

## **Constitutional Law and Public Administration in India**

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### **Supremacy of the Indian Constitution – I**

One of the most important questions is whether the Constitution of India is supreme in public administration? To answer this, one will have to refer to *Indira Gandhi v. Raj Narain*, a case that was decided in 1975 by the Supreme Court of India. A national emergency was declared by the then Prime Minister of India, but this case tells that no person is above law, and the rule of law is important, and the rule of Constitutional law is paramount and most important in all circumstances. This is a landmark case; it is for the first time in the history of independent India that the election of a prime minister was set aside.

It was also the first time a Constitutional amendment was struck down by applying the doctrine of basic structure which was pronounced in the *Kesvananda Bharati* case. And it was also for the first time that the election laws were amended retrospectively to validate the nullified election of the prime minister. Let us understand the background of this case. It's a known fact how the emergency was imposed, but that is not the real problem over here. The real problem was what happened before the emergency was imposed and the facts that resulted in the emergency where a lot of national leaders were arrested, and they could not take part in their regular parliamentary proceedings. This case will tell that even the office of the prime minister is subservient to the principles of the Constitution. General elections were held in 1971 for the 5th Lok Sabha, where Mrs. Indira Gandhi, the then leader of the Indian National Congress was supposed to come to power and was supposed to get a majority in the parliament. The parliament had 518 seats and Mrs. Gandhi's party, the Indian National Congress, won around 352 seats, which is an absolute majority.

The opposition candidate to Mrs. Indira Gandhi was Raj Narain. He was the leader of the Rammanohar Lohia SSP and contested against Indira Gandhi in Raebareli in Uttar Pradesh and was very confident of defeating Mrs. Gandhi and in that confidence, he had taken a victory march as well before the declaration of results. However, later he was disappointed because he could not succeed in the same and the results went in favor of Mrs. Gandhi and he decided to appeal to the court and he requested the court to nullify the election of Mrs. Indira Gandhi. He accused her of adopting corrupt practices during her election campaign.

This was a serious allegation and to substantiate it, he went to the Allahabad High Court where he challenged this and alleged that she had violated the election code that was enshrined in the Representation of People's Act of 1951. It was alleged that in her election campaign, almost all the government machinery was used, including government offices and vehicles. Allegedly, a lot of army and police personnel campaigned for Mrs. Indira Gandhi and that is how she won the election. There were other allegations of corrupt practices because voters were lured to vote for Mrs. Gandhi because liquor and blankets were distributed among voters and hence there was undue influence as well.

By the time this petition was filed in 1971, Mrs. Gandhi had already been declared as having won the rivalry seat in Uttar Pradesh and she had assumed to be the Prime Minister of the country as being the leader of the largest party that had won the Lok Sabha elections. But the Allahabad High Court declared that Indira Gandhi's election to be void. They found that there is substance to Raj Narain's allegation. They found that corrupt practices had been used and the said election should be nullified. Indira Gandhi made an appeal to the Supreme Court of India, and by that time the Supreme Court was on vacation and though she was granted a stay, there was uneasiness in the Indian National Congress. She feared losing her seat as a member of parliament, thereby losing the leadership of the Indian National Congress, thereby losing to be the Prime Minister of the country. To protect her seat, she passed the 39th Constitutional amendment in the parliament. This amendment introduced Article 392A to the Constitution and through which election of the Prime Minister and the Speaker were protected from judicial scrutiny. By literally saying that whatever is going to be held by the Supreme Court cannot be done because the parliament now has the supremacy; it has the sovereignty to determine which is the law of the land. However, this amendment said that if there is going to be any challenge, it will be only a challenge before a committee formed by the parliament itself.

So, judicial review of elections, especially of the Prime Minister and the Speaker was attempted to be barred by this Constitutional amendment. Interestingly, this Constitutional amendment itself got challenged for its validity before the Supreme Court of India. At this point between 1971 and 1973, came the *Keshvananda Bharati* case, which laid down the 'basic structure' doctrine. This case allowed the parliament to amend the Constitution but held that this power is not an absolute power. When it comes to public policy and public administration, the legislature's power is also going to be read along with its duty. It is a restricted power, not an absolute power. So, there can be amendments but cannot amend the entire Constitution; can amend certain parts, but will not be allowed to amend the basic structure of the Constitution.

