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Justice and Its Discontents

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This voluminous study of 75 years of the Constitution examines key constitutional changes since Independence covering property rights, economic and social justice, reservations, personal liberty, and Union-State relations.

It is said that the late freedom fighter and later opposition stalwart Acharya J.B. Kripalani, who lived to the age of 93, once lamented during his last years after several surgeries and prolonged medical treatment: "My constitution is gone. All that's left are amendments." The question this book raises is whether the Indian Constitution, with its 106 amendments in a little over 75 years of existence since its adoption on 19 November 1949, has also met the same fate.

Though it deals with much else as well, this is one of the key enquiries of this sprawling 1,012-page work by historian and constitutional law expert V. Krishna Ananth.

Ananth starts by tracing the inception and development of the idea of preparing a wholly "Indian" Constitution, written from scratch by representatives of the Indian people. The alternative would have been to accept some tweaked hand-me-down of the self-governance models the British had imposed in the final decades of their rule, particularly the Government of India Act, 1935.

The "copy-paste" route would have been a much less onerous option for a newly independent country, especially one grappling with widespread communal riots and the burden of millions of refugees following Partition. Even so, both the Congress party and some of the elected provincial assemblies specifically passed resolutions rejecting it.

As he delineates the rigorous, three-year-long process that followed, Ananth describes how an elected Constituent Assembly framed the Constitution and engaged in endless debates over every clause of every Article. In doing so, he firmly scotches a notion advanced by some right-wing sections, especially in the years following Independence-that despite the noble intent of having a wholly Indian Constitution, there is nothing intrinsically "Indian" about ours, and that it does not draw sufficiently from Indian political and cultural traditions.

No doubt, the Constitution does replicate some of the Articles of the 1935 Act, such as provisions on the division of powers between the Centre and the states, the setting up of bicameral legislatures, and more. It has also borrowed various positive aspects of the US, Irish, Canadian, French, and Australian constitutions. However, a host of its features-in particular, the provisions for Panchayati Raj, reservations for historically oppressed sections, and more-are also wholly original.

Focus on changes to the Constitution

The bulk of the book, and its most interesting part, looks at a number of the crucial changes the Constitution has undergone since its adoption. Ananth closely examines, in particular, the tussle between the legislature and the judiciary over Article 31, which made the right to property a fundamental right, and Article 38, which set as the first of the directive principles the striving for "a social order in which justice, social, economic and political, shall inform all the institutions of national life".

> Seventy-five years on…[the book argues]… the Constitution has not been distorted; on the contrary, the ideals the Constitution framers set for this country have only been better explicated by the amendments.

After a step-by-step scrutiny of the pursuit of economic justice and the obstacles it encountered in the first three decades after Independence, Ananth moves on to social justice. Once again, he probes in immense detail how, despite legal impediments, reservations of jobs as well as seats in educational institutions for the backward castes-or Other Backward Classes (OBCs), as they are officially termed-came to be. (Job reservations for the Scheduled Castes [SCs] and Scheduled Tribes [STs] were guaranteed in the Constitution and have remained, apart from a few small gains, unchanged since the Constitution was adopted.)

Ananth also tackles other aspects. These include the crucial matter of personal liberty, which faced a serious threat from constitutional changes in the 1970s and how these changes were subsequently undone. He also examines how evolving questions relating to Centre-state relations in a federal republic were tackled by the courts.

Overall, Ananth's conclusion is optimistic. Seventy-five years on, he argues, the Constitution has not been distorted; on the contrary, the ideals the Constitution framers set for this country have only been better explicated by the amendments. If anything, it is the Constitution framers whom Ananth faults for not having set forth their idea of India explicitly enough.

"Their assumptions regarding key provisions and clauses contributed to a lack of understanding of the Constitution's intended meaning," he writes. "This was not merely an oversight by the legal drafters of the Constitution or by the leaders who guided the Constituent Assembly; it constituted a betrayal of the republic's populace, particularly the poor and the oppressed, effectively denying them their rightful share of the fruits of their labour."

Original lacunae

What, in Ananth's view, did the Constitution's framers get wrong? He argues that Article 31-which affirmed the right to property and adequate compensation for any land taken over by the state-became the single major hurdle to land reform. It required at least three amendments, the First, Fourth, and 17th Amendments, to be even partially overcome.

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He also finds fault with the wording of two other fundamental rights, in Article 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law") and Article 22(4) ("No law providing for preventive detention shall authorise the detention of a person for a longer period than three months…"). In practice, he maintains, these words assisted the curbing of individual freedoms.

