

The Concept and Significance of Political Justice under the Constitution of India

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Introduction

Political justice is a value in accordance with which every civilized society aspires to live. Concentrating on equal opportunities for political participation, fairness in making and implementing laws, and ensuring good governance, it is both an intrinsic and instrumental value that has great significance in a nation's life. In the Indian constitutional jurisprudence, it has vital role and vast reach although academically its exposition is not adequately attempted. This article aims at exploring its theoretical terrains, historical roots and constitutional base, and mapping its multiple dimensions, problematic factors and contributions.

Conceptual analysis

Etymologically, political justice (PJ) has two components: 'political' i.e., regarding polity or civil affairs or 'other regarding actions'¹; and 'justice' i.e., that which binds or due, or standard of conduct or greatest sum of happiness based on equality. Put together, it connotes a comfortable situation for all people's equal opportunities in making and effectuating policies about ideal conduct of the society and its public institutions for promoting general welfare. Aristotle believed in constitutional government as the means of justice, and veritable path of

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¹ This expression refers to actions affecting others. Since knowing the true position of others has the problem of 'veil of ignorance', which obstructs vision, a satisfactory position can be attained by extensive discussion, accommodating every viewpoints of others put forward on equal pedestal and their objective consideration.

salvation.² Plato viewed that justice through application of laws and conventions was a method of saving the society from the continuing fear of reprisals and unjustified attacks.³

Ancient Indian thinkers considered that interdependence of the ruler and the people and the ruler's duty to protect life, liberty and property of the people with a fraternal outlook reflected the practice of political justice.⁴ In the republican systems, people (*pouras* and *janapadas*) had more active role in the governance.⁵ The idea of '*trivarga*' upheld the supremacy of justice and fair law upon human desires and economic actions.⁶ Kautilya considers that since human desires and considerations of justice are born out of or orienting towards interests in property or economic factors, the latter attains influential position, and hence need to be disciplined because proper balance among all the three factors is essential.⁷ The very purpose of formation of state was to protect the vulnerable from the arbitrary acts of the strong and to uphold justice. King has the duty to ensure that persons belonging to all the professions and all the stages of life perform their duties meticulously.⁸ When the laws laid down by the King and evidence collected by investigation contradict the people's customs and the principles of justice, it is in the

² Aristotle, *Politics*, <https://iep.utm.edu/aris-pol/> 06/07/2020 accessed

³ Plato, *Republic* Book II <https://iep.utm.edu/soc-cont> 06/07/2020 accessed

⁴ P V Kane, *History of Dharmasastra* vol. III Third ed (Bhandarkar Oriental Research Institute, Poona, 1946) 37

⁵ *Ibid* 94-95

⁶ Manu Smriti II.4, IV.176; Yajnavalkya I-115, Vatsayana 1.2.7-15; M Rama Jois, *Legal and Constitutional History of India* vol. I (Universal Law Publishing co., 1984, 2008) 6-7; also see Jagannmohan Singh Raju, *Ramarajya: People's Welfare State* (Excel Books, Bangalore, 2017) 121-122.

⁷Part I Section 1 Chapter7 shloka 6-7 in Kautilya, *Arthashastra* (Ankita Pustaka, Bangalore, 1963)

⁸ *Ibid*, Part I Section 1 Chapter 4 shloka 5

light of the latter that the former shall be interpreted.⁹ Law shall be the king of kings and shall operate equally upon all.¹⁰ According to Mahabharata, justice is that which secures for all living beings freedom from violence, deprivation, starving, separating and uprooting and that which has the characteristics of nurturing, cherishing, providing amply, enriching, increasing, enhancing, all living being: supporting, sustaining, bringing together and in their togetherness.¹¹ Ramarajya was a concept propounding true democracy and welfare state where the meanest citizen also could be sure of swift justice without an elaborate and costly procedure.¹² All these notions aimed at attaining highly desirable products of political processes.

Balagangadhar Tilak's assertion that freedom is everyone's birth right, and each shall have it was a bold thinking about using PJ as a means of liberating the country from the clutches of colonial rule.¹³ Raja Ram Mohan Roy thought education and freedom of speech and press were instrumental for country's emancipation.¹⁴ Gandhiji gave both theoretical clarity about PJ and practical demonstration about its application. Political freedom, equal participation, grass root democracy and welfare constituted four pillars of PJ.¹⁵ He considered colonial rule

⁹ Sastram vipratipadyeta dharmanyayenakenachit I Nyayastathra pramanmsyat tatrapatho hi nashyati Kautilya, Arthasastra Part I Section 3 (Courts) chapter 57 shloka 128.

¹⁰ Satapatha Brahmana 14.4; 2.23; Brahadaranyakopanishad 1, 4, 14

¹¹ Mahabharata Shantiparva 180.26 and Adi Parva 85.13.

¹² M K Gandhi, *Young India*, 19-9-1919, p. 305.

¹³ *Bal Gangadhar Tilak, His Writings and Speeches* (Ed) Aurobindo Ghosh (Ganesh and Co., Madras, 1922) cited by Sarbbani Sen, *Popular Sovereignty and Democratic Transformations: The Constitution of India* (Oxford University Press, 2007) 55.

¹⁴ Majumdar, J.K. (1953) *Raja Rammohun Roy The Father of Modern India*, (Bombay: The Indian Historical Research Institute) 226-241.

¹⁵ R K Prabhu and U R Rao, *The Mind of Mahatma Gandhi* (Navjivan Publishing House, Ahamadabad, 1967) 334-344.

as an unmitigated evil inflicting grossest injustice. His concept of swaraj went beyond freeing India from foreign rule, comprehended government according to the consent of the people as ascertained by the largest number of adult population and making it an instrument for poverty eradication and overall welfare of people.¹⁶ Freedom meant fullest liberty to use the talents consistently with equal use by neighbours without abuse and exploitation, and demanded performance of duties as a prerequisite for its enjoyment.¹⁷ Equal and integrated participation of all in the unarmed struggle against the British and against any exploiting force or practice was a means of PJ. High involvement in grama swaraj; eradication of poverty, 'untouchability' and other social evils; promoting education, health and self employment are the agendas set for PJ.¹⁸ Insofar as practical application of PJ goals is concerned, Gandhiji gave creative leadership to numerous struggles.¹⁹ Khilafat movement, Non-cooperation struggle, Vaikam satyagraha, Champaran agitation, Bardoli satyagraha, Salt march, Quit India movement and other mass movements are the demonstrations of Gandhiji's strategies of PJ. Practice of non violence, Hindu- Muslim unity and involvement of women, untouchables, workers, farmers and people belonging to all sections of society were the key features such struggles. Orientation for equal citizenship and collective responsibility for a better world were the inputs of the community action. Another facet of PJ that it stands for just law which ought to be obeyed as distinguished from unjust law which ought to be disobeyed as a matter of duty is clear in Gandhiji's thinking as

¹⁶ Ibid 317-321

¹⁷ P Ishwara Bhat, 'Impact of Gandhian Thoughts on the Indian Constitutional Jurisprudence: A Post-modernist Perspective' 61 (2) *Journal of the Indian Law Institute* (2019) 182-212 at 187-9.

¹⁸ Ibid 359-393

¹⁹ Nirmal Kumar Bose, *Studies in Gandhism* (Navajivan Publishing House, Ahamadabad, 1972) See chapter 9 Gandhi in Politics

reflected in his written affidavit in the famous sedition case.²⁰ Thus making and implementing just law is an inevitable component of PJ.

In the West, along with the mass assertions against arbitrary rule by the Kings in England, France or America, yoking the political rule to the goal of justice provided impetus for theorising about PJ.²¹ Social contract theorists found the base of political organisation called state in people's understanding of sharing of powers and responsibilities with the ruler. According to Thomas Hobbes the purpose of collective and reciprocal renouncing of rights to establish state was to promote justice on the basis of mutual advantage.²² In the view of John Locke, a polity became collaboration for attaining peace and realisation of civilization's goals like justice, human rights and welfare.²³ Rousseau writes that man's freedom attained by birth is chained by dependence and economic and social inequalities, and that solution for the problem consisted in organising the society through general will of the community.²⁴ Thus the idea of government in accordance with the consent of the governed not only provided an opportunity to participate in decision making but also shape the functioning of polity.

