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CONSTITUTIONAL HISTORY AS AN AID TO INTERPRET THE CONSTITUTION

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Introduction

Constitutional history, in its generic sense, provides a valuable record of the evolution, growth and maturing process of constitutional values, the political circumstances in which they developed and their importance to the polity. It documents the formulation of their legal texts in their earlier avatar, how the Constitution Makers understood them and how it underwent changes over time. It gives insight into the purpose underlying the concepts, the evil or mischief intended to be eradicated, the social experience about their functioning and reasons for preferring the chosen mechanism.[1] The genesis of a constitutional principle in the pre-Constitution law, changes in the wordings of clauses during its growth and acceptance, modification or even rejection of it in the present constitutional text enlighten about the trend of development and social choices. Hence, reference to constitutional history becomes helpful in attributing meaning to the clauses or words embedded in the nation's past. But, having secondary importance as an external aid, it has lesser preference than the text. As Justice Ravindra Bhat observed in *Jaishri Laxmanrao* case,[2]

"There cannot be a disagreement with the proposition that where the provisions of the statute or its wordings are ambiguous, the first attempt should be to find meaning, through internal aids, in the statute itself.

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[1] Kesavananda v. State of Kerala AIR 1973 SC 1461 para 654 per K S Hedge and Mukherjea JJ

[2] Jaishri Laxmanrao Patil v. Chief Minister, State of Maharashtra, AIROnline 2021 SC 240 para 585

Failing this, it is open to the court to find meaning and resolve the ambiguity by turning to external aids, which include the statements of objects and reasons, as well as Parliamentary reports or debates in Parliament."

A general constitutional history informs about political, social, cultural and economic developments that have shaped the institutions, norms and policies that entered into the present constitution.

In India, two streams nourish this phenomenon. One is the series of constitutional reforms introduced by the British from time to time, ultimately culminating in the enactment of the Indian Independence Act, 1947. Out of all the British enactments, the Government of India Act 1935 provided a wide textual resource to the Constitution Makers. The other stream flowed from indigenous efforts such as the Constitution of India Bill (Tilak Bill) 1895, the Gandhi-Annie Beasant Bill 1924, the Nehru Committee Report 1928 and prominent resolutions of the National Congress Party. The most important event of nation-building was the working of the Constituent Assembly from 1946 to 1949, which ultimately produced, adopted and enacted the Constitution. A critical study of constitutional history would focus on the external aspects with which the Constitution has relations, such as the country's political, social, economic and cultural atmosphere and the internal story of the growth of the text or clauses.[3] Perhaps, one can project a theory that a constitution cumulatively grows in response to people's demands, just like hunger grows out of little feeding. The present paper deals with the internal aspect.

Constitutional history does not stop with the making of the Constitution. Constitutional amendments, political and economic developments and judicial decisions shape constitutional development. Courts have

[3] P. Ishwara Bhat, Idea and Methods of Legal Research (OUP, New Delhi, 2019)

sometimes referred to the changing trends, such as property rights,[4] social justice, natural justice[5] and dignity of life.[6] Although external aspects may have some relevance in understanding the thematic growth, for a constitutional interpreter, the immediate concern is on the internal story of how a specific clause entered into the constitutional document. The story will be complete with a study of speeches made in the CAD and the 'Committee reports'[7] and discussions in Parliament during constitutional amendments. The law on interpretation in common law countries is called parliamentary or legislative history. Normally it does not include the study of the prior state of law articulated in the form of precedents.[8] The present paper focuses on how the judiciary gathers support from internal constitutional history of the specific provisions. The discussion on relevance of CAD in constitutional interpretation is conducted elsewhere.

Theoretical justifications

About the theoretical justification for referring to constitutional history some preliminary remarks need to be made. As explicit in the Supreme Court's view in Jindal Stainless case,[9] it throws light on the social, economic and political reasons underlying acceptance of a particular

[4] Jilubhai Nanbhai Khachar, etc. v. State of Gujarat AIR 1995 SC 142 para 51-52; Jindal Stainless v. State of Haryana AIR 2016 SC 5617 per N V Ramana J, 180-181
[5] Indian Pan Works, Delhi v. The Chief Commissioner, Delhi AIR 1969 Del 1 para 4; Orient Paper Mills Ltd v. Deputy Collector, Central Excise AIR 1971 Ori 21.
[6] K S Puttaswamy v. Union of India, AIROnline 2018 SC 237
[7] These include reports submitted by parliamentary committees, committees or commissions constituted by the Union Government. For example, Balakrishnan Committee on NCT Delhi, National Commission to Review the Working of the Constitution, Sarkaria Commission on Centre-State relations, Punchhi Commission on Centre-State relations
[8] Peter W Hogg, Constitutional Law of Canada (Vo.l II Fifth edn. Carswell, Thomas Reuters, South Asian edition, 2017) 60. 1 (a); he also excludes social science data from legislative history.
[9] Jindal Stainless v. State of Haryana, AIR 2016 SC 5617

constitutional provision or scheme. In that case, the confusion and chaos of multiple taxes and impediments on inter-state trade by numerous princely states and provinces created obstruction to unification of large market.[10] Secondly, as Justice Brennan points out, it gives a comparative picture of the legal position in olden times of its making and contemporary view of the principle. Justice Brennan observed,

"We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time."

