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RECENT DEVELOPMENTS IN CONSTITUTIONAL LAW IN INDIA

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I. INTRODUCTION

Constitution of India is understood as a dynamic, ever evolving document that has been drafted by our founding fathers in order to keep pace with the changing times, in order to safeguard a certain essence of being secular, socialist, sovereign, democratic republic. However, as constitution grows with time, it invites certain values to be challenged, better yet redefined. The theme of the article herein is not to bring about reference points of one such incident in the last year wherein the existing constitutional laws was pushed to its limits, the theme is to study a pattern of changes that caused a revolution to come about. Revolution does not start over night, there are no particular points of reference where the change takes place, it happens over time, slowly and gradually, one leap at a time. 'Constitutional revolution' particularly in this respect would be far more moderate than other revolutions, as it requires the change in perception of an entire society with respect to the values that have been endowed upon us by our founding fathers.

Constitutional Revolution is often understood when it is at its penultimate stage, and when you have a series to look at in order to identify the means to this revolution. The means of this particular end, most often than not, lies in identifying a political rapture from which such a constitutional configuration took place[2].

Over the past year and a half, the Indian constitutional history has been punctuated with a rich set of judicial pronouncements over a variety of topics concerning the root of values enshrined in the Constitution of India. It seems like a good time to stand and look back at these landmark judgements that have rolled a revolution in motion. While perusing through these judgements one must ask themselves if they can pick up on the stench of the political rapture (if there is any) that caused this revolution in the first place.

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[2] Jacobsohn, G. J. (2012). Making Sense of the Constitutional Revolution. *Constellations*, *19*(2), 164–181. doi: 10.1111/j.1467-8675.2012.00686.x

II. RECENT CONSTITUTIONAL DEVELOPMENTS AND CASES

For a well-functioning utopian democracy, there were three pillars that were put in place to hold that weight up – Legislature, Executive and the Judiciary. These independent organs of a country wsere aligned to keep other in check if they have and shortcomings. Their independence from each other yet their relationship with the other two limbs is absolutely essential for the country's machinery. It seems that the BJP-ruling government has caused quite the stir along with the judiciary this last few years. Some of the pronouncement that have been looked at during the time of (Retd.) Justice Gogoi has been far more explicit in forwarding the party propaganda. As the judiciary struggles to balance out the pressure the ruling government has been putting onto them while maintain the sanctity of their independence, the judiciary has had a rather eventful couple of years.

This section of the article shall briefly deal with the landmark decisions of Judiciary and Legislature that have made a noteworthy impact in the constitutional law of India as it stands today. The cases have been put in a chronological order for the convenience of the reader.

1. Indian Young Lawyers Association & Ors. vs State of Kerala & Ors[3].

FACTS AND ISSUES:

The following issues were listed out for consideration:

(i) Whether the practice of excluding the female gender amounts to "*discrimination*", violating Articles 14, 15 and 17? Is it protected under the heading of 'morality' as used in Articles 25 and 26 of the Constitution?

(ii) Whether such an exclusion constitutes "*essential religious practice*" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

(iii) Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?

(iv) Whether such a restriction violates Kerala Hindu Place of Public Worship Act, 1965?

[3] MANU/SC/1094/2018

KEY TAKEAWAYS:

By 4:1 majority, the Court held that the restriction of women in the Sabarimala Temple is unconstitutional, as it violated the fundamental right to equality, liberty and the freedom to profess, practice and propagate religion as encompassed in the Articles 14, 15, 19(1), 21 and 25(1) of Constitution of India.

Herein the constitutional validity of Rule 3(b) of the Kerala Hindu Place of Public Worship Act 1965 was also challenged. The Court responded to this by opining that –

"Therefore, it can be said without any hesitation or reservation that the impugned Rule 3(b) of the 1965 Rules, framed in pursuance of the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of such women to practise their religious belief which, in consequence, makes their fundamental right under Article 25(1) a dead letter. It is clear as crystal that as long as the devotees, irrespective of their gender and/or age group, seeking entry to a temple of any caste are Hindus, it is their legal right to enter into a temple and offer prayers. The women, in the case at hand, are also Hindus and so, there is neither any viable nor any legal limitation on their right to enter into the Sabarimala Temple as devotees of Lord Ayyappa and offer their prayers to the deity"[4].

