the Supreme Court of India decided in favor of the Muslim appellants who had come back to India on a Pakistani passport after initially leaving for Pakistan in the wake of communal riots. The intention of these appellants to permanently settle was in question before the court, as was their loyalty to India, but the Court decided against their deportation. Not all cases, though, were decided in favor of such Muslim returnees as evident by the verdicts in *Syed Khwaja Moinuddin v. Govt of India*[53] and *Mohd. Ilyas v. Union of India*[54], where the deportation of appellants who had Pakistani passports was upheld by the Supreme Court, but the judgments that we discussed above were successful in making both the deporting process and the authorities more accountable and breathed life into the erstwhile 'obnoxious clause' – Art. 7 by ensuring that Muslim returnees are not sent back arbitrarily.

3.3.1 Judicial Response to the claims of Bangladeshi 'Migrants'

A massive shift occurred in the Indian Judiciary's stance while dealing with the issue of Bangladeshi migrants after the breakup of Pakistan in 1971. The dilution of the *jus soli* principle started when the Central legislature enacted two amendments to the

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[51] AIR 1965 SC 1623
[52] https://indiankanoon.org/doc/1391775/
[53] AIR 1967 SC 1143
[54] (1970) 3 SCC 61

constitution, one in 1986 and the other in 2003 with the purpose of stemming the tide of Bangladeshi migrants and facilitating their return. The 1986 amendment put a condition that after 1986 a child born in India could be accorded Indian citizenship only if one of his parents was an Indian citizen then. The 2003 amendment put a specific bar to a child born after 2003 from getting Indian citizenship if any one of the parents happened to be illegal migrants at the time of its birth. The elements of *jus sanguinis* were thus inserted in the citizenship regime. The background to these amendments was made by large scale agitation in the state of Assam regarding a huge influx of Bangladeshi migrants into its territories. This agitation assumed a violent character when there were allegations of a large number of such 'migrants' getting their names into the electoral rolls prepared for the state assembly elections. It was alleged that a particular political party connived in the process as it stood to gain electorally from the newly inducted voters and hence was seen to be promoting enfranchisement of such migrants rather than doing the opposite. These allegations stemmed from the Indira Gandhi government's move to enfranchise a large number of such migrants. The violent agitation led to a terrible massacre, in the midst of state assembly elections, of about 2000 people (10,000 unofficial estimates) who were allegedly illegal Muslim/Bangladeshi migrants in 14 villages around Nagaon District of central Assam. The agitation led by all Assam Students' Union between 1979 and 1985 had taken a highly communal color by then and it eventually led to the above massacre, remembered as the Nellie massacre, Nellie being one of the fourteen affected villages. The intensity of the agitation, however, led to the signing of the Assam Accord which categorically declared, among other things, all people coming into Indian territories after 1971 as illegal migrants. People who migrated between 1966 and 1971 were provided with a possibility of registration as citizens after following the legal procedure. The aforementioned amendments were thus passed to give effect to the Assam Accord. Under pressure from the ongoing unrest, the Congress government at the centre passed the Illegal Migrants (Determination by Tribunals) Act, 1983. This Act was challenged in *Sarbananda Sonowal v. Union of India*[55]. The petitioner in this case was one of the leaders of the All Assam students Union. It was contended that that illegal migrants from Bangladesh were bringing about a change in the demography and cultural character of the state of Assam and the

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[55] (2005) 5 SCC 665, AIR 2005 SC 2920

IMDT Act was stated to be inadequate to stem the tide of migrants. One particular aspect of the IMDT Act which placed the burden of proving that an individual is an illegal migrant on the state authorities was particularly shown to be the cause of inefficiency of the act. The fact that under the Foreigners Act, 1947 which was applicable to the whole country, the burden of proving that one is not an illegal migrant lay upon the person charged to be an illegal migrant. The exception which was created under the IMDT Act was challenged before the Supreme Court and the court obliged by striking down the act as *ultra vires* of the constitution. What is particularly striking about this case is the explicit religious bias in the arguments supplied by the petitioners in support of their claim. It was contended that the population of Hindus had risen in the state by 41.89 per cent during the period from 1971 to 1991, while the population of Muslims had risen by 77.42 per cent in the same period. Also, the petitioners contended that the migration from Bangladesh constitutes an internal security threat and should be construed as 'external aggression' within the meaning of Article 355 of the constitution. The Supreme Court agreed with all the contentions made by the petitioners. A report of November 1998 sent by the then Governor of Assam who was an ex army man was relied upon by the court in reaching its conclusions. The report was particularly explicit in its wording and emphasized on the certainty of Assamese people becoming a minority in their own state if the deportation process is not expedited. It claimed that migration after 1971 has been "exclusively Muslim" and thus threatens the demographic and cultural fabric of the state of Assam. The governor even wrote:

> The dangerous consequences of large scale illegal migration from Bangladesh, both for the people of Assam and more for the Nation as a whole, need to be emphatically stressed. No misconceived and mistaken notions of secularism should be allowed to come in the way of doing so (MANU/SC/0406/2005, 14).

Thus, the court in the above case accepted and put its seal of approval to a majority of the arguments made by the petitioners and ordered fast detection and deportation of 'illegal migrants' under the Foreigners Act which was shown to be more effective in achieving the above objective. He shift in the Judiciary's stance can also be gauged from the value that has been attached to the documentary proof of 'passport' given by accused persons. As we saw in preceding case law regarding Muslim returnees from Pakistan, their possession of a Pakistani passport was seen either as proof their allegiance to and intention of settling in Pakistan, or in other case as something that

they acquired involuntarily (Jayal, 2016: 219). However, when it came to adjudicating the claims of people on the eastern border having a particular religious identity, their possession of Indian passports was not subjected to any of the above interpretations. In *Motimiya Rahim Miya v. State of Maharashtra*[56] and *Raziya Begum v. State*[57], the courts ruled that acquisition of India passports might have been a result of misrepresentation and fraud, thereby putting passports in the same category as election cards or ration cards (ibid: page ref). In *MusttSarabari Begum and Syera Begum and Ors. V. State of Assam* (2008), the Gauhati High Court rejected the citizenship claims of 58 out of 61 petitioners alleged to be illegal migrants and pleading that the order for their deportation was passed ex parte (without their presence) by the tribunals constituted under the foreigners Act. The court quoted heavily from the report of the Governor of Assam mentioned earlier and reasoned that since the onus of proving the citizenship status is on the accused and they have not discharged it properly, they are liable to be deported. Deportations were fast tracked not only in the bordering regions of Assam and other north eastern states but also in other parts of the country wherever such 'illegal migrants' were found. Especially the state of Delhi saw several cases of summary deportations. Subhradipta Sarkar has observed:

> If any poor in Delhi is a Muslim and speaks Bengali, the Delhi Police need no other proof to brand him as 'illegal migrant' from Bangladesh and summarily deport him. This all started with 'Action Plan' and 'Operation push back' in 1992-1993 when thousands of Bengali speaking Muslims were picked up from various working class settlements in Delhi and forcibly pushed inside Bangladesh. It has never been established whether those people were actually from Bangladesh (2014: 141).

This was perhaps a case of over compensation by the Congress government to salvage its own authority after it courted these migrants for electoral benefits. However, many of these deportees were detained by Bangladesh authorities as they were holding Indian documents and had no corresponding proofs of Bangladesh citizenship. Consequently many of these allegedly illegal migrants were rendered stateless and left to suffer their own fate.

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[56] AIR 2004 Bom 260
[57] (2008) 152 DLT 630

On the other hand the Citizenship Rules, 1956 were amended in 2004 by the Central government in order to facilitate the acquisition of Indian citizenship by "minority Hindus" coming from Pakistan by delegating the power to grant citizenship to District Collectors in the states of Rajasthan and Gujarat. This time the wording of the rule 8A which was inserted following the amendment shed all pretence of neutrality by explicitly mentioning the religious identity of the beneficiaries. The words used are "minority Hindus with Pakistan Citizenship". If we contrast this to the wording used in the Article 7 which was meant for the Muslims returnees, there was no mention of their religious identity. Also, the requirement of proving the 'intention to settle' which was indispensable in case of Muslims was considered jejune when it came to Hindus and thus was done away with as long as they could show a completed stay of five years. Religious identity can be certainly said to have acquired greater significance in recent times in the construction of citizenship in India.

3.3.2 Chakma and Hajong 'Refugees'

The claims of tribal people known as Chakmas and Hajongs for Indian citizenship have been granted by the Indian government and the Supreme Court in unequivocal terms under articles 5, 6, 14 and 32 of the constitution. These people also migrated from the areas falling in erstwhile East Pakistan to Indian Territory comprised by Arunachal Pradesh on account of displacement following the construction of Kaptai dam. Under the Indira-Mujib agreement of 1972, it was agreed that all migrants who entered India before March 25, 1971 would be the responsibility of India and not Bangladesh. SinceChakmas had started pouring in from 1950s onwards and most of them had been living in India from close to 30 years, the central government had a favorable policy towards Chakma and Hajong refugees. The Supreme Court has progressively ruled in favor of Chakma's rights to citizenship under Article 5 of the Indian Constitution. The relevant judgments are:

(i) *State of Arunachal Pradesh v. Khudiram chakma* (1994)

(ii) *NHRC v. State of Arunachal Pradesh* (1996)

(iii) *Arunachal Pradesh Indigenous Tribal Rights Organization v. Union of India* (1997)

(iv) *John Moyong v. Union of India* (2002)

(v) *Committee for citizenship rights of Chakmas of Arunachal Pradesh v. State of Arunachal Pradesh* (2012, 2014, 2016).

In *State of Arunachal Pradesh v. Khudiram chakma*[58], 57 Chakma families who had started occupying and cultivating lands outside the Chakma allotment areas were issued quit notices by the state government as per the foreigners' order of 1948. According to this order only citizens could own and purchase land in protected areas. Since the whole territory comprised within the state of Arunachal Pradesh was declared protected area under the Government of India Act, 1935 and continued to be so, the Supreme Court ruled in favor of the state government. However, despite the adverse ruling with regard to land rights, the Supreme Court recognized Chakma's claims to citizenship and asked both the central and the state government to expedite their claims. Despite of the stand taken by the court, the state government of Arunachal Pradesh remained reluctant in processing their claims as it was under pressure from the All Arunachal Pradesh Students' Union in a situation reminiscent of Assam. There were reports of widespread human rights abuses and threats to livelihood and properties of Chakmas and Hajongs. A committee for Citizenship rights of Chakmas of Arunachal Pradesh was formed and it made repeated petitions to the National Human Rights Commission (NHRC). Finally, NHRC filed a writ in the Supreme Court in the matter of *NHRC v. State of Arunachal and Ors*[59]. The court in response took immediate cognizance of the threats to Chakmas outlined in the NHRC report and declared that Chakmas met all the requirements of the Citizenship Act, 1955 as well as Article 5 of the constitution. Their right to apply for citizenship under Article 5(a) of the constitution was affirmed by the Supreme Court and the state government was asked in unequivocal terms to facilitate their registration. In the recent case of *Committee for citizenship rights of Chakmas of Arunachal Pradesh v. State of Arunachal Pradesh*[60], the Supreme Court again reiterated its stand and ordered the state government to take necessary steps to grant citizenship to Chakma refugees as per law.

3.3.3 Tibetan 'Refugees'

The claims of Tibetan 'Refugees' have also found favor with the Indian authorities including the courts. The Tibetans mostly started coming into India around 1959 following the Dalai Lama. Owing to their perpetual conflict with the Chinese

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[58] AIR 1994 SC 1461
[59] AIR 1996 SC 1234
[60] 2016 (15) SCC 540

government, their gradual influx continued and they found patronage from the government of India (Sarkar, 2014). They were given identity documents by the government but their claims to citizenship were kept in the lurch. In a significant verdict in *Namgyal Dolkar v. Govt of India*, *Ministry of External Affairs*[61], Justice S. Muralidhar of the Delhi High Court upheld the right of the petitioner to obtain the Indian Citizenship by birth under section 3(1)(a) of the citizenship Act, 1955. The affirmation of her rights under section 3(1) meant that the following the judgment she was to be considered Indian citizen by birth and unlike under section 5 and 6, one does not need to apply separately under section 3. Namgyal, aged 25 at the time of the petition became the first child of Tibetan born parents to be given Indian citizenship. However, she was born before the amendment of 1986 due to which she got exempted of the rider it puts on the automatic conferment of citizenship by birth. As we discussed earlier, it requires that a child born in India can become an Indian citizen by birth only if one of his/her parents was an Indian citizen then. Therefore, it has to be seen in future whether children born after July 1987 (the date of commencement of the 1986 amendment) to Tibetan parents would be able to get citizenship by virtue of birth or not. The 2003 amendment had put another condition on jus soli citizenship as we saw earlier. It lays down that a child born after December 2004 claiming Indian citizenship can be allowed only if both the parents are Indian citizens at the time or one parent is a citizen and the other is not an illegal migrant. Illegal migrant has been defined as a person who either came on the basis of forged documents or who came legally but overstayed. Both these amendments can entangle Tibetan children in its net if their parents do not have Indian citizenship or if any of the parents happen to be illegal migrants within the legal definition of the term. However, considering the fact that Tibetan Refugees have never been perceived to be a threat to the demographic or cultural fabric of their adopted home, it seems likely that their claims would not create much controversy.

3.3.4 Tamil 'Refugees'

The case of Tamil refugees is slightly more precarious as their claims have not resulted in any definite pronouncements either by the governmental authorities or the

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[61] (2010) 120 DRJ 749

courts. Though there have been directions by the courts for the proper upkeep of their camps and their basic human rights, but no clear policy has yet been framed. They have come into India in waves on account of the prolonged ethnic conflict between the majority Sinhalese and the minority Tamil population of Sri Lanka. Eelam war II in 1990, and then another war in 2006 pushed thousands of Tamils into Indian territories. In *S. NaliniSrikaran v. Union of India*[62], the appellant prayed before the Madras High Court to give direction to the government of India to grant visa to her minor daughter to visit the appellant who was in India from Sri Lanka. The appellant was a convict in the Rajiv Gandhi murder case and her daughter Meagra was born in a Tamil Nadu jail. After a special court announced death sentence for all 26 accused, Meagra's grandmother took her to Sri Lanka. She had visited her mother once before but overstayed and on those grounds her second attempt to visit her mother was blocked by the Indian authorities by rejecting her visa. One of the claims of the appellant was that Meagra is a citizen of India by virtue of Section 3(b) of the Citizenship Act, 1955 (Citizenship by descent) as she was born to an Indian mother. The court agreed with the appellant's claims and decided that Meagra continues to be an Indian citizen unless she is adjudged to have voluntarily acquired foreign citizenship by the central government under section 9(2) of the citizenship Act. Therefore, the government was directed to give allow her to come to India without further hassles. There are more such individual judgments dealing with specific cases, but the status of Tamil refugees as a whole is not yet clear.

3.3.5 Afghan 'Nationals'

The Afghan 'nationals' have also been victims of wars and ethnic conflict just as the Tibetans and the Tamilsand have entered India in periodic intervals. They have not found much favor with the Indian authorities yet. Many of them claim that their fathers or grandfathers were of Indian origin and they left undivided India for Afghanistan in the wake of Partition. If a person can prove to be of Indian origin then his chances of getting citizenship increase as he gets eligible both under the citizenship by registration clause as well as citizenship by descent clause of the Citizenship Act, 1955. A person under Indian laws is considered of Indian Origin if he/she (pre 1987), or either of his/her parents or grandparents was born in undivided

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[62] Writ Appeal No. 1599 of 2006, High Court of Madras.

India. The lack of proof of such Indian origins has prevented Afghan nationals from getting the benefits of any of the clauses of Indian citizenship law. Many of them apply under the naturalization clause, but none has found success yet. In *Mohd Sediq v. Union of India and Ors. (1998 Delhi HC) andMohd Naim Sahel and Ors. V. Foreigners Regional Registration Officer (1998 Delhi HC),* the order of deportation passed by the Indian authorities was challenged by the petitioners, but the court upheld the deportation order. The continuously volatile situation in Afghanistan and the fact that agriculture and livelihoods have been destroyed due to prolonged wars makes these Afghan nationals unwilling to go back. Considering this situation, it seems like multitude of Afghan children of next generation born in India will be rendered stateless.

In an aberration from the dominant approach of the courts regarding citizenship claims, as we have seen above, recently the Delhi High Court gave a salutary verdict in *Rashtriya Mukti Morcha v. Union of India and Ors.*[63] In this case, the petitioners sought to bar the Foreign born president of the Congress party from contesting elections to a high public office and also sought the direction that any political party which has foreign born persons as its office bearers is liable to have its recognition granted by election commission cancelled. In their revised petition, they made their prayers more general by dropping the prayer to implead the Congress party and it's then President Sonia Gandhi as respondents. They claimed that only persons who are citizens within the meaning of Article 5 of the constitution can have the political right to be appointed to any public office under the constitution. The petitioners basically sought a direction from the court to restrict political rights only to those citizens who are either citizen by birth or by descent and prohibit such rights to citizens by naturalization or registration. The court however, rejected the arguments of the petitioners and declared that such a classification of citizens was nowhere to be seen in the provisions of the constitution or inferred from the intentions of the framers of the constitution. At one place in the judgment, acting Chief Justice Vijender Jain said, "We may find sympathy with the petitioner that he wishes that the law should be that a foreign born person may not be eligible for political rights but while interpreting the constitution or the citizenship Act, we cannot lay down or give other meanings which the Parliament has not intended to do" (SCC Online, pp. 227-228). To the contention

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[63] 2006 SCC Online Del 1452

of the petitioner that a person who is foreign born will not have the ethos, cultural background and the philosophy, which would be possessed by a son of soil, the court retorted that the petitioner has forgotten that "it is the joint willingness of the persons, natural born or foreign born who owe their allegiance, whatever cause they profess and are involved with the political philosophy of a state that creates a nation and the nation is entitled to live with all such persons who owe their allegiance to the state." (Ibid: 229, para103). The court here can be said to be expressing a very modern, civic and statist definition of a nation where the allegiance to the political philosophy of the state constitutes the sole criteria for full membership/citizenship of the nation. The court made some very interesting observations in the process of elaborating on their stand such as:

> One must not forget the size of India and the diversity of its people. This country has nearly as many people as all of Africa and Latin America and people as much of dynamic diversity as seen in all Europe. In the cross-contextual sense, if the founding fathers of the constitution have not taken into consideration the concept of a natural born person for according citizenship, then by no purposeful interpretation this court will hold that a foreign born person is entitled to civic rights and no other rights…There is no force in the arguments that no effective proposals were received by the people to the draft provisions of the Constitution. To say that the framers of the Constitution or the members of the drafting committee of the Constitution were ignorant to the urges and aspiration of Indian people is to put behind the wisdom, sagacity and hard labour put in by the framers of our Constitution to a nullity (Ibid: 229-230).

