

Tracing the History of Constitutionalism and Politics in India

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ABSTRACT: The following article talks about the various situations which describe the nature of constitutionalism in India. It traces the history of judicial review in the sphere of amendments and the various political scenarios surrounding them.

I. INTRODUCTION

A constitution is a charter of the government which derives its authority from the governed. It lays down the purpose of the government, explains the power of each of its organs and defines the relationship between the state and society. Constitutionalism is the ability of the constitution to act as a limitation on the powers exercised by the government. It recognises the importance of the powers and the need for them to be kept in check. It prevents the government from becoming uncontrolled, arbitrary and stems from the idea of political philosophy. The members of the parliament who hold these powers are elected through a democratic process which is not 'rule by the majority' nor 'rule of the majority' but is a just rule. The justness of a decision is not being determined either by the number of people in favour of it or by considering the utilitarian implications.

Our Constitution vests this power to amend or pass laws in the popular, representative body through the provision of amendments. Which is essential to keep the constitution evolving with the society and it needs a room for change or will eventually become incapable of fulfilling the aspirations of a growing society? This process is counter-majoritarian¹, which is a problem that arises when the judges use their power of judicial review to nullify the laws passed by the legislature and act contrary to the "majority will." Judicial review is a power vested in the judges of the higher court of our country to interpret the laws of the legislature and to declare any law which is in conflict with the constitution to be void. The power of amendment is one of the ways through which the constitution limits the powers of the representative body.

II. AMENDMENTS IN INDIA

The Indian constitution provides for a flexible process of constitutional amendment. For an amendment bill to be passed in each of the parliament houses, with two-thirds of its members present and an absolute majority. When a provision which has a bearing on the federal outlines of the constitution has to be amended, the above

¹ S.P. Sathe, *Judicial Activism: Imposing Restrictions on the Constituent Power*.

clause must be authorized by at least half the legislatures of the state. When such passed laws are proved to be in contrary to the basic structure of the constitution, through judicial review the courts can declare them void. This process essentially inserts the idea of constitutionalism. The relationship between the legislature and judiciary in context of keeping the powers of the government in check has not been a smooth ride. Through various cases and political aftermaths of their judgements, we will track the history of constitutionalism in our country.

In *Shankari Prasad v. Union of India*,² the issue was whether the word ‘law’ in Article 13 of our constitution included amendments and if yes, they must be declared void when they breach fundamental rights. The five-judge bench struck the down the argument of ‘law’ including constitutional amendments. This case was followed by *Sajjan Singh v. The State of Rajasthan*,³ it followed the ratio of the previous case but in their dissenting opinion, Justice Hidayatulla and Justice Mudholkar questioned the importance being given to the fundamental rights as the unlimited power being vested in the legislature to amend has considerably lowered the value of these rights. One of the major reasons why the court decided to stick to the previous ratios is to prevent the chaos of reverting the land reform laws etc. This reasoning was criticised by Professor A.R. Blackshield who said to prevent such situations the Supreme Court could’ve just overruled the previous judgement prospectively.⁴

In 1967, the issue of parliamentary power to amend the fundamental rights was raised in *I.C. Golak Nath v. State of Punjab*,⁵ the majority of the eleven-judge bench ruled that the constitutional amendments fell within the purview of Article 13(2) and the courts could interpret and if found violative could declare these laws void and invoked the doctrine of Prospective overruling. This case was the beginning of judicial activism in the Indian courts. The approach while expressing the dire need for limitations on the parliament’s power to amend was done in the traditional interpretative and positivist way. The court directly expressed that it would not merely interpret the constitution but would do so from the view of what it ought to be by bringing in the concepts of natural law. The upfront political stance and inclusion of political philosophy by the court led to a change in power relations between the court and the parliament. The political aftermath of the decision included Chief Justice K. Subba Rao resigning and running for the office of the president followed by the Supreme Court declaring bills which were in favour of the party in power to be void. This gave an advantage to the opposition party and the court identified to an ally of the Anti-Indira Gandhi lobby. Then Prime Minister, Mrs Indira Gandhi retaliated by introducing the Twenty-fourth, Twenty-fifth and Twenty-sixth amendments to the constitution.

