

Judiciary, Constitution and recent judgements

November 12, 2018

Manifest Pedagogy

Tangential aspects of popular issues

Questions in UPSC on polity have mostly focused on polity and governance and less on constitution as a document in itself. The issue dealt above has brought these often neglected aspects like importance of constitution, constitutionalism role of Judiciary in maintaining the constitution and the readiness of general public to accept constitution as a fundamental document by derecognizing diversities, to the fore. Questions could be expected on these tangential issues.

In news

The role of judiciary with respect to interpreting Constitution has made news in the recent times in issues like Section 377, Section 497, Sabarimala Temple entry, Prohibition of bursting of crackers.

Placing it in syllabus

- 1) Indian Constitution
- 2) Judiciary

Static dimensions

- 1) Concept of Judicial Review
- 2) Judiciary and Federalism
- 3) Judiciary and Religion

4) Judiciary and Constitution

5) Contempt of Court

Current dimensions

1) Judiciary-Governance of Elites and Populism

2) Judicial decrees and the issue of their implementation

3) Originalist Vs Evolutionary/Living tree views and the concept of Transformative Constitution

Content

SC in giving its decisions on issues like Sabarimala temple entry, sec 497, sec 377 and prohibition of bursting of crackers has taken on an active role. The judgements and its impacts are covered almost everywhere. But out of these issues there are certain tangential issues which are given in the current dimensions above.

In all the above issues there are aspects like

1) Role of Judiciary in interpreting Constitution

2) Originalist Vs Evolutionary view

By the Constitution of India, Judiciary generally, specifically SC is considered the guardian of the Constitution. It is given the power of judicial review, one of the functions of which is to examine the Constitutionality of laws made. In interpreting the Constitution judges at times follow certain doctrines and at the times their discretion based on their experiences and expertise.

Through their discretion judges can take an Originalist or an evolutionary view of a particular issue or an article or a particular clause in an article.

Originalist view

1) Here the judge interprets the article or clause as it was intended by the Constitutional makers

2) For such a judge, Originality of the Constitution matters

For instance, an Originalist view would view Article 17 as abolition of Untouchability only under the confines of caste and not gender as it was not intended by the Constitutional makers.

Advantages of Originalist views

Preserve's the sanctity of the Constitution

Checks the arbitrary discretionary powers of the judges

Disadvantages

It makes the Constitution stagnant and impervious to change with changing times.

Citizens may become discontented with the Constitution and it may lead to social movements and revolutions.

Evolutionary/Living Tree view

1) In this case the judge interprets the clause as it means today

2) It goes beyond the meaning intended by the framers

For instance, an evolutionary interpreter would view "Untouchability in a broader sense which may also include discrimination or seclusion of women during the period of menstruation. Hence Sabarimala issue under such a reading finds place not only under articles like 14, 15, 25 – 28 but also under article 17.

Such a view expands the scope of article 17 and opens the door

for further reforms which may traditionally be not considered as part of article 17. Such a Constitution is called Transformative Constitution.

Transformative Constitution has two meanings:

1) The Constitution changes with time, according to rising aspirations

2) Social change in the country is led by the Constitution. That is Constitution is responsible for the transformation of the society.

The idea of transformative constitution got a huge fillip in Navtej Singh Johar vs UOI case of 2018 (section 377) in which two doctrines were used.

Doctrine of progressive realization of rights – certain rights cannot be given at a point of time and can only be progressively realized like economic rights under DPSP. Under the above case sexual orientation as a right though not visualized by constitutional framers but is included today as the constitution is considered a progressive document.

Doctrine of Non-retrogression or Non-regression

According to this a right given cannot be taken back or reversed. The decision of Section 377 being declared unconstitutional cannot be reversed. This ensures that the progress of the constitution as a document cannot be challenged.

These two doctrines make constitution of India truly transformative.

Advantages of Evolutionary/Living Tree view/ Transformative Constitution

1) Constitution will be a living document

- 2) It gets more inclusive over time
- 3) Constitution-the fundamental law of the land becomes harbinger of change
- 4) Transformative Constitution, acts as a safety valve by bringing peaceful change and preventing violence.

Disadvantages

- 1) Discretionary powers of judges may be used to alter the Constitution completely.
- 2) It may lead to Judicial Despotism.
- 3) Constitutional change may not necessarily lead to transformation in the society .For instance, though parts of sec 377 were struck down and now it may guarantee State protection but the attitude of people may need not necessarily change.

Judiciary, Intellectual Elitism and Populist issues

Judiciary is an institution of the learned who are trained in the specifics of law. Parliament and executive on the other hand are representatives of the people. The nature of the institutions being different, their decision making and factors determining them are different.

Parliament and executive who are answerable to public in their Constituency (vote bank) do not usually take any decision which does not appeal to the popular imagination. This takes an ugly form when the popular imagination is anti-legal, anti-institutional and anti-minority.

Example: Ban on women entry into Sabarimala, sec 377 etc. We hardly see Parliament taking any initiatives on these issues.

Judiciary on the other hand is not bound by the popular opinion and is accountable to the Constitution. So in recent

times, Judiciary has taken a strong stand over the above issues. At times the decisions may not be acceptable to the popular imagination like the removal of ban on temple entry for women, the sudden ban on bursting of crackers which did not go well with the manufacturers as livelihood was not given sufficient time to be addressed. Judiciary is today accused of being elitist and removed from popular will. This has opened up the debate of Populisms Vs Judiciary, which may be asked in different ways in the exam.

In the above issues the lack of implementation mechanism for court orders as a topic crops up which can be linked to Contempt of Court.

Contempt of Court has a base in the constitution of India in Article 129 (Court of Record) and Article 142 (enforcement of court decrees). It also has a statutory backing through Contempt of Court Act of 1971.

Civil contempt: Under the Contempt of Courts Act of 1971, civil contempt has been defined as wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.

Criminal contempt: Under the Contempt of Courts Act of 1971, criminal contempt has been defined as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:

Scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or

Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or

Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Sometimes it is a wilful disobedience like the disobedience of the people to court order in Sabarimala issue and at times it is out of ignorance like the decision of striking down of section 66A of IT Act 2008 in Shreya Singhal Vs UOI case of 2015 which has not been sufficiently publicized. Some of the factors for the latter are

There exists no official method for sharing information about important decisions, even those of constitutional import with the lower branches of administration.

Even the statute with regard to the decision like the Indian penal code is not immediately changed.

This lack of effective communication with the executive branch of the state hinders effective implementation of a judicial decisions.

The bureaucrats who are not legal experts will not integrate a court decision immediately in their administration leading to injustice to the public.

Judiciary and Federalism

Judiciary under its Original Jurisdiction (Article 13), is given the function to manage federalism as it has the Original and Exclusive power to deal with Central-State disputes. It uses various doctrines to manage federalism.

Recently this issue was in news when Tamil Nadu demanded different timings to burn crackers owing to different culture in South and respecting Federalism, Judiciary allowed it. It can be read in the context of importance of role of judiciary in managing federalism.

Test yourself: Mould your thoughts

Constitutionalism and populism need not necessarily go hand in hand. Discuss the statement in the context of recent judgement

on Sabarimala temple entry for women by the Supreme Court. Do you think India is ready for Constitutional Theocracy?