Here, Justice Vijender Jain, the acting Chief Justice at that time reaffirmed the jus soli principle as the basis of citizenship in India. In continuation of the exposition of the decision to reject the claim of the petitioner, the court while rejecting the petitioner's interpretation of the philosophy of citizenship in India from ancient times, gave its own understanding as follows,

> The whole premises of the argument of the petitioner is based on the definition of citizen which we have held, cannot take into consideration any other meaning which is repugnant to the definition as mentioned in the Citizenship Act read with other relevant statutes in this regard. If one has to follow the liberal and humane concept of ancient Indian philosophy, then what our scriptures have taught us is "VASUDEV KUTUMBKAM", i.e. the whole planet earth is a family. When this is the ethos of this nation and our people which has such benevolent concept then any narrow parochial meaning de hors the provisions of law would amount to holding what is not even in the philosophy of this soil also (Ibid: 230).

The above interpretation comes closest to the founding ideals of citizenship established under part II of the constitution. However, the effect of the majority of

cases related to citizenship claims, when taken together, has been to curtail and parochialize the liberal conception of citizenship embodied the *jus soli* principle and the scheme of the constitution at the time of its commencement.

3.4 Conclusion

The progressive ideals enunciated by the constitution of India true to the spirit of the civic conception of national identity were furthered and protected in equal measure by the Indian higher judiciary from *Kesavananda* through to *Bommai*. In the elucidation of the basic structure as well as the repudiation of an exclusivist understanding of secularism, the courts in India have shown a willingness to interpret, uphold and apply the ideas of the framers of our constitution in their true essence. However, the *Hindutva* judgments, which withstood the scrutiny of the Supreme Court recently when it stopped short of overruling them, mark a change in the understanding of India's national culture which was seen to be multi cultural and plural at the time of independence to a culture that is uniformly based on a single religious community. This shift is unfortunately seen not only in the understanding of India's mass culture but also in the membership criteria regulated by the citizenship regime in the country. The successive amendments to the Citizenship Act, 1955 represent a systematic barricading of people of one particular ethnic stock.

When the constitution was adopted, the phrase 'we the people' definitely included all people of different ethnic, religious, and linguistic hues who believed and acted for the realization of the ideal of a free and modern India. However, the recent amendments to citizenship laws and their endorsement by the higher courts constitute an attempt to trim and narrow down the ambit of 'we the people'.

The proposed Citizenship (Amendment) Bill 2016 further makes the shift from *jus soli* to *jus sanguinis* principle anchored on the basis of religious identity more pronounced. It is currently getting under review by a parliamentary select committee. Its stated objective is to facilitate citizenship for those minorities in the neighboring countries who are facing religious persecution. 'Hindus, Sikhs, Buddhists, Jains, Parsis and Christians' would not be considered illegal migrants according to this bill. The residence requirement for citizenship for them is also proposed to be reduced

from twelve years to six years. One is left to wonder if religious persecution was the real concern behind the Bill then why the Rohingyas from Myanmar and Ahmadiyas from Pakistan, some of the most persecuted groups in the world, were ignored. It will be interesting to see the Supreme Court's take on the validity of this bill, if it gets enacted into an Act in future.

CHAPTER FOUR

JUDICIAL CONSTRUCTIONS OF NATIONAL IDENTITY IN PAKISTAN

4.1 Introduction

The peculiar set of circumstances that Pakistan found itself in since its inception as a sovereign nation-state has put its judiciary in a unique position. The weakness of the elected offices has been one of the reasons. The lack of strong political institutions in Pakistan is another. It can be traced back to the weak organizational networks of the Muslim League in the areas which finally constituted the territory of Pakistan (Jalal, 1995). Big swathes of territory where the Muslim League enjoyed support remained in India. This factor, combined with a strong camaraderie between the Military and the Civil Bureaucracy both of which have a high Punjabi preponderance, resulted in frequent disruptions of the constitutional order and long phases of military rule. Every time a military coup took over the government machinery, the Supreme Court was called upon at the behest of the political representatives to make sense of the legality or necessity, as the case may be, of the military rule.

Pakistan took birth on the promise of a separate nation for Muslims of the subcontinent where utmost priority would be given to the economic, political and religious concerns of the Muslims. However, the real purpose of Pakistan got shrouded in ambiguity soon after and continues to be so because the rival narrative of Pakistan as an Islamic theocracy based on dogmatic Islamic law has taken over as the dominant narrative. Pakistan represents a case of a makeshift national identity cobbled together by the political elites to suit the situation of the time. This is because the other real differences among Muslims on ethnic, linguistic and cultural lines were cleverly suppressed by the Muslim League during the Pakistan movement and religion was the only ascriptive feature used for imagining and constructing the national identity. National identity of Pakistan remained inchoate also because Muslim nationalism in the pre-independence period did not spell out its distinctive features and it based itself primarily on the fear of Hindu majority. In spite of the inception of Pakistan as an independent state dedicated to the protection of religious rights and politico-economic interests of Muslims, with other communities having

equal corresponding rights, the fact that people were mobilized in the name of religion led Pakistan to develop a thick notion of national identity. Unlike India, the idea of Pakistan did not reflect continuity between the principles set out before Independence and the principles finally adopted after independence in the constitution. The movement for Pakistan, as manifest from the Lahore resolution and other public stands taken by the leaders of the Muslim League, was clear in its demand for creation of separate states out of the Muslim majority provinces, but the establishment of an Islamic state was not on the agenda of the westernized bourgeoisie leadership (Weiner, 1960). Pakistan, in a situation similar to that of India, did not have a common language; the people envisaged to be Pakistanis did not have a common culture, nor had it ever functioned as one geographical or economic unit. Just like India, Pakistan was not a nation in the classical sense of the term, and that also at a time when nation was understood mostly in classical terms as the theories exposing the artificial nature of nations had not yet emerged. However, one factor that helped Congress leadership give a clear sense of national identity to the citizens of India was that they clearly defined the future political, economic and social organization of the nation and also the status of religion vis-a-vis the state beforehand, whereas, in case of Pakistan none of the above was spelled out. Even when the slogans like 'Islamic state', 'Islamic government', 'Islamic constitution' were common during the pre-independence days, no one actually had an idea what it meant, or at least the idea never got articulated (Islam, 1981: 56-57). Indeed, the civic conception of national identity sought to be implanted by the Indian national leaders was at the time of its inception and even thereafter, a 'fragile construct' in the face of extreme odds, as argued by Jayal (2013) in India's case and as apparent with the recent rise in India of the religious counterpart, but at least Indians had certain well articulated goals and principles embodied in the constitution unto which they could focus their energies collectively as a nation. It took nine years for Pakistan to adopt her first constitution in 1956. It has been shown by various authors that the program of the Muslim league spearheaded by Jinnah did not find traction with the 'ulama' or the religious leaders of the Muslim community in undivided India (Weiner, 1960; Callard, 1957; Talbot, 1998). Ian Talbot has articulated this point in the following words:

> Jinnah's aim and that of the professional elite who controlled the League was to wrest a state in which Muslim economic, political and cultural interests could be safeguarded, but not to create an Islamic state. The secular outlook of the Muslim league lay beneath the temporary millenarian enthusiasm of the closing stages of

Pakistan movement. Many religious leaders were well aware of this fact and hence opposed the Muslim league, despite its demand for a state in the name of religion (1998: 5).

On one hand, ulemas of different shades and sects, with the exception of Barelvi sect, did not support the Muslim League because perhaps, they could see through the shallow credentials of the League when it came to having a blueprint of an Islamically ordained state. On the other hand though, the disparate Muslim masses were engulfed in the communally charged atmosphere and were rallied around Islamic jargon. Pakistan can be described as a curious case in the history of national phenomena where the nationalist intelligentsia and the mobilized masses entertained different ideas of the nation to be. Consider this excerpt from Ishtiaque Ahmed,

> Pakistan meant different things to different people. To the landlords it meant continued leadership; to the doctrinal minded Muslims, a unique opportunity to establish an Islamic state in the light of their ideas; to the Muslim intelligentsia and the poorer classes, a state where social and economic justice would prevail and their dignity established according to the Iqbalite teaching; to the peasants freedom from the yoke of Hindu money-lenders; to the regional leaders, a greater autonomy than was expected in a united India dominated by the Congress; to the Muslim bourgeoisie, the necessary environment where they could develop their potential…; and to the bureaucrats and the military, an excellent opportunity to secure quick promotions… (Ahmed, 1987: 80-81)

This incongruence in the national vision explains not only the continuous tension between western and Islamic methods of statecraft in Pakistan, but also thesevere pressure that the construct of a Muslim identity, used by the state elite to extract legitimacy from among the masses, is subjected to from the varied ethnic identities sprinkled in Pakistan. Political performance of religious parties as compared to secular parties gives an indication of the above incongruence. Until the 1970s, all the religiously oriented political parties performed miserably in both wings of Pakistan. In the fateful elections of 1970, which presaged the eventual breakup of Pakistan, the Awami League won the eastern wing on a program of regional autonomy, while in the west the People's Party of Pakistan won on a socialist program. In the words of Nasir Islam, "the sense of Muslim national identity became less important, once the objective of Pakistan was achieved and the external enemies of the Muslim nation were removed from the domestic political scene" (1981: 57). In spite of the fragmentation of identities in Pakistan, the elites continue to press for religion as the

primary basis for forging a national identity. It is evident from the fact that the first constitution of 1956 incorporated a commitment to bring all laws in conformity with Islam. The Second constitution of 1958 reiterated this commitment and the third one of 1973 moved even closer towards Islamization. The first two constitutions required only the President to be a Muslim; the third one required the Prime Minister to be a Muslim too (Ahmed, 2008: 51-52).

The rift in the idea of Pakistan is also manifestin two major events where the founding fathers laid the normative basis for the newly born nation to erect itself. They are: First Presidential address to the Constituent assembly of Pakistan by Muhammad Ali Jinnah, 11th August, 1947 and the Objectives Resolution adopted by the Constituent Assembly of Pakistan under the Prime Minister ship of Liaqat Ali Khan on 12th March, 1949. The 11th August Speech of Jinnah where he spoke his vision for the state of Pakistan, clearly envisaged Pakistan as a Liberal Democracy with no state religion. Some excerpts from his speech are quoted below:

> Dealing with our first function in this Assembly...The first observation I would like to make is this: You will no doubt agree with me that the first duty of a government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State...You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed -- that has nothing to do with the business of the State...We are starting with this fundamental principle: that we are all citizens, and equal citizens, of one State.... Now I think we should keep that in front of us as our ideal, and you will find that in course of time Hindus would cease to be Hindus, and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.[64]

The legislators, the Judges, the elected officials and the intellectuals supporting the idea of Pakistan as a secular democracy refer to the above speech by Jinnah to justify their view, whereas people on the other side argue that this speech was made by Jinnah simply to assuage the fears of the minorities of Pakistan under the incumbent situation. That it was a strategic move to assure non-Muslim minorities that they will

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[64]Mr. **Jinnah's** address to the Constituent Assembly of Pakistan, www.columbia.edu/itc/mealac/pritchett/.../txt_**jinnah_**assembly_1947.html (accessed on 29th March, 2014)

be treated fairly as equal citizens of Pakistan (Datta: 2004). They say that the whole idea behind formation of Pakistan was to have a State based on Islamic principles and Jinnah was well aware of it. This debate though, is still very inconclusive and is played out day to day in different public forums. The way court decisions are informed by this debate and in turn, the way court decisions shape the public discourse shall be examined in the next section.

The Objectives resolution was Pakistan's first attempt at constitution making following the Indian example where Jawaharlal Nehru also presented an Objectives Resolution in the Constituent Assembly of India on December 13th, 1946. It was presented by Pakistan's first Prime Minister Liaqat Ali Khan and adopted by the Constituent Assembly of Pakistan on 12[th]March, 1949. Though it envisaged a similar line of vision for Pakistan's minorities as enunciated by Jinnah, it ran quite contrary in the matters of state religion. It declared the following:

(i)   Sovereignty belongs to Allah alone but He has delegated it to the state of Pakistan through its people for being exercised within the limits prescribed by Him as a sacred trust;
(ii)   The state shall exercise its powers and authority through the chosen representatives of the people;
(iii)   The principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;
(iv)   Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings of Islam as set out in the Quran and Sunnah;
(v)   Adequate provision shall be made for the minorities to freely profess and practice their religions and develop their cultures;
(vi)   Pakistan shall be a federation;
(vii) Fundamental rights shall be guaranteed;
(viii) The judiciary shall be independent.[65]

The Objectives Resolution did not get passed without commotion in the constituent assembly. While the Prime Minister Liaquat Ali Khan was emphatic in his belief that Objectives Resolution was an embodiment of Quaid-i-Azam's intentions, the Hindu, Christian and some liberal Muslim members recorded their disagreement with the Prime Minister's interpretation.Sris Chandra Chattopadhayayasaid "What I hear in this resolution is not the voice of the great creator of Pakistan, nor even that of the Prime Minister of Pakistan, the honorable Mr. Liaquat Ali Khan, but of the Ulema of

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[65]http://en.wikipedia.org/wiki/Objectives_Resolution (accessed on 29th March 2014)

the land."[66] Another Hindu member Bhupendra Kumar Dutta said "Were this resolution to come before this house within the lifetime of the great creator of Pakistan, the Quaid-i-Azam, it would not have come in its present shape." The authors of the Munir Report[67] observed that Pakistan cannot be described as a sovereign nation state in the modern sense because in a modern nation state the sovereignty rests with the people and they exercise it according to their will, whereas the first clause of Objective Resolution vests the sovereignty in God (Munir, 1981). Justice Mohammad Munir, Chairman of the Committee and a vocal critic of the Objectives Resolution has wriiten "If during Quaid-i-Azam's life, Liaquat Ali Khan, Prime Minister had even attempted to introduce the Objective Resolution of the kind that he got through the assembly; the Quaid-i-Azam would never have given his assent to it."[68]On the other hand, the Prime minister tried to assuage the concerns of the minority communities, but remained firm in his reading of the *raison d'etre* of Pakistan. He said: "Pakistan was founded because the Muslims of the subcontinent wanted to build up their lives in accordance with the teachings and traditions of Islam…Muslim League has only fulfilled half of its mission and the other half is to convert Pakistan into a laboratory where we could experiment upon the principles of Islam to enable us to make a contribution to the peace and progress of mankind."[69] During his tour of the Unites States, Prime Minister Liaquat tried to dispel the notion that Pakistan is a theocratic state during the course of his many speeches. He is reported to have said:

> We have pledged that the State shall exercise its power and authority through the chosen representatives of the people. In this we have kept steadily before us the principles of democracy, freedom equality, tolerance and social justice as enunciated by Islam. There is no room here for theocracy, for Islam stands for freedom of conscience, condemns coercion, has no priesthood and abhors the caste system. It believes in equality of all men and in the right of each individual to enjoy the fruit of his or her efforts, enterprise, capacity and skill -- provided these be honestly employed.[70]

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[66] Constituent Assembly Debates (CAD), 12 March, 1949. At http://ghazali.net/book1/reference2.htm, accessed on 18/07/2017

[67] Report of the Court of Inquiry constituted under Punjab Act II of 1954 to enquire into the Punjab Disturbances of 1953 under the Chairmanship of Justice Muhammad Munir. Punjab Disturbances was the name given to anti-Ahmadi riots of Lahore, 1953.

[68] Justice Munir (1981), 'From Jinnah to Zia', Delhi: New Era Press, p. 36.

[69] CAD, 12 March, 1949.

[70] Liaquat Ali Khan (1951), 'Pakistan: The heart of Asia'. In Abdul SattarGhazali (1997), 'Islamic Pakistan: Illusions and reality', chapter three p 1. (e-book available at http://ghazali.net/book1/index.htm)

Thus, the making of Pakistan as an Islamic state was fraught with contestations and disagreements. The legacy of the Pakistan movement did not envision future Pakistan as an Islamic state, but a variety of factors including the influence of religious clerics like MaulanaMaududi and the policies of the political leadership after Jinnah led Pakistan to take the religious trajectory.

After the passing of the Objectives Resolution, all the Constitutions of 1956, 1962 and 1973 carried forward the spirit of the above resolution and contained certain provisions from Islam. Though, the first constitution of 1956 as well as all the subsequent constitutions proclaim Pakistan to be an Islamic state, but there is a strong tension subtly lying underneath which can be seen when the state institutions and Laws are sought to be brought into consonance with Islamic principles. This tension can be attributed to the fact that the founders and the early rulers of Pakistan were men acculturated in British political tradition and promoted liberal democratic values (Cheema: 2012). Pakistan like India inherited colonial legal system based on English Common Law and had all its state structures modeled on the western institutions of government. That is why, even when Islamization of Laws has always been a part of the political discourse and the word Islam finds mention in Pakistan's constitution, the state of Pakistan is not yet fully Islamized. The process is very much underway and the resultant friction is very much there. I will examine this contest through the case law in the section on Basic Structure.

