Constitutional Studies
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Lecture 3
Constitutional Change

Hello. And welcome to another lecture in your Constitutional Law course. This is lecture 3 in week 1.

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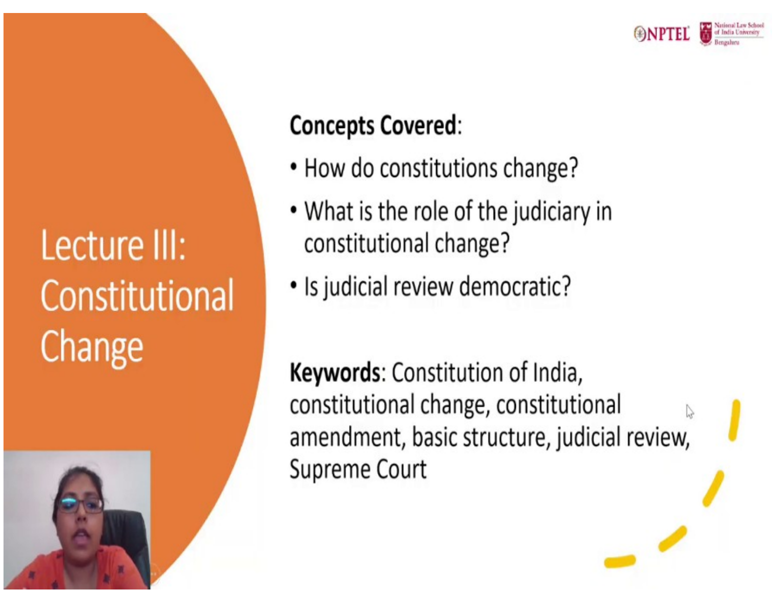

And today we will be looking at Constitutional Change. The concepts that we will cover include – how do Constitutions change, what is the role of the Judiciary in Constitutional change, and is Judicial Review Democratic.

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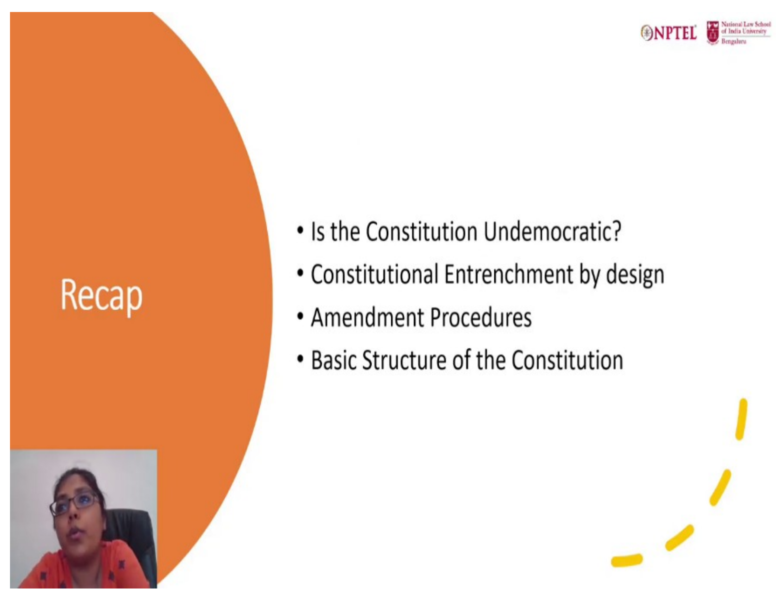

But before we begin, let us take a quick relook at what we discussed in the last class. So, we looked at whether the Constitution is undemocratic. We saw that the Constitution was made by a group of people who were not elected on the basis of Universal Adult Franchise. They were not representative of the population at that time.

They did not mirror the composition of the of the population at that time. And they definitely did not include the people here and now, you and me, who had no role in framing the Constitution. If that is the case, the question that we were asking ourselves is, why do they get to decide for us what, how, and how we can govern ourselves.