²⁰ P Ishwara Bhat, *Law and Social Transformation in India* (Eastern Book Co, 2009) 132

²¹ Magna Carta, 1215, American Declaration of War of independence, 1786 and the French Declaration of Rights of Man, 1793

²² Thomas Hobbes, *Leviathan* (1651), ed., C B Macpherson, (Harmondsworth, Penguins, 1985) 228-9 cited by Christian Brutsch, 'Representation' in Iain Mackenzie (Ed) *Political Concepts: A Reader and Guide* (Edinburg University Press, 2005) 179-205 at 181.

²³ John Locke, *Two Treatises of Civil Government* (1690) ed. P Laslett (Cambridge University Press, Cambridge, 1988) 358-368 cited by Christian Brutsch, 'Representation' in Iain Mackenzie (Ed) *Political Concepts: A Reader and Guide* (Edinburg University Press, 2005) 179-205 at 182.

²⁴ Rousseau, J, *The Social Contract* (1762) ed. M. Cranston (Harmondsworth, Penguin, 1968) 61-82 Christian Brutsch, 'Representation' in Iain Mackenzie (Ed) *Political Concepts: A Reader and Guide* (Edinburg University Press, 2005) 179-205 at 183.

William Godwin held an in-depth enquiry into the concept of PJ from an anarchist and utilitarian perspective, and had the following findings.²⁵ By justice he meant impartial treatment of every man in relation to his happiness and a rule of conduct entailing harmonious relation with others. It is the standard of conduct of one man towards another, and proposes to produce greatest pleasure. Injustice and violence in state of society compelled people to have government.²⁶ While good government makes people moral, bad government renders them wretched. Contribution by every power holder to the benefit of the whole is a moral principle underlying PJ. Obedience to laws and conventions by the community and authority support the goals of justice. Political associations shall abstain from cultivating hostility to PJ. Objective investigation of facts helps in ascertainment of PJ. Tranquil and wholesome progress of knowledge is an enlightened friend of PJ. While steady and uniform operation of fixed principles augments happiness, putting the mankind at the mercy of every momentary impulse of changing wind is reversal to PJ. Love for one's country and sinking of one's individuality in favour of collective interest has undoubted basis in PJ. PJ is opposed to secrecy and calls for tranquil discussion as a step for taking decision. PJ demands that people be free, virtuous and wise in realising social co-existence. PJ frowns upon political superintendence of opinion, and emphasizes on moral improvement through free

²⁵ William Godwin, *Enquiry Concerning Political Justice and its Influence on Morals and Happiness* (1793) http://dwardmac.pitzer.edu/anarchist_archives/godwin/PJfrontpiece.html visited on 16.9.2020.

²⁶ “Government, as it was forced upon mankind by their vices, so has it commonly been the creature of their ignorance and mistake. Government was intended to suppress injustice, but it offers new occasions and temptations for the commission of it. By concentrating the force of the community, it gives occasion to wild projects of calamity, to oppression, despotism, war and conquest. By perpetuating and aggravating the inequality of property, it fosters many injurious passions, and excites men to the practice of robbery and fraud. Government was intended to suppress injustice, but its effect has been to embody and perpetuate it.” William Godwin, *ibid*.

deliberation. The system of religious conformity is also injurious to PJ. Godwin regards that fabric of justice is complete only with property, but he opposes fortuitous and hereditary succession to property without hard work and prevalence of economic inequality. Godwin's treatment of PJ is comprehensive and is applicable to all spheres of political life. He points out its relevance to the constitution making process, government formation, control over bureaucracy and dissolution of national assembly.

The twentieth century philosopher, John Rawls, conceived PJ in the sense of substantive justice or constitutional justice.²⁷ The constitution, by guaranteeing equal rights and liberties to all citizens, endeavours to realize PJ. Rawls contemplates two pre-requisites for PJ: First, the constitution is to be a just procedure satisfying the requirements of equal liberty; and second, it is to be framed so that of all the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation.²⁸ Both the concepts are inclusive and expanding to accommodate various components involved in discursive democracy. Equal liberty for political participation entails free and fair election, real right to contest election in the background of ticket politics of political parties, fairness in constituency formation neutralising gerrymandering, periodical conducting of election, limited tenure of the legislature and equal freedom within the political party through inner party democracy.²⁹ Effective system of legislation requires conducting the legislative business without disruption, voting without instruction, freedom of speech within the House supported by Parliamentary privileges, good drafting of the proposed law and critical and thorough discussion of the Bill both at the Committee stage and at the House. Expectations about party government in parliamentary form

²⁷ John Rawls, *A Theory of Justice* (Oxford University Press, 1999)

²⁸ Ibid 194

²⁹ Ibid 195-8

of government to run the office without unreasonably being toppled by party disloyalties or defections also has the dimension of equal liberty if we consider such acts as not having determinable principle based on political morality. The limitations are that concerning each of the components so many impediments are prevalent, and meticulous efforts are to be put to establish both equal liberty of participation and just and effective system of legislation. A criticism levelled by Robert Nozick against the Rawlsian concept is that by concentrating more on distributive justice it deviates from the notion of least governance or minimal state.

Among the ten central human capabilities listed by Martha Nussbaum essential for just society, freedom of expression, freedom of association, capacity to conceptualise and plan one's own life, freedom of affiliation with others on non-discriminatory terms, control over one's own political environment including right to vote and right to own property constitute prominent tools for attaining political justice. Recognising them as capabilities and tapping their potentialities for just society speak about PJ's functional base in people's participation. Nussbaum further views that political emotions of anger, fear, envy and disgust need to be properly managed or restrained and that of love, compassion and humour need to be deliberately cultivated in order to promote shared goal of PJ.³⁰

Examining the global experience on treatment of nations, Erik O Eriksen points out three essential components of PJ: non-domination or rejection of arbitrary wielding of power which can be neutralised by scope for participation and representation; impartiality which can be ensured through unbiased hearing and strong human rights system; and

³⁰ Martha C Nussbaum, *Political Emotions: Why Love matters for Justice?* (Harvard University Press, 2015); <https://www.law.uchicago.edu/news/research-matters-martha-nussbaum-political-emotions-why-love-matters-justice-07/06/2020> accessed

mutual recognition, which calls for communitarian approach and process of deliberation.³¹

Ronald Dworkin considers PJ as the domain in which law is embedded, having both substantive and procedural dimensions.³² Substantively, mutual relation between the ruler and citizens shape its functioning. Procedurally, official bodies vested with power fairly decide the individual entitlement to rights and obligations. Hence PJ requires support from outside the court system.³³ Lawrence Sager states that political justice will flourish only when its elements positively contribute and that what is attained through case law is thin compared to the scheme of values to be realised.³⁴

PJ does not operate in a vacuum or isolation. Often, elements of social and economic justice operate in the public plane either in support of, or deviating from political justice. In the latter case, a balancing process operates and determines the direction of the movement of sum total of forces. Although generally, there is a meeting point for the economic, social and political forces to operate, political force plays a leading role as it ultimately decides the outcome. It generally coincides with the diagonal of parallelogram of forces if we treat social and political forces as two adjacent sides of the parallelogram. This has implications for cumulative effect of triple notions of justice. Its instrumental value for helping social and economic justice and bringing benevolence is conceptually explicit.

³¹ Erik O Eriksen, 'Three Conceptions of Global Political Justice' Global Research Paper (Working Paper1/2016)

³² Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2013)

³³ Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); also see James E Flemming, Book Review 'Constitution Outside the Courts' 86 (1) *Cornell L Rev* 215-249

³⁴ Lawrence G. Sager, 'Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 *Nw. U. L. Rev.* 410 (1993-1994).

The preamble to the Constitution of India and Article 38 refer to JUSTICE, social, economic and political in a juxtaposed manner. Both in the contemplation of constitution makers and views of judges in the course of interpretation of constitution interdependence of these three facets of justice can be found, as will be discussed. The oft-cited speech of Dr Ambedkar about the life of contradictions to which the Indian polity is entering because of the absence of social and economic democracy making political democracy a mockery hints about the inevitable relation between various facets of justice.³⁵ It is pertinent to remember that making and implementing of laws shall be in support of triple justice in order to gain legitimacy.

The Supreme Court in *Raghunathrao* stated, “Political justice relates to the principle of rights of the people, i.e. right to universal suffrage, right to democratic form of Government and right to participation in political affairs.”³⁶ The idea of ‘democratic form of government’ can bring indirectly so many aspects of constitutional morality. President Ramanath Kovind said in a public speech, “Political justice implies the equal participation of all adults in the political process and the just formulation and implementation of laws.”³⁷ This definition, by bringing the element of ‘just’ both in making and implementation of laws, lays a focus on good governance too. Political justice is a part of constitutionalism.