Thirdly, in the context of a transformative constitution, it enlightens about the problems, felt necessities and difficulties and the role of the chosen principle to address them. The Constitutional Court of South Africa has observed,

"The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in

[10] The Court referred to section 297 of the Government of India Act, 1935, which prohibited Provincial Governments from imposing barriers on trade within the country, and from levying any tax, cess, toll or other due which discriminated between goods manufactured in one locality and similar goods manufactured elsewhere. The Court also referred to the Report of Sub-committee on Fundamental Rights.

the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[11]

This has great significance in identifying the subjective and objective purpose. Fourthly, the factors of cultural pluralism, aspirations for conservation of culture and national way of life can be gathered from constitutional history. This helps in understanding the cultural ethos of socio-legal values that entered into the constitutional culture. Deeper study of cultural history gives insights and orientation for understanding the cultural and regional diversities and their basis in human rights, harmony and welfare.[12] Finally, the advantages which the originalists seek in reliance on the past also come into play. Since judiciary is not an elected body, justification or legitimacy for judicial review consists in adherence to the original intention which was a product of democratic will of the nation.[13] Such adherence provides consistency and coherence in judicial reasoning. But in extraordinary situations of compelling needs, developments shall be enabled by transcending the past. Further, the time gap between making of the Constitution and its interpretation brings variation in the intensity of constitutional history's importance when we

[11] Investigating Directorate: Serious Economic Offences and others v. Hyundai Motor Distributors (Pty) Ltd and others; In Re Hyundai Motor Distributors (Pty) Ltd and others v. Smit NO and others 2001 (1) SA 545 (CC)

[12] P. Ishwara Bhat, 'The Gorgeous Flow of Socio-Legal Values: Eternal, Interactive and Inspiring: A Note on the Medieval Karnataka Experience and its Aftermath' in Shivaraj Patil, P. Ishwara Bhat and Chidananda Reddy S Patil (ed) Socio-Legal Values in Mitakshara, Vachana, Dasa and Folk literature in Karnataka (Karnataka State Law University, Hubballi, 2022) 3-43.

[13] Michael C Dorf, 'Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning' 85 Georgetown Law Journal (1997) 1765

look from a 'distance'.[14] The longer the gap, it is less persuasive and vice versa, according to this approach.[15] Although such formula is vague, it has roots in representation reinforcement argument.[16]

Application of constitutional history in constitutional interpretation in India

Courts have applied constitutional history in the interpretation of various constitutional provisions touching upon important aspects. This speaks about the overwhelming importance of this external aid of interpretation. Following is a brief illustrative exposition of case law discussion.

Towards procedural fairness

In *A K Gopalan* v. *State of Madras*[17] The Court considered the constitutional history of dropping the initial due process clause and replacing it by a neutral phrase 'procedure established by law'.[18] Kania CJI observed, "No extrinsic aid is needed to interpret the words of Art. 21, which in my opinion, is not ambiguous. Normally read, and without thinking or other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian

[14] Rik Peters, 'Constitutional Interpretation: A View from a Distance' 50 History and Theory (Wesleyan University, 2011) 117-135; Taking support from Justice Rehnquist's work on Living Constitution, he states, "To distance oneself from the original intent is therefore a denial of the popular will and therefore fundamentally undemocratic". William H. Rehnquist, 'The Notion of a Living Constitution', 54 Texas Law Review (1976), 693-706

[15] Compared to A K Gopalan v. State of Madras AIR 1950 SC 27 where the court was closely influenced by the drafting history of 'procedure established by law' which replaced original proposal for 'due process of law' the Supreme Court in Maneka Gandhi v. Union of India AIR 1978 SC 597 had less inclination to follow constitutional history.

[16] For an argument that constitutional interpretation shall reinforce representative form of democracy, see John Ely, Democracy and Distrust

[17] AIR 1950 SC 27

[18] "A perusal of the report of the drafting committee to which our attention was drawn shows clearly that the Constituent Assembly had before it the American Article and the expression "due process of law" but they deliberately dropped the use of that expression from our Constitution."

Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase or if they wanted to limit the same to procedure only, to adopt that expression with only the word 'procedures' prefixed to 'law'."[19] This points out how textual interpretation can be supported by arguments based on constitutional history. In contrast, in *Maneka Gandhi* [20]the Court referred to the general constitutional history instead of history of drafting, and observed with a positive note,

"These rights represent the basic values of a civilised society and the constitution makers declared that they should be given a place of pride in the Constitution and elevated to the status of fundamental rights. The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India formed the background against which these rights were enacted and consequently, these rights were conceived by the constitution-makers not in a narrow limited sense but in their widest sweep, for the aim and objective was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured. The constitution-makers recognised the spiritual dimension of man and they were conscious that he is an embodiment of divinity, what the great Upnishadic verse describes as "the children of immortality" and his mission in life is to realise the ultimate truth."[21]

[19] Para 18

[20] Maneka Gandhi v. Union of India AIR 1978 SC 597

[21] Ibid at 636-7 per P N Bhagwati J. The approach resembles that of Justice H R Khanna's dissenting judgment in ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1206 where he relied on general constitutional history.

This historical/creative analysis supported the structuralist approach of reading Articles 14, 19 and 21 together and expanding the scope of rights under Article 21 by insisting on fairness of legal procedure. This approach brought big change in the Indian constitutional jurisprudence.