4.2Status of 'Basic Structure' in Pakistan

In one of the first instances in perhaps the whole South Asia, the question of the extent to which a written constitution could be altered or changed came before the Dacca High Court in the erstwhile East Pakistan in 1963. The reason for such a question to be put up before the court was the complete ouster of the power of judicial review purported to be carried out by the martial law administrator Ayub Khan through a presidential order. He sought to bring about far reaching changes in the constitution of 1962 adopted under his very own tutelage. Apart from ousting the power of the courts to review executive ordinances and presidential orders, he promulgated an ordinance to amend the constitution to the effect that some of the members of his executive council could assume membership of the National

Assembly even when they were not formally elected to the Assembly. The Dacca High Court in *Muhammad Abdul Haque v. FazlulQuaderChowdhury et al*[71] held that it is of the very essence of a written constitution that it is not susceptible to easy change. It also observed that orders prohibiting the judicial review of executive action breach the very spirit of a written constitution. Soon thereafter, the military government went in appeal to the Pakistan Supreme Court in *FazlulQuaderChowdhury v. Muhammad Abdul Haque.*[72] Justice Cornelius, in a famous decision reminded the military government of the centrality of a written constitution in the governance of the state and declared it to be the fundamental or 'master-law'. According to Paula R. Newberg, "this definitional hierarchy was crucial, for Pakistan had been governed for the past sixteen years by approximations of constitutional rule rather than by clear constitutional instruments" (1995: 95). Cornelius J., in an important declaration which was to lay the foundations of a semblance of basic structure in the years to come, if not the exact doctrine as understood in India, stated that constitution can be modified "not for the purpose of altering the constitution itself, but in order that constitution as a whole should be brought into force" (Ibid). Even before the Basic Structure doctrine came into being in India, Indian Supreme Court relied upon the above judgment from across the border in *Sajjan Singh v. State of Rajasthan*[73] and endorsed the view that there should be some fundamental features of the constitution which are immune from modification. However, this early exposition of unchangeable nature of some basic features of a constitution did not lead to the development of a full-fledged doctrine of basic structure in Pakistan. Till very recently as we shall see later, Pakistan courts have ruled against the exact adaptation of the basic structure doctrine as applied in India and have rather developed a milder version of the doctrine which can be called a 'salient features doctrine'. This is because the Pakistan courts have only ventured to the extent of identifying certain salient features of the constitution but they have desisted to strike down or declare any legislative or executive action as *ultra vires* on the touchstone of salient features of the constitution. The question whether there are any limits to the parliament's power to amend the constitution and whether courts can exercise judicial review over constitutional amendments has come before the Pakistan

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[71]PLD 1963 Dacca 669
[72]PLD 1963 SC 486
[73]AIR 1965 SC 845

courts several times but in most of the instances, while answering the above questions in the affirmative they have simultaneously held that it does not amount to a basic structure doctrine. Let us examine individual cases for extracting what features have been identified by the courts as salient features of the constitution. For our purposes, those features will constitute the Pakistan judiciary's opinion on the fundamental principles of Pakistan as a collective entity governed by a constitution. As discussed in the previous chapter, the judicial demarcation of the salient or fundamental features of the constitution plays a significant role in the making of the public culture in that country and thereby inflects the discourse on national identity. In case of India it was the debate on secular character of Indian constitution, a feature which the Indian Supreme Court identified as fundamental and immutable, which had a decisive impact on the public culture. In case of Pakistan, as we shall see in the case laws, the insistence on the Islamic provisions of the constitution as being salient and fundamental have had a similar impact.

In *Darwesh M. Arby v. Federation of Pakistan*[74] the Lahore High Court declared that Islamic character, federal character and democratic character are the three essential features of the 1973 constitution of Pakistan which the parliament does not have the power to amend. But this verdict could not stay for long as it was overruled in *Fauji Foundation v. ShamimurRahman*[75]where it was held by Chief Justice Muhammad Haleem that the Parliament was empowered to amend, vary, modify or repeal any provision of the constitution as provided in the Article 239(6) of the 1973 constitution. However, in *Mahmood Khan Achakzai v. Federation of Pakistan*[76]the Supreme Court held that the question of basic structure is a question of academic nature which cannot be answered with finality. Then they went on to say that basic structure is not specifically mentioned in the constitution but objective resolution does reflect the salient features of the constitution which may be taken to be similar to basic structure in case of Pakistan. Chief Justice Sajjad Ali Shah speaking for the majority observed:

> Within a period of 50 years of the history of Pakistan we have had three constitutions and three complete martial laws and in between we have been struggling to make up our mind whether presidential or parliamentary form of government suits us. One,

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[74] PLD 1980 Lah 206
[75] PLD 1983 SC 457
[76] PLD 1997 SC 426

> this is beyond dispute that in all the three constitutions objectives resolution is common and the same which has been incorporated as preamble in all the three constitutions including the constitution of 1973. Since the objectives resolution is very important and is the sheet anchor of our constitution because it reflects aspirations of the people of Pakistan as to what they want and how they want to be governed… In a nutshell it can be said that basic structure as such is not specifically in the constitution of 1973 but objective resolution as preamble of the constitution and now inserted as the substantive part in the shape of Article 2-A when read with other provisions of the constitution reflects salient features of the constitution – Federalism, Parliamentary form of government blended with Islamic provisions (Rizvi J, 2005, vol II: p. 1507).

Here we can see a guarded exposition of three features: Federalism, Parliamentary form of government and Islamic provisions along with the whole Objectives Resolution as constituting the salient features of the constitution. In *Wukala Mahaz Barai Thafaz Dastoor v. Federation of Pakistan*[77], the Pakistan Supreme Court reiterated its earlier stance on the issue stating that Basic structure as understood in India is not feasible for the politico-legal conditions of Pakistan. This provoked a question from the counsel of the petitioner to the effect that if the Parliament makes Pakistan a secular state via constitutional amendment although Pakistan is founded as a state based on Islamic ideology, will the Supreme Court have no power to examine the validity of such as amendment? The court, however, left this question unanswered. In the later part of the judgment, the court declared the representative from of government, Islamic concept of democracy and independence of Judiciary as constituting the salient features of the constitution. In *state v. Zia-urRehman and others*[78] and *Nadeem Ahmed v. Federation of Pakistan*[79] the Supreme Court put specific restrictions on the exercise of executive power, but stopped short from grounding it under any kind of basic structure doctrine. In a recent as well as mammoth 902 page judgment of 2015, *District Bar Association, Rawalpindi and ors v. Federation of Pakistan and ors*[80], the Supreme Court of Pakistan with a majority of 13 out of 17 judges held that that courts have an intrinsic power to review and test the constitutionality of an amendment passed by the Parliament. In this case the constitutional validity of the 18th amendment and the 21st amendment was challenged before the court. The 18th amendment, among many other changes nullifying the ill effects of Zia-ul-Haq regime's measures and welcomed by the people wholeheartedly,

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[77]PLD 1998SC 1263
[78]PLD 1973 SC 49
[79]Constitution Petition No. 9 of 2009
[80]http://www.supremecourt.gov.pk/web/user_files/File/Const.P.12of2010.pdf, accessed on 03.06.2017

also laid down a new procedure for judicial appointments which came under the scanner of the court in the above judgment. The 21st amendment mainly provided for setting up of military courts for quick trial of cases related to terrorism. It was passed as a governmental response to the Peshawar terror attack on school run by the Pakistan army. In a judgment full of diverse opinions by the 17 judges on the bench, the majority agreed that there are limitations on the power of Parliament's power to amend the constitution and Courts have the jurisdiction to judge the validity of a constitutional amendment. They spared Article 239(5) and (6)[81], which bar courts from exercising review over constitutional amendments and give Parliament unlimited powers to amend. The reason provided was that despite of the above articles, there is still room for the judicial review of constitutional amendments because even if the parliament has unbridled powers of amendment, the word 'amend' means to correct and rectify and not to change the fundamental character of something (p. 95). The bench, however refused to ground the above power of judicial review in the basic structure doctrine. Th Chief Justice Nasir-ul-Mulk and justice HameedurRahman opined that it has been the consistent position of Supreme Court to confine the Basic structure doctrine to the identification of salient features. They said that difference in the political and judicial history of India and Pakistan mean that the doctrine cannot be applied 'unthinkingly' to Pakistan (p. 77-78). They mentioned the differing voices in the *Kesavananda* judgment itself and quipped that the business of ascertaining the *vires* of the constitutional amendments is a political one to be determine by the parliamentary democracy and not by the Judiciary. Justice Jawad S. Khawaja in his judgment said that unlike the preamble to the Indian Constitution which is 'hopelessly vague', the preamble to the Pakistan is a "charter comprising nine commands ordained by the people of Pakistan for all instrumentalities of the State, including the Parliament and the Judiciary" (p. 118). Justice Khosa reasoned that enumeration of any such immutable features as the basis for testing other provisions of the constitution would render the whole constitution susceptible to various challenges (p. 585). Justice EjazAfzal Khan and IjazChowdhury and Faez Isa, however, in their dissenting opinion said that a constitutional amendment can be struck down if found to be *ultra vires* the constitution, though they did not find the

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[81]Art 239(5) of Pakistan Constitution says, "no amendment of the constitution shall be questioned in any court on any ground whatsoever", and Art 239(6) states, "for the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Parliament to amend the constitution."

impugned amendments in the present case (18th and 21st) as being *ultra vires*. Justice Isa asserted that because the Parliament is transitory in nature, it cannot be expected to uphold the constitution at all times and therefore it is primarily, the judiciary's job to do so.

This verdict shows diverging opinions of the Judges on the question of basic structure, but few patterns can be inferred from the majority judgment which has mostly followed the reasoning in the earlier verdicts on the same issue. One is the confinement of the doctrine to identification of salient features rather than erecting an indestructible wall of basic structure as in India. Second, unanimous importance is attached to the preamble. The interesting thing in Pakistan constitution is that most of the preamble, about 80 per cent has been taken verbatim from the Objectives Resolution. This means the Islamic orientation of the polity is guaranteed. It should be noted, though, that Objectives resolution also provides some salutary guarantees for the safeguard and welfare of minorities and we will see how the courts have fared on this issue in the section on Pakistan's public culture.

4.3 Judiciary's take on Pakistan's Public culture

A preliminary assessment of the landmark verdicts delivered by the Pakistan courts show that they have preferred the Objectives Resolution over Jinnah's vision in deciding constitutional questions and have thereby contributed in giving religious moorings to the national identity. The thrust of the political elite, including both the elected government and the military rulers, to bring the successive constitutions of Pakistan in consonance with the spirit of the Objectives Resolution has affected the Pakistan Judiciary to a great extent. This can be seen in the stance taken by the Supreme Court whenever it had to grapple with the question of Islamization of Laws. Islamization of Laws has prominently been the instrument employed by the political elite to clothe the national identity of Pakistan with an Islamic identity. Let us consider briefly some important case law along with the political situation in Pakistan surrounding those cases.

The first Parliamentary Government in Pakistan instituted by the newly promulgated constitution of 1956 was short lived as it got abrogated by the first military coup of

1958. Major General IskanderMirza being the last Governor General of Pakistan simultaneously became the state's first President. The period soon after the adoption of the Constitution saw large scale political turmoil with four Prime Ministers taking office in succession within a span of two years. The One Unit Program launched by the then Prime Minister Muhammad Bogra in 1954 became controversial and fuelled further unrest. This program brought the four provinces of West Pakistan into one province with the East Pakistan as one separate province. It was done to counter the political and numerical dominance of Bengali inhabitants of East Pakistan. But it made it more difficult to administer the provinces. These events coupled with rampant corruption and frequent succession of Prime Ministers instilled a feeling in the public that the political incumbents of Pakistan are too weak to govern the system effectively. One of the earliest and best known analysts on South Asia, late Wayne Ayres Wilcox wrote: "Some observers accepted the coup as inevitable, given Pakistan's weak political community and the superior organization, training and leadership of the military forces….The collective wisdom of published opinion seems to suggest that the political system failed, and that representative government collapsed" (1965: 142).

Under such context, when the question first came before the Supreme Court of Pakistan in *State v. Dosso*[82], it validated the imposition of Military rule by invoking legal jurist Hans Kelsen's theory. According to this theory "an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, 'higher' legal norm that authorizes its creation in that way."[83] Using this theory, the Supreme Court reasoned, where revolution is successful it satisfies the test of efficacy and becomes a basic law creating fact.

The Martial Law was however lifted and a new Constitution got promulgated in 1962 and then for a period of seven years Pakistan functioned as constitutional democracy, but again in 1969, the 1962 constitution got abrogated this time at the hands of General Yahya Khan. Now, the martial law came under challenge in the landmark

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[82]PLD 1958 SC (Pak) 533

[83]Marmor, Andrei, "The Pure Theory of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/>.

case of *Miss AsmaJillani v. The Government of the Punjab and another.*[84]In this case, the detention of Malik GhulamJilani and AlthafGohar, which had been made under the Martial Law Regulation No.78 of 1971 imposed by General Yahya Khan, was challenged first in the Lahore and Karachi High Courts by Jilani's daughter. The High Court held that it had no jurisdiction to go into this case because clause 2 of the Jurisdiction of Courts (Removal of Doubts) Order No.3 of 1969 barred the courts from questioning the validity of any act done under the Martial Law Regulation No.78 of 1978. Then Miss AsmaJilani appealed to the Supreme Court and because the detention was made under the Martial Law, the validity of the whole martial Law came in question. The major points in issue were:

(i)   Whether the doctrine of positive law as propounded by Kelsen and applied by the court in State v. Dosso was correct?

(ii)   If Yahya Khan's Martial Law is illegal then what is the legality of the acts authorized by such Martial Law?

(iii)   What are the limits to the doctrine of necessity? Whether the doctrine of necessity can be used to scrap a constitution or to repeal a part?

The court declared the Martial Law to be illegal and held Yahya Khan to be a usurper. It overturned the earlier judgment in *State v. Dosso* where the court validated the Martial Law citing Kelsen's theory and the doctrine of necessity. The Supreme Court reasoned that this country was neither a foreign land which had been invaded by an Army with General Muhammad Yahya Khan as its head and nor was it an alien territory which had been occupied by the said Army and therefore, the Martial Law is without any legal foundation. Justice Hamood-ur-Rehman while speaking for the bench observed:

> With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone...no valid law comes into force from the foul breath or smeared pen of a person guilty of treason against the national order."[85]

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[84](PLD 1972 SC 139)

[85]PLD 1972 SC 139, p.181

The Court also held, importantly, that Pakistan has its own *grund-norm*[86] in the form of the Objectives resolution according to which no theory could dominate over the Quran and Sunnah. When this judgment was released, War with India had concluded and East Pakistan got separated owing to which Yahya Khan was forced to hand over power to the party commanding majority in the western wing of the country and thus Zulfiqar Ali Bhutto became the President and also the chief Martial Law administrator.[87] This judgment provided a fresh lease of life to democracy as Bhutto was compelled to remove the martial Law. This case was followed by the interim Constitution of 1972 and then by the unanimous adoption of the permanent constitution of 1973 by the then Parliament. Due to its wide acceptance, the constitution of 1973 continues to be the constitution of Pakistan till date.

The next general elections were held in 1977 amidst strong allegations of rigging which led to yet another disruption of public order and the military forces taking over the reins of government under General Zia-ul-Haq this time. The civil government was dismissed and several leaders including President Bhutto were put in detention. This time though, the constitution was not abrogated, and it was 'held in abeyance', that is, despite the military rule the overall authority of the constitution was maintained. This time the Martial Law was challenged in the case: *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan.*[88] In this case the court yet again upheld the imposition of Martial Law, but this time under the justification of the Doctrine of Necessity and the legal maxim '*saluspopulisupremalex*' which means welfare of the people shall be the Supreme Law. The court reasoned that "on account of massive rigging in the 1977 elections, the State machinery had crumbled down and the constitution did not provide remedy.[89]However, when General Pervez Musharraf took over the reins of government in yet another military coup in 1999 for similar reasons, he adopted a string of de-Islamization measures. One of the reasons for this, according to some commentators, was that he wanted to improve his image in the

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[86]Grundnorm is a term given by Hans Kelsen in his treatise, 'Pure Theory of Law'. It means the basic norm: the norm which gives authority to all other norms.

[87]TasadduqHussainJillani, The Rule of Law and the Supreme Court of Pakistan, p. 4 www.aihja.org/images/users/1/.../pakistan.national.report_pakistan.en.0.p...(accessed on 2nd April, 2014)

[88]PLD 1977 SC 657

[89]Op cite;*Jilani*, p. 4.

international media and make his regime acceptable in the international forums. Whatever might be the reasons, he successfully reduced the rigor of the Hudood Ordinances by bringing a number of procedural safeguards which led to the enactment of the Protection of Women Act, 2006.

General Zia's regime was different from other Martial regimes in that it brought about Islamization measures unprecedented in Pakistan until that time. He is attributed to have brought about a change in direction not only of the legal system of Pakistan but also in the founding conception of Pakistan understood as a homeland for the Muslims of the subcontinent. According to Ian Talbot, "The Zia regime further reworked the foundational myth to posit Jinnah and the Muslim League leadership as demanding Pakistan in order to establish not just a homeland for the nation of Indian Muslims, but an Islamic state" (1998: 4-5). With this high mission of changing the character of Pakistan in his mind and the immense power assumed via military dictatorship, Zia-ul-Haq era represents the single most important stage responsible for shaping the national identity and the character of Pakistan in its current form. As observed by Cheema, in the first three decades of independent Pakistan, the 'Islamization of Laws remained on the proverbial back burner' (Cheema: 2012, 878). But soon after the takeover by General Zia-ul-Haq a number of controversial constitutional amendments and ordinances were enacted which brought the Islamization of Laws at the centre of the Pakistan's political discourse. The most controversial part was the passing of Hudoodordinances which brought certain Islamic criminal laws and punishments into mainstream penal laws. Most important and far reaching measure adopted by the Zia regime was the establishment of separate religious courts at the appellate level called the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. Religious scholars (ulemas) were appointed as judges in these courts and they were granted powers of Judicial Review of legislative and executive action. They could also strike down any action on grounds of repugnancy to the Islamic Injunctions. Despite all these efforts towards Islamization made by the Zia regime, there is a belief among some Pakistani scholars that the serious intent to Islamize was lacking and the real reason for taking these steps was to legitimize the illegal occupation of power by the Zia regime. Cheema writes: "Having displaced the elected government of Zulfiqar Ali Bhutto in 1977, General Zia was desperately in search of some basis for popular support and legitimacy. During

Bhutto's rule Islamization was one of the key demands of the leading opposition parties. "An alliance between these opposition parties and General Zia, with Islamization at the core of the manifesto, was thus a natural development" (Cheema, 2012: 879). However, General Zia's Martial regime could not control the Islamization process because the courts, once given the authority to interpret Islamic law employed their own way of incorporating Islamic Law. In some other instances the interpretation given to certain Islamic Laws by the newly established Shariat Courts ran contrary to interpretation and intentions of the regime. For instance, in *HuzoorBakhsh v. The State*[90], the Federal Shariat Court by a majority decided that the punishment of 'Rajm' (stoning to death) provided for in the Hudood Ordinances for 'Zina' (adultery or fornication) is un-Islamic. This decision proved to be an embarrassment for the Military regime because they had projected the Islamic credentials of the Hudood ordinances despite protests by human rights groups. (Ibid: 881).