So, this was the Dead Hand of the Past problem, this, the Dead Hand of the Past reaching out to limit our possibilities of governance today, and we were asking whether that makes Constitutions by design undemocratic. And this is also because Constitutions are designed for entrenchment.

They are designed to last for a long time, for longevity so that they can provide stability and that they can provide limits upon the day to day working of the Government. And because they are designed for entrenchment and to provide limits, they are much more difficult to amend than ordinary laws.

We looked at the amendment procedures, and we saw that there are different ways in which different parts of the Constitution can be amended. Some can be amended by ordinary statutes, like any other law passed by Parliament, some parts require a special majority in Parliament. Some parts require ratification from the State. And there are some parts that are completely in the Constitution that are completely unamendable. Those parts constitute the basic structure of the Constitution.

And we briefly looked at what the basic structure of the Constitution is. But this is where we will start today, we will look again at the basic structure of the Constitution. I am going to take you through the basic structure doctrine, how it came to be why the courts have said that there are certain aspects of the Constitution that are completely unamendable. And then what does that say both about the democratic possibilities of the Constitution, as well as of Judicial Review.

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And the person on your screen is Kesavananda Bharati, you might have seen in the news, he passed away last week. The basic structure doctrine came into being in a case that he had filed. And so, therefore the case is named after him. Kesavananda Bharati versus State of Kerala. But Kesavananda Bharati versus State of Kerala is the middle of the story, let us start from the beginning.

The Constitution as it was originally drafted, included a right to property, a fundamental right to property. At the same time, one of the tasks that the Constituent Assembly and the framers of the Constitution had set for themselves was redistribution of resources in society, particularly land reform and redistribution of economic resources in society.

So, these two provisions, 1, the right to property, to protect the property that you have, and to protect it from governmental interference came up against the redistributive policies of the Government, the land redistribution, the Zamindari Abolishing laws and there was an immediate tension. So, the court started striking down many of those amended Zamindari Abolishing laws and the land reform laws on the ground that they violated the right to property.

To address this, the Constitution was repeatedly amended to allow for laws, and to permit to remove the taint of invalidity of laws that allowed for Zamindari Abolition and land reform. Initially, the Supreme Court said that such Constitutional Amendments were permissible, that Parliament had all the power as long as the procedure for amendment that was set out in the

Constitution was followed, Parliament had all the power to amend any part of the Constitution.

And so to amend the fundamental right in a way that removed that fundamental right or limited that fundamental right, that was well within the scope of Parliament to do. However, in 1967 in a case called Golaknath versus State of Punjab, the Supreme Court changed track. It said that you can amend any part of the Constitution except the part that contains fundamental rights. Fundamental rights are by their very nature fundamental. It means that they dare to impose very strict limits on the Government and on the State.

And if you can amend fundamental rights and amend them away through an easy process, the Fundamental Rights Amendment only requires a special majority in Parliament, it does not require even the ratification of States. And this was very easy bar to meet for a Government that has a decent majority in Parliament.

So, the Supreme Court said that if you allow for fundamental rights to be amended by such an easy process, they will no longer remain fundamental. They will become the playthings of special majorities. And this is too low a bar to, for protecting fundamental rights. For fundamental rights to have any meaning to impose any meaningful limits upon the State, you would have to believe that fundamental rights cannot be amended at all.

Now, this obviously, put a big question mark on the Government's agenda of redistribution. In 1973, the case came up for reconsideration in Kesavananda Bharati versus State of Kerala. And the largest ever Supreme Court bench that has assembled till date, bench of 13 judges assemble to hear this case.

I will not go into the details and the vagaries of the multiple opinions in this case. But suffice it as is to say that by a majority of 7 to 6, the Supreme Court held that any and every part of the Constitution, including the part on fundamental rights can be amended, but no amendment can take away the basic structure of the Constitution, the basic structure of the Constitution cannot be abrogated. Then, what is the basic structure of the Constitution?