Aspects of pluralism

In *Narasu Appa Mali*[22] Chief Justice Chagla of Bombay High Court while interpreting the gamut of 'law' in Article 13 (3) (a) referred to the definition of 'law' under section 112 of GI Act, 1915 which had used the words personal law or custom having the force of law disjunctively and concluded that because of the omission of the words 'personal law' in Article 13 (3) (a) it cannot be inferred as included within the scope of 'law'. In contrast, section 292 of the GI Act 1935 had referred to continuance of all laws in force prior to 1935 as continuing after 1935 subject to the provisions of the GI Act 1935. In interpreting the words 'all laws in force' the Federal Court had interpreted the phrase to include personal law also. This aspect of constitutional history was not considered by the Narasu Appa court. Doctrinally and normatively, *Narasu Appa* approach was problematic and obstructed the purging of personal law from the angle of fundamental rights. Other High Courts took different approaches and tested the validity of personal law under the touchstone of fundamental rights. In *Shayara Banu*[23] (Triple Talaq case) the majority held that Muslim personal law providing for triple talaq as arbitrary and violative of Article 14.[24] Justice R F Nariman observed that the view of Justice P B Gajendragadkar in *Narasu Appa* to the effect that 'laws in

[22] State of Bombay v Narasu Appa Mali AIR 1952 Bom 84
[23] Shayara Banu v. Union of India (2017) 9 SCC 1
[24] Ibid

force' contained only statutory law as not correct legal position. In *Young Lawyers Association* (Sabarimala case*)* the majority tested the validity of custom and temple rule providing for exclusion of women in the age group of 10 to 50 from entry into the Ayyappa temple and held the same as unconstitutional.[25] The Court took support from the views of Dr Ambedkar that liberty was meant for reform of the social system.[26] It also referred to H M Seervai's view that there was no distinction between existing law and laws in force and hence, inclusive definition of existing law comprehended within its ambit personal law also.[27] The whole development shows the relevance and limitations of constitutional history, and the care to be bestowed by the judiciary in using it. In a case relating to legislative competence of states to regulate rent of buildings in cantonment areas, the Bombay High Court held that the Constitution was based upon the Government of India Act and the Court must look at the constitutional history in order to construe expressions used in the Government of India Act and in the Constitution.[28]

In *A S Narayana Deekshitulu*[29] Justice K Ramaswamy made a deep study of approaches to religion in India ranging from ancient times to the present. His exposition of dharma, equality in religious freedom, peace, secularism and welfare of society by reference to cultural and historic literature leads to a conclusion that,

[25] Indian Young Lawyers Association v. State of Kerala, AIROnline 2018 SC 243
[26] Constituent Assembly Debates, Vol. VII, at page 781
[27] H M Seervai, Constitutional Law of India, Vol. I, at page 677
[28] A C Patel v. Vishwanath Chada AIR 1954 Bom 204 the Court held that the Bombay Rent Act 1947 came under List II and hence valid.
[29] A S Narayana Deekshitulu v. State of Andhra Pradesh 1996 AIR SCW 2029; the case was relating to appointment and service of archaka in a temple on the basis of hereditary claim, which was conceded. It was observed, "True religion is spiritual religion that seeks to live in the spirit, in what is beyond the intellect, beyond the aesthetic and ethical and practical being of man and to inform and govern these members' life by higher light and law of the spirit."

Religion, therefore, can be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foot-hold in secular aspect of the Constitution.[30]

The reasoning based on historical analysis had an apt result. In explaining the content and contours of secularism in *S R Bommai case*[31] the judicial reasoning has anchored on historical analysis.

In *Samata* v. *State of Andhra Pradesh*,[32] a case relating to interpretation of provisions in the fifth Schedule to the constitution, reference to constitutional history was highly useful. The Court observed,

"The founding fathers of the Constitution were conscious of and cognizant of the problem of the exploitation of the Tribals. They were anxious to preserve the tribal culture and their holdings. At the same time, they intended to provide and create opportunities and facilities, by affirmative action, in the light of the Directive Principles in Part IV, in particular, Arts. 38, 39, 46 and cognate provisions to prevent exploitation of the tribals by ensuring positively that the land is a valuable endowment and a source of economic empowerment, social status and dignity of persons. The Constitution intends that the land should always remain with the tribals."[33]

[30] Ibid para 89
[31] S R Bommai v. Union of India AIR 1994 SC 1918
[32] AIR 1997 SC 3297
[33] Para 93 p. 3336

Accordingly, prohibition of transfer of land to any person other than tribal wars construed to operate upon artificial legal persons also. In interpreting constitutional provisions on use of language in educational institutions the idea of constitution makers that there shall be avoidance of imposition of any particular language upon a community not conversant with the concerned language has been put into service.[34] This has resulted in a liberal approach pertaining to the use of language in public for ensuring linguistic harmony. Thus, in the sphere of cultural diversity the approach of adhering to the intention of the Constitution Makers has helped in promoting equal liberty of all and social harmony.