The Indian quest for Political Justice up to 1950

PJ is enshrined in the Indian cultural ethos. Although polity’s external crust reflected changing dynasties, the stable existence of village

³⁵ CAD dated 25.11. 1949

³⁶ *Raghunathrao Ganapatrao v. Union of India*, AIR 1993 SC 1267

³⁷ Speech on the Constitution Day, 26.11.2018, cited in *Ashwani Kumar v. Union of India* AIROnline 2018 SC 867

panchayats withstood the din and dust of political upheavals and exhibited their solidarity for community's sense of justice. But caste distinctions, patriarchy and hierarchic structure had created what Dr B R Ambedker called 'sinks of casteism and communalism'. Dr Ambedker's belief that universal adult franchise would bring revolutionary changes had rooted in dynamism of political justice. While the British-given constitutions were half hearted political structures with communal divisiveness and petty concessions, the indigenous efforts of framing of India's constitution and political resolutions reflected mature aspirations for self-governance and national unity. The Tilak Bill, Gandhi-Annie Besant Bill, Nehru Committee Report and annual general body resolutions of National Congress reflected sublime values of PJ. Normative interface between the British policy on the constitution of India and native aspiration continued for decades with conflicts and compromises. A major political outcome of 1930s was growing popularity of the idea of all India federation, the workers' movement and the movement of farmers. The fact that people in as many as 560 princely states were agitating for merger with the national mainstream formed a strong political force for unification of India. Movement for linguistic states and special status of ethnic areas had the influence of multiculturalism upon the instrument of PJ. On the other hand, communal polarisation backed by politics took the country to the verge of partition. In contrast, timely pacts and compromises for sharing of power and privileges kept national unity. Cabinet Mission's green signal for constitution making acted as curtain raiser for political bargaining, petitioning and lobbying for protection of political advantages.

In other countries also, the constitution making process is preceded by mass movements, national struggle for independence and incremental accretion of constitutional values based on polity's experience. Magna Carta, Petition of Rights, Bill of rights, Habeas Corpus Acts, Tolerance Act, Race Relations Act, Sex Discrimination

prohibition and Human Rights Act in England; the story of war of independence, confederation, federation, civil war amendment in US; the French Declaration of Rights of Man; the self determination narratives from various colonial states of Asia, Africa, America, Middle East and Europe; the Russian revolution, dissolution and constitution of Japan have been illustrations of PJ shaping the respective constitutions.

The Constituent Assembly (CA) assumed great importance as a forum of democratic decision making. The CA used to get huge amount of representations, request letters, memorandums and post cards from the people expressing specific types of constitutional principle or arrangement.³⁸ Newspapers carried the ongoing story of constitution making and views of people, leaders and groups expressed in various forums including street corner speeches. Issues relating to language, village panchayat, cow protection, 'untouchability' and so on were focus of people's curious attention. Responses by CA members either in the floor of the CA or in party offices were getting public reaction. The speeches of popular leaders and the stories of merger of princely states were heard with curiosity even by the illiterate masses. The concluding speech by the Chairman Dr Rajendra Prasad in the CA stated that the Constitution acquires life because of the honest implementation of its objectives by persons of integrity and commitment. Thus success of PJ much depended upon the choice of such leaders. Informally, 'We the People' of India participated so much that the potentiality of emerging of the 'people's constitution' was very much visible. Apart from this, the content of the constitution has also numerous provisions incorporating the idea of PJ.

³⁸ Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press, Princeton, 2018) 2-5.

Textual basis for Political Justice

The presence of PJ in the text of the constitution is ubiquitous. Its grand entry in the preamble is studded with various prominent concepts like sovereign, socialist, secular, democracy, republic, equality, liberty, fraternity, dignity and national unity is not only inspiring but speaks about its close interconnection with each and every concept. The idea of 'union of states' with adequate flexibility in territorial formation of states by parliamentary legislation drawing the inner political map of India is a forum for PJ's application. Satisfying the linguistic, ethnic or regional identity on the basis of sustainable political agitation meant promotion of PJ in territorial reorganisation. Definition of citizenship, recognition of immigrants as citizens and the working of Citizenship Act with amendments has attracted the issue of PJ. The guarantee of fundamental rights – equality, freedom, right to education, rights against exploitation, freedom of religion, cultural and educational rights and right to constitutional remedies – nourishes PJ to flourish. Use of freedom of speech, expression, assembly, association and movement enables political activities whereas right to equality and non-discrimination enables effective participation. PJ requires both negative and positive state duty towards freedoms. As the Supreme Court observed in a recent case,

Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing 'negative' restraints on the state these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance

when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom.³⁹

The directive principles of state policy lay emphasis on organisation of village panchayats and cooperative societies, workers' participation in management, separation of functions of legislature, executive and judiciary and compliance with international conventions and imperatives of world peace. This hints about working of PJ at various levels. Further, DPSP becomes criteria for assessing the performance of governments in the context of elections, as pointed out by Dr Ambedkar. In the implementation of welfare policies for better life of people, PJ has instrumental role as it orients the direction of development. The fundamental duties insisting on abiding by the constitution, upholding the values of freedom struggle, respecting the national emblems, courtesy towards women, safeguarding the composite culture, transcending the narrow barriers, striving towards excellence both in individual and collective life of the nation and parental duty towards education of children have strong orientation towards fulfilment of PJ. These are highly motivating provisions alerting the citizens to involve in effective participation in political life.

Equality in voting right is the beginning of PJ. Article 325 states that no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them. Single electoral roll, rejection of separate or communal electorate system, independent Election Commission vested with the power and responsibility to

³⁹ *Indibility Creative Pvt Ltd v. State of West Bengal*, AIROnline 2019 SC 2412 per D Y Chandrachud J

superintend, control and prepare electoral roll and conduct elections, duty to conduct election in free and fair manner and remedies in case of violation of electoral law are the key factors for ensuring PJ. Ever since T N Seshan's time, Election Commission has grown with strength, and has been doing marvellous work in a vast state of huge population. The judicial stance that free and fair election is a prerequisite of democracy and is a basic structure of the constitution has extended admirable support to PJ⁴⁰.

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of People and State Legislative assemblies is an effort to augment PJ by resorting to substantive equality. Although confined to first ten years after the commencement of the Constitution, through periodical constitutional amendments it has been stretched up to 2020. There were some aborted attempts to extend reservation to women. Insofar as panchayats, nagarpalikas and cooperative societies are concerned, constitutional amendments have extended reservation of seats and position of presiding officers to Scheduled Castes and Scheduled Tribes, women and other backward classes on rotation basis. Limited duration of representative bodies at various levels and periodical conducting of elections reflect commitment to PJ as an enduring principle and expanding opportunities.

PJ requires stability of democratic institutions along with the principles of representation and responsibility. Formation of government on the basis of the principle of collective responsibility, scrutiny of administrative actions by the legislature, executive's leadership in initiating and enacting law, conducting the functioning of the legislative bodies by duly recognising their privileges and immunities, distinct procedure for money bills and ordinary bills, superiority of the voice of the popular chamber over the second chamber by virtue of joint sitting of

⁴⁰ *T N Seshan v. Union of India* (1995) 4 SCC 611

parliament and the executive head's limited powers constitute dynamism of parliamentary democracy which translates PJ into ever-continuing action. In order that representative competence on the part of un-elected ministers, it is insisted that within a period of 6 months they should attain membership of either House of the legislature or else they cease to be ministers. Cabinet resolutions are pre-requisite for declaration of national emergency. The requirement that all taxations shall be authorised under law speaks about the PJ principle, 'no taxation without representation'.

PJ thrives only with constitutionalism. The constitutional text subjects the legislature and executive at both the central and state level to act in accordance with the provisions of the Constitution. Laws inconsistent with Part III of the constitution shall not be passed, and in case of inconsistency they shall be void to that extent. The Supreme Court and High Courts have vast jurisdiction for judicial review and power of providing constitutional remedies in case of unconstitutional exercise of legislative or executive power. Appellate jurisdiction ensures fairness and legalism in judicial action. Inbuilt mechanism for ensuring compliance with the Constitution can be found in the arrangement for issuing of administrative instructions by the centre to the States, whose non-compliance will be amounting to failure of constitutional machinery, a justifiable ground for President's rule in the concerned State which disobeys the directions. Union Government has responsibility of ensuring constitutionalism in the States. The President has the power of taking over the governance of any state if he is satisfied that there is failure of constitutional machinery in that state. There are adequate procedural safeguards against abuse of this power as well as the power of proclaiming national emergency. Rule of law and theory of separation of powers, which are the basic instruments of constitutionalism, provide both theoretical and practical input for PJ's functioning.