Those principles and features of the Constitution that give it its identity, think of it as the DNA of the Constitution, what constitutes the DNA of the Constitution, where if you tamper with those, this Constitution will become unrecognizable. So, for example, this Constitution, from its very first words, is set up as a democracy that sets up the State as a democracy. You cannot, if you were to change the Constitution, amend the Constitution in a way that changes

it from a democracy to a monarchy, that that would abrogate the basic structure of the Constitution and that would not be permissible.

So, the Supreme Court listed out some aspects of the Constitution, which it said were part of the basic structure. And over the years, the court has in multiple other cases, added to what it believes is part of the basic structure of the Constitution. And the Court has said that these parts of the Constitution, you cannot amend in a way that destroys the basic structure of the Constitution.

So, the courts rationale was this: the court said that the Parliament derives its authority from this Constitution and the scope of its authority, therefore, cannot exceed this Constitution. This, it cannot do something that takes that, that destroys the very Constitution that authorizes it, because it does not have any power and any authority beyond this Constitution.

And that is why whatever else the Constitution or whatever else Parliament can do, it cannot amend the Constitution in a way that changes the very characteristic of this Constitution, so that it does not remain this Constitution, that cannot destroy the identity of this institution. The concern, like I said was, that if no limit was placed on the power of parliament to amend the Constitution, then the ability of the Constitution to constrain the state and constrain the Government of the day would be completely destroyed. And so that is why the court puts in place the basic structure doctrine.

What does that result into? It results in the idea that there are certain aspects of the Constitution that just cannot be amended. To think about it like this, tomorrow, the Government cannot come in and say that we are removing the equality principle from the Constitution, that we will, that the guarantee of equality will no longer be part of the Constitution. The, this would be a violation of the basic structure doctrine. However, the Government can come in and add to or change the provisions relating to equality, but in a way that does not destroy or fundamentally alter the concept of equality that is enshrined in the Constitution.

And that is what for example, the AWS amendment, Reservation Amendment controversy is all about. The, as you probably know, the Government brought in an amendment recently to allow for reservations for economically weaker sections of the society. And to do so, they had to amend the Constitution. This amendment is now pending before the Supreme Court. And the Supreme Court has to decide whether this amendment does or does not violate the basic

structure of the Constitution. So, the, the question that the Supreme Court will ask and will seek to answer is whether reservations for economically weaker sections of society violates the equality principle in such a way that it destroys the basic structure of the Constitution.

If it does, if the court comes to the conclusion that yes, it destroys the basic structure of the Constitution, then it will strike down the Constitutional Amendment. If it comes to the conclusion that it does not destroy the basic structure of the Constitution, then it will uphold the amendment. So, that is the basic structure doctrine. But then this leads to, again the worry that the Constitution is, the aspects of the Constitution, the core aspects of the Constitution cannot be amended. That means that our agenda for governance has already been set in stone. It has been set in stone by people who are not us.

We do not get to set our agenda for governance, that agenda for governance has been set by someone else. The limits of governments and policies have been set by someone else. And we have limited scope to work and govern ourselves within those limits. So, how is that justified? That is the question that we were asking.

The typical answer that is provided on the other side, is that, that beyond the bounds of the basic structure doctrine, it is still fairly easy to amend the Indian Constitution and even where it requires some special measures, special majorities or ratification from half the states to take place, as long as there is ample support for the for the change, that change can still go through.

The evidence of the fact that it is fairly easy to amend the Indian Constitution is the fact that there have been 104 amendments to the Indian Constitution in the last 70 years. Compare that with about 27 amendments to the U.S. Constitution in the last 231 years. And that just goes to show that the Indian Constitution is fairly easy to amend in large part.

The other argument that is typically given is that even where amendment of the Constitution is difficult through a formal amendment process, there are other ways in which the Constitution changes. And the best example of the other ways in which Constitutions change is that – the change through Judicial Interpretation. We had discussed in an earlier lecture, that if you want to identify what the Constitution says about a particular issue, you look not only at the text of the Constitution, you also look at Judicial interpretations.