Empowerment through protective discrimination

For deciding the question whether persons belonging to Scheduled Castes or Scheduled Tribes in a particular State are entitled to reservation claims in another State or Union Territory to which they migrate, the Supreme Court in Bir Singh traced the constitutional history.[35] Under the GI Act, 1935, the phrase 'Scheduled Castes' was defined to mean corresponding castes or groups formerly known as Depressed Classes. The Depressed Classes were identified prior to 1935 with reference to specific provinces. The orders issued under the GI Act, 1935 also identified 'Scheduled Castes' with reference to provinces. After the commencement of the Constitution, the phrase 'Scheduled Castes' was defined by the Constitution Scheduled Castes Order 1950 "in relation to the States." In a number of cases the claim for reservation under the category of Scheduled castes was confined to the members of the community belonging to that State by adherence to the imperatives of constitutional history. The whole

[34] English Medium Students Parents Association v. State of Karnataka (1994) 1 SCC 550; State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools (2014) 9 SCC 485

[35] Bir Singh v. Delhi Jal Board AIROnline 2018 SC 233

constitutional history supported the idea of State-specific status of the Scheduled Castes.

The Supreme Court in *Sudhakar*[36] relied on Constitutional history relating to 85th Constitutional Amendment Act to insist as per *M Nagaraj* verdict[37] that defense of state policy for providing consequential seniority shall be preceded by an objective estimate on the basis of empirical data that there was compelling necessity to go for such a measure in the context of reservation in promotion. The court observed,

A challenge to the resolution providing for consequential seniority is indeed a serious matter. Such a challenge calls upon the court to upset a policy circular which has been issued with the avowed objective of safeguarding consequential seniority which was, as our constitutional history indicates, a clear purpose underlying the 85th Amendment to the Constitution.

The Supreme Court in *Jaishri Laxmanrao* (Maratha reservation case)[38] extensively referred to precedents pointing out relevance of Parliamentary Committee's proceedings and Statement of Objects and Reasons in constitutional interpretation. While the judges in dissent (Ashok Bhushan and Abdul Nazeer) relied on proceedings of the Parliamentary Committee regarding the States' continued power of identifying Backward Classes through their method,[39] The majority (Justice Nageshwara Rao, Ravindra Bhat and Hemant Gupta) ruled that in view of clear provision introduced by the constitutional amendment, the Parliamentary Committee's

[36] Sudhakar Baburao Nangure v. Noreshwar Rao, AIROnline 2019 SC 494, para 65
[37] M. Nagaraj v. Union of India (2006) 8 SCC 212
[38] Jaishri Laxmanrao Patil v. Chief Minister, State of Maharashtra, AIROnline 2021 SC 241
[39] Kishan Lal Gera v. State of Haryana (2011) 10 SCC 529; (AIR 2011 SC 2970); Modern Dental College and Research Centre v. State of M.P. (2016) 7 SCC 353 : (AIR 2016 SC 2601) : 7 SCEC 1] and Lal Babu Priyadarshi v. Amritpal Singh (2015) 16 SCC 795 : (AIR 2016 SC 4610): (2016) 3 SCC (Civ) 649

proceedings cannot be relied upon. The majority also viewed that the Statement of Objects and Reasons was not helpful especially in the absence of details in the present case.[40]

Federalism

In interpreting the provisions of Part XIII of the Constitution, viz., trade, commerce and intercourse within the territory of India, extensive references to constitutional history have been made by the judiciary in a number of cases. Whether imposition of tax by a State on inter-state trade amounts to violation of fundamental right was a question decided by the Supreme Court by referring to constitutional history in the case of MPV Sundaramier.[41] The Court observed that our Constitution was not written on a tabula-rasa, that a Federal Constitution had been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built, and that the provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act.

An important judgment wherein reference to constitutional history was crucial for the outcome of the case is *Godfrey Phillips India Ltd*.[42] The

[40] For this proposition the Court cited authority from State of West Bengal v. Union of India AIR 1963 SC 1241 where it had been observed, "It is however, well settled that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, cannot be used to determine the true meaning and effect of substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. But we cannot use this statement as an aid to the construction of the enactment or to show that the legislature did not intend to acquire the proprietary right vested in the State or in any way to affect the State Governments' rights as owner of minerals. A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute."

[41] M P V Sundaramier and Co. v. State of Andhra Pradesh, AIR 1958 SC 468

[42] Godfrey Phillips India Ltd. v. State of Punjab, 2005 AIR SCW 613

case involved constitutionality of state taxations of 'luxury goods'[43] whereas under Entry 62 of List II the legislative subject until the 101st constitutional amendment was "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling." The Supreme Court held the impugned laws as suffering from legislative incompetence for the reason that as per Noscitur Socii rule luxuries contemplate activities and not goods and that the entry did not permit overlap with other entries of taxation. In addition, the Court found strong support from constitutional history for the proposition that luxuries meant activities and not articles. Entry 50 of List II under the GIA 1935, which corresponds to Entry 62 of List II of the Seventh Schedule to the Constitution as it originally read: "Taxes on luxuries including tax on entertainment, amusement, betting and gambling". Here too there is no evidence of any tax being imposed by the State under this entry on any goods. On the other hand, the imposition of tax on tobacco was brought under Entry 45 of List I. During the CAD, a proposal to draft the Entry in a different pattern was rejected and the same version as that of Entry 50 was adopted. Until 1993, no state had imposed tax on luxury articles in the name of luxuries. Justice Ms. Ruma Pal observed for the Court, "Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy

[43] While the UP Act had included tobacco products as luxury articles, the West Bengal Act had included 34 items such as now contains 34 items, under the heading 'luxuries'. The original items are covered by items 1 to 5 of the Schedule. Items 6 and 8 to 21 deal with mill-made textile fabrics, footwear, trousers and jeans, shirts and T-shirts, coat jackets, blazer and suit, watches, bath-room fittings, electric switches, sun-glasses, fountain pens and dot pens, home theatre equipment, music system and video camera. Each of these items are classed as luxury if their values exceed particular rates specified against each item. Those which do not refer to any value are silk yarn, foreign liquor, toys, electrical and electronic goods, cosmetics, umbrellas, tea, glassware and crockery, soaps, chocolate and confectionery, readymade garments, motorcycles and motor vehicles.

of tax on goods or articles. In our judgment, the word "luxuries" in the Entry refers to activities of indulgence, enjoyment or pleasure."[44]

The Supreme Court in *Government of NCT Delhi* case,[45] while interpreting the provisions of Article 239-AA which excluded the power relating to public order, police and land from the domain of the state government and conferred the same to Parliament, considered the Constitution as a political document providing for democratic governance. The Court observed,

The words of the Constitution cannot be construed merely by alluding to what a dictionary of the language would explain. While its language is of relevance to the content of its words, the text of the Constitution needs to be understood in the context of the history of the movement for political freedom. Constitutional history embodies events which predate the adoption of the Constitution. Constitutional history also incorporates our experiences in the unfolding of the Constitution over the past sixty-eight years while confronting complex social and political problems. [46]

The Court extensively traced from the trajectory of constitutional history, the position after the Part C states Act, 1951, the position after State reorganization Act, 1956, Government of Union Territories Act, 1963, the Delhi Administration Act, 1966 and the Balakrishnan Committee Report leading to the enactment of the 69th Amendment to the Constitution and GNCTD Act, 1991. The Court took cognizance of the requirement of balancing between the interests of representative democracy in Delhi territory and national interest arising from a special situation of national capital that necessitates the Union Government to manage the affairs keeping in mind the national and international matters as contemplated by

[44] Supra n.43 at 645 para 85.
[45] Government of NCT Delhi v. Union of India, AIROnline 2018 SC 1029
[46] Ibid Para 296

the Committee and the Constitutional Amendment. In an earlier case also,[47] The Court traced the constitutional history of the Union territory of Delhi since 1919, the development under GIA 1935 and the report of Pattabhi Sitaramayya Committee on Chief Commissioner's provinces. The Court recognized the unique character of the national capital and competence of the union to impose tax upon the property situated in Delhi except upon the property of Delhi Municipality unless engaged in trade or business.

Parliamentary privileges

The judgment in *Rajaram Pal*[48] gives a clear indication about the benefit of referring to constitutional history on parliamentary privileges. The provisions in GIA 1919 and GIA 1935 were the basis for the draft and final articles on parliamentary and legislative privileges. The language of sections 28 (1) and (2) and section 71 (1) and (2) was the basis for Articles 105 and 194. There was omission of clauses (3) and (4) of sections 28 and 71 which provided for sanction against persons refusing to give witness before the House or Committee and punishment through courts. Instead, by reference to the powers, privileges and immunities of the House of Commons of the UK Parliament the extent of Indian Parliament's powers, privileges and immunities is recognised in Article 105. Subsequently, in 1978 by the 44th Constitutional Amendment the reference was changed to the position prior to the Amendment and the reference to the UK Parliament was omitted. Although since 1947 in UK the parliamentary privileges have not been in fact applied to punish any member or imprison any witness, and on the other hand there was an effort in 1997 to remove such powers of punishment and imprisonment, in Rajaram Pal the Court

[47] New Delhi Municipality v. State of Punjab, 1997 AIR SCW 2851
[48] Rajaram Pal v. Hon'ble Speaker, Lok Sabha, AIR 2007 Supp SC 1448

was not inclined to put the clock forward. The CAD had also thrown light on the issue of parliamentary privileges. The discussion on constitutional development since 1950 was also useful in expounding the extent of such privileges.

In *Ajith Mohan*,[49] where the issue was on competence of the Legislative Committee of Delhi Government to summon the head of Facebook with regard to hate speeches circulated, it was argued by the petitioner that the Committee had only privilege of the House but not power to summon any person for conducting the proceeding. In support of this proposition the Counsel cited constitutional history. He referred to the origin of powers and privileges by inviting the court's attention to Section 71 of the Government of India Act, 1935. He stressed that the provincial legislatures had no powers but only privileges; they did not have powers to punish people under that Act. He argued that Article 194 (3) of the Constitution adopted this position. The Supreme Court referred to numerous precedents rejecting this proposition and held that the power to compel attendance by initiating privilege proceedings is an essential power dealing with privilege.

Certification of Money Bill by the Speaker

In adjudicating on Speaker's power of certifying a Bill as Money Bill the Supreme court in *Rojer Mathew*[50] traced the constitutional history to the British Parliamentary practices ever since the Bill of Rights of 1689. Section 3 of the Parliament Act 1911 provided for special provision relating to the Money Bill. This recognized the need for dominance of the popular chamber in matters of Money Bill. The Court referred to section 41 of the GIA 1935 which was predecessor to Article 122 and section 37

[49] Ajith Mohan v. Legislative Assembly, NCT Delhi, AIROnline 2021 SC 325
[50] Rojer Mathew v. South Indian Bank Ltd, AIROnline 2019 SC 1514

of the GIA which was followed in enacting Article 110. But constitutionalism prevailed in judicial assertion of reviewing power over the speaker's decision.