² [1952] SCR 89.

³ [1965] SC 845

⁴ A.R. Blackshield, ‘*Fundamental Rights and The Institutional Viability of The Indian Supreme Court*’. (1966)

⁵ [1967] SC 1643

These amendments essentially tried to bring back the powers of the government, removed the right to property and abolished privy purses.

III. BASIC STRUCTURE DOCTRINE

These amendments were challenged in *Kesavananda Bharati v. The State of Kerala*,⁶ popularly known as the judgement which saved our constitution. The thirteen-judge bench with a majority of 7:6, ruled that the parliament which has unlimited power at that point to amend cannot redraft the constitution just on the basis of amendments. It said in the name of amending the parliament cannot take away the basic structure of the constitution like secularism, democracy etc. Yes, they do have the power to make amendments, but after the amendments the constitution should still remain within its meaning without any grave changes to its basic structure and values. What construes 'basic' will be decided by the Supreme Court. Justice Khanna states that the word amendment itself is a limitation on the powers. As the word in itself does the envisage the right to destruct. This decision became crucial in cases where the government's stance is anti-majoritarian, where the will of the representatives does not represent the will of the people.⁷ By limiting the parliament's power, the Supreme Court prevented any future event which could lead to complete collapse of the constitution and would've proven to be detrimental to the people. The power to amend from now is not limitless and is always coextensive with that of the people.⁸ This makes the Supreme Court the 'Guardian of the constitution'. As the power to interpret, protect and keep it flexible lies with the Supreme Court which acts as a safety valve.⁹

IV. POLITICAL AFTERMATHS AND JUDICIAL SUPPRESSION

At the time of this judgement, the then majority party was at its peak of popularity and could not afford to lose the majority and at the same time could not comply to a decision which has limited their powers to a fairly large extent and might cost them their political future as the laws were now under the watch of the court which could invalidate them if needed. So, the government tried to respond conclusively. The then Chief Justice of India, S.M Sikri was due to retire shortly after this judgement. The government deferred the traditional practice of replacing him with the senior most judge instead they appointed A.N. Ray as the Chief Justice of India. This led to the three judges who were senior to him to resign which dropped the majority of the judgement to four which further reduced to one after which an emergency was declared in the country. The government's attempts to surpass the basic structure judgement did not stop here. In *Indra Gandhi v. Raj Narain*,¹⁰ in which Indra Gandhi's election to the Lok Sabha was challenged. While the appeal was to be heard in the Supreme Court, the

⁶ [1973] SCC 225

⁷ Zia Mody, 'Ten Judgements that changed India', First published by Penguin Books India in 2013.

⁸ Jayadevan, 'Interpretation of the Amending Clause', p. 243

⁹ Zia Mody, 'Ten Judgements that changed India', First published by Penguin Books India in 2013.

¹⁰ [1975] SC 2299

parliament passed the Thirty-Ninth Amendment Act, 1975, which categorised the election of the President, Vice-President, Prime Minister and the Speaker of the Lok Sabha to be beyond the scrutiny of the courts. This amendment was further challenged with respect to the electoral laws to be constitutionally invalid as it breaches the basic structure. This was a clear try by the representative government to shield the Prime Ministers position. The court tried to escape a scuffle with the political parties and avoid destabilisation of the court as the executive had the power to appoint judges and have previously used this power after the basic structure judgement with unethical intentions. For these reasons, they chose the safer option to uphold Indra Gandhi's election and invalidate the amendment. The representative party took advantage of the euphoria generated by this decision and quickly turned it into a mass campaign. In Seervai's view, this judgement provided 'social legitimacy' to the Basic Structure doctrine. This amendment bill was seen a move which showcased 'autocratic arbitrariness'¹¹ and this decision of the Supreme Court restored the faith in rule of law.

These cases show how political parties and their representatives have been trying to control judicial activism and gain unlimited power. The attempt to dissolve judgements and pass bills which are favourable to the parties have become frequent over the years. The struggle of the Supreme Court to keep the government in check and act as the safety valve for the constitution has now enabled it to withstand unforeseen circumstances. With changing political parties every five years the focus of the Acts also change. Commissions, bills which have been put into work during the term of a particular party fails to see the light when there is a change in representatives. Even after sixty-eight years of independence, our political representatives fail to recognise the need to not propose bills which represent and will of the people and do not infringe their fundamental rights.