Another crucial juncture came when the Zia regime inserted Article 2A to the constitution through the 8th amendment which made the Objectives Resolution a substantive and enforceable part of the Constitution. As discussed earlier, the Objectives Resolution of 1949 was a document providing the guiding principles for the future constitutions of Pakistan and it was not enforceable. This amendment had the effect of bringing about a pervasive change in the nature and functioning of Pakistan's legal system as now the Shariat courts could have used Article 2A as a supra constitutional provision to interpret the whole constitution in its light. Some High courts actually started to give such an interpretation to article 2A. But the Supreme Court in *Hakim Khan v. Government of Pakistan*[91]ended the confusion by declaring that all constitutional provisions including Article 2A were at par with each other and any conflict between them had to be resolved by harmonizing the interpretation of both the provisions. It is interesting to see the court's decision on the question of further course of action if the inconsistency between the objectives resolution and any existing provision of the 1973 constitution could not be harmoniously resolved. It held that if in the opinion of the court any existing provision of the Constitution contravened the Injunctions of Islam in some respects "it

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[90]PLD 1981 FSC 145
[91]PLD 1991 SC 595

should have brought the transgression to the notice of the Majlis-e-Shoora (Parliament) which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam".[92] The Court reached this decision by interpreting the words "within the limits prescribed by Allah" and "chosen representatives of the people" in the clause (i) and (ii) of the Objectives Resolution respectively. It observed:

> Now expressions like "the limits prescribed by Allah" or the principles of Islam" which according to the clauses of the Objectives form the basis of the Constitution are rather vague. The varying interpretations placed on these concepts by Law Courts from time to time pursuant to the controversies raised about them every now and then would render the constitution unstable and make it uncertain. They, accordingly, opted for saddling the responsibility of giving effect to the true intent of these concepts on the chosen representatives of the people---as the chosen representatives were the ones who had to frame the Constitution and were also the ones empowered to amend it (subject, of course, to the Divine limitation)...Objectives Resolution has three separate distinct components. The first is purely structural feature of it that the sovereignty of Almighty descending on the people of Pakistan constituting State of Pakistan is to be exercised through their chosen representatives. So the people operating through their chosen representatives and the Almighty Allah at the apex exhaust the pristine devolution, distribution and sharing of Divine sovereignty. The individuals, the authorities, the institutions, the Courts, do not figure in this structure.[93]

The Supreme Court of Pakistan in this case, as we have seen, despite maintaining that all the provisions of the constitution are equal to each other, accepts the supremacy of the provisions of the Objectives Resolution in that it relinquishes its power to adjudicate in case of a conflict between a normal provision of constitution and Art. 2A containing the provisions of the Objectives Resolution. It represents a momentous step taken by Judiciary with regard to the implication that it eventually had on the quality of public culture in Pakistan. The Islamic rhetoric which was hitherto mostly confined to the political realm made its way to into the legal lexicon. It acted as judiciary's endorsement of the increasing Islamization of Pakistan's political as well legal discourse. This was followed by the Supreme Court and High Courts increasingly using Islamic Law arguments and Islamic reasoning in their judgments, especially towards the end of the Zia regime. The pace of this Islamization was also

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[92]P L D 1992 Supreme Court 595, (ppd.pitb.gov.pk/index.php?q=system/files/...pdf, accessed on 2nd April, 2014)

[93]P L D 1992 Supreme Court 595, (ppd.pitb.gov.pk/index.php?q=system/files/...pdf, accessed on 2nd April, 2014)

hastened by the establishment of the Shariat courts because they opened the doors for a wider permeation of Islamic Law throughout Pakistan's legal system due to which increasing number of litigants started to use Islamic law arguments in the pleadings and the judges had to go into the terrain of Islamic Law to adjudge their evidentiary value within the circumstances of the particular case. This development had mixed effect. In some cases it had the effect of discriminating against the minorities, while in some others the interference of Islamic principles produced better accountability of the government and enhancement of the Rule of Law. For instance, in *Zaheeruddin v. State*[94] the Supreme Court validated a draconian ordinance curtailing the freedom of Ahmadiya minority sect as to their religious practices. In this case certain criminal Laws prohibiting the Ahmadis from adopting religious practices and titles similar to Muslims were challenged as being unconstitutional and violating the fundamental right of freedom of Religion. But the Court, adopting a skewed reasoning dismissed the challenge on the ground that the fundamental rights provisions of the constitution were subject to reasonable restrictions and the objective of the impugned ordinance comes within those 'reasonable restrictions'. It resulted in the denial of their fundamental right to profess, practice and propagate their religion under Article 20(a), constitution of Pakistan. On the other hand, In *Inre: Islamization of Laws*[95], the Federal Shariat Court gave an absolute character to the rules of natural justice which were frequently flouted in a military style administration of justice. It gave the status of Islamic Law to the rules of natural justice, that is, (i) the rule of fair hearing and (ii) the rule against bias, now became mandatory. In the same case, the Court also held that 'the exemption granted to the members of Parliament from appearing before courts while the Parliament is in session, could effectively result in immunity from prosecution and is thus repugnant to the injunctions of Islam."[96] In *In re: Civil Servants Act*[97], quoting some instances from the Muslim history where even rulers were answerable to the courts, the court observed that "even the head of state cannot claim immunity from prosecution or from appearance in the court during the tenure of his office."[98]

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[94]1993 S.C.M.R. 1718
[95]PLD 1985 FSC 221
[96]Ibid pp.199-200
[97]PLD 1984 FSC 34
[98]Ibid p. 37

A discussion of the peculiar case of Ahmadiya Muslims and the jurisprudence it has generated from the courts in Pakistan is important for two reasons. First, it gives us an opportunity to examine the Pakistan model of secularism vis-à-vis the Indian model. Just as the Ahmadiyas in Pakistan are a distinct sect deriving much of their principles from Islam but differing in some of their basic tenets, so have been the several different sects of Hinduism like the Swaminarayan sect and the MahanubhavPanth, to name a few who have differences with the core definition of Hinduism as adopted by the courts in India. The nature of the demands in the two countries have been different inasmuch as the Ahmadiyas have claimed to be a part of the Muslim community and have tried to assert their rights over Muslim institutions and Muslim places of worship, whereas on the other hand the smaller sects in India have demanded a separate existence from the fold of Hinduism. Secondly, an examination of the way the Pakistan Supreme Court has dealt with Ahmadiya claims gives us an idea as to the effect that the Islamization of public culture has had on the minority sects like Ahmadiyas. Ahmadiya is the collective name used to refer to two groups in Pakistan. Both groups are the followers of MirzaGhulam Ahmad of Quadian (Mirza Sahib). One group believes that Mirza Sahib was the promised Mehdi, the promised Messiah and a Prophet. This group is known as the Quadiani group. The other group called the Lahori group says that he was a 'Mujaddid' (revivalist), the promised Mehdi and the promised Messiah. The Pakistan constitution of 1973 was amended the very next year by the Constitution (Second Amendment) Act, 1974. It amended Article 106 and Article 260 and clause (3) was added to Article 260 to declare those persons as non Muslims who do not believe in "absolute and unqualified finality of prophet or claim to be a prophet in any sense of the word or of any description whatsoever, after Prophet Muhammad (pbuh) or recognize such a claimant as a Prophet or a religious reformer". The Ahmadiyas of both the descriptions were covered by this definition and were thus declared non-Muslims. They were henceforth to be treated on par with Christian, Hindu, Sikh, Buddhist and Parsi communities as minorities. This should not be taken as a further downfall in their status because a survey of the relevant case law shows, as we shall see later, that while the courts have been attentive and forthcoming with respect to the rights of Christians, Hindus, Sikhs, and Parsis, but very indifferent to rights of Ahmadiyas in particular. An ordinance was passed in 1984 called the Anti-Islamic activities of Quadiani group, Lahori group and Ahmadis (Prohibition and Punishment) Ordinance, 1984. This Ordinance amended certain provisions of the

Pakistan Penal Code, 1860, the Criminal Procedure Code, 1898 and the Press and Publications Ordinance, 1963 and the religious activities of the Ahmadiyas like taking out processions, celebrating their festivals, bringing out pamphlets for the same and using Muslim places of worship were sought to be regulated on grounds of public order. This ordinance was rightly challenged by the Ahmadiyas on ground of violating their right to freedom of religion enshrined in Article 20 of the Pakistan Constitution. The question of validity of the ordinance came before the Federal Shariat Court in *Mujibur Rahman v. Federal Government of Pakistan*.[99] The court held the Ordinance to be valid because it was promulgated for maintenance of public order and public order forms a condition to which the right to freedom of religion is subjected in the Article 20 of the Pakistan constitution. The ordinance was validated but not before dealing expansively with the history of the conflict over Ahmadiyas. The Court observed that since the very inception of the Quadiani sects, Muslims of the subcontinent have shown a sense of resentment and uneasiness. Initially when Mirza Sahib was proclaimed to be the promised messiah, the resentment was only slight, but it reached its peak when Mirza Sahib made a claim to Prophethood in 1901. The agitation grew to such an extent that Martial Law had to be imposed in 1953. Finally in 1974 the second amendment Act was passed which declared the Ahmadiya sect to be non-Muslim and relegated them to the sphere of other religious minorities. The Court further observed:

> As a result of the declaration… it was not possible for the Quadianis to call themselves Muslims or to propagate Islam of their concept as true Islam but they showed the least respect for the constitutional amendment and continued as before to call their faith as Islam. They continued to propagate their religion freely by publication of books, journals, etc, as well as among individual Muslims to create resentment which obviously was likely to create law and order situation and all this continued till the present Ordinance was passed and promulgated. In these circumstances the ordinance appears to be covered by the exception in Article 20 about its being subject to maintenance of law and order (Rizvi J., 2005, vol. I, p. 211).

In a few years time in *Zaheeruddin and Others v. State and Others*[100] the Pakistan Supreme Court also declared the 1984 Ordinance as constitutionally valid in a huge setback to the religious rights of Ahmadiyas. Though the court nullified some of the provisions inserted by the Ordinance into the Pakistan Penal Code, but retained other

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[99] PLD 1985 FSC (Federal Shariat Court) 8
[100] 1993 SCMR 1718

clauses inimical to the Ahmadiyas' practice of their religious faith. The 1984 ordinance introduced many new sections and clauses in the Pakistan Penal Code which made specific acts if committed by any Ahmadiya member punishable with up to three years imprisonment. In this case the clauses which interfered with Ahmadiyas' way of making a prayer call and organizing their prayers in mosques were held to be violative of their right to practice and propagate their religion, right to equality and freedom speech and hence *ultra vires* the constitution. Section 298B, clause (d) and (e) of the Penal Code as amended by the ordinance go as follows: "any person of Quadiyani group or Lahori group, who by words, either spoken or written, or by visible representation; (d) refers to, or names, or calls his place of worship as 'Masjid' shall be punished... (e) Refers to the mode or form of call to prayers followed by his faith as 'Azan' or recites azan as used by the Muslims shall be punished."[101]On the other hand the clause where punishment was prescribed for a member of Ahmadiya group who by words, spoken or written, or by visual representations outrages the religious feelings of Muslims was retained as within the ambit of reasonable restriction on freedom of religion. Validation of this particular clause which made punishable something as vague as outraging the religious feelings of Muslims left a large scope for persecution of Ahmadiyas on whimsical grounds and engendered a lot of false and frivolous criminal litigation against them. Although, the criminal appeal filed by accused was allowed and their conviction by the High Court was set aside, but the fact that Supreme Court validated some of the highly restrictive and punitive provisions of the ordinance practically stifled Ahmadiyas' hopes of getting their fundamental rights restored. The above verdict went against not only universally recognized principles of freedom of religion but also against the express guarantees given to minorities in the preamble of the constitution of Pakistan to "freely profess and practice their religion and develop their cultures".[102]The various civil society and human rights groups both within and outside Pakistan continue to protest this blatant injustice meted out to the Ahmadiyas and only time will tell whether we see any reversal in the judiciary' stand in this respect.

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[101] Ordinance XX of 1984, Gazette of Pakistan, available at: http://www.thepersecution.org/50years/paklaw.html. Accessed on 23.06.2016

[102] Preamble to the 1973 constitution at na.gov.pk/uploads/documents/1333523681_951.pdf

In *Pakistan v. Public at large*[103]*,* the Supreme Court observed that the process of Islamization of laws should be completed in phases and should not be hurried up. While noting that the involvement of the public at large is imperative for any process of Islamization to be proper and complete, the court observed:

> Although as visualized in the foregoing paragraph much enlightened interest is needed in the Islamization process but it will not be enough unless the public at large is involved in it… The mass of laws should be permitted, subject to the constitution to be modified and applied by the courts according to the Islamic Injunctions, in a phased program. For example, few dozens of laws by the centre and the provinces may be thus permitted each year, with increase may be in geometrical progression in due course. Article 268(6) of the constitution contains somewhat parallel existing provisions of similar types as suggested. In this regard and progressive methodology the state functionaries, the tribunals, the courts, the lawyers, the litigants and the public at large when protecting their rights and observing the obligations would perforce be involved in the gradual Islamization process. It will not strain the state resources vis-a vis personnel and the entire process would be gradual and all involving.[104]

The above observation further shows the willingness of Pakistan's judiciary to join the bandwagon of Islamization initiated by the political elites for legitimizing and perpetuating their power in the face of their gaping incompetence in fulfilling other important responsibilities.

In *Ramesh Kumar Vankwani v. Federation of Pakistan*[105] the Pakistan Supreme Court took *suomotu* cognizance of a suicide attack on a church in Peshawar and the threats issued to Muslim minority sects like the Kalash tribe and Ismailites in Chitral. Drawing from the resolutions passed by the Muslim League including Jinnah's 14 points where the liberty of belief, worship and observance was guaranteed to all communities, the court declared that minorities have a special status in the constitution and that the rights guaranteed to them constitute a social covenant. It remarkably said, "The very genesis of our country is grounded in the protection of religious rights of all, especially minorities". It directed the federal government to the following: (i) constitute a task force for developing a strategy of religious tolerance and to protect minorities' religious places of worship, (ii) appropriate curricula be developed in schools and colleges to promote a culture of social and religious tolerance, (iii) "the Federal Government should take appropriate steps to ensure that hate speeches in social media are discouraged and offenders are brought to justice",

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[103] PLD 1986 SC 240
[104] PLD 1986 SC 304
[105] 2014 SCC Online Pak SC 6

(iv) minorities rights Council should be established, (v) a special police force be established with professional training to protect the places of worship of minorities, (vi) enforcement of reservation quota for minorities, (vii) setting up of a three member bench to oversee that "this judgment is given effect to in letter and spirit".[106]

In a recent 2015 case: *Malik Muhammad MumtazQuadri v. the State*[107], the court restored the conviction and death penalty of accused who had murdered a minister in the government, Salman Taseer for his views against the Blasphemy Laws. In its observations the courts severely indicted the widespread misuse of Blasphemy laws in Pakistan and called for a revision in such laws.

Thus we see that barring a few bold pronouncements in the support of minority rights, the courts in Pakistan have largely furthered the official policy of bringing the legal as well as the public sphere more in tune with Islamic ethos. The curious aspect, however, is that the courts have conveniently accepted the governmental narrative of Pakistan's public culture as anchored around the Islamic religion but do not go into the question of diversity and differences within the grand narrative of Islam. Also, the Judiciary while standing firm for the religious rights of minorities enshrined under Article 20, seems to have ignored the legitimate cultural rights of Christians, Hindus, Parsis and other religious minorities despite clear directions in the constitution for the state to provide 'adequate safeguards for legitimate interests of minorities and the right to minorities to 'develop their cultures'. The courts' stance on public culture also shows their embrace of the official effort of the political as well as military elites to fashion Pakistan's national identity on the primary basis of Islam. No we move to the membership aspect of Pakistan's national identity via an examination of the citizenship claims in the next section.

4.4 Adjudication of Citizenship Claims by Pakistan Courts

On paper, Pakistan has the most progressive norms of granting membership to prospective claimants as it follows the *jus soli* principle of citizenship unconditionally. After Cambodia introduced qualifications in its *jus soli* citizenship, Pakistan remains the only country in whole of Asia with unconditional *jus soli*

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[106]Ibid p. 6
[107]2015 SCC Online Pak SC89

citizenship rights. Citizenship in Pakistan is regulated by the Pakistan Citizenship Act, 1951. There are no corresponding provisions with respect to citizenship in the constitution of Pakistan, unlike the Indian counterpart where one full chapter is dedicated to the principles governing citizenship. Pakistan Citizenship Act, 1951 recognizes citizenship by birth, descent, migration, registration, naturalization and incorporation of territory.

Section 4 of the Pakistan Citizenship Act, 1951 which is the source of unconditional *jus soli* citizenship reads, "Every person born in Pakistan after the commencement of this Act shall be a citizen of Pakistan by birth provided (a) his father possesses such immunity from suit and legal process as is accorded to an envoy of an external sovereign power accredited in Pakistan and is not a citizen of Pakistan, or (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy."[108] The above two conditions are internationally recognized and do not constitute an exception in the *jus soli* rights. The Indian Citizenship Act, 1955 also granted such unconditional rights at the time of its commencement, but got modified later with amendments which restricted such rights upon the fulfillment of certain conditions. Such open and inclusive jus soli rights belie the thick ethnic type of national identity that Pakistan has come to adopt. However, in practice the above section 4 which confers unconditional jus soli rights has been followed more in the breach in Pakistan. We will examine the nature of citizenship regime by analyzing select case law on four of the most contentious claims on citizenship of Pakistan.

4.4.1 Hindu Returnees from India

In *Rochomal Daryanomal v. Province of West Pakistan*[109], the petitioner was a Hindu living in Sindh province of West Pakistan. He left Pakistan for India at the time of partition. After the passage of a few months he applied to the Pakistan High Commission in order to return to Pakistan with a permanent permit. The High Commission gave him a temporary permit and he was asked to apply for a permanent permit after reaching Pakistan. He tried getting a permanent permit to stay in Pakistan

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[108]The Pakistan Citizenship Act, 1951 (II of 1951), available at:
http://www.refworld.org/pdfid/3ae6b4ffa.pdf., accessed on 10.08.2017.
[109]PLD 1960 (W.P.) Karachi 150

but only managed to get a temporary one. After five years of such temporary stay, in 1953 an order of deportation was passed against him. He challenged the order in an appellate court and claimed to be a citizen of Pakistan. The appellate court, decided that visiting another country without intention of permanent stay did not amount to migration under the Citizenship Act, 1951. Since the appellant's migration was not proved, the court declared that he should be considered a citizen of Pakistan under section 3(a) of the Act. In another observation, court held that the burden of proving that a person, who is a deemed citizen of Pakistan, is not a citizen falls upon the party denying his citizenship.