Power is subject to abuse and absolute power is subject to absolute abuse. And it is very important to look at the limitation of power in public administration. Confining the powers, limiting the powers, and performing the duties in public interest is critical and important. In this case, the Prime Minister at that point of time wanted to protect her seat and made a

law that protects only her interest and was it necessary in public policy was a real question. And hence, the doctrine of basic structure limits the power of the parliament. The 39<sup>th</sup> amendment took away the supremacy of the judiciary in terms of Constitutional review. The independent and autonomous character of the judiciary is important to bring in an accountable public administration. In the Supreme Court, the 39<sup>th</sup> Constitutional amendment was challenged. The 39<sup>th</sup> Constitutional amendment, even if it was brought by the parliament, was not appropriately debated at all. What you would notice is that many of the leaders at that point of time were detained and due to the emergency that was imposed, they could not take part in the debate. There was no adequate application of legislative mind.

Judicial review of legislative and administrative action is the public policy of the land. While many opposition leaders could not take part, the vote in the parliament for the 39<sup>th</sup> Constitutional amendment was merely a farce. Though both the Houses did make this amendment, the President, assented to such an amendment without even applying his mind.

So, the court held that the election of Mrs. Gandhi should be nullified. It was taken through corrupt practices. And the court also held that the 39<sup>th</sup> Constitutional amendment is illegal, it is unconstitutional, and it should be struck down, because the judicial review of any such action should not be taken off. And this affects the basic structure of the Constitution. In fact, in the words of Justice Mathew, he said that Article 329A destroys the basic structure of the Constitution. Held that an election dispute should be adjudicated. This is very important for the protection of democracy. A healthy democracy can only function when there is the possibility of free and fair elections. The impugned amendment destroys the possibility and therefore violates the basic structure of the Constitution and added that this amendment violates Article 14. It creates inequality among the members who are elected, for example, Prime Minister and Speaker's election cannot be cautioned or called for judicial review. That is an inequality that was introduced by this amendment. Justice Khanna found that this amendment violates the norms of free and fair election and affects the principles of natural justice. And therefore, the 39<sup>th</sup> Constitutional amendment must be struck down as being violative of the Constitution. And they said that it is an important part of public administration in elections. And to that extent, this case clearly lays down the supremacy of the Constitution, supremacy of the judiciary, and why the Constitution should be the guiding light for all kinds of administrative actions of all the three organs of the government. This case clearly reiterates that fact in very clear terms. So, it is a case which goes on to state why the Prime Minister's office, though it is the most important, powerful office, remains to be bound by the principles of the Constitution, by the confines of the Constitution, which clearly has laid down democracy and democratic values as the touchstone of the Constitution of India.

Why is the Constitution of India the guiding light of public administration and public

policy? The case of Triple talaq is an important case to substantiate this point. In 2017, the Supreme Court decided *Shayara Bano v. the Union of India*, which to a larger extent, prevents discrimination of women in marriage. The word public and administration, define what is public is not what is private. Is talaq a private matter? And should it interfere with marriage as a private matter? Marriage is private. But interestingly, the aspects of marriage that affect an individual adversely or impact an individual negatively or influence the right of an individual to dignity, interestingly becomes a matter of public policy and public administration.

Public administration, it is about protecting rights, it is about preventing discrimination, it is about maintaining the dignity of an individual. That is precisely what public policy and public administration should attempt to do. And the Constitution gives the guiding light for the same to an extent. Triple Talaq case, as it is popularly called as, was an issue under the Muslim law, or Mohammedan law, which is a personal law in India, like the Hindu law or the Christian law is. Mohammedan law governs the Sunnis and the Shias and largely it is not codified. When a law is not codified, it lacks interpretation or judicial application of mind. Uncodified laws happen to be custom. And customary practices vary from state to state from situation to situation and customs face a lot of challenges of ethical morality. And Triple Talaq in India developed due to such a kind of customary practice and was a means of giving divorce. It is sometimes called Talaq-e-biddat. The name suggests it is a form of divorce, where a Muslim man pronounces Talaq three times in one sitting. And if he does so, the divorce is confirmed.