So, Judicial interpretations put flesh on the bones of the Constitution. And it is through the process of Judicial interpretations that Constitutions change, and they adapt to new

circumstances, they respond to new situations and new circumstances. So, the Constitutions do not get stuck in the time in which they were freed. They are constantly being updated through the device of, through the device of Judicial interpretation.

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Now, this, however, leads to the question of whether Judicial Review itself, the ability of the Judiciary to review the actions of the other branches of Government and test it against the Constitution, whether Judicial Review itself is democratic.

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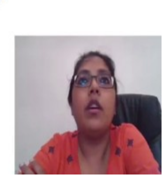
Judicial Review

- Broad concepts and framework allow for flexibility through interpretation
- Update the Constitution to meet the requirements of the modern era
- Judicial decisions reflect the ethos of the times



Now, on the one hand, what Judicial Review allows us to do is that Constitutions, because Constitutions are meant to endure for long periods of time, and to take into account a whole

range of contingencies that might not even be in the minds of the framers, that is why by design, Constitutions contain broad concepts and broad frameworks that allow for a lot of flexibility in their interpretation.

So, for example, they have mentioned broad words like equality and liberty and free speech, and freedom of religion, but what those rights actually mean in a day to day, on a day to day basis, or in a particular context is for future generations to decide. And typically, they get, the interpretations of future generations get tested in courts, and therefore, there is the ability of judges to give authoritative pronouncements on the meaning of the Constitution and thereby change the meaning of the Constitution in the future, change and update the meaning of the Constitution in the future.

So, you can keep updating the Constitution to meet the requirements of the modern era. So therefore, the same Constitution that was designed for Horse and Cart era can also speak to an age of Space Travel. A Constitution that was designed for telegrams and possibly landline telephones can be used to govern the realities of the internet each. More than just concepts, Judicial decisions are also reflective of the ethos of the time.

So, when there are fundamental changes in society, those fundamental changes also get reflected in Judicial decisions because judges are also human beings, they are also products of their own societies. So, fundamental change in attitudes, for example, a change in attitudes towards women will get reflected in Judicial decisions of the next era.

And that is again a way in which, the Constitution changes and evolves. So, through the device of Judicial interpretation, through the device of reviewing the actions of other branches of the state for compliance with the Constitution, the Constitution is regularly updated, the Constitution is regularly evolving. And that is how today’s ethos, today's values today’s needs, requirements get reflected in the Constitution. This is the argument, that Judicial review saves the Constitution from becoming stultified, fossilized and just a relic of the past.

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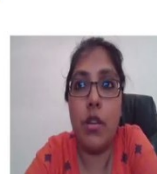
Judicial Review

- Limits to flexibility
- Precedents and Path dependency
- Democratic Deficit of the Judiciary
  - Lack of accountability
  - The role of personal ideology
  - Expertise?



But on the other hand, is the argument that Judicial Review does not solve the democratic concerns, it adds to it. One for example, there are limits to flexibility. There are many things that the Constitution has set in stone that cannot be changed to give an example, when the Indian Constitution was framed, the State was seen as the biggest danger to the rights of an individual.

And so, the bulk of fundamental rights, not all, but the bulk of fundamental rights are targeted at limiting the State. Today, we know that large corporations, particularly multinational corporations, that may very often be located outside the Jurisdictional reach of Indian courts, but might have presence and footfall in the territory, where as much, if not more power in society and in, within the State, but the Constitution has been designed in such a way that it is designed to limit the powers of the State.

So, there might be nothing that not much that the Constitution can do to, on, or the Judiciary can do to bring such power centres, such private power centres within the purview of the Constitution. I am not saying its not possible, but that its difficult, as some amount of legal gymnastics, that might be an involved.

There is a limit to what the concept, what Judicial interpretation can do or not do. It cannot take, it can take 1 plus 1 and only make a 2 out of it. It cannot take 1 plus 1, and it will possibly take 1 and 1 and make a 11 out of it or a 2 out of it, that there is that range of flexibility, but it cannot take 1 and 1 and make a 19 out of it.