In *Advocate General, Government of East Pakistan, Dacca v. Benoy Bhusan Majumdar and Others*[110], the plaintiff was a resident of East Pakistan and continued living there at the time of Partition. However, owing to the communal violence in East Pakistan in 1964, he acquired a migration certificate from the Indian High Commission. He lived in India for a few months but returned to Pakistan when the situation became normal. He was ought to be prosecuted under the Foreigners Act, 1946. The Supreme Court of Pakistan held that there was no *animus manendi* (intention to settle) in India and he only left his hometown to save his life. The court mentioned the fact he did not sell any of his properties and repaid his agricultural loan after his return showed that his act of leaving Pakistan did not amount to migration. Thus, the court reversed his prosecution under the Foreigners Act of 1946 and held that he never lost the citizenship of Pakistan.

In *Legal Affairs, Government of East Pakistan v. Amalendu Baul*[111], the petitioner who was born in Pakistan migrated to India in the wake of Partition. He acquired an Indian passport and entered Pakistan on that passport in 1955. He continued to live in Pakistan after the expiry of his visa. He was arrested by the police and prosecuted under Pakistan (Control of Entry Act, 1952). He claimed citizenship by birth but the court rejected his claim and held that his acquisition of Indian passport constituted a prima facie proof of his Indian nationality.

Thus, we can see that the Pakistan courts have largely reciprocated the way Indian courts interpreted the citizenship claims of those persons who initially left India for

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[110] PLD 1971 SC 179
[111] PLD 1960 Dacca 329

Pakistan but returned after the cessation of communal conflagrations. Pakistan courts were generally severe on Hindu returnees who possessed an Indian passport. However, this favourable treatment of citizenship claims of returnees from India was confined to the period soon after partition.

4.4.2 Afghan Refugees

The case of Afghan refugees shows that the promise of *jus soli* rights enshrined in the section 4 of the Pakistan Citizenship Act remains superficial. Afghan refugees largely entered Pakistan after the Soviet invasion of Afghanistan in 1979. According to the United Nations Good Offices Mission in Afghanistan and Pakistan near about 5 million Afghan nationals fled to the neighboring countries and Pakistan alone gave refuge to about 3 million of them.[112] After the withdrawal of the Soviet forces by virtue of the Geneva Accords, a bilateral agreement was signed between the Republic of Afghanistan and Islamic Republic of Pakistan. According to the agreement, Afghan refugees were to be repatriated peacefully to their home country after the end of war. However, due to the continuous instability in Afghanistan and the large scale destruction of businesses and livelihoods very few Afghan refugees returned home and instead their influx into Pakistan continues. In a situation redolent to what arose in India's eastern border after the creation of Bangladesh there have been unregulated movements of Afghan refugees into Pakistan territories and just like Bangladeshi migrants found ethnic links with people across the border, most Afghan refugees share the Pashtun ethnicity with fellow Pashtuns in Pakistan. They have also acquired identity cards and certain other legal documents like election cards and national identity cards. Some of them are settled in Pakistan for more than three decades but are still considered aliens in Pakistan and consequently the children of such refugees are denied the citizenship of Pakistan.

In *Ghulam Sanai v. the Assistant Direction National Registration Office, Peshawar,* [113]an Afghan refugee kid challenged the denial of issuance of a national Identity card upon his attainment of the age of majority before the High Court. He claimed Pakistan

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[112]United Nations Good Offices Mission in Afghanistan and Pakistan, available at http://www.un.org/en/peacekeeping/missions/past/ungomap/background.html. Accessed on 12.08.2017

[113] PLD 1999 Peshawar 18

citizenship by birth and pleaded that his father was a Pakistan citizen on account of his possession of a national identity card and a Pakistan passport. But the court agreed with the contention of the government officials that his father had obtained national identity card and passport by providing false information to the government authorities. The court ruled the children of Afghan refugees cannot claim citizenship by birth as their parents have a recognised refugee status and hence would be treated as aliens under the law. The court also observed long stay in a foreign country does not make him a citizen of that country unless so acquired by the process of law.

In *Abdul Majeed and Another v. the SHO Police Station, Naulakha, Lahore*[114], the petitioner pleaded with the court for freedom of movement of Afghan refugees and for a declaration that Afghan refugees should not be treated as foreigners and they should be treated on par with refugees entering Pakistan at the time of partition and with the refugees entering from the disputed territories of Kashmir. He questioned the court as to why differential treatment is meted out to the Afghan refugees as compared to the aforementioned two categories of refugees. The court however dismissed the claims and distinguished the case of Afghan refugees from both the 1947 refugees and refugees coming in from Kashmir. It pointed out that statutory exceptions have been carved out in the citizenship law of Pakistan by the Pakistan Citizenship (Amendment) Ordinance, 1973 for the above groups. While the Afghan refugees were granted only refugee cards in compliance with the Geneva Accords, the court observed that their stay in Pakistan is therefore temporary and the authorities are justified to restrict the movement of foreign refugees in the country. In another case of *SardarMohammad Ali and Ors v. Pakistan*[115], *the* Karachi High Court held that afghan refugees cannot claim entitlements like a place of residence from Pakistan government however they have a right to sue the government for any damage to their property by government personnel.

4.4.3 Muslim migrants from 'Indian-held Kashmir' (IHA)

Pakistan government policy has been particularly favourable to the migrants from the disputed territories in Kashmir which is popularly called "India-held-Kashmir". The

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[114] PLD 1989 Lahore 223
[115] PLD 1961 (W.P.) Karachi 88

Pakistani Citizenship Act, 1951 was amended in 1973 to accommodate the claims of Kashmiri migrants. Two important provisions inserted in the Act by the above amendment are:

(i)   Section 8 (2): A subject of the State of Jammu and Kashmir who, being under the protection of a Pakistan passport, is resident in the United Kingdom or such other country as the Federal Government may, by notification in the official Gazette, specify in this behalf, shall, without prejudice to his rights and status as a subject of that State, be deemed to be, and always to have been, a citizen of Pakistan.[116]

(ii)   Section 14-B: *Certain persons to be citizens of Pakistan.* A person who, being a subject of the State of Jammu and Kashmir, has migrated to Pakistan with the intention of residing therein until such time as the relationship between Pakistan and that State is finally determined shall, without prejudice to his status as such subject, be a citizen of a Pakistan.[117]

One striking feature about the above provision is that the residency requirement has been dispensed with as long as the Kashmiri migrant expresses an intention to reside in Pakistan. In *Akhtar Hussain Jan v. Govt. of Pakistan*[118], one Kashmiri resident migrated to Pakistan in 1971 and married a Pakistani woman. He applied for Pakistani citizenship but was denied due to pending litigation against him. He challenged the refusal by the administrative authority before the Supreme Court. The Supreme Court held that the Kashmiri subject migrated with the intention to reside and no other condition is required to be fulfilled. The court granted him citizenship under section 14-B of the Citizenship Act.

In *Mst. Naseem Akhtar vs. Director General Immigration and Passport*[119], a judge of 'Azad Kashmir' and his wife applied for the official passport called the *gratis. Gratis* is usually granted to all senior public officials and their immediate family members in

[116]Sec 8(2), Pakistan Citizenship Act, 1951, available at: http://eudo-citizenship.eu/NationalDB/docs/PAK_Pakistan%20Citizenship%20Act%201951%20[EN].pdf. Accessed on 12.08.2017
[117] Ibid
[118] 1995 SCMR 1554
[119] PLD 2006 Lahore 465

Pakistan. It was refused by the administrative authority on the ground that the state of Kashmir does not form a part of the territories of Pakistan and it is an independent administrative unit. The Lahore high court set aside the order of the administrative authority and acknowledged the Kashmiri people as recognized citizens of Pakistan under the Citizenship Act, 1951. The court also observed that they will be entitled to enjoy all the privileges enjoyed by the public officials and their families in Pakistan.

4.4.4. Stranded Urdu speaking minorities in Bangladesh

The creation of Bangladesh in 1971 induced an amendment in the Pakistan Citizenship Act, 1951 and Section 16-A was inserted accordingly through Pakistan Citizenship (Amendment) Ordinance, 1978. Three kinds of persons were given protections:

1. The persons who continued residing in Pakistan after the day of separation.
2. Persons who migrated to Pakistan form East Pakistan after the day of separation.
3. Persons domiciled in East Pakistan, however living in some foreign country at the time of separation under the protection of Pakistan passport would be considered citizens only if they obtain certificates from the federal government of Pakistan.[120]

The following persons were not given the same protection and hence lost their status of citizenship:

1. The persons who continued residing in East Pakistan.
2. The persons who were residing in Pakistan but migrated to the territory of East Pakistan after the separation.[121]

The above clauses targeted the Bihari Muslims based in East Pakistan who wanted to maintain Pakistani citizenship but were unable to migrate due to lack of resources. Thousands of them are stranded in refugee camps in Bangladesh. While some of them have been granted Bangladesh citizenship very recently but many others still wish to go to Pakistan. The 1978 Amendment has barred Urdu speaking Bihari Muslims from

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[120]FaryalNazir (2016), 'Report on Citizenship Law'; Pakistan, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute, Italy.
[121]Ibid

Pakistan's citizenship. In a recent verdict in *Stranded Pakistani General Repatriation Committee and Ors vs. Federation of Pakistan* (2015), the Supreme Court of Pakistan rejected the claims of about 237,000 stranded Pakistanis from Bangladesh on the grounds that the organisation had no *locus standi* to represent them as it was not registered under the relevant laws of the country. The Supreme Court also endorsed the statement of the foreign office of Pakistan that not all stranded Pakistanis would want to return to Pakistan and that Pakistan has already taken about 170,000 of such persons.

Pakistan's citizenship jurisprudence curiously treats the incoming migrants from 'Indian-held Kashmir' preferentially, while it does not accord the same status to Bangladeshi and Afghan refugees who are of the same religious stock over which Pakistan grounds its national identity. One reason for this different treatment seems to be the continuous impact of the legacy of partition. Kashmir is included in the Pakistani political elites' imagination of Pakistan, while Afghanistan and Bangladesh are not. However, it is certain from the examination of citizenship regime as practiced in Pakistan that Pakistan does not see itself as a homeland for all Muslims in the region. In a way it constitutes a reversal of the initial idea of Pakistan which was to be a sovereign homeland for the Muslims of the subcontinent.

4.4 Conclusion

Analyzing the above decisions, the Judiciary's proclivity to accept and further the dominant narrative of an Islamic identity as Pakistan's national identity comes out clearly and cannot be missed. This has been manifest especially in the case law regarding Pakistan's public culture, particularly in *Hakim Khan v. Government of Pakistan*, and *Zaheeruddin v. State*. It can be said that the Judiciary in Pakistan has been very true to the spirit of the Objectives Resolution of 1949, and less so to the Jinnah's Independence day speech of 11th August, 1947. Pakistan Supreme Court has furthered the dominant religious imagination of Pakistan conceived in the Objectives Resolution and pursued by every successive government since its inception. Unlike India where the religious conception of national identity has gained in popularity and support very recently, Pakistan has had a much longer experience in trying to keep the nation intact by the means of religiously defined national identity and it has already

witnessed the worst repercussions of such a conception in the form of the secession of Bangladesh. The fissures in the religious nationalism which stood out during the Bangladesh's liberation war of 1971 continue to haunt Pakistan even after the separation of the Bengali nation. It is surprising to see that that the dominant narrative of National identity and public culture has remained the same in Pakistan even after the calamity of 1971. The never ending enthusiasm of the political and military elite in Pakistan to define Pakistan's public culture in a strictly uniform way with little space of any plurality is engendering violent outbursts from different people who do not conform to the official narrative. The fact that the official conception of an Islamic national identity has a high ethnic (Punjabi) flavor to it makes it more divisive and much less palatable to Sindhis, Pathans of North west, Balochis, Ahmadiyas, Shias and other such groups. Recently, a 72 year old man Mama Qadeer Baloch was in the news for walking more than 2000 Kilometers on foot from Quetta to Islamabad, breaking Mahatma Gandhi's record for longest walk barefoot. He did it in protest of the enforced disappearances in Islamabad by military action. Given the vulnerability of the political class in Pakistan with weak regional organization and support base and the fragile state of the political institutions, religion continues to be a readily available fixative in the hands of the political class to navigate through problems of legitimacy. In such difficult circumstances, the Judiciary, to its credit, has definitely tried to rescue the falling sense of constitutionalism by delivering some bold judgments, but it has not been able to reverse the religious trajectory that the political elite have imparted to the idea of Pakistan. In the matter of adjudication of citizenship claims also, judiciary has been found wanting in lending support and strengthening the remarkably progressive conception of unconditional *jus soli* principle as enshrined in section 4 of the Pakistan Citizenship Act of 1951. With respect to the genuine claims of Afghans and stranded Urdu speaking minorities from Bangladesh, the courts could have taken a stronger stand as they had the constitutional and legislative backing, but they remained indifferent. Overall, the judiciary's imprint on the membership aspect of national identity has not been satisfactory and leaves much to be desired.

Despite having a thick national identity, Pakistan could have ensured a greater purchase for smaller local sects and ethnicities and with that ensured a pluralistic public culture. For instance, Germany started with a thicker notion of national identity than even Pakistan but over passage of time, it became more secure about its place

and identity in the world of nations and consequently allowed multiple races and cultures to amalgamate by adopting a liberal citizenship policy and a relatively plural conception of public culture. The recent permission granted by the German authorities to Syrian refugees to enter their territory and rehabilitate illustrates the point. Maybe, Pakistan is still very young and unable to erase the deep smirch of the circumstances and events leading up to its formation. Whatever the case maybe, it will have to strengthen its democratic institutions to be able to come close to the German example.

CHAPTER FIVE

'BENGALEE' OR 'BANGLADESHI': THE DILEMMA BEFORE BANGLADESH COURTS

5.1 Introduction

Bangladesh came into existence in 1971 after breaking away and claiming separate nationhood from Pakistan. Bangladesh in many ways exemplifies the imperfections and the weaknesses of nationalism in general in South Asia. The formation of Bangladesh, which many call the unfinished business of the partition of India, followed years of oppression and denial of political and economic rights to the people of erstwhile East Pakistan by its Western counterpart. It showed once and for all the infirmity inherent in religious nationalism which spawned the nation of Pakistan. The fact that the language movement for Bengalee language was the precursor for the movement for Bangladesh reaffirmed the importance of language, the marquee element in the western classical conceptions of nation, as a source of identity too strong to be crushed or ignored.

Bangladesh represents a classic example of the constructivist and instrumentalists theories of nationalism as I discussed in chapter one. It exposes the unmistakably fragile nature of the national identity constructs in South Asia. The political and intellectual elites in Bangladesh, within a span of a quarter of a century adopted two different sets of founding myths and historical materials to construct two different kinds of national identity and soon after achieving the nationalist goal of a sovereign nation state, they continue to flirt with both the religious and ethnic-linguistic conceptions of national identity. If the creation of Pakistan was analogous to Brass's account of nationalism as the process by which elites and counter elites within the group select particular aspects and symbols of group's culture, impute new value and meaning to them and use those pre-selected aspects as symbols to mobilize the group and compete with other groups (Brass, 1991), the Bangladesh example most closely corresponds to the thesis of 'internal colonialism' as elucidated by Hechter ([]1975] 1999). Hechter referred to it as a "process of unequal exchange between the territories of a given state that occurs either as a result of free play of market forces or economic

policies of the central state that have intended or unintended consequences for the region" (Hechter, 1999: xiv). In Bangladesh's case the unequal exchange between West Pakistan and the erstwhile East Pakistan occurred as a result of deliberate economic policies of the central state controlled by the western wing which had inevitable consequences for the eastern region. It also followed Hechter's model of cultural division of labor where the super ordinate group which he calls the 'core' stabilized and monopolized its starting advantages by regulating the "allocation of social roles such that those roles commonly defined as having high prestige are reserved for its members" while the less advanced groups called the 'periphery' are "denied access to those roles" (1999: 9). The glaring economic inequalities were coupled with extremely low representation of ethnic Bengalees in the civil bureaucracy as well as the military establishments. The central government's policy of declaring Urdu as the sole state language proved to be the highest point of disillusionment of the Bengali speaking majority which was simmering ever since the creation of Pakistan owing to the above colonial policies.

In February 1952, students protest in Dacca against the state language status to Urdu alone led to the killings of many of them in police firing and it imparted an increased impetus to the entrenchment of a linguistic identity and its eventual transformation into a national identity grounded in the Bengali language and culture. Even though Bengali was recognized in 1956 as one of the official languages of the state, there were constant efforts by the central government to Islamize the Bengali language evident in the government proposals to change certain letters from its script in order to bring it closer to Persianized Urdu. The overt acts of subjugation of key elements of Bengali culture by the Pakistani state produced a renaissance of sorts. The formation of Awami Muslim League in 1949 provided the political vehicle to the aspirations and frustrations of the Bengali community. It led the mobilization for Bengali nationalism by invoking distinct historical myths and historical memories involving the Bengali language and culture. Two of the key demands of its 44 point program were the state language status for Bengali Language and provincial autonomy for East Bengal. The Awami Muslim League handed a crushing defeat to the Muslim League, the vehicle of Muslim nationalism, in the provincial elections of 1954. It was a portent for the upcoming change in the content of the nationalist discourse from religious to an ethno-lingual one. The national movement of Bangladesh acquired a distinctive

secular undertone. Manyengali Muslims started finding grounds of common interest with their Bengali Hindu brethren as most of the exploitative Hindu zamindars and money lenders had already migrated to the Indian west Bengal. The birth centennial of Nobel laureate Rabindranath Tagore was celebrated with great fervor in 1970 in an act of defiance to the West Pakistan leadership and large scale protests erupted against the government ban on Tagore's songs (Kabir, 1990). The non participation of Bengali Muslims in the first Bengali nationalist movement in reaction to the partition of Bengal in 1905 was "attributed to the lack of education and backwardness of Bengali Muslims" (Islam, 1981:63). The decision of Awami Muslim League, a mainstream political party to drop the word 'Muslim' from its name epitomized the rise of a secular Bengali identity and demonstrated the lowly abyss to which the general foothold of a Muslim identity had fallen to. Usually a political party would be highly wary of dropping a word from its name which corresponds to the religion of the majority of its electorate, especially in a South Asian context.