Talaq-e-biddat or Triple Talaq is different from Talaq-e-hassan wherein there is a time between which each of these Talaq is pronounced, which gives the husband a time to repent and decide and come back. But in Triple Talaq once the third Talaq is pronounced, it cannot be revoked or taken aback. Now, in case the husband realizes his mistake, or after he has pronounced the Triple Talaq, the process of remarrying the same girl is very complicated. But more than it is complicated, it is quite humiliating. Because the condition is that the girl should marry someone, some other person and get a divorce. And after a period, only then she can remarry the same husband. This clearly looks to be quite a cruel practice that has been developed. And has it impacted many women, per se whose lives have been turned upside down by just the practice of this Triple Talaq. Triple talaq has been a controversial practice or a custom.

And it has left Muslim women to a lot of abuse by their husbands. And this is one of the contributing factors to the declining social economic condition of women in India. Muslim women are usually not financially strong, and husbands tend to use this against them. Now, in the *Shayara Bano* case, what happened was, a lady, who was married for nearly 15 years to a person called Rizwan Ahmed. In 2016, she was divorced through the pronouncement of the Triple Talaq. However, interestingly Triple Talaq also does not require any reason

for giving up the Triple Talaq. She filed a repetition in the Supreme Court challenging the Constitutional validity of the Triple Talaq along with the practice of polygamy. And she argued that this infringes the fundamental rights of women, especially Articles 14, 15, 21 and 25. So, you will notice how the Constitution is a very important document in ensuring that the administration is pro people and pro women as well. So, a lot of organizations joined this petition. But the organizations that opposed the judicial intervention on Triple Talaq said that this is an essential religious practice. And hence, it is protected by Article 25 and the courts should not intervene in this matter and what the Supreme Court did was to form a Constitutional bench for the same and see if Triple Talaq infringes on the fundamental rights guaranteed in the Constitution and should be held to be unconstitutional. There were many arguments that were brought about in the court of law.

What is important is that the court said that public order, morality, and health are very important touchstones of the Indian Constitution and Indian public policy, public order, morality, and health. And hence, any right of religion that is granted the same by Article 25 or anything else is subject to public order, morality, and health. So, the right to religion is not going to be absolute in any sense. And what the court did find is that the form of Triple Talaq has no sanction from the Quran and it is not mentioned in the holy books of the Muslim community. And Triple Talaq has been kind of an evil in theology, which has been banned in many countries already. And taking the shelter of this custom was really a cruel practice. The most important judgment that comes is from Justice Nariman and Justice Uday Lalit, who had similar views. And they declared this Triple Talaq to be unconstitutional because they found that it was manifestly arbitrary in all nature and character. Justice Kurian Joseph said that this lacks the sanction of the Quran.

And hence, once there is a lack of sanctions in the Quran, there is no place for its practice at all. And he thought that it was bad in theology and cannot be good in the eyes of law. Justice Nariman and Justice Lalit said that, Triple Talaq was in a way by which the marital bonds can be broken, and the bills of the husband and the wife cannot do anything. And hence, essentially, this violates Article 14 and at no point of time, the court holds this to be an essential religious practice, and then protects it under the light of the religion.

Following this judgment, the Government of India not only took this case and this judgment very seriously, but they also enacted a legislation which made Triple Talaq a punishable offence through what is known as the Muslim Women Protection of Right on Marriage Act of 2019. Triple Talaq has been declared void as well as illegal. And there is a punishment that can be averted to a person who tries to divorce his wife through Talaq-e-biddat. And they can be punished for 3 months to 3 years of imprisonment. So, this is very important because when there is a conflict between personal law and Constitutional law, personal law that is made or attached with religion, personal law that is in relation to marriage, family,

adoption, guardianship or any other matters, and they are against the public order and morality of the state, then the personal law will have to give way to Constitutional law.

So, personal laws which are not in consonance with the Constitution must be abandoned and such practices, there are such kinds of customs, which infringe the dignity of women in marriage have no place in India. And that is what has been done right now. And despite the controversy attached to this case, it is a settled principle of law that anything that is not permissible by the Constitution or is arbitrary, unfair, and infringes the rights of women, then those must be taken off. So, this case also highlights the principle that the Constitution is supreme and your personal practices, personal laws must be subservient to the Constitution of India.