He further suggests that the need for special measures for OBCs, especially reservations in jobs and educational institution seats, was not sufficiently emphasised in the Constitution. There was just one mild-sounding article, Article 340 ("the President may by order appoint a Commission … to investigate the conditions of socially and educationally backward classes … and to make recommendations as to the steps that should be taken … to remove such difficulties and to improve their condition…"), devoted to it, apart from a few caveats appended to the fundamental rights in Articles 15(4) and 16(4). These caveats simply stated that ensuring equality and non-discrimination for all citizens did not bar the state from making special provisions for the underprivileged.

Finally, he notes that Article 356 ("If the President, on receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation assume to himself all or any of the functions of the Government of the State …") was a standing invitation for misuse. It allowed the union government to dismiss any opposition state government that annoyed it, even if that government was functioning perfectly well.

This lacuna was indeed exploited in the first four decades after Independence. Fortunately, however, the historic March 1994 Supreme Court verdict in *S.R. Bommai versus the Union of India* sharply curtailed the practice. Contrary to previous interpretations of Article 356, the Bommai judgment laid down that even a presidential proclamation under this Article could be subject to judicial review, to ensure that it had no mala fide intention behind it. It also held that a state government's majority had to be tested on the floor of the House before it could be dismissed.

First Amendment

What was the hurry to pass the First Amendment as early as June 1951, even before the first general election of January 1952 had been held? It was because, as soon as the Congress government took its first minimal step towards land reform by abolishing zamindari, a measure it had committed itself to through several resolutions starting from the early 1930s, it encountered judicial resistance.

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Zamindars began challenging the constitutional legality of the Acts passed by different states to abolish zamindari, and in one crucial case the court agreed with them. In March 1951, the Patna High Court struck down the Bihar State Management of Estates and

Tenures Act, which was challenged by the Maharaja of Darbhanga, Kameshwar Singh, maintaining that it went against Article 14 (equality for all before the law) of the Constitution and Article 31.

To nullify the objections raised by the Patna High Court, the First Amendment made crucial alterations to the text of a number of the fundamental rights, particularly adding two new paragraphs to the property-related right, Article 31 (Paras 31A and 31B). Crucially, while the original Constitution had eight broad sections or Schedules, the First Amendment added a Ninth Schedule, which would comprise laws immune from judicial oversight, and in which it placed Article 31B.

There were two other important aspects to the First Amendment, unrelated to land reform -the first near-routine, the second extremely controversial. With reservations for SCs and STs in technical education institutions (as distinct from those in government jobs) not having been explicitly endorsed by the Constitution, the First Amendment made changes to ensure these would continue.

The other modification followed governmental faceoffs with certain publications where the courts supported the latter. It imposed significant curbs on freedom of speech and expression and has been much criticised since. Ananth has discussed the subject at length in an earlier work, *Between Freedom and Unfreedom: The Press in Independent India* (2020), but in this volume he deals with it somewhat cursorily, refusing to be judgemental.

Alas, even the First Amendment proved inadequate to ensure smooth land reforms. In December 1953, the Calcutta High Court struck down the West Bengal Land Development and Planning Act 1948 on the ground that the compensation it offered was too meagre. A fresh, Fourth Amendment was then brought in, which put all matters relating to compensation for state-acquired property outside legal purview.

Golaknath

Zamindari may have been abolished successfully, but a second round in the legislature-judiciary tussle began once state governments moved on to imposing land ceilings. Ananth notes that the 17th Amendment, passed in May 1964, had to be made primarily to close various loopholes-especially in the definition of "estates"-that large landholders were using to evade ceiling laws. Hoping to pre-empt more judicial roadblocks, the government also used the 17th Amendment to shift a large number of land-ceiling Acts into the Ninth Schedule.

> …[T]he main takeaway from the [Golaknath] verdict was its observation that Parliament's power under Article 368 …was not absolute.

However, far from ending, the confrontation grew more bitter thereafter. The next big faceoff was the *I.C. Golaknath versus the State of Punjab* case, where the descendants of one Henry Golaknath, who had headed the Presbyterian Church in Jalandhar and left behind considerable property, took issue with the Punjab Security of Land Tenures Act 1953. The Act limited each descendant's holding to 30 acres, and they claimed that it violated the fundamental rights provided in Articles 14, 19 and, obviously, 31.

While the Supreme Court's February 1967 judgment did not entirely agree with the petitioners, the main takeaway from the verdict was its observation that Parliament's power under Article 368 ("Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution") was not absolute. Parliament had no authority to tamper with fundamental rights.