Constitutional history supplied crucial guidance in *K S Puttaswamy* case[51] in understanding the reasons for the specific pattern of composition of the Council of States or Rajya Sabha. The discussion on provisions on the Money Bill attracted the issue of bicameralism. The Supreme court looked into the genesis of bicameralism in provinces in 1921, introduction of it into the federal legislature in 1935, representation from provinces and princely states, and the method of balancing between small states and big states in the course of representation by giving greater weightage to smaller states in order to protect their interests in addition to giving fair representation to big states on the basis of their population.

Re-promulgation of ordinances

While adjudicating on judicial review of re-promulgation of ordinances by Governor under Article 213, the Supreme Court in *Krishna Kumar Singh* case[52] traced the constitutional history of promulgation of ordinances in England and India. Section 23 of the Indian Council Act, 1861, Government of India Act, 1915 and section 42 of the Government of India Act, 1935 had conferred ordinance making power to the Governor General for a limited period of six months. In the Constituent Assembly members suggested for limiting the scope of the power to three months, or to confine to emergency circumstances only or not to deprive right to life or personal liberty or to be based upon recommendation by Council of Ministers in the light of criticisms that it is negation of rule of law as proved during the

[51] K S Puttaswamy v. Union of India, AIROnline 2018 SC 237
[52] Krishna Kumar Singh v. State of Bihar AIR 2017 Supp SC 161

colonial rule. The empirical evidence in the *D C Wadhwa* case[53] mechanical and callous re-promulgation of ordinances was also considered. The Court concluded that absolute immunity from judicial review cannot be supported as a matter of first principle or on the basis of constitutional history.

Reference to Committee proceedings

Proceedings of the Parliamentary Committees, which reflect constitutional history, becomes relevant for understanding the intention of constitution makers or makers of constitutional amendments. In *A R Antulay* case, the Constitution Bench observed that the basic purpose of all canons of interpreting the Constitution is to ascertain with reasonable certainty the intention of Parliament. For the said purpose, external aids such as reports of Special Committee preceding the enactment, the existing state of law, the environment necessitating enactment of a legislation and the object sought to be achieved by the Parliament become relevant. The luxury of availing access to these materials should not be denied to the court whose primary function is to give effect to the real intention of the legislature in enacting a statute.

In *Kalpana Mehta* case[54] the Supreme Court reiterated that the reports of Parliamentary Committee are fully admissible. In *Jaishree Laxmanrao the*

[53] D C Wadhwa v. State of Bihar (1987) 1 SCC 378

[54] Kalpana Mehta and others v. Union of India, (2018) 7 SCC 1 : (AIR 2018 SC 2493). Dipak Misra J: 159.1. Parliamentary Standing Committee report can be taken aid of for the purpose of interpretation of a statutory provision wherever it is so necessary and also it can be taken note of as existence of a historical fact. 159.2. Judicial notice can be taken of the Parliamentary Standing Committee report under Section 57(4) of the Evidence Act and it is admissible under Section 74 of the said Act." 260. DY Chandrachud J: (360) The use of parliamentary history as an aid to statutory construction is an area which poses the fewest problems. In understanding the true meaning of the words used by the legislature, the court may have regard to the reasons which have led to the enactment of the law, the problems which were sought to be remedied and the object and purpose of the law. For understanding this, the court may seek recourse to background parliamentary material associated with the framing of the law."

majority considered that the reports of the Parliamentary Committee are relevant but nevertheless in the circumstances of the case, in view of the clear provisions of the amendment, the secondary material like external aid is not persuasive and not admissible.[55] The dissenting judges gave weightage to the external aid and held that the ambiguity in the constitutional amendment shall be resolved by resort to the proceedings of the Parliamentary committee. They stated that averment in the Committee proceedings about clarification given by the Ministry of Social Justice, Union Government to the Committee that the proposed amendment does not interfere with the powers of the State Governments to identify the Socially and Educationally Backward Classes had provided a clue to interpret the impugned amendment.[56]

General constitutional history of other countries

It is interesting to note that in the absence of express provision in the preceding laws on fundamental rights, general reference to the hoary tradition of English and American constitutional history, especially about specific components of due process protection, has been highly rewarding. Courts have recognised the right to speedy trial and principles of natural justice on the basis of such an approach.[57] In *A G Kazi*,[58] long before *Maneka*,[59] The Bombay High Court recognised the right to go abroad as a part of personal liberty on the basis of broad reference to English and American constitutional history and documents such as Magna Carta. The broad concept of constitutional history and constitutional philosophy has