Therefore, Rule 3(b) of the Kerala Hindu Places of Public Worship Act, 1965 was struck down on being unconstitutional.

With regards to morality as conceived in Article 25(1), the Court was of the opinion that the term cannot be looked at in a narrow and skewed manner. It has to be widened in order to resonate the meaning of constitutional morality. Echoing with that, the court held that –

"*Neither public order nor public health will be at peril by allowing entry of women devotees of the age group of 10 to 50 years into the Sabarimala temple for offering their prayers. The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their*

[4] Ibid.

prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality."[5]

With regards to the question of whether the practice being essential to the Hindu religion, the Court answered in negative. Infact, they held that it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity.

This was an important judgement in terms of elevating the status of constitutional morality when in comparison to public morality as encompassed in Article 25(1). It was also a significant victory for the religion to inculcate the fundamental rights, the most primary of which is the Right to Equality.

2. 10% RESERVATION FOR THE ECONOMICALLY WEAKER SECTION (JANUARY 2019)

On 9 January 2019, Constitution (One Hundred and Third Amendment) Act, 2019 was put into motion enabling the State to make reservations in higher education and matters of public employment on the basis of economic criteria of the citizens.

The Act meets this end by amending Articles 15 and 16 of the Constitution, introducing two new subsections - 15(6) and 16(6).While the first one empowers the State to make special provisions for the advancement of any economically weaker section of citizens, the latter makes room for reservation in appointments. Both the set of reservations are independent of the existing reservations that have already been put in place. The amendment further states that 10% would be the upper limit of the reservations for the economically weaker section in the society. As mentioned earlier, this step would be introducing a 10% quota for the general-category poor is in addition to the currently provided 27.5% quota for the OBC (other backward class) category, 15% quota for SCs (Scheduled Castes), and 7.5% quota for the STs (Scheduled Tribes), collectively known as the socially and educationally backward classes[6].

[5] Ibid.

[6] Rautray, S. (2019, August 1). 50% ceiling can be broken: Government in SC on 10% EWS quota . *Economic Times*. Retrieved from https://economictimes.indiatimes.com/news/politics-and-nation/will-decide-if-pleas-against-10-quota-are-to-be-referred-to-constitution-bench-says-sc/articleshow/70453115.cms

3. AJAY MACKEN V. UNION OF INDIA [7](MARCH 2019)

FACTS:

The case was pivoted around a public interest litigation filed with regards to forced eviction of 5000 dwellers of jhuggijhopribasti (hereinafter referred as 'JJ Basti') at Shakur Basti. Officials of Northern Railway in the Ministry of Railways, Union of India along with Delhi Police to commence demolition, thereby forcing eviction of thousands of people. The 1200 jhuggis were providing shelter to a tentative of 5000 people. The demolition rendered the 5000 people homeless thereby violating their right to life and liberty. It was brought to Court's notice that no prior notice of demolition was given to the people staying in the JJ Basti, neither was a survey undertaken in order to determine how many people would be homeless. The Petitioner thus sought for reliefs in relation to the forced eviction. in Post the demolition there were inadequate measures taken by the Ministry of Railways that included – inadequate distribution of food packets, inadequate medical relief, insufficient lighting in the area.

The case thus emphasized on the need of recognising the right to adequate housing of such displaced people.

KEY TAKEAWAYS:

- The Court herein dealt with two issues primarily – the first was with regards to the 'Right of adequate housing' and its subsidiaries, one of which is 'Right to the City', although discussed widely in the international law, the concept has barely been manifested in the Domestic law.
- Taking from the 'New Urban Agenda', the Court acknowledged the components that essentially formed the 'Right to the City', and opined that –

  "*The RTTC acknowledges that those living in JJ clusters in jhuggis/slums continue to contribute to the social and economic life of a city. These could include those catering to the basic amenities of an urban population, and in the context of Delhi, it would include sanitation workers, garbage collectors, domestic help, rickshaw pullers, labourers and a wide range of service providers indispensable to a healthy urban life. Many of them travel long distances to reach the city to provide services, and many continue to live in deplorable conditions, suffering indignities just to make sure that the rest of the population*