The government was not prepared to take such a snub lightly, even more so after Prime Minister Indira Gandhi had consolidated her political position with a whopping victory in the 1971 mid-term Lok Sabha elections. Though Ananth does not explicitly say so, it becomes clear from his account that, from this point on, the legislature-judiciary confrontation over land reform became less about ensuring economic justice and more of an ego battle, with the former determined to assert its supremacy.

Thus came the 24th Amendment in November 1971, intended expressly to nullify the Golaknath judgment. It altered Article 368 to emphasise that Parliament did indeed have the power to amend every fundamental right in any way it chose. The amendment thereby gave the state not only carte blanche for land reforms, but also the right to impose whatever authoritarian laws it wanted, curbing every kind of democratic freedom-all with constitutional approval.

The 25th and 26th Amendments followed, aimed solely at overturning judicial decisions which had struck down as unconstitutional two important moves of the government-the nationalisation of 14 private banks in the first case, and the termination of privy purses for

former maharajas in the second.

Kesvananda and 'Basic Structure Doctrine'

But the landholding classes struck back too. The next big development was the April 1973 Supreme Court judgment in the historic *Kesavananda Bharati versus State of Kerala* case. It had been filed by Kesavananda, head of the Edneer Mutt (monastery) in Kerala's Kasargod district, which owned vast tracts of land, challenging the constitutionality of the Kerala Land Reforms (Amendment) Acts of 1969 and 1971.

> [The Basic] structure encompasses features such as maintaining the government's democratic form, its secular and federal character, and ensuring individual freedoms, among others.

Prevailing by a narrow 7-6 majority on a 13-judge bench, this was the verdict that, for the first time, threw up the concept of a "basic structure" of the Constitution. It maintained that even though the 24th Amendment allowed Parliament to tinker with fundamental rights, it did not give it the power to alter the Constitution's basic structure. This structure encompasses features such as maintaining the government's democratic form, its secular and federal character, and ensuring individual freedoms, among others.

Fifty years on, the "basic structure doctrine" still sets the limits of legislative power. The Kesavananda judgment annoyed Mrs Gandhi so much that, for the first time in independent India's history, she broke the seniority tradition of the Supreme Court. She superseded three senior judges who had supported the majority decision to appoint the fourth in the seniority line, Ajit Nath Ray, who had opposed it, as the next Chief Justice of India.

Once the Emergency was in force from 26 June 1975, she went further, bringing in the 42nd Amendment. This totally negated the Kesavananda judgment, laying down-along with many other changes-that no law of any kind seeking to fulfil the directive principles, nor any constitutional amendment passed using Article 368, could be invalidated by any court.

But history works in strange ways. As it happened, Mrs Gandhi lost the next Lok Sabha election, bringing the opposition Janata Party to power in March 1977. A ragtag coalition pretending to be a unified party, the Janata Party led a government that was unstable from the start and collapsed in two and a half years.

Yet, within that short span, it managed to pass the 44th Amendment Act. This repealed all the negative, undemocratic features of the 42nd Amendment, while retaining the positive ones, thereby effectively restoring the "basic structure" concept. The amendment also sorted out the contentious "right to property" issue by removing it from the list of fundamental rights and making it a mere constitutional right instead, repealing Article 31 and inserting Article 300.

Social Justice

On social justice, unlike in the case of economic justice, the Congress government was slow off the mark. It set up the commission on socially and educationally backward classes suggested in Article 340 only in January 1953, more than three years after the Constitution had been adopted.

Ananth provides a vivid and incredibly detailed account of the developments that followed, including the reasons why the report of this First Backward Classes Commission, headed by social activist and author D. B. (Kaka) Kalelkar and submitted in March 1955, was never implemented, even though it recommended 25% reservation for OBCs in government jobs. He also describes how it was followed by different states setting up their own similar commissions.

> The landmark judgment in the consolidated case of 'Indra Sawhney and others versus the Union of India', delivered in November 1992, however, upheld the Mandal Commission's report as perfectly constitutional.

The judiciary was drawn into the matter after Karnataka (still called Mysore at the time), the first among the states to set up such a commission, passed an order in July 1961 seeking to implement its commission's recommendations. The order reserved 50% of jobs in the state government and seats in the state's technical colleges for OBCs. Taken together with the 15% reservation for SCs and 3% for STs that already existed, it raised the total reserved quota in the state to 68%.