[55] Jaishree Laxmanrao Patil v. Chief Minister, State of Maharashtra, AIROnline 2021 SC 240
[56] Ibid 360-400 per Ashok Bhushan J and Abdul Nazeer J
[57] Madheshwardhari Singh v. State of Punjab 1986 Cri. L. J 1771; Indian Pan Workers v. Chief Commissioner of Delhi AIR 1969 Del 1;
[58] A G Kazi v. C V Jethwani, AIR 1967 Bom 235
[59] Maneka Gandhi v. Union of India AIR 1978 SC 597

been the basis for Justice D Y Chandrachud's dissent in *Abhiram*[60] to the effect that 'appeal to his religion etc' cannot include appeal to the religion of the voter. But, the majority was inclined to extend the ambit of the word 'his' to voter also. In *Kesavananda*, since the Government of India Act, 1935 had no provision on amendment, general constitutional history was relied upon for the proposition that the Constitution Makers would not have expected or anticipated about destruction of fundamental rights, minority rights, democratic structure, etc., for which they made great sacrifice in the course of freedom struggle.[61] In cases relating right to property,[62] constitutional history of specific clauses in Article 31 or 31A was not considered, which had adverse effect upon the jurisprudence of economic justice. But the general constitutional history about the doctrine of eminent domain was considered on questions of 'just and fair compensation' which, in fact, favoured the rich class of people.[63]

Comparative Note

Constitutional interpretation in the US has strongly relied on constitutional history as the courts adhere to originalism. Chief Justice Marshall in *McCulloch* v. Maryland[64] interpreted the Tenth Amendment which reserved to the states "all powers not delegated to the United States by the Constitution, nor prohibited by it to the States" by comparing with the provision in the articles of confederation where the word 'delegated' was

[60] Abhiram Singh v. Commachen AIR 2017 SC 401
[61] Kesavananda Bharathi v. State of Kerala AIR 1973 SC 1461 at 1515, para 183
[62] State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Ors. (1952) 1 SCR 889 ; State of West Bengal v. Bella Banerjee and others, AIR 1954 SC 170; State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92; State of Kerala v. Gwalior Rayon Silk Manufacturing (Wvg.) Co. Limited (1993) 2 SCC 713, Kavalappara Kottarathil Kochuni and others v. State of Madras and others (1960) 3 SCR 887; I.C. Golaknath and others v. State of Punjab, AIR 1967 SC 1643; I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu (2007) 2 SCC 1
[63] Ibid; Also see K T Plantation Co v. State of Karnataka, 2011 AIR SCW 5356.
[64] 1819-4 WN 316

preceded by 'expressly'. He observed, "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of the word ('expressly') in the articles of confederation, and probably omitted it to avoid those embarrassments." By resorting to fair construction of the whole instrument, which contemplated national level economic and political activities of the federal government, the learned judge recognised the competence of federal government to run a national bank undisturbed by state intervention or taxation under 'necessary and proper clause'. While constitutional history of America has a background of European history of libertarian movement for seven centuries, which Laurence Tribe considers as "too much of history",[65] The judicial practice is to confine the scrutiny to the making of the Constitution which is depicted in the Federalist papers or to the immediate decades prior to the Constitution. In *Gibbon* v. *Ogden*[66] The Supreme Court relied on the natural sense of the word 'commerce', which "the enlightened patriots who framed our constitution" had adopted. Since all America understands the word commerce to include navigation or intercourse, the same meaning shall be given to the same. Some of the provisions such as the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", do not give guidance for freezing the position to the time of making of the constitutional amendment. Recognition of right to privacy, reproductive right and freedom of association got recognised after more than one and a half century.[67] The post-enactment history is relevant

[65] Laurence H Tribe, American Constitutional Law (Third ed. New York, Foundation Press, 2000) 48.
[66] 22 US (9 Wheat.) 1, 188 (1824)
[67] Roe v. Wade (1973) 410 US 113: 35 Law Ed 2nd 147; Griswold v. Connecticut 381 US 479, 484 (1965); NAACP v. Alabama 357 US 449; 2 L Ed (2nd) 1488 [1958]

as per Justice O W Holmes as the entire life experience of the nation shall be taken into account to supplement the wisdom of the founding fathers.[68] Because of the need to accommodate social transformation owing to pressing needs of the time, especially when some undemocratic element prevailed in the original constitution such as defence of slavery and racial discrimination, the need to stop fidelity to the past and engender new principles based on national values shall be realised. Otherwise searching meaning in history becomes 'quixotic'[69] and retrogressive.[70] Laurence Tribe suggests for determining the point at which the flow of time's arrow shall be considered in terms of direction and intensity.[71]

Under the influence of common law tradition of exclusionary rule and understanding the difficulty of amending the constitution, both Canada and Australia have declined to be governed by originalism. In *Edwards* case,[72] the Privy Council agreed with the Supreme Court's view that the word 'person' did not include woman at the time of framing of the BNA Act. But it used a metaphor of living tree to the provisions of the constitution which have inherent capacity to grow within the natural limits, and accordingly conceded the rights of women to be considered for membership of the Senate. The judicial practice not to entertain constitutional history continued for a long time. But since the 1980s there has been increased reference to 'legislative history'. It is applied in identifying the matter of legislative measure in order to test the legislative competence[73] and in resolving the issue of paramountcy in the context of