PJ sets tone for constitutional amendment and limits the extent of amending power. Special procedure for constitutional amendment and

participation by the state legislatures in the course of ratification of constitution amendment Bill in case of entrenched provisions enable PJ to thrive. The basic structure scrutiny ensures that PJ is not marginalised.

Federalism and local self government expand the base of the constitutional structure and create multiple levels of participation by people's representatives in the governance. Mutual dependence and cooperation among them have made them partners of PJ and national development. Cooperative federalism has grown strong with central government's assistance to state agrarian reforms, irrigation, environmental protection, industrial development, rural employment guarantee, food security and education. Division of powers between central and state government, equitable distribution of revenue and resources for the development of all the states, and the functioning of GST Council on proper lines add to the worth of PJ.

Another strong fort for PJ is multiculturalism in the background of plurality of religions, languages and ethnicity. Preamble's commitment to secularism, equal religious freedom of all, state's non-involvement with any specific religion, people's duty to transcend the barriers of religions and judicial recognition of secularism as basic structure immensely support PJ. Insofar as languages are concerned, the constitutional policy of non-imposition of any language upon any unwilling community is clear in provisions about language of the union, equal rights of regional languages, language of courts, language in administration, legislature and public place and language in education have supported the cause of PJ. Language movements and linguistic organisation of states had interface with PJ. Regarding ethnic pluralism, the constitutional provisions on special measures for Scheduled Tribes regarding access to education, employment and legislatures; security of their lands, forests and social customs; and elaborate schemes for local self-governance in accordance with their tradition fulfil the objectives of

PJ. In ensuring social harmony which is a prerequisite for PJ these constitutional provisions play a significant role.

The above description of the constitutional base of PJ points out its widespread canvas and rootedness in the prime constitutional values and functioning of all the institutions that builds up the political structure. Its omnipresence vindicates its vertebral role that runs as the golden thread throughout the governance system. Complementary character of various principles and institutions provide dynamism to the working of PJ.

Journey of political justice in 70 years of constitutional development

Establishment of republican system paved the way for the magnificent journey of political justice, which had to respond to varieties of challenges and overcome numerous obstacles. Since its journey is an ongoing phenomenon and its goal is to be realised in the day-to-day functioning of the political system, incompleteness will be implicit in the narration of its sojourn. The whole development can be comprehended by surveying three aspects: political development, constitutional amendments and judicial response or contribution.

Political development

Politics as an art of the possible had an agenda of capturing political power, using it for people's welfare and sustaining by clinging to people's support, which had high vicissitudes. The first two decades (1950-1970) witnessed dominance of monolithic political party both at the centre and the states, wars with neighbouring nations, handling of refugee problem, language movements, agrarian reforms, infrastructural developments through five year plans, reforms of personal law and passing of women-specific laws for their empowerment. The 1970s saw questioning of mono-party system, people's movement for revolutionary

changes, over-reacting response by the party in power by imposition of internal emergency, people's movement for removal of autocratic rule and restoration of the democratic order. While internal emergency was gross violation of political justice, the way people set right the things by concerted efforts expanded the competence for attaining political justice. Plugging the loopholes at various spheres through constitutional amendments and laws, developing the political alternatives in the form of coalition and strengthening the constitutional democracy through basic structure doctrine are some of the notable developments reinforcing the preparedness for PJ. The 1980s saw the move back to popular socialism, emphasis on technological development, strengthening the parliamentary system through anti-defection law, debates on centre-state relations and laying foundation for panchayat raj reforms. Passing of a law in response to *Shah Bano*⁴¹ judgment about maintenance of divorced wife under Muslim law and growing agitation for Ram Mandir are the other developments having political significance. The 1990s was a decade of conflicts – implementation of Mandal Commission Report⁴², demolition of disputed structure at Ayodhya⁴³, shift towards liberalization, privatization and globalization, stability in coalition politics, inter-state water disputes⁴⁴, spread of naxalism⁴⁵ – and initiation of new ideas for millennium development with human rights agenda and formation of new institution, WTO. The first two decades of 21st century witnessed consolidation of the gains of liberalisation and globalisation, consequent marginalization of workers and farmers, political stability through

⁴¹ *Mohd. Ahmed Khan v. Shah Bano Begum And Ors* AIR 1985 SC 945

⁴² *Indra Sawhney v. Union of India* AIR 1993 SC 477

⁴³ *M. Ismail Frauqui and Oth.v. Union of India* AIR 1995 SC 605; *M. Siddiq (D) thr. L.Rs v. Suresh Das and Others.* AIROnline 2019 SC 1420.

⁴⁴ *State of Karnataka v. State of Tamil Nadu*, (2018) 4 SCC 1

⁴⁵ *Nadini Sunder v. State of Chhattisgarh* AIR 2011 SC 2839

coalition, effective handling of naxalism and removal of special status for Jammu and Kashmir. Cooperative federalism required for meeting the disasters and pandemic like COVID-19 is also another factor. These political developments during seven decades had shaped the journey of PJ either as incentives or as impediments. The economic social and cultural factors had also contributed in this process.

Constitutional amendments and Political Justice

Constitutional amendments have profusely contributed to PJ by expanding or effectuating the opportunities of political participation; by strengthening the rules of accountability of the administration and checking the abuse of power; by enhancing the responsibility of the legislators towards their respective political parties and constituencies; and by building new institutions committed to the cause of PJ. PJ has also responded to the call of social justice providing for reservation to the vulnerable sections and to promote economic justice by saving the economic reforms from constitutional challenges. This development has proved its instrumental role in upholding the composite value of justice.

Article 334 which had originally confined reservation up to ten years was amended from time to time in order to extend reservation to SCs and STs in the House of People and state legislative assemblies for a period up to 70 years.⁴⁶ Formation of State Election Commission (Article 243-G), regular conducting of election to Panchayat Institutions (Article 243-E), reservation of seats and offices of Chairpersonship to the Scheduled Castes and Scheduled Tribes in proportion to their population in the State and one third of seats and posts to women in all categories (Article 243-D) are envisaged by 73rd Amendment. Similar provisions can be found in 74th and 97th Amendments in relation to Municipalities

⁴⁶ Constitution 8th Amendment (1959), 23rd Amendment (1969), 45th Amendment (1980), 62nd Amendment (1989), 79th Amendment (1999), and 95th Amendment (2009)

and Cooperative societies. Thus there is expansion of the policy of reservation in order to widen the political base of representation and thereby strengthen PJ.

For ensuring that legislators will abide by party instructions in the floor of the House and the elected representatives will maintain loyalty to the political party from whose political banner they were elected to the legislatures, the 52nd Constitutional Amendment was made in 1985.⁴⁷ Tenth schedule was added providing for anti-defection law, and defection became a ground for disqualification for continuing as member of the legislature. In Parliamentary form of government, it is a moral and legitimate expectation on the part of constituency that their representative chosen on the basis of their acceptance of party's programmes, agenda and manifesto will continue to represent those interests centring round their choice. If we consider justice is a notion of balancing between individual and collective interests, PJ is very much there behind this attempt. When the menace of political defection was a big and everyday threat to stability of government, and the culture of party government had not percolated through the strata of political structure this amendment introduced certain element of dependability. But in the absence of inner party democracy and free atmosphere for the evolution of policies and leadership achieving the goal of anti-defection, the 52nd amendment had some weaknesses. By 91st amendment the provision on splits in party as ground for defection was removed in 2003.

In the background of abuse of internal emergency powers in 1975-1977, both in declaring, continuing and executing through suspension of basic human rights denying judicial remedies in case of violation, the Parliament brought drastic changes through the 44th Constitutional Amendment in 1978. Procedural safeguards were

⁴⁷ The Statement of Objects and Reason stated, "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it."

introduced in the matter of declaration of emergency by insisting on resolution by the Council of Ministers of the union Government in support of it and the approval by both the Houses of Parliament by special majority (assent by majority of the total number of members in the House and two thirds of members present and voting) in the matter of its continuance beyond one month. Opportunities for reconsideration of decision about emergency were expanded. The rights under Articles 20 and 21 were made not suspend-able during emergency. In the backdrop of the experience during emergency that these rights were unjustifiably encroached upon and grossly violated, this is a veritable measure of PJ.