The autocratic rule of General Ayub Khan (1958-1969) exacerbated the widening divide between the two geographical units and brought about the complete demise of religion as connecting glue between the west and the east. In the course of this military rule Sheikh Mujib-ur-Rehman, with his focus on secular Bengali nationalism and repeated tributes to the martyrs of the language movement, became the undisputed leader of Bengalis. By the end of the above military rule, the linguistic and regional identity of Bengali Muslims had assumed a far greater salience than their religious identity. The one identity which Bengali Muslims took for granted during the entire nationalist mobilization against the British rule acquired a paramount place in their self consciousness within a span of 25 years. It reaffirms the point made in the first chapter- greater the threat to a particular collective identity which the members identify with, the more conscious and protective such members tend to become for that very identity under threat.

The Bengali nationalist movement followed one of the two pathways identified by Smith (1991) for the formation of nations around a pre-modern ethnic core in substantial ways. 'Vernacular mobilization' by the intelligentsia involving university students, professors, artists, journalist, folklorist, playwrights carried forward the task of awakening the nation from its slumber. Slogans like*Joy Bangla* (victory to Bangla), *Ekti Bangla Aksar, Ekti Bengalir Jibon* (every single letter of the Bengali alphabet

epitomizes the life of a Bengali), *Amar desh, tomar desh Bangladesh Bangladesh* (your home and my home is Bangladesh), *Bir Bengali Astro Dhoro Bengladesh Swadhin Koro* (take up arms, brave Bengalis and bring independence to Bangladesh) filled the air and helped invigorate a Bengali identity (Hossain and Khan, 2006: 326). The above slogans replaced slogans such as *Pakistan Zindabad*.

The firm grounding of the newly born Bangladesh's national identity in Bengali language and culture found reflection in its newly adopted constitution. The Preamble asserted the high ideals of nationalism, socialism, democracy and secularism as the fundamental principles of the constitution and consists of specific provisions earmarking the key features of Bengali nationalism. The Bangladesh Constitution is also vocal about her national identity much like the Pakistani constitution and leaves little room for any doubts about the nature of nationhood upon which Bangladesh was conceived. Article 6(2) states that 'the people of Bangladesh shall be known as Bengalis as a nation' and Article 9 reads as follows:

> The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.

In the words of Tanveer Fazal, "since the rupture from the Pakistani state had to be complete, both politically and ideologically, the secular Bangladesh state epitomized the ejection of all that the Muslim state had stood for – the separate electorates, two nation theory, and flirtation with the idea of a theological state" (1999: 190). However as most of the history of national phenomena has shown, no matter how clearly the nationhood has been defined and projected in the founding document - the constitution, there are other national narratives that emerge. In fact the very process of giving a clear definition of national identity of any prospective nation is such that it inevitably creates certain non-nationals or 'others'. That is why it has been argued by the constructivists and modernist thinkers that a loosely defined national identity is more inclusive in context of the implausibility of a perfectly homogenous population in current times. Though Bangladesh is one of the most homogenous nations one is likely to encounter in today's world, but in a re-affirmation of the conviction of Gellner (1983) when he wrote that it is not possible for all ethnicities to have their

own political roofs and the observation of Sufia M. Uddin (2006) that any imagining of a nation gives rise to alternative imaginings – the Bengali nationalism generated its own set of alternative imaginings. As has been well described by Fazal, there were at least three different groups which did not identify with the official Bengali nationalism:

First were the tribal ethnic minorities including the Chakmas and Hajongs inhabiting Chittagong Hill Tracts. They comprised of adherents of different religions such as Buddhism, Christianity, Animism but not Islam. They spoke various dialects of Tibeto-Burmese family of languages. Chakma leader Manabendra Narayan Larma is reported to have recorded his refusal to identify with the Bengali nation in the following words: "under no definition or logic a Chakma can be a Bengali or a Bengali can be a Chakma… as citizens of Bangladesh we are all Bangladeshis but we also have a separate ethnic identity which unfortunately the Awami League leaders do not want to understand" (Fazal, 1999: 192). As we saw in the chapter on India most of these tribals eventually migrated to and settled in India primarily in the state of Arunachal Pradesh. A clear declaration from the India Supreme Court of their right to Indian citizenship saved them from facing the dire prospect of statelessness. The second category of people was the Urdu speaking ethnic minorities which showed their allegiance to Pakistan but could not migrate to Pakistan due to various reasons. These people also could not have much say in the Bangladesh politics as they were relegated to the margins owing to their allegiance to Pakistan. The third category not identifying with the newly crafted ethno-lingual national identity of Bangladesh is represented by the 'traditionalists' (Ibid) and the Islamic nationalists represented politically by political parties such as Jamaat-e-Islami and Muslim League. It is this faction with which the military establishment of Bangladesh has often connived to attempt a change in the national identity as well as the basic character of Bangladesh.

We will return to this issue in the section on Bangladesh's public culture. Another fundamental contradiction in the very genesis of ethno-linguistic Bengalee nationalism demanding a separate Bangladesh was the exclusion of fellow Bengalees across the border in India. Questions were raised about the basis of exclusion of Hindu Bengalees when the nationalism adopted was avowedly secular and built

around the Bengali identity. However, the political leadership was aware of the dangers associated with the prolongation of this issue and also the utopian quality of the whole proposition. Concerns were raised regarding India's continued interference in Bangladesh after her decisive role in the war of liberation. When Awami League government signed a twenty five year treaty of Friendship, Co-operation and Peace with India in 1972, it further fuelled the fears of India's domination of Bangladesh. The Awami League was increasingly seen as a vehicle for India's influence in the region. Owing to the above, Sheikh Mujib-ur-Rehman did not discard the Muslim identity of prospective Bangladeshis completely and carefully incorporated elements of the religious identity of Bengalee people in order to differentiate it from the Hindu Bengalis of India. One of the ways in which this incorporation was given effect was through the medium of speeches, where the supreme leader introduced the use of Islamic expressions which were completely absent in the pre independence period (Kabir, 1990: 46). Thus, the seeds of the foundational conflict within the identity of Bangladesh were sown soon after its creation. This Islamic alternative was pursued with great vigor under the military dictatorship of General Zia-ur-Rehman who toppled the civilian government soon after the assassination of Sheikh Mujib in the country's first coup. In a turn of events strikingly similar to that of Pakistan, successive military rulers starting from Zia-ur-Rehman pandered to the religious fundamentalist factions for extracting legitimacy for perpetuating their rule. Soon after usurping power, General Zia proclaimed the 5th amendment to the constitution which *inter alia* attacked the very provisions which grounded Bangladesh's national identity in her language and culture. Article 8(1) which declared secularism as one of the 'fundamental principles' to be observed by the state "in making of laws, interpretation of the constitution and forming the basis of the work of state and its citizens" was replaced with the following words: "absolute trust and faith in Almighty Allah". He even brought about a change in the nomenclature of the collective identity of Bangladesh's people from 'Bengalee' to 'Bangladeshi' via amendment in the article 6 of the constitution. The change in the name of the collective identity was a strong symbolic move as if to impart clarity to the intentions of the military ruler to bring about a change in the way the nation is imagined and felt. This overarching change in the key provisions of the constitution constituted a direct assault on the understanding of Bangladesh's public culture as defined by the rich historical memories, symbols and myths associated with the Bengali language in

contradistinction to a culture constructed around Islamic myths and symbols. It is in this context that the higher courts in Bangladesh were called upon to re-interpret the founding sources of Bangladesh's public culture. I will discuss the relevant case law in the next section.

5.2 Judicial interpretation of Bangladesh's Public Culture

Bangladesh was able to frame and adopt a constitution the very next year after getting independence. Bangladesh's first constitution of 1972, as stated earlier spelt out four principles as the fundamental state principles of Bangladesh. They were Nationalism, Secularism, Democracy and Socialism. However, when the first military coup toppled the popular government of Bangabandhu Shiekh Mujibur Rahman, it scrapped these fundamental principles and made major changes in the constitution which tried to change not only the philosophical bases of national identity but also its symbolic appearance. Along with the above changes in the language of Articles 6 and 9, as discussed earlier, the Fifth Amendment also declared Islam as the state religion of Bangladesh. Since then it has been a tale constant tussle between these two narratives of the idea of Bangladesh.

Let us deal now with the famous Fifth Amendment case and the Seventh Amendment case, judgments of which were delivered in quick succession and went a long way in shaping the public culture in Bangladesh.

In *Khondker Delwar Hossain, Secretary, B.N.P. Party vs. Bangladesh Italian Marble Works, Dhaka and Others,*[122] the case which is famously known as the 5th Amendment case the validity of the 5th amendment to the constitution made under the Martial rule of General Zia ur Rehman B.U. in 1979, was the main matter in issue. Section 2 of the Fifth Amendment sought to validate all the regulations and proclamations made under the military rule in Bangladesh from the period 20th August, 1975 to 9th April, 1979 and inserted a paragraph 18 to the fourth Schedule of the Bangladesh Constitution empowering the chief Martial Law Administrators to suspend and nullify the provisions of the Constitution by issuing proclamations. In this case a company registered in 1964 by the name of Italian Marble works

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[122] (2010) 62 DLR (AD) 298

constructed a Cinema called the Moon Cinema Hall on its own land holding in 1964. After the liberation of Bangladesh, in or around the last week of December, 1971, some people taking advantage of the poor law and order situation prevailing at that time took over forcible possession of the above Moon Cinema Hall from the staffs of the company. Subsequently, by notification No.186-SI dated December 31, 1971, the management of the Moon cinema was taken over by the petitioners and thereafter by subsequent orders under the Martial law regulation VII, the Cinema was completely taken over by the petitioners, that is, Delwar Hossain and Munshi Ahsan Kabir of the Bangladesh Nationalist Party (BNP). The orders made under the Martial Law Regulations drew their legal validity from the Fifth Amendment and thus, the company in order to get back its rightful possession of the cinema Hall challenged the constitutionality of the Fifth Amendment in the High Court Division. The High Court division in its judgment dated 29th August, 2005 in Writ Petition No. 6016 of 2000, upheld the plea of the Company and declared Fifth Amendment to be *Ultra vires* the Constitution and void. Even before this appeal came to the Supreme Court, the High Court Division while summarizing its judgment touched upon the idea of a Bangalee Nation. It reaffirmed the idea of Bangladesh as a sovereign, democratic republic 'governed by the government of laws and not of men' and the supremacy of the Constitution by stating that 'the Constitution of Bangladesh being the embodiment of the will of the Sovereign People of the Republic of Bangladesh is the supreme law and every other law, action, proceeding have to confirm to it and if made in violation of the Constitution, is void' (page 12-13). Further the High Court while stating reasons as to why all the martial law regulations, proclamations and orders are void, illegal and *non est* stated:

> Those were made by persons without lawful authority, as such and without jurisdiction… The Constitution was made subordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders… Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also… The Proclamations destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism, negation of Rule of law, ouster of the jurisdiction of Court (pp. 14-15).

The above reasoning adopted by the High Court Division of Bangladesh clearly shows that according to it, the change in the secular character of the Constitution (as

the word secular was omitted from the Preamble of the new constitution promulgated by the Proclamations amendment Order, 1977), the negation of the Rule of Law and the ouster of the jurisdiction of the Higher Courts, amounts to a negation of the Bengalee Nationalism. This view of the court rejected the religious conception of nationalism as sought to be implanted within the constitution by the military establishment.

The court also observed "the constitution also spells out the high ideals of nationalism, socialism, democracy and secularism…our war of liberation was fought on those high ideals and those high ideals inspired our heroic people to dedicate themselves and our brave martyrs to sacrifice their lives in the national liberation struggle and those ideals being the basis of our nationhood shall be the fundamental principles of the Constitution."(pp. 57-58).

Especially striking is the way the High Court Division, as referred to in the Judgment, sticks to the 'Bengalee' identity as opposed to a 'Bangladeshi' identity. The new constitution brought about by the Proclamations Amendment Order, 1977 substituted the word 'Bengalee' and replaced it by 'Bangladeshi' so that the Art 6 of the Constitution which originally read as: "the citizens of Bangladesh would be known as Bengalees", now read as: "citizens of Bangladesh would be known as Bangladeshis". The Court read meaning into the term Bengalee and looked at it in context of the distinct culture which the Bengalees have possessed as against the other Muslims of the subcontinent. The Supreme Court observed:

> The inhabitants of this part of the world irrespective of their cast, creed and religion were known as Bangalees from time immemorial. In their lighter moments they laugh as a Bangalee, in their despair they cry as a Bangalee, they record their feelings in Bangla, their history, their philosophy, their culture, their literature are all in Bangla. These finer features of life and intellects gave them an identity as a race in India for more than thousand years… As such, this identity as a Bangalee was not a mere illusion or frivolous idiosyncrasy but has a definite character which separated them from other races in Pakistan. The identity of Punjabees, Pathansetc might have faded away in their new identity as Pakistanis but the Bangalees consciously kept their separate entity in their culture and literature in spite of their Pakistani citizenship. This was their pride. Their identity as Bangalee blooms in their weal and woe. This sentiment may not have strict legal value but this very sentiment of Bangalee nationalism paved the way to the ultimate independent Bangladesh which has a very definite legal existence. As such, no body, how high so ever, must not ignore or undervalue the words 'Bangla' or 'Bangalee' because since 1952, beginning with the martyrs of language movement, thousands of Bangalees gave their lives for their right not only to speak Bangla but also to live as such Bangalee. It

is their basic right and very naturally, their Constitution recognized it (SCC Online pp. 117-118).

Here the court can be seen to be aware of the immense significance of symbolism in the construction of national identity. It has interpreted Bangladesh's collective identity as firmly grounded in Bengali language and culture and according to the court Bengali culture underpins the 'Bengali nationalism'. It is not that the word Bangladeshi is inherently sinister. After all it perfectly corresponds to the name of the country, but the fact that it forms the newly coined nomenclature for the far ranging changes envisaged by the amendment makes it suspect. The imposition of Bangladeshi over Bengali came along with the proclamation of Islam as the state religion and absolute faith in Almighty Allah as a replacement for the cherished fundamental principles of state. It was this change in the content of national identity which the word 'Bangladeshi' embodied that made it impossible for the courts to accept.

In *Siddique Ahmed v. Bangladesh*, *represented by the Secretary Ministry of law, justice and Parliamentary Affairs, Bangladesh Secretariat, P.S.-Ramna and District-Dhaka and others,*[123] the matter in issue was the validity of the martial Laws imposed this time by a different military dictator General Hussian Mohammed Ershad when he assumed power on the 24th March, 1982 in a similar fashion as his predecessors. Under his regime, the 7th Constitutional Amendment got passed which incorporated all the Martial Law regulations into the Constitution of Bangladesh. The petitioner, in this case, got conviction and sentence for murder from a court convened under the above Martial Laws. In order to set aside his conviction and sentence, the Petitioner appealed in the Supreme Court challenging the legality of the 7th Amendment and thereby of all the laws and court orders made under the said amendment. The Supreme Court while declaring the 7th amendment to be illegal expressed its resolve to bring back the spirit of 'Bengalee Nationalism' back into the constitution. It went one step ahead from the 5th amendment case inasmuch as it declared that the spirit of 'bengalee Nationalism' is to be brought back into the scheme of the Constitution, whereas in the 5th amendment case, the court had only re-inserted the words 'Bengalee Nationalism' in the Article 6 of the Bangladesh Constitution. It observed:

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[123] (2010) 39 CLC (HCD)

> …the entire population of the country wanted the victory to the 'Bangalee Nationalism' and as such, inscription of this phrase in their sacred Constitution reflected the overwhelming will of the people. Mr. Amir-ul-Islam contended that although it was Zia who ejected this phrase from our Constitution… ostensibly for communal considerations…General Ershad is no less to blame, as he continued with it. We could not agree more. The whole world knows that we fought our War of Liberation to hold the flag of 'Bangalee Nationalism' high. It is also true that everyone in Bangladesh, including all ethnic people, who also speak in Bangla, fought valiantly for the liberation of Bangladesh. They are Bangalees too…It was viewed by the Appellate Division (in the 5th Amendment Case) that return to 'Bangalee Nationalism,' now, would involve huge expenditure and changes have to be recorded in all the passports and other official documents, home and abroad. There is no doubt, and keeping in mind the question of expenses as viewed by the Appellate Division, we can nevertheless gradually, proceed to eventually bring back 'Bangalee Nationalism' in our Constitution, which was the commitment of the historic War of Liberation and the cherished desire of the people and Bangabandhu himself (SCC Online pp. 132-133).

Along with the categorical direction to bring back the letter and spirit of the Bengali nationalism, the court also observed the following: (i) the killing of the father of nation by army men was the result of a plot and that the plot was "not only to kill the father of the nation and his family but also to wipe out the principles on which the liberation war was fought".[124] At another part in the judgment, Justice Shamsudddin Chowdhury spoke specifically about the cultural identity of Bangladesh and how it has been attacked by the successive military rulers. Consider this extract from the judgment:

> Soon after usurpation to the helm of the state affairs, Ziaur Rahman unraveled the historic Bengali language "Joy Bangla" slogun, which sparked and kept immortalised the Bengali People's vigour and zeal to commence and continue with the Sacred War of Liberation, the slogan that kept the entire populace awake during the whole period of war, the slogan that was the source of aspiration and inspiration for the freedom fighters and hope for the entire population, the slogan that inspired us to vanquish virtually invincible, well organised and heavily armed Pakistan's occupation army . General Zia substituted that with Pakistani oriented "Urdu" (Persian) language slogan "Jindabad", which slogan was denounced by the Bengali people long ago as being alien to our cultural identity, having it's nativity in the land of our occupiers. Other lucid Bengali Words that went hand in glove with the "Bangali Nationalism,", like Bangladesh Betar, Bangladesh Biman" were also erased from our vocabulary, albeit that they are words of Bengali language, the language for which we shed blood profusely (Ibid, pp. 32-33).

Here the judgment shows the extent to which the Bengali culture especially as manifest in Bengali language is considered central to the Bengali identity and is jealously protected. The court emphasizes the distinct character of Bengali culture as

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[124]Ibid p.134

compared to the Urdu-Persian culture followed by Bangladesh's tormentors. The slogan 'zindabad' is touted to be alien to the cultural identity of the Bengali people.