For example in *Shreya Singhal v. Union of India*,¹² the constitutionality of Section 66(A) of the Information Technology Act, 2000 was challenged. Two women who expressed their displeasure on an online platform at a bandh called in by a major political party were arrested under this clause. It states that any 'objectionable content' posted on the internet might make the person liable for an arrest. The Supreme court held the law to be illegitimate and said that the provisions mentioned were too vague and amount to censorship. Also, it can cause a chilling effect which might force people to eliminate any form of dissent in their modes of expression. It also violates Article 19(1)(a) of our constitution. The section has no connection with public order and incitement. Even after being a blatant violation of the Fundamental Rights, the centre made a plea to be committed to free speech and only use the section in a reasonable manner. The question which arises here is - what dissent is the state trying to censor? Against the party itself to make sure there no negative campaign against them? Or is it for the benefit of the citizens?. The two women were arrested for voicing their opinion against the government.

¹¹ Seervai, *The Emergency, Future Safeguards and Habeas Corpus Case*, p.4.

¹² [2015] SC 1523

This particular instance where the online post was held to be 'aggressive' and 'inciting' enough to make an assumption as to the object of this law.

The National Judicial Appointments Commission (NJAC) was proposed to replace the existing method of appointing judges. It was proposed to have the Chief Justice of India, two most senior judges of the supreme court, Law Minister, and two 'eminent' persons on the panel who would have the absolute power to appoint judges. This bill was criticised for involving political interest in the works of the judiciary and making the system opaque. There can be favouritism based on caste, creed, political stances etc. This commission was struck down by the Supreme Court, which stated that it might be detrimental to share the 'wisdom' of appointing judges with political executives and it would be the best fit if the judiciary is kept independent from other bodies of the government to prevent the possibilities of corrupting the system.

V. CONCLUSION

Judicial review was called out for being an undemocratic body when held in comparison to the representative body which in-turn was criticised for not always being able to represent the 'will of the people'. In this constant struggle to enforce their powers at the cost of each other can be made into a smoother process solely by cooperation. This can be achieved by following Ronald Dworkin's 'policy principle'.¹³ Which suggests the court to not interfere with the choice of the policy unless it infringes the fundamental rights or the basic structure of the constitution. As stepping on each other's toes has will only cause a possible collapse of either of them. By giving maximum respect to the legislature, the judiciary can retain the doctrine of the basic structure without being the target of political powerplays. The basic structure doctrine should not be used to determine judicial or parliamentary supremacy but rather must be seen as the will of the people against that of the ruling.¹⁴ Also, an effective way to enforce constitutionalism in order to limit government's power from being arbitrary and a representation of the will of the political body is for the courts to exercise judicial activism within its limit and basic structure as its base.

VI. BIBLIOGRAPHY

- Constitutionalism and changing Paradigm, retrieved from: <http://www.legalserviceindia.com/article/1385-Constitutionalism---changing-paradigm.html>
- C. Raj Kumar, *Constitutionalism and Judicial Governance*, The Hindu. Retrieved from: <http://www.thehindu.com/todays-paper/tp-opinion/Constitutionalism-and-judicial-governance/article14859181.ece>

¹³ Ronald Dworkin, *Taking Rights Seriously*, supra n. 39.

¹⁴ S.P. Sathe, *Judicial Activism: Imposing Restrictions on the Constituent Power*.

- Jayant Sriram, *SC strikes down 'draconian' Section 66A, The Hindu*. Retrieved from: <http://www.thehindu.com/news/national/supreme-court-strikes-down-section-66-a-of-the-it-act-finds-it-unconstitutional/article10740659.ece>
- *NJAC v. Collegium: the debate decoded*, The Hindu. Retrieved from: <http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>
- Zia Mody, *Ten Judgements That Changed India*, Penguin India, First Published In 2013.
- S.P. Sathe, *Judicial Activism: Imposing Restrictions on the Constituent Power*.