

A JUDGMENT THAT MUST BE TAKEN IN THE RIGHT SPIRIT

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

A constitutional amendment is a rare event. There have only been 104 such cases of those in the 71 years since the Constitution came into being. Rarer still is when a court strikes down a constitutional amendment, an event which has occurred only seven times before last week.

But such a moment has come to pass once again as [Union of India vs Rajendra N. Shah](#), a judgment delivered by the Supreme Court of India on July 20, 2021. The [97th Constitutional Amendment was struck down](#), albeit in a limited manner.

Explained | Where did the Centre go wrong on cooperatives?

The [97th Constitutional Amendment](#) came into effect from February 15 2012, and brought about many changes to the legal regime of cooperative societies. The amendment added “cooperative societies” to the protected forms of association under Article 19(1)(c), elevating it to a fundamental right. It also inserted Part IXB in the Constitution which laid down the terms by which cooperative societies would be governed, in more granular detail than was palatable.

The Constitution can be amended only by the procedure provided in Article 368. The amendment procedure requires a majority of the total strength of each of the Houses of Parliament and two-thirds majority of those present and voting. A proviso to the Article lists out some articles and chapters of the Constitution, which can be amended only by a special procedure. The special procedure requires that the amendment will also have to be ratified by the legislatures of half of the States. It is precisely on the grounds of violation of this additional requirement that the 97th Constitutional Amendment was challenged.

It is important to locate this amendment in context. The idea that the cooperative sector ought to be controlled at the State level and not at the central or Union level goes back all the way to the Government of India Act, 1919 which placed cooperatives in the provincial list. This scheme carried forward into the Constitution with Entry 32 of the State List in the Seventh Schedule of the Constitution conferring power on the State legislatures to make laws pertaining to incorporation, regulation and the winding up of cooperative societies.

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But the Union government has been acquiring incrementally greater control of cooperative societies over the years. Cooperative banks have been brought under the purview of the Reserve Bank of India. The political intent of the Union Government for more active involvement in the cooperative sector is also apparent from the recently established Union Ministry for Cooperation.

The statement of objects and reasons of the amendment Bill, which resulted in the amendment in question, cites the need for greater independence and transparency in the functioning of the cooperatives and inserted a number of provisions which provided for the regulation of cooperative societies.

Government keen to empower cooperatives, says Amit Shah

The Gujarat High Court struck down the amendment in 2013 on the grounds that it had failed to comply with the requirements under Article 368(2) by virtue of not having been ratified by the States and had also given an additional finding that the 97th Amendment violated the basic structure of the Constitution.

The Union Government challenged the Gujarat High Court judgment before the Supreme Court, arguing that the amendment neither directly nor effectively changed the scheme of distribution of powers between the Centre and the States.

The parties which had challenged the amendment in the High Court argued that Part IXB, inserted by the 97th Amendment impinged upon the legislative power of the States by casting mandatory obligations upon the State legislatures to legislate in a particular way in areas in which they ought to have had freedom. Some clauses of the newly inserted part of the Constitution would also override some existing State legislations.

Centre can't meddle in State cooperative sector: Pawar

The court took the example of the 73rd and 74th Amendments which introduced the chapters on panchayats and municipalities, respectively. Those amendments, similar in impact on the legislative power of the States, had been passed by the special procedure involving ratification by State legislatures. The court noted that the procedure had not been followed in this case but clarified that the judgment is confined to the procedural lacuna and does not go into the question of the amendment being violative of the basic structure of the Constitution.

Having found this lapse in procedure, the judgment makes a distinction between cooperative societies operating in one State and multi-State cooperative societies and holds that while a ratification by half the State legislatures would have been necessary insofar as it applies to cooperative societies in one State, they chose not to go deeper into the question of whether the amendment also required ratification in respect of application to multi-State cooperative societies. The minority opinion considered that the provisions of the newly added part which pertain to multi-State cooperative societies could not exist independently of the parts which pertain to cooperative societies, and hence the whole amendment should be struck down.

This now brings us to the question – can the Government get over this decision? In theory it would seem simple enough. The amendment has only been struck down on account of the right procedure not having been followed and another amendment can be brought, but this time, going through the rigour of ratification by State legislatures. The National Democratic Alliance has a majority in 18 out of 28 State legislatures. The amendment which has now been struck down was an amendment of the United Progressive Alliance era, so it is not clear as to whether there will be any significant political opposition to the amendment if it is brought again.

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Which brings us to the next question – should they? The cooperative sector has always been in the domain of the States or provinces. The organising principles and mechanism of these cooperatives differ from area to area and depend on the industry or crop which forms the fulcrum of the cooperative. Homogeneity in this area would only result in the creation of round holes in which square pegs no longer fit. They also would not really serve to break the control some political interests have taken over cooperatives. It is best that the Government takes this judgment in the right spirit and stays away from further meddling in the cooperative sector, notwithstanding the creation of the new Ministry.

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