Elements of PJ can be traced in the amendments introducing changes in the entries of the First and Eighth Schedules relating to state boundaries and recognition of languages. Special provisions for newly created states or states having regional disparity are introduced through constitutional amendments incorporating Articles 371-A to 371-J which aim at protection of specific interests of groups of people. Implementation of border agreements with neighbouring nations also has the component of PJ as it touches upon rights of citizens. Constitutional amendments accommodating these developments are in response to PJ.

While the above constitutional amendments are directly relating to PJ, amendments aiming at economic justice and social justice are triggered from political decision making. Protection of agrarian and economic reforms and abolition of Privy Purse are examples of PJ supporting economic justice.⁴⁸ Amendments introducing reservation in educational institutions and public employment are outcomes of such developments.⁴⁹ PJ's instrumental role comes to the surface in this process.

⁴⁸ Amendments bringing Articles 31-A, 31-B and 31-C, and amendments to them or property right provisions are examples of amendments to effectuate economic justice.

⁴⁹ Amendments to Article 15 and 16 introducing new clauses or amending them for providing for reservation are examples of social justice related amendments.

Judicial responses and contributions to political justice

As in other spheres of constitutional law, in the domain of PJ also, judicial action has tremendously contributed to its vigorous growth and productive application. How judiciary has helped in ensuring equal participation in all political processes, vibrant functioning of institutions of democracy and polity's compliance with constitutional values of justice, good governance and multiculturalism can be briefly discussed by reference to case law. The following is a theme wise discourse on the matter.

Free and fair election

PJ is unattainable without an electoral process which is free, fair and pure. By stating that it is one of the basic structures of the Constitution, the Supreme Court in *Indira Gandhi* case⁵⁰ has elevated its importance and protected it from unscrupulous manipulations and distortions. By nullifying Clauses (4) and (5) of Article 329-A which had immunised the elections of Prime Minister and Speaker from any challenges the Court upheld the spirit and philosophy of PJ. But the literal expression 'Political Justice' in the preamble was considered as vague and nebulous, and did not constitute a sound basis for nullifying the constitutional amendment.⁵¹ The Court relied upon right to equality, rule of law, democracy and separation of powers to nullify the constitutional amendment. This approach has reinforced PJ. However, judicial self restraint in not applying the basic structure doctrine to test the ordinary law viz., amendment to Representation of Peoples Act (RPA), made a dent into PJ.

⁵⁰ *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299

⁵¹ *Ibid*, the views of Justice Y V Chandrachud and Justice Beg.

Elections could be free and fair if voters know the background and antecedents of the candidates contesting for elections. The Supreme Court's directions in *Association for Democratic Reforms* case⁵² to the Election Commission to obligate all the candidates to disclose along with the filing of nomination papers the details about pending criminal cases against them, past convictions and their assets and liabilities including that of their spouses were based on the idea that voters' decision should be based on true information. Thwarting a legislative effort of undoing the efficacy of these directions, in *People's Union for Civil Rights*,⁵³ the Supreme Court reinstated the democratic values promoting PJ and stated that exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. Well informed voter-citizen formed the foundation of healthy democracy. The Court nullified the amendment to the RPA which caused obstruction to the implementation of the court's order as unconstitutional, as it had not addressed the basis of the decision but aimed at set it naught. In *Public Interest Foundation*,⁵⁴ the Court issued directions to the Election Commission to mandate the candidates to inform the political party on whose banner he contests election about antecedents of crimes and the political parties to inform through its website and disclosures to the media.

There are provisions in RPA prohibiting corrupt practices like influencing the voters by appealing to their sentiments of religion, caste and race or by monetary and economic allurements. Judicial approach on these matters is, by and large, meeting the legal requirement. However,

⁵² *Union of India v. Association for Democratic Reforms*, 2002 AIR SCW 2186

⁵³ *People's Union for Civil Liberties v. Union of India* 2003 AIR SCW 2353

⁵⁴ *Public Interest Foundation v. Union of India*, AIROnline 2018 SC 238

the court's Hindutva judgments⁵⁵ have been criticised as deviating from the idea of secularism.⁵⁶

The Supreme Court's judgment in a PIL case laying down the scheme for 'none of the above' NOTA is another development in elevating the electoral process towards PJ.⁵⁷ The Court stated, "For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting." But as decided in *Shailesh* case⁵⁸ the NOTA scheme is not applicable to Rajya Sabha elections where each vote has single transferable value because any such negative voting will open up scope for corruption and defection going against the anti-defection law.

Equal rights in political participation

An entry in the voters list is the starting point of political right. Deletion of any name from the list on the basis of mere suspicion without hearing the party violates right to equality, as stated in *Lal Babu Hussein*.⁵⁹ Non-publication of the electoral roll before the closure of

⁵⁵ *Dr Ramesh Yeshwant Prabhuo v. Prabhakar Kashinath Kunte*, AIR 1996 SC 1113; *Manohar Joshi v. Nitin Bhaurao Patil* AIR 1996 SC 796.

⁵⁶ S P Sathe, *Judicial Activism in India: Transforming Borders and Enforcing Limits* (Oxford University Press, New Delhi, 2001) chapter on secularism.

⁵⁷ *People's Union for Civil Liberties v. Union of India* 2013 AIR SCW 5597

⁵⁸ *Shailesh Manubhai Parmar v. Election Commission of India*, AIR Online 2018 SC 134

⁵⁹ *Lal Babu Hussein v. Electoral Registration Officer*, AIR 1995 SC 1189

filing of candidature and subsequent addition or deletion of names by the Electoral Officer in accordance with law by itself is not vitiating electoral result unless unfairness is established by the petitioner.⁶⁰ In *Kuldip Nayar* the Court ruled that deletion of requirement of residence in a particular state for the purpose of election to Rajya Sabha is not violating federal principle, but is justified on the basis of right to equality.⁶¹ This reminds the proposition laid down in *Raghunathrao* case⁶² to the effect that abolition of Privy Purse to the former Princes is a measure of bringing political equality rather than violating political justice. The Court rejected the argument that breach of promise to the Princes at the time of merger of their territory was abridging political justice. Thus political justice has not come in the way of reforms orienting towards political equality.

Judiciary has compromised with political equality rule in two cases. The majority in *R C Poudyal*⁶³ extensively referred to the legislative history, the justifications for deviating from 'one person one vote' in a parliamentary democracy which responds to the issue of pluralism and implications of the doctrine of political question vis-a-vis judicial review. It held that inequality in weightage of votes was inherent in first-past-the-post system; that in view of socio-political and cultural role of the Sangha in the past and its continued social significance rather than its mere religious character there was justification for its accommodation comparable to that of nomination of Anglo Indian member to the Parliament and not amounting to communal representation; and that doctrine of political question is not applicable in India. In contrast, the minority of judges referred to the rejection of the practice of communal representation and need for adherence to the

⁶⁰ *P T Rajan v. T PM Sahir*, AIR 2003 SC 4603

⁶¹ *Kuldip Nayar v. Union of India* 2006 AIR SCW 4394

⁶² *Raghunathrao Ganapatrao v. Union of India*, AIR 1993 SC 1267

⁶³ *R C Poudyal v. Union of India*, AIR 1993 SC 1804

equality rule. In *Subrata Acharjee*⁶⁴ a temporary arrangement for continuing the same number of members belonging to the Scheduled Tribes in Tripura Legislative Assembly until the next census which enables application of proportionality rule was upheld. Although this position conformed to convenience deviated from the rule of political equality.

Representative capacity of Ministers and politics sans crimes

In democracy people expect to be governed by their representatives. But the Constitution provides scope for non-legislator ministers for a temporary period of six months.⁶⁵ The question whether there could be reappointment of a minister under Article 164 (4) when he could not get himself elected as member of the House within a period of 6 months from the date of his appointment as minister was before the Supreme Court in *S R Chaudhury* case.⁶⁶ Answering negatively, the Court observed,

“Every Minister must draw his authority, directly or indirectly, from the political sovereign - the Electorate. Even a most liberal interpretation of Article 164(4) would show that when a person is appointed as a Minister, who at that time is not a member of the legislature, he becomes a Minister on clear constitutional terms that he shall continue as a Minister for not more than six consecutive months, unless he is able to get elected in the meanwhile.

⁶⁴ *Subrata Acharjee v. Union of India* AIR 2002 SC 843

⁶⁵ Article 164 (4) interpreted and applied in *Har Sharan Verma v. Tribunal Rarain Singh*, AIR 1971 SC 1331 in the case of Chief minister and ministers; Article 75 (5) as interpreted in *S P Anand v. Deve Gowda*, AIR 1997 SC 272 in case of Prime Minister.