So, there is a limit to this flexibility. Second, it is the nature of the Indian Judicial process, that it follows a system of precedents that is subsequent judgments have to follow what has been laid down in previous judgments and that leads to a certain amount of path dependency. Again, people who have come before us, get us, get a disproportionate amount of say in what we can do here and now and here and today.

So precedent, instead limit our ability to again, update the Constitution as we would, if we were rewriting the Constitution all over again today. Third is the concern that the Judiciary itself has a lot of democratic deficit. And if ours, our response to the democratic deficit of the Constitution is that the Judiciary will save us from the democratic deficit, then we have to answer the question of why is the Judiciary itself a democratic institution.

The Judiciary is not, and this argument goes that the Judiciary is in fact, itself has a democratic deficit, and you cannot use the Judiciary to come to the democratic deficit of the Constitution. Why does the Judiciary have democratic deficit? To get into that, let me just very-very briefly take you through the structure of the Indian Judiciary. And certain key issues of how the Judiciary works. And then I will take you through the arguments that are presented in this context.

So first, the Indian Judiciary can broadly be classified into a 3-tier Judiciary, that the trial courts are at the bottom that do criminal trials and civil cases. Then you have the High Courts, they are about 25 High Courts in the country, some High Courts have jurisdiction over more than 1 State.

And then there is a Supreme Court. All courts in the country, all High Courts and the Supreme Court can look at laws passed by States as well as the Central Government, and they're bound together in the system of precedence. So, the trial courts are bound by the decisions of the High Court and the Supreme Court. High Courts are bound by the decisions of the Supreme Court. And within the Supreme Court itself, the Supreme Court does not sit together. It has 34 judges now.

All judges do not sit together. They sit in small benches, typically have 2 or 3 judges, sometimes 5 or more judges. And decisions of a larger bench are binding on the, on a smaller bench. So that is a system of placements that has been created. Now, the High Courts and the Supreme Court are called Constitutional Courts in this for the reason that they can strike

down and invalidate the actions of the Executive or the Legislature for not complying with the Constitution. This is the power of Judicial Review.

The Judiciary can review the decisions of the Executive and the Legislature, and if found to not comply with the Constitution, can strike them and invalidate these decisions. So this is an enormous power. Think about it this way, the people elect Parliamentarians from the Parliament, from the Parliament is drawn the Executive by and large.

And so, the authorization, the electoral authorization is to Parliament and to the Executive. Here is a body, which is not accountable to the people in the same way, which can take a look at the decisions of the, of Parliament and the Executive and can invalidate those decisions on the ground that it violates the Constitution. So, it is in that sense, it can turn up, overturn the decisions made through the democratic channels through the majority channels. This problem is compounded by the fact that the Judiciary has no accountability to the people and very little accountability to Parliament and to the Executive.

The judges of the High Court and the Supreme Court are not elected. There are countries in the World, wherein, and states for example, within the U.S. where judges are elected. In India, we do not follow a system of Judicial Elections. So, the judges are not elected. Judges in the High Courts and the Supreme Court are appointed through a Collegium system. A Collegium comprises of the senior judges of the High Courts and the Supreme Court. And there is a system of self-appointment, they appoint themselves. They are the ones to decide, who will get, who is in contention for appointment.

The Government can recommend names, but it is for the for the Collegium to decide who will be appointed. Those names go to the Government. The government can, if it has concerns about any given name, it can return the recommendation happens very rarely, but has happened over the last few years has happened a few times, can return the name to the Collegium. But if the Collegium will reiterate the name, then the Government has no option but to appoint that person. So, the appointment process is by and large an inhouse process. There is very little accountability or oversight, limited oversight of the elected branches on the appointments process.

It is very-very difficult to impeach a judge of the Supreme Court or the High Courts. There has not been a single successful impeachment of a judge of the High Courts or the Supreme Court till date. And it is purposely kept very, it is a very stringent procedure, because you do

not want, you want judges to decide without fear or favour. You want these judges to not be concerned that their decisions might lead to personal harm to them or their careers. So, there is no accountability on that side, as well.