In *Maulana Syed Rezaul Haque Chadpuri and Ors v. Bangladesh Jamat-e-Islami*[125], the petitioners led by an Islamic cleric himself filed a public interest litigation praying for the cancellation of the registration of Jamat-e-Islami (herein after Jamat) as a political party in Bangladesh. The cancellation was prayed on grounds that the Jamat's constitution does not conform to the conditions laid down under the Bangladesh Representation of People Order, 1972. The petitioners based their case on two grounds: First they argued that Jamat does not follow the true traditional Islam which, according to the petitioners, is embodied in the Medina Charter signed between the prophet and other representatives of other religions. According to this charter "Muslim and non Muslim inhabitants of Medina exercised their free will, right of self determination and formed themselves collectively through a process which displayed early traces of democracy" (SCC Online, p. 2). Petitioners alleged that the Jamat follows radical Islam inspired by Maulana Maududi and Wahabism and its extremist ideology is the anti thesis of law, constitution and the fundamental tenets of Islam itself. Second limb of their argument was that the Jamat's philosophy is against the founding ideals of Bangladesh which were based on secular and democratic principles. They contended that Jamat aligned itself with the occupation army and engaged in war crimes. They also alleged that constitution of Jamat is contrary to the constitution of Bangladesh and that it discriminates on the basis of religion, race, caste, language and sex and thus its registration should be cancelled. The Supreme Court of Bangladesh in a remarkable decision agreed with the contentions of the petitioners and cancelled the registration of Jamat-e-Islami as a political party in Bangladesh. It held that the constitution of the Jamat goes contrary to fundamental principles of the constitution of Bangladesh and also Article 90C of the Representation of people Order, 1972. Article 90C(1) reads:

> (1) A political party shall not be qualified for registration under this Chapter, if
> (a) the objectives laid down in its constitution are contrary to the Constitution of the People's Republic of Bangladesh; or
> (b) any discrimination regarding religion, race, caste, language or sex is apparent in its constitution ; or
> (c) by name, flag, symbol or any other activity it threatens to destroy communal harmony or lead the country to cessation; or
> (d) its constitution reflects the objectives of maintaining and nourishing party-less or

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[125]Writ Petition No. 630 of 2009, available at www.scconline.com, accessed on 18.08.2017.

one-party   system;   or
(e) there is any provision in its constitution for the establishment or operation of any office, branch or committee outside the territory of Bangladesh.[126]

Thus we can see that the higher judiciary in Bangladesh has been bold and unequivocal in restoring the original idea of Bangladesh's culture as secular in nature and animated by the Bengali language and culture. All the discussed cases also show that there has been a continuous contest between the executive composed of military Administrators and the Judiciary to organize and homogenize people through their own versions of nationalism. On one hand, the military executive time and again tries to assimilate people under the banner of Islam for their own ulterior motives, thereby trying to Islamize the Constitution, and on the other hand the Judiciary trying to re-assert the idea of a Bangalee Nation constituted by people of different religions but glued by the same language. This contest in Bangladesh, just like in India, is very much alive and perhaps at its climax today. The Shahbag protests with public outpouring of emotions against the perpetrators of violence in the war of liberation, resulted in the capital punishment being handed out to many of them. The courts have been equally unequivocal in upholding the harshest punishments pronounced to the former leaders of Jamat and others who were involved in the war of liberation on the side of the Pakistan army and found to have committed war crimes. The Government of Bangladesh set up special tribunals to adjudicate all cases related to war crimes. Some of the important recent cases dealt by the tribunals are:

(i)   *Ahsan Muhammad Mujahid v. Government of Bangladesh[127]*,

(ii)   *Mir Quasem Ali v. Chief Prosecutor, International Crimes Tribunal, Bangladesh[128]*,

(iii)   *Abdul QuaderMulla v. Government of Bangladesh, represented by the Chief Prosecutor, International Crimes Tribunal, Bangladesh[129]*.

In all these cases the Supreme Court of Bangladesh rejected the appeals of the accused that were convicted and sentenced to death by the tribunal. The Supreme Court in all the above judgments traced the history of the liberation struggle of Bangladesh, remembered the atrocities committed by the accused in collusion with

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[126]Representation of People Order, 1972, available at:
http://bdlaws.minlaw.gov.bd/sections_detail.php?id=424&sections_id=38025, accessed on 16.08.2017.
[127] 2015 SCC Online Bang SC (App) 15
[128] 2016 SCC Online Bang SC (App) 3
[129] 2013 Cri Appeal No. 24-25 of 2013

Pakistan army and expressed the need to uphold their sentences in the interests of justice. Let us now turn to examine the judiciary's interpretation of the essential, salient and fundamental features of the Bangladesh constitution.

5.3 Basic Structure of Bangladesh Constitution?

Given the circumstances of military rule and frequent abrogation of basic provisions of the constitution, the Supreme Court of Bangladesh also could not resist the Basic Structure Doctrine. Although there has not been much litigation on the issue of Basic structure per se, but the Supreme Court of Bangladesh has given a clear judgment proclaiming the basic structure of Bangladesh constitution in the *Anwar Hossain* case, as we will discuss later.

The Supreme Court in its initial years remained shy of striking down executive actions on the touchstone of basic structure and allowed many executive excesses. It had relinquished much of its authority in the days of martial law and people had started questioning whether it is capable of discharging the functions entrusted to it. The infamous decision *in Halima Khatun v Bangladesh*[130], Munim, J. of the Supreme Court, by drawing on a close interpretation of the martial law proclamation that conditioned but not wholly suspended the operation of the Constitution, held that the Constitution "lost its character as [the] supreme law of the country." In refusing to grant any relief to the claimant who challenged appropriation of her property as an abandoned property, the judge found a "total ouster" of jurisdiction (p. 211) under the martial law proclamation and regulations which were made judicially unchallengeable. Regrettably, the judge also proclaimed that it was "the duty of the judges to administer a 'harsh' or even an unjust law"(p. 211). One might well wonder whether such a harsh view about the judicial role was necessary in disposing of this case. Many commentators expressed the view that if the judge thought he lacked authority, he could have simply dismissed the case, instead of demeaning the role of a judge. According to Ridwanul Hoque "Halima Khatun's failure to exercise judicial minimalism shockingly attached unsolicited legitimacy to an otherwise unconstitutional regime" (Hoque, 2011: 108). Similarly in *Hamidul Huq Chowdhury v*

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[130] (1978) 30 DLR (AD) 207

Bangladesh[131], the High Court Division of the Supreme Court of Bangladesh refused to declare the 4th constitutional amendment void because the people had "not resisted it" and it had been recognized by the judicial authorities.The judges in an act of producing something opposite to the basic structure doctrine observed that "no constitutional provision can claim to be sacrosanct and immutable". One of the commentators said "neither can an unconstitutional political change nor any passage of time impart validity to an otherwise unconstitutional act" (Islam 2002: 406).This attitude of the Supreme Court changed drastically and it laid down that certain basic features of the constitution cannot be abrogated or modified. It over-ruled the above judgments and certain other judgments facilitating the military rule in harsh terms.

The historic decision in *Anwar Hossain Chowdhury v Bangladesh[132]*invalidated the 8th Amendment to the Constitution, holding that Parliament's plenary legislative and amendatory power is subject to un-alterability of "basic structures" of the Constitution. In this case the military authority had broken the High Court division of the Supreme Court into seven permanent benches. After the withdrawal of martial law the above change was incorporated into the constitution by amending Article 100 of the constitution through the 8th amendment act. This part of the amendment was challenged and it was contended that the plenary judicial power of the High Court Division was vested over the whole republic of Bangladesh and this power was part of the basic structure of the constitution. This claim was upheld by the Appellate Division of the Supreme Court. In a 3:1 majority decision the Appellate Division after citing the famous Indian case of *Kesavananda Bharti v. State of Kerala*, took the view that Parliament's power to amend any provision of the Constitution is not an "original" but "derivative" constituent power and is, therefore, "a power within and not outside of the Constitution" (p.84). As mentioned earlier, the Supreme Court in this case over-ruled some of the earlier judgments in harsh terms. To the observation of the judges in Halima Khatun's case to the effect that "no provision of constitution is immutable" and "the supremacy of the constitution is no longer unqualified", the court in this case declared these observations to be 'seditious'. It identified the following features as constituting the basic structure of the constitution:

(i)   Supremacy of the constitution given in the article 7,

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[131](1981) 33 DLR (HCD) 381
[132] 18 CLC (AD)1989

(ii)   Democracy as enshrined in the preamble,

(iii)   Republican form of government given in article 1,

(iv)   Independence of Judiciary given in article 22,

(v)   Unity and solidarity of Bengali nation as provided in article 9,

(vi)   Fundamental principles of state policy as provided in article 8,

(vii)   Fundamental rights as provided in articles 26 to 47A.[133]

The declaration of Article 9 as forming a part of the basic structure of the constitution by the Supreme Court once again shows the judiciary's clarity as well as insistence to keep the basis of national identity in Bengali language and culture intact. Article 9 says, "The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism". This article gives a robust conception of national identity and the court's verdict in effect outlaws any attempt to fiddle with or to change this source of identity. The court has shown awareness of the fact that the successive Martial laws along with other dictatorial measures have always targeted the identity defining clauses of the constitution such as articles 6 and 9, and tried to change them in a way which replaces the core of Bangladesh's identity from its language-culture to its religion. That is why the courts have consciously included article 9 and article 8 under the basic structure to nullify the repeated attempts of the military regimes. The inclusion of article 8 is also important because it contains the commitment to secularism which again shows judiciary's reading of the basic structure of constitution being in conformity with the ideals adopted in the national movement of Bangladesh. Even the decisions of the court, as discussed earlier, in *Khondker Delwar Hossain* and *Siddique Ahmed* cases outlawing the 5th and the 7th amendment respectively, have struck down parts of the constitutional amendment which disturbed the above provisions in article 8 and 9. Although these verdicts did not couch their reasoning in terms of 'basic structure' but they had the same effect of restitution of the targeted provisions, related to national identity, to their original form.

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[133]Ibid: pp. 77-108, available at: https://betterjustice.files.wordpress.com/2013/03/1989-bld-spl-1-8th-amendment-judgment.pdf, accessed on 10.08.2017

I will now discuss, as in the earlier empirical chapters, the membership aspect of Bangladesh's national identity.

5.3 Citizenship claims and their adjudication in Bangladesh

Bangladesh also follows both *jus soli* and *jus sanguinis* principles of granting citizenship and initially adopted the Pakistan Citizenship Act, 1951 as its governing statute. Later it promulgated the Citizenship (Temporary Provisions) Order, 1972. These two together constitute the Citizenship regime in the country. Section 4 of the Citizenship Act, 1951 as discussed in the previous chapter confers unconditional *jus soli* citizenship rights and so does the Article 2 of 1972 order which also confers citizenship by birth to those born after 26 March, 1971 and puts one additional condition of permanent residence. However, as in case of Pakistan and India these remain mere paper rights as their implementation has been jeopardized by later day amendments in a situation similar to that of Indian citizenship regime, as we shall see later. The constitution of Bangladesh provides for the determination and regulation of citizenship very briefly under Article 6(1) reads, "The citizenship of Bangladesh shall be determined and regulated by law", Art. 6(2) reads: "The people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshis". Here in the article 6(2), the Bangladesh constitution provides one additional dimension to the citizenship status which was absent both from the citizenship provisions of India's as well as Pakistan's constitution. The part that speaks about the collective name that people of Bangladesh are purported to be called: 'Bangalees as a nation' shows that the citizenship not only provides the legal status of membership to the people of Bangladesh but also gives them a collective identity of being Bangalees (Hoque, 2016a). The second part of the article which says that the citizens shall be called Bangladeshis was inserted later by the military government of Zia-ur-Rehman in 1978 and remains hotly contested as we saw in the section on public culture. Coming to the claims made upon the membership of Bangalee nation, the first such claim arose from the people who returned from West Pakistan. Just as in case of India and Pakistan, the creation of Bangladesh engendered suspect loyalties. If the creation of Pakistan resulted in suspicion falling on those

Muslims who fled to Pakistan initially and returned to India and those Hindus which fled to India and returned to Pakistan, the case of Bangladesh brought the Urdu speaking people who fled to Pakistan and returned to Bangladesh territories later under the same category of people with doubtful allegiance. The violence accompanying the creation of Bangladesh gave rise to similar set of circumstances.

In *Bangladesh vs. Mirza Shahab Ispahani*[134] adjudicating upon the status of a person who showed allegiance to Bangladesh and went to Pakistan without relinquishing his citizenship the court held that the citizenship status of the person was not lost as he was a permanent resident according to the provision - Art2(ii)[135] of the Citizenship Order, 1972. The father of the above petitioner and been a former judge of the High Court of East Pakistan and his mother lived and died in Bangladesh.

In *Bangladesh Vs. Professor Golam Azam and others, Supreme Court Appellate Division*[136] one Prof Golam Azam was served a show cause notice by the Government of Bangladesh as to why he should not be deported out of Bangladesh as he had been staying in Pakistan since the war of liberation and had been refused citizenship by the Home ministry, Govt. of Bangladesh. His case was that his grandfather, father and he himself all were born in Bangladesh. He became the President of Jamaat-e-Islami in 1969 and he stayed in Bangladesh till 22nd November, 1971. Thereafter he went to Lahore to attend his party's central working committee meeting. In the meantime war broke out in Bangladesh and his return flight got diverted at first to Colombo, and then to Jeddah. After a few days the respondent was sent back to Karachi along with other passengers. He had to remain in Pakistan against his will for some months as the Government of Pakistan did not allow any Bangladeshi citizen to leave Pakistan. For making contact with his family he tried to go to London in March, 1972, but he failed to obtain any travel document. He arranged a Pakistani passport for going to Saudi Arabia for performing Hajj in December, 1972. Thereafter he tried to go back to Bangladesh but was told that his life was in danger owing to his allegiance to the Jamaat. His requests to get his Bangladeshi Citizenship restored were repeatedly turned down, but he was allowed to come to Bangladesh on 11 July 1978 to see his

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[134] (1988) 40 DLR

[135] Article 2(ii) provides that a person would be deemed to be a citizen of Bangladesh if he or she was a permanent resident of Bangladesh on March 25, 1971 and continues to be so resident and is not otherwise disqualified from being a citizen by or under law.

[136] (1994) 23 CLC (AD)

ailing mother with a visa for three months. His visa was extended twice. For avoiding a possible deportation, on 8 November 1978 he filed an application again for restoration of his citizenship to the Ministry of Home Affairs and surrendered his Pakistani passport. But the Ministry served him with the above show cause notice and detained him by an order of detention under the section 3 of the Foreigners Act, 1946. The government on the other hand contended that he was actively involved in anti-Bangladesh activities throughout his stay in Pakistan as well as in Saudi Arabia. That the respondent had been staying abroad since before liberation of Bangladesh as a citizen of Pakistan; that for his anti-liberation role and active collaboration with the Pakistan Army in raising irregular forces like the Rajakers, Al-Badrs and Al Shams and placing his party, the Jamaat-e-Islami, at the disposal of the Pakistani Army, and because of his conduct during and after the liberation war, and his voluntarily residing in Pakistan as a citizen of Pakistan he could not be deemed to be a citizen of Bangladesh.

The Supreme Court while accepting Golam Azam's claim to Bangladeshi citizenship made certain important remarks about the nature of citizenship and the test which applies to ascertain citizenship.

> In the present case the onus of proving that the respondent has lost his citizenship from the country of his permanent residence is on the appellant who seeks to deprive the respondent of his rights as a citizen and for discharging the onus the appellant could not place any objective material before us other than mentioning about the conduct and mental attitude of the respondent. The test of citizenship, so far it relates to the order as it originally stood, is to be determined by objective tests and not by conduct and subjective satisfactions. In the order, the concept of citizenship is that of permanent residence (domicile) and it does not evaporate with the passing of time and it clings to a person wherever he may go…The appellant has totally failed to show that the respondent has voluntarily renounced his original citizenship or is guilty of some conduct as not being qualified to be deemed citizen of Bangladesh' under the Order (SccOnline Para 193, pp. 152-153).

The interesting part in the judgment came when Justice M. Rehman, while denying the contentions of the attorney general appearing for the govt., gave reasons why the respondent should not be denied his citizenship. He observed:

> I do not see how anybody else will be affected if a single citizen is restored to his citizenship. No case has been made out that the property rights, succession rights or any other rights of any other citizen will be adversely affected if the respondent obtains a relief at this state. The learned Attorney-General submits that the third party which will be affected by restoration of citizenship to the respondent will be the political process of Bangladesh. It will be tantamount, he submits, to a rehabilitation of Professor Golam Azam in the political process of Bangladesh which will be a

national catastrophe. The learned Attorney General invokes the maxim *SalusPopuli Est Suprema Lex* (regard for the public welfare is the highest law) and urges that in the interest of public welfare the writ petition ought to be dismissed. No officer of the Government has risked his oath to swear an affidavit in opposition to say that a restoration of citizenship to the respondent will invite a national catastrophe. I place no credence to such arguments of despair…. What aid and comfort the Court can bestow upon the respondent for his political rehabilitation? Political parties of all recognizable shades had already rehabilitated him politically by wooing him for political and parliamentary support, before he filed the present writ petition (Para 169, p. 43).

The Bangladesh Supreme Court here gives a very liberal interpretation of citizenship laws and upholds the spirit of the section 4 of the citizenship Act, 1951 as well as the Citizenship Order, 1972 in their original un-amended forms. This judgment by implication made the ground of lack of allegiance as ineffective and inapplicable for depriving any person of citizenship by birth. The decision in this landmark case turned out to be a highly followed precedent as it laid down the guiding principles and tests to be applied in the interpretation of the citizenship laws and in arriving at decisions regarding cessation of citizenship. Bangladesh higher courts relied on it to adjudicate upon many future similar contentious claims to citizenship.

In *Ananda Prasad Das v People's Republic of Bangladesh and Ors*[137]., the High Court division of the Bangladesh Supreme Court held:

> Citizenship by birth is a complete legal right and vested constitutional right which cannot be taken away or denied or lost to a particular person for his temporary absence from Bangladesh or for his residence in any other country for a considerable number of years, unless it is found that a particular citizen of Bangladesh renounces or abandons the citizenship of Bangladesh and acquires the citizenship of another country (SCC Online, p. 81).