Not surprisingly, this move saw a rash of petitions opposing it, which were grouped together and heard by the Supreme Court in the crucial case of M. R. Balaji versus the State of Mysore. The judges quashed the Mysore government's order, upholding some-though not all-of the petitioners' objections. The enduring impact of this judgment, however, was its observation that "speaking generally, and in a broad way, a special provision should be less than 50%"-a recommendation that several subsequent judgments related to reservations in other states also upheld.

It was this very limit that the Second Backward Classes Commission at the central level (Kalelkar's having been the first), set up in December 1978 and headed by former Bihar chief minister B.P. Mandal, adhered to. In its report it proposed that, since SCs and STs together already enjoyed 22.5% reservation in central government services, the quota for OBCs should be limited to 27%, even though OBCs comprised 52% of the population.

Even so, the Mandal report-submitted in December 1980 but implemented only a decade later in August 1990-sparked vehement opposition in the streets of North India and led to 23 public interest litigations against it in the Supreme Court. The landmark judgment in the consolidated case of *Indra Sawhney and others versus the Union of India*, delivered in November 1992, however, upheld the Mandal Commission's report as perfectly constitutional.

At the same time, it once again reinforced the 50% limit set by the Balaji case, while also laying down that the well-to-do section among the OBCs-those it called the "creamy layer"-should not draw advantage from the OBC quota.

Sadly, Ananth has chosen to conclude this section with the Indra Sawhney judgment, leaving out the major judicial developments of the three decades since. He makes only token reference to the surprising verdict in the *Janhit Abhiyan versus Union of India* case delivered in November 2022, which upheld the government's decision to pass the 103rd Amendment providing an additional 10% reservation for economically weaker sections (EWS) irrespective of caste. This raised total reservations well above 50%, jettisoning the views of the Balaji, Indra Sawhney, and sundry previous judgments.

Ananth merely opines that a five-judge bench, which decided the Janhit case, should not have gone against the Indra Sawhney judgment of a nine-judge bench, without any critique of the judges' arguments. So too, he omits any mention of a regrettable recent trend-dominant castes in different states seeking to inveigle themselves into the central and state OBC lists to gain competitive advantage in the scramble for government jobs, inevitably at the expense of the genuinely backward castes and thereby making a mockery of the very idea of social justice.

These include Jats in Uttar Pradesh and Haryana, Marathas in Maharashtra, Patidars in Gujarat, and more. This trend has led to a slew of cases-*Ram Singh versus Union of India (Jats)*, *Hardik Bharatbhai Patel versus the State of Gujarat (Patidars)*, *Jaishree Laxmanrao Patil versus the State of Maharashtra (Marathas)*, among others-whose verdicts ought to have been analysed.

Nor is this trend restricted to the OBCs. It was, for instance, the March 2023 verdict of the Manipur High Court in the case of *Mutum Churamani Metei versus the State of Manipur*, through which the relatively well-off Metei community was sought to be included in the Scheduled Tribes list, which sparked a civil war between the Meteis and Kukis in the state.

Preventive detention

To the layman, the difference in meaning between the expressions "due process of law" and "procedure according to law" may seem like hair-splitting. But in legal terminology, Ananth notes, there is a world of difference between the two-while the former emphasises law and justice per se, the latter focuses more on whether the correct procedure was followed by law-enforcing agencies.

> Ananth points out that the first preventive detention law was passed as early as February 1950, and that under newer Acts … preventive detention has always remained a feature of Indian life.

Thus, the precise words used in Article 21-"no person shall be deprived of his life or personal liberty except according to procedure established by law"-Ananth maintains, have had serious consequences for individual freedom. They have adversely impacted the right to life and personal liberty and left room for preventive detention, which should have had no place in a truly democratic country.

According to Ananth, it remains an enduring mystery as to how this expression found its way into the Constitution, even though the Constituent Assembly's sub-committee on fundamental rights had recommended the use of the more democratic "due process of law". In addition, Article 22(4), by simply including the term "preventive detention" in it, further legitimised its use, thereby making the

Constitution still more amenable to authoritarian manipulation.

Ananth points out that the first preventive detention law was passed as early as February 1950, and that under newer Acts with chilling acronyms such as MISA (Maintenance of Internal Security Act), POTA (Prevention of Terrorist Activities Act), UAPA (Unlawful Activities Prevention Act) and more, preventive detention has always remained a feature of Indian life.

His summing up is damning: "The post-colonial state has utilised its coercive power to suppress resistance, thereby obstructing movements by marginalised and productive classes within society. This suppression has been facilitated by laws which deny these groups their right to natural justice, particularly preventive detention laws."

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