⁶⁶ *S R Chaudhury v. State of Punjab* AIR 2001 SC 2707; also see *Harsharan Verma. Union of India* 1987 (Supp) SCC 310

To construe this provision as permitting repeated appointments of that individual as a Minister, without getting elected in the meanwhile, would not only make Article 164(4) nugatory but would also be inconsistent with the basic premise underlying Article 164.”⁶⁷

Treating the representative capacity of ministers as an essential link in the governance system for PJ is an important development carried out in this case through a purposive interpretation of the Constitution. Prevalence of PJ and constitutionalism over the voice of majority in a state legislative assembly in the matter of appointment of Chief Minister, who was convicted for a period of two years under the Prevention of Corruption Act, and whose punishment was suspended during appeal, was the theme in the decision of the Supreme Court in *B R Kapur*⁶⁸. The Five Judges Bench unanimously held that the appointment is not valid and she shall cease to continue in office of CM with immediate effect. Justice Bharucha, in his leading judgment, rejected the arguments that suspension of punishment during appeal meant suspension of its factual existence and all of its consequence, and ruled that suspension was merely of execution but disqualification arising from conviction will continue. The Court held that by virtue of Article 164 (4), in order that a non-legislator member shall become a minister she shall possess all qualifications to become a member of the House. Otherwise, she will not be able to become a member of the legislative chamber within a period of six months. This position was reached by reading Articles 164 (1) and (2), 173 and 191. The argument that courts shall not enter into political thicket and abstain from deciding political question was also rejected by citing from the *Rajasthan Assembly Dissolution* case to the effect that

⁶⁷ Ibid paragraph 35

⁶⁸ *B.R. Kapur v State of Tamilnadu* AIR 2001 SC 3435

“Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political....So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.”⁶⁹ Justice Pattanayak, while concurring, observed that the Governor has no unfettered discretion in appointment of minister and any appointment of a disqualified person was contrary to the idea of good governance. Justice Brijesh Kumar opined that the contention that in all eventualities whatsoever the Governor is bound by the decision of the majority party is not a correct proposition. The case demonstrates PJ’s contribution to good governance and exclusion of corruption and crimes in public life.

The combat of PJ against crimes in politics was taken to greater heights in *Manoj Narula* case.⁷⁰ Its central idea was that abhorrence to corruption and prevalence of genuine orderliness, positive propriety, dedicated discipline and compliance with constitutional morality constitute pillar stone of good governance. In the background of Article 75 and 162, where the Prime Minister or Chief Minister have the responsibility of aiding and advising the President or Governor, in order to live up to the trust reposed in him, he would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. Although the Court declined to read implied limitations on the discretion of PM or CM, on the basis of earlier precedents on excluding criminalization of politics⁷¹

⁶⁹ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592

⁷⁰ *Manoj Narula v. Union of India*, (2014) 9 SCC

⁷¹ *Dinesh Trivedi, M. P. and others v. Union of India* (1997) 4 SCC 306; *Anukul Chandra Pradhan, Advocate, Supreme Court v. Union of India* AIR 1997 SC 2814; *K. Prabhakaran v. P. Jayarajan* AIR 2015 SC 688.

and by reference to principle of constitutional morality, the Court recognised the above responsibility as an unwritten rule.⁷² The judgment has its own impact and there are instances of ministers resigning in the contexts of criminal charges against them.⁷³

Making and unmaking of government – confidence/no confidence motions

Forming and defeating of governments in parliamentary democracy on the basis of strength of supporters of legislators in the popular chamber is an essential aspect of democracy and calls for application of PJ. From Parliament to panchayat raj and municipalities there are various forums for linking the governance to popular support, scrutiny and approval. It is the factor and process of accountability that brings dynamic dimensions to PJ. In the context of hung legislature without any signs of pre-poll alliance, although the leader of single largest party shall be invited to form the government, trust vote in support of the government cannot be delayed. When the Governor of Karnataka gave 15 days time for trust vote in 2018, in *G Parameshwara*⁷⁴ the Supreme Court ordered for immediate appointment of pro-tem Speaker and conducting of the floor test the very next day after the date of the order. The Court also ordered for extending police

⁷²*Manoj Narula v. Union of India*, (2014) 9 SCC Per Dipak Misra J “Good governance is only in the hands of good men. No doubt, what is good or bad is not for the court to decide: but the court can always indicate the constitutional ethos on goodness, good governance and purity in administration and remind the constitutional functionaries to preserve, protect and promote the same. Those ethos are the unwritten words in our Constitution.”

⁷³ For example resignation of M J Akbar. <https://www.hindustantimes.com/india-news/mj-akbar-resigns-as-minister-of-state-for-external-affairs-over-allegations-of-sexual-harassment/story-lk7B64UD5b3lgY3IhqmdaJ.html>; resignation of KJ George in Karnataka following a criminal charge.

⁷⁴ *G. Parameshwara v. Union of India* (2018) 16 SCC 46

protection to the legislators and live telecast of the floor test. Similar steps for immediate floor testing were taken in the case of Maharashtra in 2019 in order to prevent unlawful practices such as horse trading, to avoid uncertainty and to effectuate smooth running of democracy.⁷⁵ In both the cases, there were fears of corruption-induced floor crossing by the legislators and political instability marring PJ. The Court observed that the situation called for maintaining democratic values and facilitating the fostering of the citizen's right of good governance. Although institutional comity and separation of powers needed self restraint, judicial interference as a last resort became an imperative. Admirably quick decisions by the apex Court avoided the predicament of injustice.

After the 73rd and 74th Amendment, the issues relating to no-confidence motion – legislative changes, interpretation of the clause, period of notice, counting of votes, competence to vote, prejudices, etc – in various layers of Panchayat and municipalities have cropped up in big numbers, especially before the high Courts. In *Bhanumati* and *Usha Bharti* cases the Supreme Court decided few of such issues.⁷⁶ The Court's discussion of the CAD, legislative history and the philosophy underlying local self government hints at the significance of PJ in this sphere. One can notice from the reported cases that the representatives act with vigilance and claim their rights in courts in order to gain PJ.

Anti defection law

Political parties establish links between people and power holders. They put forward specific political ideologies, schemes and programmes upon whose strength they attract the people. Through the

⁷⁵ *Shiv Sena v. Union of India*, (2019) 10 SCC 809

⁷⁶ *Bhanumati v. State of Uttar Pradesh*, AIR 2010 SC 3796; *Usha Bharti v. State of Uttar Pradesh*, AIR 2014 SCW 1981

inner party democracy, party manifesto or ideologies and continuous relation with cadre and people, they attain distinct identities. Political support that they get through these pillars of power during election is the basis for their claim to reins of governmental power. Hence, loyalty of the leaders to the political party through which they got elected becomes a component of political morality. Added to this, they have moral obligation towards their constituencies or the electorate who trusted them with power. The cohesive bond developed through such political interactions keeps the leaders within the orbit of parties whether they are in power or remain outside the power. In parliamentary form of government, it is the comparative strength of a party's elected members in the floor of the popular chamber, which provides access to power. Political morality demands that elected members do not betray the trust of the people and parties. In a constitutional system that recognises political parties as players of constitutional game, this political morality should operate within the parameters of constitutional morality. It is because of these factors that PJ discourse is essential in dealing with the issues of party discipline and loyalty.

In the backdrop of the menace of political defections, instability of governments and unprincipled floor crossings belied the expectations of people and political parties starting from late 1960s, and in response to considerations PJ pointed out above, 52nd Constitutional Amendment was enacted providing for the Tenth Schedule that details the snit-defection law. Compared to the extent, frequency and intensity of political defections that were taking place in pre-1985 period, the post-1985 scenario is far better although the evil could not be totally eradicated. The obstructions to the efficacy of Tenth Schedule were to a great extent removed by subsequent constitutional amendments. Removal of provision relating to split, prescription of ceiling limit on number of ministers in the Council of ministers, and disqualification of a defecting member for appointment on remunerative political post for the rest of the

period or until he is elected have reinforced the basic policy underlying anti-defection law. Judiciary has repaired some of the infirmities in the Tenth schedule by holding that the Speaker shall act as a tribunal and comply with principles of natural justice, that Speaker's decisions regarding disqualification of members on account of defection are reviewable by judiciary and that the Speaker shall decide the matter of defection within a reasonable period. Regarding acceptance of resignation submitted by any member, Speaker has the responsibility of making suitable inquiry and not accepting any resignation if it is not voluntary or genuine as per Article 190 (3) (b).