[68] Missouri v. Holland 252 US 416; 64 L Ed 641 (1920)
[69] Ernest Brown, Book Review 67 Harv L Rev 1439 (1954)
[70] Laurence Tribe 65, 66
[71] Ibid 67
[72] Edwards v. Attorney General for Canada [1930] AC 124, 136. Per Sankey LJ.
[73] Re Residential Tenancies Act [1981] 1 SCR 714 (law reform commission report relied on); Re Exported Natural Gas (1982) 1 SCR 1004 (government policy paper); Schneider

inconsistency between the federal law and provincial law.[74] It is applied to determine the purpose of impugned statute vis-à-vis the Charter;[75] to determine the overbroad character of law, if any;[76] and to decide whether the statute is within the reasonable limits prescribed by law as demonstrably justified in free democratic societies as per section 1 of the Charter.[77] There was also paradigm shift from the policy of giving least weightage to history[78] to an approach of insisting upon the Government to produce the policy paper that triggered the enactment of the law.[79] In *Hunter* v. *Southam*[80] The Supreme Court of Canada held that the historical origins of the concepts enshrined in the Charter shall be considered along with other factors such as cultural values in determining the purpose of the Charter rights.

The Australian High Court has disapproved originalism as an overarching theory of constitutional interpretation.[81] Nevertheless, the approach of reading in context has necessitated the Court to refer to and rely upon history of making of the constitutional provision.[82] In *Cole* v. *Whitefield*,[83]

v. The Queen [1982] 1 SCR 297 (government information pamphlet was admitted); R v. Morgentaler (No 3) [1993] 3 SCR 463 (parliamentary debates relied on)

[74] Canada Western Bank v. Alberta [2007] 2 SCR 199 (parliamentary debates relied on)

[75] R v. Edward Books and Art [1986] 2 SCR 713

[76] R v. Appulonappa [2015] 3 SCR 754; R v. Safarzadeh-Markhali 2016 SCC 14.

[77] R v. Appulonappa [2015] 3 SCR 754 (reliance on statements made by ministers in the parliamentary committees, law commission reports); Irwin Toy v. Quebec [1989] 1 SCR 927 (parliamentary debates) R v. Keegstra [1990] 3 SCR 697 (report of the special committee on hate propaganda)

[78] Re B C Motor Vehicle Act [1985] 2 SCR 486

[79] RJR-MacDonald v. Canada [1995] 3 SCR 199

[80] [1984]2 SCR 145, 155; also see Joanna Harrington, 'Interpreting the Charter' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (Ed) The Oxford Handbook of the Canadian Constitution (Oxford University Press, New York, 2017) 621-638 at 629.

[81] Commonwealth v. Australian Capital Territory (2013) 250 CLR 441, 455

[82] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Federal Law Review 1, 14; also see Adrienne Stone, Judicial Reasoning' in Cheryl Saunders and Adrianne Stone (Eds) Oxford Handbook of The Australian Constitution (Oxford University Press, New York, 2018) 472-487 at 477-8.

[83] (1988) 165 CLR 360, 391.

in interpreting section 92 providing for free inter-state trade, commerce and intercourse the Court extensively relied upon statements of the drafters during the framing of the Commonwealth Constitution of Australia and the successive resolutions to arrive at a conclusion that the purpose was to enable free trade throughout Australia without any impediment from the Commonwealth or the States to the free movement of people, goods and communication across State boundaries. Similarly, in interpreting the Commonwealth's obligation to provide for trial by jury under section 80, the Court considered the historical practices prevalent during the framing of the Constitution.[84]

Comparison of the above juxtaposition leads to the following inferences: (a) constitutional history is an important resource for constitutional interpretation in all the countries. The hesitation to refer to constitutional history in Canada in the past is replaced by moderate reference to constitutional history. (b) While the US has enthusiastically resorted to constitutional history on the basis of originalist ideas, the British approach of low-key treatment of parliamentary history has influenced Canada, Australia and India to take a careful step about the extent of its use. This is keeping in mind the growing and organic nature of the constitutions and distrust with strict originalism. (c) In all the 4 jurisdictions focus on constitutional history has helped in unravelling the purpose and spirit underlying the text of the constitutions. But failure to connect history with purpose or ignoring both has yielded not so comfortable results in the US and India as demonstrated in cases relating to racial equality and property rights respectively.

Conclusions

[84] Cheatle v. R (1993) 177 CLR 541.

Past, present and future are highly interconnected stages in the matter of events, national developments and evolution of values. Constitutional history provides valuable insights about the reasons underlying and growth of constitutional norms. As it sheds light primarily on subjective purpose, a lot of care shall be bestowed on deciphering and identifying the true collective intention. Such identification helps in connecting it with the contemporary perception of the constitution's purpose in the light of eternal values. The fact that history is a continuing process does not close the lid of human experience's crucible at the threshold of the Constituent Assembly's final session of adoption and enactment of the Constitution. The contexts of constitutional amendments provide a continued story of constitutional development.

Reference to, and reliance on constitutional history has sound theoretical justification. It enlightens about the Constitution's connection with socio-economic realities and composite culture. It gives clues about the evils intended to be removed and goals to be achieved. It gives legitimacy for judicial review.

Application of constitutional history in the Indian constitutional jurisprudence has wide gamut to cover major spheres of constitutional values. This demonstrates the significance of constitutional history as an important resource of information. Further, in building up constitutional jurisprudence on sound pedestal, discussion of constitutional history has given valuable guidance. Creative use of general constitutional history has considerably contributed to human rights values. The tendency in other jurisdictions to increasingly use constitutional history in the course of constitutional interpretation is explicit.