[7] MANU/DE/0961/2019.

is able to live a comfortable life. Prioritising the housing needs of such population should be imperative for a state committed to social welfare and to its obligations flowing from the ICESCR and the Indian Constitution. The RTTC is an extension and an elaboration of the core elements of the right to shelter and helps understand the broad contours of that right. As will be seen hereafter, the 2015 Policy implicitly acknowledges the RTTC and seeks to expand and deepen the right to shelter in more meaningful ways."[8]

- The Court also looked at the case of Olga Tellis v. Bombay Municipal Corporation[9], to firstly, appreciate the link between right to shelter and right to livelihood and how they form a vital part of the Right to Life; secondly to concur that an attempt of depriving either of the above would mandate compliance with basic principles of natural justice, one of which is to provide a hearing to those who were forcefully evicted. The court opined that since there was no survey done to measure the effects of such an eviction and demolition, the Railway Ministry was at fault.
- *"The right to housing is a bundle of rights not limited to a bare shelter over one's head. It includes the right to livelihood, right to health, right to education and right to food, including right to clean drinking water, sewerage and transport facilities."*[10]

4. ABROGATION OF ARTICLE 370 (AUGUST 2019)

The most important and brazen of all developments was the amendments brought forth with regards to extending India's territory. On 19th December 2018, there was a proclamation was issued by the President of India under Article 356 of the Constitution, declaring the President's Rule'. It was implied that from now on the powers of the state legislature would be transferred and thus "exercisable by or under the authority of Parliament". The objective of the proclamation was to clarify that any reference in the Constitution to the "Governor" or "Legislature" of Jammu and Kashmir would imply a reference to the President and Parliament respectively[11].

Thereafter, on 5th August 2019, the Presidential order C.O. 272 was passed, which superseded the 1954 order including special provisions like Article 35(c) and Article 35A which were applicable to Jammu and Kashmir. Not only that, it also amended Article 367

[8] Ibid.
[9] (1985) 3 SCC 545
[10] MANU/DE/0961/2019.
[11] Chandrachud, A, *The Abrogation of Article 370*. Festschrift in Honour of Nani Palkhivala (January 2020, Forthcoming).

of the Constitution by replacing the words "Constituent Assembly" in Article 370(3) with that of "Legislative Assembly". Due to the imposition of President's rule was already imposed in Jammu and Kashmir, it was now to be understood that the ruling party, Bhartiya Janata Party-dominated Parliament would step in acting as the "Legislative Assembly".

This asymmetrical representation was a major reason of going forward with the step abrogating or rather de-operationalize Article 370. To empower this further, there was an issuance of a recommendation to the President followed, by both the houses of Parliament, to de-operationalize Article 370. On 6th August 2019, the President issued a declaration, C.O. 273, essentially making Article 370 redundant. On 9th August 2019, 'Jammu and Kashmir Reorganization Act, 2019' was enacted, which divided up the state of Jammu and Kashmir into two Union Territories - Jammu and Kashmir, Ladakh.

What transpired from this exercise was to indirectly de-operationalize Article 370, the Presidential Order, C.O. 272 was utilized to amend Article 370 (3) by the method of making additions to Article 367.

5. AYODHYA JUDGMENT[12] (NOVEMBER 2019)

FACTS:

The case revolves around Ayodhya, a city on the banks of River Sarayu, in Uttar Pradesh, that is acknowledged as the place of birth of Lord Rama according to the Hindu mythology. As historical evidences suggest that India stood to welcome a series of emperors, it is believed Babur, the first Mughal emperor demolished the Temple which was believed to be the birthplace of Lord Rama and built a mosque instead.

In 1992, the mosque was demolished by Kar Sevaks and thereby the dispute between the Muslims and Hindus arose. The dispute was obviously politically motivated and involved nothing but electoral arithmetic, but it became significant in order to preserve the value of 'secularism' as envisaged in the Constitution of India.

[12] (2019) SCI Civil Appeal Nos 10866-10867 of 2010.