So there is no accountability to the elected branches. There is no accountability to the people themselves. And this group of people, people who are not accountable at all to others in the system, this group of people get to overturn the decisions made by Parliament or the actions of the Executive in the name of the Constitution.

So, the argument goes that, there is a democratic deficit in the Judiciary, which compounds rather than addresses the democratic deficit of the Constitution. This is particularly compounded by the fact that when judges are deciding pieces, they are not deciding cases in some objective neutral manner as you may in science. Law is not an objective science.

In law, there is always more than one side, that is why you can have 2 or more parties, who are all convinced that they have the right, that their side is the right side and they are trying to convince the judge that the judge should decide in their favour. How the judge decides is influenced very often by their own personal ideology, the background that they come from, their own experiences in life.

And so, who the judge is becomes very important, who the judge is, who that person is, is very important in how they decide the case, the kind of decisions that they give. But as I mentioned before, the people do not have any control over who the judge of, who becomes the judge. So, it is individuals, these individuals who are self-selected through a system of self-selection and self-perpetuation, these are the people who then go on to control the, who go on to then review the decision of the, of those people who have been, who are representing the people at large.

Again, it might be said that even if the task of judging is not neutral and is not objective, or neutral, there is still an element of expertise that is involved. And what judges do is that they bring this expertise about dealing with the law and dealing with Constitutional questions to bear on the task of adjudication of reviewing the decisions of the State, in light of the Constitution. But this goes back to the fundamental conundrum that we have is the premise of democracy is that in the most fundamental and moral and political questions, each of us should have an equal say, that there is no element of expertise.

To what extent should the State protect the free religious freedom of persons? These, to what extent should free speech be protected and to what extent should it not be protected? There are people who have studied these issues, who might have well informed views. There are people who might not have thought about these issues at all.

There is an element of engaging in public discourse and dialogue to convince to transfer information and to convince the other of their viewpoints. But when it comes down to making a decision on these aspects, democracy dictates the idea the underlying rational of democracy dictates that each of us have an equal interest and an equal share, an equal rational capacity to puzzle out these moral philosophical conundrums and political decisions. And we should each be equally making those political decisions.

So, that is the idea that, that the judges do not have any particularly special expertise in making moral and political choices, which they have to. They are always making those decisions for the, for precisely the reason that the Constitution is framed so broadly, that when it talks about concepts like equality of personal liberty or right to life, these are such broad concepts, that the text is of very limited guidance, judges do not have any superior moral reasoning ability. Most law schools, for example, do not teach moral philosophy or political philosophy in any great depth.

So, its not as if judges are moral philosophers or political philosophers par excellence. That is not their, that is not an area of expertise for them, but they have been called upon to make those decisions. What should be the scope of equality? What should be the limits of equality? What should be the scope of liberty? What should be the limits of liberty in furtherance of social control?

Should, what is the meaning of right to life? Should it, if the Constitution guarantees the right to life, does that mean that death penalty has to be abolished? These are the most, some of the most important political, philosophical questions of our day. And philosophers and moral philosophers disagree about these issues. People who do have expertise in this kind of reasoning and training. Judges do not have special expertise. And we would not want to become one by moral political philosophers who will, would rule over us and tell us what is the right thing to do. We all have the capacity to determine for ourselves on these questions, what is the right thing to do.

And we should all have a say, that is the argument, that, therefore the democratic deficit of the Judiciary, which comes from its lack of accountability, the lack of neutrality and objectivity in Judicial decision making, and the absence of expertise of judges in making any of these, in making these decisions, that all of this together compounds the problem of democratic deficit of the Constitution.

So, this these are the two views. I am not responding to these concerns; I am not addressing these concerns. As the course goes on, the hope is that you will keep coming back and reflecting on these questions, to make up your mind for yourselves on where you believe, whether you believe that the design choices that have been made in this Constitution, adequately protect or adequately reflect some of the underlying values of the Democratic system.

