

THE FOUR PHASES OF CONSTITUTIONAL INTERPRETATION

Relevant for: Indian Polity | Topic: Indian Constitution - Historical underpinnings & Evolution

The Constitution of India being signed by Members of the Constituent Assembly in January 1950. | Photo Credit: [The Hindu Photo Archives](#)

The Constitution of India came into force 70 years ago, on January 26, 1950. The enactment of the Constitution was an ambitious political experiment – with universal adult franchise, federalism in a region consisting of over 550 princely states, and social revolution in a deeply unequal society. However, it was equally a unique achievement in terms of constitutional design. This Republic Day therefore provides an opportunity to take a step back from political contestations about the Constitution and consider how the text has been interpreted by the courts over the last seven decades.

In its early years, the Supreme Court adopted a textualist approach, focusing on the plain meaning of the words used in the Constitution. *A.K. Gopalan v. State of Madras* (1950) was one of the early decisions in which the Court was called upon to interpret the fundamental rights under Part III. The leader of the Communist Party of India claimed that preventive detention legislation under which he was detained was inconsistent with Articles 19 (the right to freedom), 21 (the right to life) and 22 (the protection against arbitrary arrest and detention). The Supreme Court decided that each of those articles covered entirely different subject matter, and were to be read as separate codes rather than being read together.

Amongst the most controversial questions in Indian constitutional law has been whether there are any limitations on Parliament's power to amend the Constitution, especially fundamental rights. In its early years, the Court read the Constitution literally, concluding that there were no such limitations.

In the second phase, the Supreme Court began exploring other methods of interpretation. Appeals to the text of the Constitution were gradually overtaken by appeals to the Constitution's overall structure and coherence. In the leading case of *Kesavananda Bharati v. State of Kerala* (1973), the Court concluded that Parliament's power to amend the Constitution did not extend to altering its "basic structure" – an open-ended catalogue of features that lies within the exclusive control of the Court. When Parliament attempted to overturn this decision by amending the Constitution yet again, the Court, relying on structuralist justifications, decisively rejected that attempt.

In this phase, the Court also categorically rejected the *Gopalan* approach in favour of a structuralist one in *Maneka Gandhi v. Union of India* (1978). Through this decision, the Court conceived of the fundamental rights as a cohesive bill of rights rather than a miscellaneous grouping of constitutional guarantees. The right to life was incrementally interpreted to include a wide range of rights such as clean air, reasonable accommodation, education, livelihood, health, speedy trial, and free legal aid. This paved the way for the Supreme Court to play an unprecedented role in the governance of the nation.

What was common between the first two phases of the interpretive story was that significant decisions involving the interpretation of the Constitution were entrusted to Constitution Benches (comprising five or more judges of court) and were carefully (even if incorrectly) reasoned. There was limited scope for precedential confusion, since matters which had been decided by

Constitution Benches and which demanded reconsideration were referred to larger Constitution Benches.

In the third phase, the Supreme Court's interpretive philosophy turned far more result-oriented than it had ever been. The Court often surrendered its responsibility of engaging in a thorough rights reasoning of the issues before it. Two factors underpinned this institutional failure. First, the changing structure of the Court, which at its inception began with eight judges, grew to a sanctioned strength of 31 (it is currently 34). It began to sit in panels of two or three judges, effectively transforming it into a "polyvocal" group of about a dozen sub-Supreme Courts. Second, the Court began deciding cases based on a certain conception of its own role – whether as sentinel of democracy or protector of the market economy. This unique decision-making process sidelined reason-giving in preference to arriving at outcomes that match the Court's perception.

The process of interpretation became instrumental to the particular sub-Supreme Court's view of the situation. The failure to give reasons contributed not only to methodological incoherence, but also to serious doctrinal incoherence and inconsistency across the law. This can be best described as panchayati eclecticism, with different Benches adopting inconsistent interpretive approaches based on their conception of the Court's role, and arriving at conclusions that were often in tension with one another. The imagery that panchayati eclecticism is meant to invoke is that of a group of wise men and women (applying the analogy, sub-Supreme Courts), taking decisions based on notions of fairness that are detached from precedent, doctrine and established interpretive methods.

To take just one example, three Supreme Court decisions produced an internally inconsistent and confusing electoral jurisprudence. In one case, the right to vote was held out as a privilege, which can freely be granted and denied by Parliament. In two other cases, the right to secrecy in voting and the right to cast a 'none of the above' (NOTA) vote were treated as fundamental rights, and were considered immune from the ordinary political process. This resulted in a situation where franchise could be denied to a large section of society, electoral disqualifications could be imposed liberally, but those who had the vote nevertheless had the right to cast an anonymous NOTA vote.

We are currently in the midst of transitioning from the third phase of constitutional interpretation to the fourth. In the fourth phase, the Court has acknowledged as critical to its interpretive exercise the purpose for which the Constitution has been enacted. Many constitutions attempt the task of entrenching a political compromise between the incumbents and challengers of the day. India's Constitution, at its very inception, was different. In enacting the Constitution, the founders of our Republic expressed a sense of unease with the status quo and raised expectations of root-and-branch social revolution and transformation. The Court is now beginning to interpret the Constitution in accordance with its revolutionary and transformative potential.

With about a dozen significant Constitution Bench decisions from the Supreme Court since September 2018, there has been a renaissance in decision-making by Constitution Benches. This includes the Court's decisions striking down Section 377 and the criminal offence of adultery, upholding the constitutional challenge to the Aadhaar project and including the office of the Chief Justice of India within the scope of the Right to Information Act.

However, facets of phase 3 continue to linger on in the courts. Cases that involve substantial questions of interpretation of the Constitution – such as the cases concerning the National Register of Citizens and the electoral bonds scheme – are still being adjudicated upon by benches of two or three judges. There remains a latent risk, therefore, that the gains made in the

early days of phase four could be lost, and we could slide back to panchayati adjudication once again.

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