Thus, the Hindu community claimed that the disputed property was the birthplace of Lord Ram, an incarnation of Lord Vishnu, thereby the temple that had existed before the demolishment, the property thus should be given to Hindus for use. The Muslim community claims it as the site of the historic Babri Masjid built by the first Mughal Emperor, Babur, therefore, it should continue to be in use as a mosque.

The Allahabad High Court, in 2010, by a 2:1 majority, ruled three-way division of disputed area between Sunni Waqf Board, the Nirmohi Akhara and Ram Lalla. The inner courtyard, where the dome once stood, went to the deity. The Ram Chabutra and Sita Rasoi nearby went to the Akhara. Each side was expected to give entry and exit rights to the other. Since neither of the sides were happy with such a division, Supreme Court was approached to reconsider the issues.

KEY TAKEAWAYS:

- The Court discusses 'secularism' as a constitutional value, wherein bringing reference from S.R. Bommai, the Court held that Secularism is more than passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. In accordance to the Places of Worship Act, it was opined that in consonance Section 4(1) and 4(2) of the act, the only exception of the cases not to be entertained by the court would be those which had been instituted on the ground that the conversion of the religious character of the place had taken after 15 August 1947 and was pending at the commencement of the Places of Worship Act[13].
- The Court directed the Central Government to formulate a scheme pursuant to the powers vested in it under Sections 6 and 7 of the Acquisition of Certain Area at Ayodhya Act 1993, within three months of the pronouncement of this judgment. The scheme would encapsulate a Trust with a Board of Trustees, or any other appropriate body under Section 6. Further, the possession of the inner and outer courtyards would be transferred to the above-mentioned body[14].
- The court also directed that a suitable plot of land admeasuring 5 acres be handed over to the Sunni Central Waqf Board. The land shall be allotted either by: (a) The Central

[13] Ibid.
[14] Ibid.

Government out of the land acquired under the Ayodhya Act 1993; or (b) The State Government at a suitable yet prominent place in Ayodhya[15].

- The Court also empowered the Sunni Central Waqf Board with the liberty, to take all necessary steps for the construction of a mosque on the allotted land.

6. CITIZENSHIP AMENDMENT ACT (DECEMBER 2019)

Introduced by the Minister of Home Affairs, Amit Shah, on 9th December 2019, the Bill faced a long series of opposition from being tabled and passed by the Parliament to being enacted and effective throughout the country. The Act, formerly known as the Citizenship Amendment Bill, 2019 (hereinafter referred as the 'CAB') and subsequently the Citizenship Amendment Act, 2019 (hereinafter referred as the 'CAA') was introduced to bring in the following changes in the citizenship regulations in the country:

The controversial Act targeted a particular set of illegal immigrants, that were arbitrarily chosen by the Central Government, for the purposes of granting citizenship. It was proposed that illegal immigrants from the countries of Pakistan, Bangladesh and Afghanistan will be offered benefits of citizenship.

The Act specifically excluded "persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians" from the countries of Pakistan, Bangladesh, and Afghanistan, thereby targeting the Muslims from these countries. Further, the Act would mandate that such people should be migrating only due to religious persecution, or otherwise they would be not be allowed to benefit from the citizenship laws in India.

The amendment also referred to the method of acquiring citizenship by the process of naturalization if the individual had been residing in India or has been a central government employee for the past 12 years, especially 11 years out of the preceding 14 years. Further, with regards to a particular set of illegal migrants hailing from a particular set of countries, the number of years of residency was relaxed to five years from 11 years.

[15] Ibid.

III. CONCLUSION

According to Gary Jacobson, a constitutional revolution can be said to exist when we are confronted with a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity[16]. According to the six milestones discussed above, it is safe to say that the constitutional weather wane has been shifting in a newer direction that seems to encapsulate a modified version of the definition of the values mentioned in our Constitution. While the aim is to grow closer to becoming a secular, socialist, sovereign, democratic, republic; it has to be done without changing their meaning as per the ruling government that come over time.

[16] Jacobsohn, G. (2014). Theorizing the Constitutional Revolution. *Journal of Law and Courts*, *2*(1), 1-32. doi:10.1086/674453