The facts of this case were interesting as the appellant who was born in Bagerhat district of Bangladesh with his paternal home there, had migrated to India for the safety of his life during the Bangladesh liberation war but returned after the cessation of war. One of the defendants, defendant no. 4 had filed a title suit for grabbing the property of the appellant by fabricating some papers and the suit was *sub judice* at the time of the current case. Further, the same respondent had in collusion with the local police served a notice on the appellant to leave the country based on the allegation that he was not a citizen of Bangladesh and that his home was in Indian West Bengal. The defendant even got success at the level of lower courts as they decided that the

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[137]22 BLD (HCD) 2002

appellant could not prove his Bangladesh citizenship. The lower courts found that he left for India on 25.7.1965 according to his passport entry and that he settled in West Bengal along with his family and even got enrolled as a voter there in 1971. On the other hand, it was recorded by the lower courts that there was no documentary proof of the date of his return to Bangladesh and that his name was not found in the East Pakistan voter list prepared for the elections of 1970. However, the Supreme Court negatived all the findings of the lower courts and decided that the appellant never lost the citizenship of Bangladesh merely on account of his absence from the country for some years. The court relied on it earlier decisions in *Mirza sahib Ispahani* and *Prof. Golam Azam* and also relied on a decision of the Indian Supreme Court in *Mohd. Ayub Khan v. Commissioner of Police, Madras*[138] wherein it was held that temporary absence cannot be the reason of loss of citizenship unless it is proved that citizenship was either renounced or citizenship of another country was voluntarily acquired. The Supreme Court also held that the lower courts erred in shifting the onus of proving appellant's citizenship on him since he was always a citizen of Bangladesh by birth.

5.4.1 Claims of Urdu speaking minorities

The claims of the Urdu speaking minorities or the 'Biharis', as they are colloquially referred in Bangladesh because they originally migrated from the Bihar region in India, have been the most contentious of all in the short history of Bangladesh as a nation-state. The acrimonious separation of Bangladesh from Pakistan left a mark on the relations between the two countries and the Bihari people had to face the worst consequences in the aftermath of the liberation war. The negotiations between the two countries regarding the repatriation of Biharis who were willing to resettle in Pakistan did not produce a clear policy due to the weak bilateral relations in the wake of the bloody war of liberation. Hence, the official policy of the Bangladesh government has been consistently hostile towards these people and it got manifest in the 1978 amendment to the Citizenship Order, 1972. Section 2B inserted by the amendment provides – "Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly

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[138]AIR 1965 SC 1623

or by conduct, allegiance to a foreign state".[139] This provision became the validating legal instrument in the hands of Bangladesh authorities to deny citizenship to the Urdu speaking Bihari people and the fact that some of them expressed their allegiance to the state of Pakistan along with a wish to return made the authorities more reluctant. The government of Pakistan, as I discussed in the previous chapter also amended its laws in 1978 to bar persons who continued to reside in East Pakistan after 16 December, 1971 from Pakistan citizenship. It provided for continued citizenship of those people who were agreed to be repatriated but could not be repatriated before 1978. This partial acceptance by Pakistan and the inability of many such Urdu speaking people to go back to erstwhile West Pakistan resulted in the stranded status of these people.

Nevertheless, the stand taken by the Bangladesh judiciary with respect to Bihari people has been remarkably progressive despite the indifferent attitude of the political class. The courts in Bangladesh have been the lone warriors for the rights of Urdu speaking minorities and have consistently decided in their favor. In *Mokhtar Ahmed v. Government of Bangladesh*[140], one such Bihari person, Mr. Mokhtar Ahmed applied for naturalization and got Bangladesh citizenship by taking the oath of allegiance to Bangladesh. Few years later, however, owing to the bad conditions of living for Biharis and the attitude of apathy from the political dispensation in Bangladesh, he registered himself with the International Committee of Red Cross for being repatriated to Pakistan. The Court refused to count this expression of intention to resettle in Pakistan by a person who had been domiciled in Bangladesh since 1951, as a reason for depriving him of the citizenship of Bangladesh. It observed:

> The mere fact that he filed an application for going over to Pakistan cannot take away his citizenship. The Bangladesh Citizenship Order has not discriminated among citizens no matter in which way they have become citizens of this country. So the petitioner is on the same footing as any other citizen. His citizenship, therefore, clings to him. He could voluntarily renounce it or he could be deprived of it if he had incurred any disqualification. Though he filed the application, he did not even pursue it. He filed an affidavit affirming his allegiance to Bangladesh in 1972. The petitioner having not acquired the citizenship of any other country, his citizenship of Bangladesh which he acquired long before cannot evaporate and he continues to be a citizen of this country.[141]

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[139]The Bangladesh Citizenship (Temporary Provisions) Order, 1972, available at: http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=423, accessed on 16.08.2017.
[140](1982) 34 DLR (HCD) 29
[141]Ibid: 31.

In another case, *Abid Khan v. Bangladesh*[142], the High Court Division of the Supreme Court of Bangladesh confirmed the entitlement of Biharis to Bangladesh citizenship under both the 1951 Citizenship Act and the 1972 Presidential Order. The court held that the "birth and the residence of the petitioner in the so called Geneva camps do not disentitle them to citizenship and 'mere residence' in the Bihari camps had not attained any special status so as to be excluded from the operation of the laws of the land".[143] The court also gave a declaration that the residents of the Bihari camps are entitled to be registered as voters in the electoral rolls unless they are disqualified under section 7 of the Election Rolls Ordinance, 1982. However even after the above favorable verdicts of the Supreme Court, the government did not show any urgency to implement the above measures as directed by the courts. The Urdu speaking minorities living outside the camps within the mainstream of Bangladeshis cities found it easier to get national identity cards and register themselves as voters but Biharis living inside camps found it much more difficult to avail those services as their residence in camps was seen as a mark of unwillingness to integrate into the Bengali nation and their continued allegiance to Pakistan. That is why a group of ten such Biharis went to the Supreme Court again in 2007 seeking a writ of Mandamus for the implementation of the Court's earlier verdict directing the election commission to register them as voters.

In *Md. Sadaqat Hossain khan (Fakku) and Others v. Chief Election Commissioner*[144]The High Court Division of the Supreme Court was unequivocal in holding that Biharis in Bangladesh were generally entitled to citizenship and directed the election commission to register all Biharis willing to be enrolled as voters without delay. The court was asked by the counsel for the petitioners to give a direction to the Election Commission to organize registration of Urdu speaking people *en bloc,* but the court put the qualification of willingness to register reasoning that forced registration cannot be done in the absence of any law to this effect. However, the court remarked that the "time has come to look at this issue objectively and with compassion" (p. 411). The court distinguished between Urdu speaking people who swore their allegiance to Pakistan in 1971 and are still waiting to be repatriated on one hand and such people who were minors at that time and not mature enough to express

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[142](2003) 55 DLR (HCD) 318
[143]Ibid: 321
[144](2008) 60 DLR (HCD) 407

any preference even if their parents opted for Pakistan or those Biharis born after Dec 1972 on the other. For the first category, the court held that they belong to a different class and they should be left to their fate, but for the second category, the court was clear in its verdict that their claims should be expedited immediately and they should be given the full status of a citizen. The court observed:

> By keeping the question of citizenship unresolved on wrong assumption over the decades, this nation has not gained anything rather was deprived of the contribution they could have made in the nation building. The sooner the Urdu-speaking people are brought to the mainstream of the nation is the better (p. 414).

Thus, the court in this case expanded the gradually narrowing citizenship regime of Bangladesh to its original state as it was adopted at the time of the adoption of Bangladesh constitution. This verdict facilitated the enrolment of Urdu speaking minorities in the electoral roles and also the public life in Bangladesh.

5.4.2 Status of Rohingya Refugees

The Rohingya people have not been able to garner the generosity of Bangladesh authorities. They are consistently regarded as foreigners even if they have stayed for years and they are excluded from naturalization as well. The Rohingyas are an ethnic-religious-linguistic minority originally found in the Rakhine state of Myanmar. They were deprived of nationality by Myanmar in 1982 which considers them to be Bengalis who crossed over into Myanmar during the British rule somewhere in 1940s (Hoque, 2016a: 11). However, they had started entering Bangladesh from 1978 onwards and have been counted as one of the most persecuted communities in the world (Hoque, 2016a; UNHCR, 2007). Hundreds and thousands of them have crossed into neighboring countries and Bangladesh alone is reported to have absorbed some 500,000 of them (Ibid: 11). Since then and many of them have also been repatriated to Myanmar. Some 30,000 of them are reported to be living in two camps in southern-most district of Cox's Bazar and some 300,000 have settled in villages without any intervention of the authorities and are called 'self-settled' Rohingyas (Ibid: 11). They are also known as 'Myanmar Refugees' in Bangladesh and invariably live without any documents. Under such circumstances, the denial of citizenship rights to Rohingyas runs afoul of the UN convention on the Reduction of Statelessness, 1961 which obligates a state party to grant citizenship to persons born in its territories who will

otherwise be rendered stateless. But Bangladesh authorities do not allow, as of now, any sort of integration of Rohingyas into the Bangladesh public life (UNHCR, 2007: 36-37). In fact not only Bangladesh but all nation-states including India and Pakistan that have seen an influx of Rohingyas stand in violation of the above Convention unless they facilitate citizenship at least to the Rohingya children born on their soil. The attitude of Bangladesh authorities has been tough on the Rohingyas even when: (i) they are of the same religious stock as the majority of Bangladeshis; (ii) most of them speak Bengali; (iii) there is no history of animosity. Neither the ethnic affinity nor the civic-humanitarian considerations seem to be having any effect on the citizenship laws of Bangladesh with respect to Rohingyas. No case law has yet emerged on this issue yet. It is likely, given the track record of Bangladesh judiciary that it may deliver some favorable verdicts for the Rohingyas. Otherwise, the government institutions have been particularly hostile to their claims. For instance, in a recent government order of 2014, the registrar of marriages has been instructed not register marriages between a Rohingya and a Bangladeshi citizen male or female (Hoque, 2016a: 26).

5.5 Conclusion

The Judicial organ of Bangladesh has definitely come out strongly in favor of the original four principles adopted as the fundamental principles of the state in the original constitution – nationalism, secularism, democracy and socialism. Remarkable is the court's insistence on retaining a Bengali identity instead of a Bangladeshi one imposed upon it by the military establishment. It can be inferred that the judiciary has tried to interpret Bangladesh's national identity in a way that shows its conscious effort to make it absolutely distinct from that of Pakistan.The judgments relating to the 5th amendment and the 7th amendment, and also the *Anwar Hossain Chowdhury* (basic structure) case show that Bangladesh judiciary has assiduously protected the initial idea of nationhood bequeathed by the leaders of its independence movement and there is no deviation or departure from the initial idea. It has consistently sided

with the ethno-cultural orientation of national identity as conceived at the time of Bangladesh's inception in opposition to the religious version championed by the military rulers.

Though the national identity conceived for Bangladesh by its national leaders was ethnic in its orientation, as stated above, but the Courts have expanded that definition by conferring the Urdu speaking minority, even when it showed its allegiance to Pakistan, with the membership of the 'Bengalee' nation. The fact that the courts swam against the political currents of the time withstanding the pressures from a hostile political and social atmosphere against the Biharis, with memories of Pakistan army ravaging Bengali lives still fresh, is commendable. Not only was the general public opinion against them but Biharis did not fit into the ethno-linguistic definition of nationhood with which Bangladesh took birth.

The issue of the citizenship claims of the children born to Rohingya refugees is perhaps the only area where the judiciary in Bangladesh has not yet played a game changing role.

AFTERWORD

This Work Attempted to Investigate and Examine the Reasons FOR the emergence of three different national units expressing their own versions of a nation out of the same historical circumstances. India, Pakistan and Bangladesh constituted the core of what used to be the British Empire inherited the same colonial legacy with the same state structures and constitutional frameworks. In spite of this similarity in the historical circumstances not only in the geographical and political terms but also in terms of the collective identity that the people inhabiting these three countries came to acquire during the struggle for independence from the British rule, we witnessed three different constitutions establishing three different set of people within a span of twenty five years. The fact that the demise of the formidable British Empire, which encompassed the territories of all the three future countries as one political unit, eventually led to the creation of not one but three different nation-states led me to find out the reasons for this fragmentation of sorts. It has been shown that one of the primary causes, apart from the policies of the British government, behind this divergence was the difference in the nature of the national identities that were sought to be constructed by the political elites - first in the decade preceding the year 1947 and then during the lead up to 1971.

The inquiry into the concept of national identity showed that it a highly flexible form of identity which can align itself with different kinds of identities such as religious, linguistic, ethnic, racial, territorial and civic. The sources available for the constructions of national identities vary from shared historical memories, distinct historical myths, shared customs and cultural symbols, common religion, common language, ancestral relations, felt kinship ties, a bureaucratic state with common institutions to just an experience of exploitation from, or war with, a common enemy. It was found out after a thorough examination of the origins of national phenomena that there is no single or uniform recipe for the formation of national identities and the kind of national identity professed by particular nations depends upon the kind of available tools and sources that were utilized by the elites and the intelligentsia in particular regions. It was also found out that national identity is inevitably formed at the intersection of culture and politics, which is why the nature of mass culture in a

nation-state as identified by Smith (1991) heavily influences the kind of national identity acquired by that particular nation-state. If the culture is ascriptively defined, that is, if mass/public culture is grounded in ascriptive features like race, language, religion, ethnicity then the national identity engendered is thick and highly exclusive. On the other hand if the public culture is defined in civic and territorial terms, then the national identity tends to be more open and inclusive. It was also attempted to find out the key features of national identity that make it what it is, the features which distinguish national identity from all other identities. Chapter one yielded the finding that 'membership in a political community' is what differentiates national identity from other identities. Nation is the only collectivity which provides a secure connecting link to a viable political community in the current world order. Nation remains the only organizing principle and the only human collectivity which is considered to be a valid source of political legitimacy.

This is evident in the fact that nationhood is considered as a precondition for statehood in the international arena. It is true that European Union serves as an example of an extra-national political community, but it still derives its legitimacy from the constituent national units and is far from transcending these national communities. This feature of national identity connected it to the legal category of citizenship as the citizenship status decides the membership in a nation-state in tangible legal terms.

Chapter two traced the historical evolution of national consciousness in the Indian subcontinent and established that subcontinent's past was a story of healthy interactions and blending of cultures, different religious and linguistic traditions which yielded an inherently plural and layered common identity. This common identity got concretized with the mobilization against the British rule but the potential of a common nationhood was always there as manifest in the distinct mental and cultural set of qualities exhibited by the subcontinent people from the Pathan in the north- west to the Tamil in the south. This common nationality did not conform to the classical variant of nationhood but did correspond to the theoretical trappings of a civic and liberal nationalism.

The following chapters three, four and five formed the empirical portion of the thesis. The questions that inspired the above chapters were concerned with the nature of

national identity envisioned by the founding fathers of India, Pakistan and Bangladesh and expressed in their respective constitutions. One primary inquiry was about the judicial interpretation of the vision in the three countries and another was to decipher whether there has been any deviation in judicial interpretation with respect to the conception of national identity originally envisaged and the nature of the deviation if any. The chapter on India revealed that the Indian Judiciary furthered and protected the civic/liberal conception of national identity, bequeathed by the leaders of the national movement and enshrined under the constitution of India, till the 1980's. In the following decade with the landmark *Hindutva* Judgments a change in the judiciary stance could be seen. The equation of Hindu way of life to Bhartiyata or Indian-ness by the Judiciary conveys a substantial departure from earlier interpretations. The judiciary moved from an understanding of India's national identity which was seen to be underpinned by a culture that was pluralistic and multi layered to a culture that is uniformly based on a single religious community. With respect to the membership norms of Indian nation also, the successive court rulings have had the effect of narrowing down the liberal principle of *jus soli* citizenship and a movement towards the increased entrenchment of the *jus sanguinis* principle. Thus there is a clear deviation shown by the judiciary and it can be said that its interpretations have resulted in a reverse construction of India's national identity from a civic/liberal conception to an ethnic/ascriptive one. The differential treatment meted out to Bangladeshi and Afghan migrants vi-vis migrants from Tibet, Chittagong Hills and Pakistan reinforce the above conclusions.

In the case of Pakistan, the deviation in the vision of national identity first occurred during the process of the adoption of constitution itself which was then followed meticulously by the judiciary. The peculiar nature of the national movement of Pakistan resulted in Pakistan developing a thick national identity steeped in religion despite the espousal of a civic/liberal conception of national identity by the 'Quaid-e-Azam', Mohammad Ali Jinnah. The Pakistan judiciary shows no deviation from the religious conception of national identity adopted and expressed in her constitution. The majority of important judgments have facilitated and furthered the dominant religious version of national identity promoted both by the political elite and the military establishment. However, Pakistan's higher judiciary has certainly deviated from the initial idea of Pakistan as a safe haven for Muslims and a state dedicated to

the protection of religious and cultural rights of the minorities. Right from the first constitution to the Zia regime's Islamization, Pakistan has progressively moved towards becoming an Islamic theocracy without a consensus on what it means. Pakistan's citizenship jurisprudence treats the incoming migrants from Indian held Kashmir preferentially, while it does not accord the same status to Bangladeshi and Afghan migrants who are also of the same religious stock over which Pakistan grounds its national identity. It shows the continuous impact of the legacy of partition. It also shows that Kashmir is included in the Pakistani political elites' imagination of Pakistan, while Afghanistan and Bangladesh are not. However, it is certain that Pakistan does not see itself as the homeland for all Muslims in the region.

The Supreme Court of Bangladesh has definitely come out strongly to defend the original four principles adopted as the fundamental principles of the state in the original constitution – nationalism, secularism, democracy and socialism. Judiciary has tried to frame Bangladesh's national identity in a way that shows its conscious effort to make it absolutely distinct from that of Pakistan. The Bangladesh Judiciary has assiduously protected the initial idea of nationhood bequeathed by the leaders of its independence movement and there is no deviation or departure from the initial idea. Though the national identity conceived for Bangladesh by its national leaders was ethnic in its orientation but the Courts have expanded that definition by conferring the Urdu speaking minority, even when it showed its allegiance to Pakistan, with the membership of the 'Bengalee' nation. The Bangladesh Judiciary has been the most proactive and steadfast in restoring the founding ideals of Bangladesh as compared to its Indian and Pakistani counterparts. It has delivered some bold verdicts which were against the dominant socio-political atmosphere at many instances and it has been precisely the feature of Bangladesh judiciary which has been found lacking with the judiciaries of the other two countries. Indian and Pakistani courts have largely swum with the political currents while Bangladesh courts have repeatedly insisted on protecting the founding vision of Bangladesh as a secular nation with its identity grounded in the Bengalee Language and culture, whenever it has come under attack from the Military or the civilian government.

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