In *Kihoto Hollohan*,⁷⁷ the validity of the Fifty second constitutional amendment was upheld as definitely strengthening parliamentary democracy in the background of unscrupulous floor crossings by members of political parties which had made deep derogation to honesty in public life and loyalty to the constituencies. By requiring that the Speaker shall act as a tribunal and comply with principles of natural justice, the majority upheld its basic structure compliance. Resorting to harmonious construction of the Tenth Schedule by recognising the importance of freedom of speech of individual members as a part of parliamentary privileges, the majority narrowed down the scope of 'direction' that can be issued by political parties to the purpose of the anti-defection law, viz., ensuring stability of the government and disallowed its application in matters of law making function unless the legislative policy is staked by the government as essential for its functioning. The basic idea of promoting democracy and building procedural safeguards to the same can be seen in the judgment. This has strengthened the scheme of PJ underlying anti-defection law, and integrated it into the general constitutional philosophy.

⁷⁷ *Kihoto Hollohan v. Zachilu*, AIR 1992 SC W 3497

Anti-defection law had to be further strengthened by the ninety-first constitutional amendment by limiting the number of ministers in the council of ministers, removing the disqualification arising from split and disqualifying the members defected from holding any ministerial post until re-elected. Questions on their interpretation came before the Supreme Court and High Courts in a number of cases.⁷⁸ *Shrimanth Patil* case⁷⁹ is the latest one and makes a typical use of legislative history, structure of the Constitution and purposive approach towards satisfactory result. The case involved validity of Speaker's orders disqualifying 15 members of ruling coalition, who had submitted their resignation to membership of the Legislative Assembly, for the rest of the period of Legislative Assembly's tenure. The Supreme Court started its reasoning by referring to constitutional morality, discussed the reasons behind the Fifty-second and Ninety-first Amendments on anti-defection law and examined the Thirty-third Amendment on requirement of voluntariness and genuineness of resignation. The Court approvingly referred to the views of Griffith and Ryle to the effect that loyalty to the party is based on shared belief, electorate's expectation about adherence to of ideological commitment and reliance on general policy of the party. Thus, judicial contribution to PJ in this sphere is substantial.

Effective functioning of the legislature, privileges and immunities and political justice

Parliament and state legislatures constitute key instruments of PJ. This entails two inter-related factors: legislature's image, efficacy and role as national or regional deliberating body shall be maintained

⁷⁸ *Balachandra Jarkhiholi v. B S Yeddyurappa*, (2011) 7 SCC 1; *Ravi S Naik v. Union of India*, 1994 Supp (2) SCC 641; *Keisham Meghachandra Singh v. Speaker, Manipur Legislative Assembly*, MANU/SC/0062/2020

⁷⁹ *Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*, AIROnline 2019 SC 1448

undisturbed as against assailment; second, voting behaviour shall be immune from corruptive influences. Justification for legislative privileges is attributed to the first factor.⁸⁰ In the President's Reference on Legislative Privileges case the Supreme Court opined that there was no contempt of the legislature by moving the judiciary for writ of habeas corpus against detention order by the legislature on ground of breach of legislative privilege. Extending the logic that justice is not cloistered virtue and that respect for an institution emanates from its respectable behaviour the Court brought out PJ dimension of legislative privileges. This meant that the conflicts between basic human rights of citizens and privileges of parliament shall be fairly resolved.⁸¹ Regarding the second factor, the majority in *P V Narasimha Rao* case⁸² had adopted an approach that the bribe-taking MPs who voted in favour of confidence motion enjoyed immunity whereas bribe-givers were punishable. This is inimical to PJ. The minority view that Article 105 clause (2) does not confer an immunity for challenge in the Court on the speech or vote given by a Member of Parliament, and does not protect from civil and criminal liability for bribe taken is better promoting PJ. In contrast, in *Rajaram Pal*⁸³ the majority upheld expulsion of 10 Lok Sabha Members and one Rajya Sabha member who were caught red handed by media when they involved in 'cash for questions' for raising any matter before the Parliament. The Court considered that Parliament has inherent power under Article 101 and 102 for ensuring discipline. The minority judge Justice R A Raveendran held that there was no express authorization for expulsion. The majority view laid stress on aspects of PJ.

⁸⁰ Krishnan Veugopal and V Sudhish Pai, *ROIL: Legislative Privilege in India* (Indian Law Institute, New Delhi, 2011) 3

⁸¹ *Justice (Retd) Markandeya Katju v. Lok Sabha*, AIR 2017 SC 1379; *Justice Ripusadan Dayal v. State of MP*, 2014 AIR SCW 1459

⁸² *P V Narasimha Rao v. State* (CBI) AIR 1998 SC 2120

⁸³ *Rajaram Pal v. Hon'ble Speaker*, Lok Sabha, 2007 AIR SCW 1448

Safeguarding democracy and the constitution from the abuse of amending power

The Supreme Court came to the centre of constitutional politics for defending constitutionalism and PJ in *Kesavananda case*⁸⁴ by its innovative basic structure doctrine. The doctrine is a grand compromise formula of balancing continuity with change and strengthening basic pillars of democracy by balancing among three organs of government. It is born from the churning process of competition between legislature and judiciary about the final say in constitutional politics for saving the Constitution against dismemberment.⁸⁵ As applied in *Kesvananda* itself, it checked against legislative finality of protection to economic reforms laws under Article 31-C. Role of PJ was clear when the political manipulation of the Allahabad High Court judgment through constitutional amendment and amendment to RPA was nullified by basic structure theory in *Indira Gandhi* case.⁸⁶ The attempt at legislative judgment was struck down asserting the theory of separation of powers. There was also a playing of little politics in not applying the basic structure theory to examine the validity of amendment to RPA incorporated into the Ninth Schedule.⁸⁷ Subsequently, this position was altered and the final political voice of protecting the ninth Scheduled legislations was rejected and its openness to judicial review was

⁸⁴ *Kesavananda v. State of Kerala*, AIR 1973 SC 1461

⁸⁵ Upendra Baxi, 'To be a 'constant irritant' to untrammelled power is the essence of judicial duty' <https://indianexpress.com/article/opinion/columns/supreme-court-kesavananda-bharati-vs-state-of-kerala-judgment-indian-constitution-6597505/> visited on 7-10-2020.

⁸⁶ *Indira Nehru Gandhi v. Union of India*, AIR 1975 SC 2299

⁸⁷ Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Co, 1980)

recognised in *Waman Rao*,⁸⁸ *D G Mahajan*⁸⁹ and *I R Coelho* cases.⁹⁰ In *Minerva Mills* case⁹¹ extension of Article 31-C protection to all DPSPs was nullified. The Court observed, “That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend.”⁹² By treating Speaker’s decision on defection of legislators quasi judicial and reviewable by judiciary centre of gravity about its judiciousness was kept in the judiciary in *Kihoto Hollohan*.⁹³ In the *NJAC judgment*,⁹⁴ PJ standing for independence of judiciary was crucial in totally rejecting the constitutional amendment introducing the system of national judicial appointment commission for appointing judges of Supreme Court and high Courts. Primacy of judiciary’s role in appointments of judges was considered as based on CAD, protecting against executive interferences and necessary for judicial independence.⁹⁵ The sole dissent by Justice Chalmeswar justified the 99th Amendment as an outcome of democratic choice and equal status of constitutional organs. In interpreting various

⁸⁸ *Waman Rao v. State of Maharashtra*, AIR 1981 SC 271

⁸⁹ *D G Mahajan v. State of Maharashtra* AIR 1977 SC 915

⁹⁰ *I.R. Coelho (Dead) By Lrs v. State Of Tamil Nadu* AIR 2007 SC 861

⁹¹ *Minerva Mills v. Union of India* AIR 1980 SC 1789

⁹² *Ibid* per Y V Chandrachud

⁹³ *Kihoto Hollohan v. Zachilu* AIR 1992 SC W 3497

⁹⁴ *Supreme Court Advocates on Record Association v. Union of India* (2016) 4 SCC 1,

⁹⁵ For a thought provoking discussion on the judgment see Upendra Baxi, ‘Demosprudence and Socially Responsible/Respons-able Criticism: The NJAC Decision and Beyond’ 9 *NUJS Law Review* 153-172 (2016) at 157-158.

amendments the Court carried further the objective of constitutionalism rather than the political agenda behind the constitutional amendments.