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I will end with one idea. We have spoken about the Constitution, we have spoken about the authorization given by the people to Parliament and the Executive, we have spoken about the Judiciary. But there is another element and another institution almost that the Constitution speaks of, the people themselves.

We the People, what is the role of the people in making this Constitution democratic? When the Constitution talks about, we the people, is it we are hubris? Is it just purely symbolic? That, an indication that we are going to be a democracy or does the phrase, we the people carry some, do some important work, carry some important weight? And that means are we each of us individually, the people who, the individuals who comprise the people, do we have

a Constitutional role to play in Constitutional change and updating the Constitution to reflect current realities? We have seen that there are limits to what Parliament can do.

We have seen that there are limits to what the Judiciary can do. What can the people do? In Kesavananda Bharati, the judges said that if the people want a different Constitution, there is a path open to the people for a different Constitution, and that is to Constitutional Revolution. Junk this Constitution, get a new Constitution in, have a revolution, that is the path that is always open to the people. But then you will have a new Constitution, you will not have this Constitution. If you are working within the framework of this Constitution, then what is the role of the people?

The role of the people, and this comes not from any specific part in the Constitution, but from Constitutional theory and political theory is that the people play a crucial role in determining Constitutional meaning through an unconstitutional interpretation, through mobilizing, through protesting, through arguing, through litigating, through voting, through both formal processes of voting, of petitioning, of filing a right to information, applications of sending in suggestions to the Government when they open up suggestions on policies or putting, put out policies or legislations for comments, through litigating cases, through mobilizing in the streets, through protesting, through all of these means the people are creating Constitutional meaning of what is permissible under this Constitution, what is not permissible under this Constitution.

We may agree, we may disagree with the people, but the idea that an agreement, agree with the government in a particular respect and think that the people who are protesting against a particular law are mistaken, or we may side with the people and think that the government is mistaken. That is not the point. The point is that the people have a very-very important role in shaping Constitutional meaning.

So, if you look at the India Against Corruption movement that had taken place, and that had swept the country. At the time when that was happening, you could see how the language of courts in talking about Constitutional meaning changed, where the court started talking about good governance and freedom from corruption, the right to be free from corruption as part of the right to life including the right to political life included within the Constitution.

So, when the people mobilize, when the people get together, and when people protest, when people participate, not only in voting, but in the day to day activities of a being engaged

citizens, that itself creates Constitutional meaning. Again, one of the best examples of this is the entire journey of the fight against Section 377 of the Indian Penal Code that had criminalized sodomy in the Indian Penal Code.

And the years and years and years of activism that went on in the streets, in courts, before Parliaments activating human rights institutions and agencies, which led to the 2009 judgment from the Delhi High Court, which struck down 377. When the Supreme Court overturned that judgment and restored Section 377, again there was so much protest. There was so much, the Supreme Court came in for so much criticism.

And there was so much mobilization that by the time in 2017-2018, (())(40:25) the Supreme Court said that struck down 377 again, or before that in 2017, in the right to privacy judgment, where the court virtually struck down 377, though it stopped just short of doing that. This was a foregone conclusion that this is the direction that the court is going to take, because it was no longer sustainable for the court to give the meaning to read the Constitution in a way that said that discrimination against people on the basis of their sexual orientation is permitted by this Constitution. That meaning had become illegitimate.

And that illegitimacy was produced by the people themselves. It was not produced by the government. It was not produced inherently by the court. The court had rejected that interpretation. That was a meaning that was produced by the people themselves. So, there is a role for the people. It is a very important role for the people in determining what meanings the Constitution can bear or cannot bear.

And there is always the residuary power that the people have to overthrow the Constitution. So, I am going to stop the lecture here today. And this concludes week 1 of the lectures. The week 2 will pick up with discussion on some of the themes that we have touched upon in this week. And the week 2 onwards, there will be a deeper dive into many of these issues. Thank you.