Federalism, pluralism and Political Justice

In shaping the Centre-State relations on the constitutionally contemplated lines of cooperative federalism judiciary has contributed by employing the principle of PJ. A memorable case in this regard is *S R Bommai*.⁹⁶ The Supreme Court held that the power of President to take over any or all powers of any state government on being satisfied that a situation has arisen wherein the governance of the state cannot be carried in accordance with the provisions of the Constitution is not absolute, but is reviewable. The abuse of discretion can be rectified by restoring the government whenever possible. Judiciary's recognition of state government as a democratic unit entitled to perform its functions within the constitutional limits operated as a check against abuse of power under Article 356. As against frequent imposition of President's rule in the past, the post-*Bommai* scenario is proving the protective role of PJ.⁹⁷

In a country of cultural pluralism as that of India PJ has the task of ensuring equal opportunities and rights for diverse religious, linguistic and ethnic communities to have protection of their cultural identity, opportunities for the exercise of their rights and an atmosphere of non-dominance. In the background of movement and constitutional provisions under the 5th and 6th Schedules on tribal local self government and security of their land, forests and social customs judiciary has given decisions in support of these policies.⁹⁸ Language movement being influenced by political agitations, casting impact upon state formation,

⁹⁶ *S R Bommai v. Union of India*, AIR 1994 SC 1918; (1994) 3 SCC 1

⁹⁷ *Rameshwar Prasad v. Union of India*, 2005 AIR SCW 5225, 6303;

⁹⁸ *Samata v. State of Andhra Pradesh*, (1997) 8 SCC 191; *District Council of United Khasi and Jaintia Hills v. Sitimon Sawion*, (1971) 3 SCC 708

medium of education, job reservations and other policies, the judiciary had to respond towards implementation of the constitutional objectives in numerous cases.⁹⁹ The mainstream approach has been towards the direction of non-implementation of any language upon an unwilling community, to remove hegemonies and ensure equal rights.¹⁰⁰ Insofar as religious diversity is concerned, judiciary has established a sound philosophy and jurisprudence of secularism in an impressive manner.¹⁰¹ All these aspects of multiculturalism have substantive dimensions of PJ.

Protection of human rights and Promotion of welfare

The contribution of PJ to the jurisprudence of fundamental rights and directive principles of state policy and vice versa has also been substantial. It is the ascendance of PJ in constitutional jurisprudence after the internal emergency that enormous development took place in the method of understanding FR and DPSP. Emergency had produced shock waves and awakened the political consciousness that is required for eternal vigilance fit for safeguarding the liberty lest it may be lost due to concentration of powers. Amendment to emergency clauses, making rights under Articles 20 and 21 suspension-free during emergency, expansion and effectuation of grass root democracy, subjecting the political parties to the constitutional governance, removal of property right and inclusion of educational rights changed the scenario of PJ, and in turn made both FR and DPSP conscience of the constitution. The judgment in *Maneka Gandhi* case,¹⁰² which brought revolutionary change

⁹⁹ See P Ishwara Bhat, *Law and Social Transformation* (Eastern Book Co, Lucknow, 2009) chapters -8.

¹⁰⁰ *English Medium Students Parents Association v. State of Karnataka* (1994) 1 SCC 550

¹⁰¹ P Ishwara Bhat, *Law and Social Transformation* (Eastern Book Co, Lucknow, 2009) chapter 5

¹⁰² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

in the interpretation of Article 21 and other provisions of Part III, was essentially on political and civil right of going abroad. The new approach on interrelationships of rights was instrumental in opening the vista of each of the rights, a process nowadays called as progressive realisation of rights without retrogression.¹⁰³ The very idea of public interest litigation is essentially political, as it has ‘other regarding’ effect or has genesis in pro bono public approach. Although PJ might not have been mentioned as the instrumental concept, it was the working force under the rights revolution. Justice to the vulnerable sections of the society – women, children, untouchables, tribals, minorities, aged and the poor – meant enhanced levels of protection through public scrutiny. Socio-political agitation urging for such protection added value to public action itself. At least in few recent cases there is mention of PJ as vital key behind expansion of rights. In *Ashwani Kumar*¹⁰⁴ while recognising the rights of elderly persons which included their right to live with human dignity, right to shelter and right to health, the Supreme Court gathered support from political justice as continuous monitoring of progress in implementation of the rights of elderly was needed. The Court cited from President Ramanath Kovind’s exhortation on political justice and realised the importance of trinity of justice. Reliance on welfare goal could be strengthened by recourse to political justice in *Mool Chand Khairati Ram Trust* case¹⁰⁵ where the administrative instruction for free treatment of weaker sections in hospitals to a certain extent was regarded as coming within reasonable restriction under Article 19 (6). On the other hand PJ became strong with FRs. Mainly the application of FR jurisprudence to election law enhanced the competence of PJ.

¹⁰³ P. Ishwara Bhat, *Fundamental Rights: a Study of their interrelationship* (Eastern Law House, Kolkata, 2004)

¹⁰⁴ *Ashwani Kumar v. Union of India*, AIROnline 2018 SC 867

¹⁰⁵ *Union of India v. Mool Chand Khairati Ram Trust*, AIROnline 2018 SC 524

Supremacy of the constitution and PJ

The occurrence of the above constitutional development could take place under the canopy of constitutionalism and judiciary's unfailing emphasis on this factor. The idea of constitutional morality built on the basis of equality, liberty and dignity has supplied inputs against arbitrary majoritarian legislative choices on issues such as sections 377 and 497 of the Indian Penal Code, section 66-A of the Information Technology Act.¹⁰⁶ Basic structure theory is also an aspect of constitutionalism. Supremacy of the Constitution is to be deliberately cultivated as it is a natural sentiment according to Dr B R Ambedkar.¹⁰⁷ It is the good quality on the part of people who work the constitution that makes the constitution good. Hence, PJ has the role of involving all the people in adhering to constitutional values. Ronald Dworkin and Mark Tushnet had suggested about the need to develop PJ outside the constitution. Constitution is not the only force of PJ.¹⁰⁸ As observed in Public Interest Foundation,¹⁰⁹

“It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the concerned authorities. Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in order to infuse the culture of purity in politics and in democracy and foster and nurture an

¹⁰⁶ *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321; *Joseph Shine v. Union of India*, AIR 2018 SC 4898; *Shreya Singhal v. Union of India*, AIR 2015 SC 1523; (2015) 5 SCC 1

¹⁰⁷ CAD 25.11.1949

¹⁰⁸ See supra n 23, 24.

¹⁰⁹ *Public Interest Foundation v. Union of India*, AIROnline 2018 SC 238

informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that "we shall be governed no better than we deserve..."

Conclusion

From the above discourse on PJ it can be inferred as follows: It is one of the cardinal concept and basic value that has influence on the whole gamut of the Constitution. Equal participation of all the citizens in the political life and decision making process and good governance in accordance with the Constitution are its main features and sources of strength. It draws support from both the constitution and society.

PJ has sound philosophical base, long historical genesis and extensive textual support. It has influenced political revolutions and freedom movements in various parts of the globe. Political accountability, human rights, rule of law, good governance, welfare, harmony, justice and separation of powers contribute towards its holistic presence and action. PJ becomes a touchstone for assessing the performance of the polity.

By juxtaposing PJ with other key concepts in the preamble, the Constitution Makers have recognised its interrelated character and complementary role. Mutual reinforcement of various concepts has contributed towards robust growth of each of the concept. Insofar as economic and social justice is concerned PJ has spearheaded for those ideals because of its political facet.

In the context of changing political, social and economic circumstances and cultural conditions, PJ has faced great many challenges and has responded with tremendous strength. Experiencing from unjustified imposition of emergency and its atrocities, PJ mustered strength and developed a well informed political consciousness that stood

for creating a dynamic tradition of judicial activism, people's participation in using judicial remedies and reorienting the polity for welfare ideologies.

Through the seven decades of constitutional developments from 1950 to 2020, PJ has grown in strength and acted with its transformative competence through political developments, constitutional amendments and judicial review. While the first two are by use of forces outside the Constitution but having ramification upon the constitutional development, the last one is within the constitution and through a systematic and well played judicial role. But none of them operated in isolation. It is interesting to find that PJ enters into every tissue of the political structure and sensitises them with a very promising input and output. It operates as live energy for pro-people action. Because of its link with people's participation higher amount of dynamism is implicit in its functioning. PJ is the backbone of the Constitution. Since people's participation is its strength, eternal vigilance and support are needed for its success.