Amending the Constitution Without Deliberation

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India is undergoing a “deliberation backsliding”. The data and numbers confirm this. As per analysis undertaken by PRS Legislative Research, a not-for-profit think tank tracking the Indian Parliament, since the current government was elected to office in 2019, only 13% of all government bills introduced in Parliament were referred to Parliament Committees for detailed study, scrutiny and stakeholder consultations. The track record of the earlier government (under the same Prime Minister) was only slightly better at 28% of all government bills being referred to Parliament Committees. In contrast, the governments before 2014 (under a different Prime Minister) managed to refer 60% of all bills between 2004-09 and 71% of all bills between 2009-14 to Parliament Committees.

While the deliberation deficit is concerning with respect to ordinary government bills, it becomes alarming with respect to bills which seek to amend the Indian Constitution. As per my own analysis, since 2014, the government has proposed seven bills to amend the Indian Constitution, of which only two were referred to Parliament Committees. The earlier government between 2004 and 2014, did only marginally better by introducing sixteen Constitutional Amendment Bills of which only five were referred to Parliament Committees.

In this blog post, I argue that the promise of deliberative democracy in India is coming undone, which sets back the project of constitutionalism in India.

Parliament Committees—A useful Metric for Deliberative Democracy

The reference of Bills to Parliament Committees is intended to achieve several objectives. It ensures that a small group of Members of Parliament (MPs) from different political parties examines the bill closely and in detail, over several sittings, something which is not possible in plenary discussions in Parliament. It also enables MPs to objectively analyse bills in a non-partisan manner whereas in the open discussion in Parliament, MPs tend to tow their party lines. Parliament Committees also provide the only formal mechanism for MPs to require bureaucrats to place data and justification for a particular legislative proposal before the committee and invite comments, testimonies and evidence from and interact with different experts and stakeholders within and outside the government.

Parliament Committees, thus, are avenues for deliberation. As per the rules and procedures of Parliament, it is discretionary and not mandatory to refer bills to Parliament Committees. Therefore, whether a government prefers or avoids sending

bills to committees is a relevant metric to determine how central deliberation is to law and policy-making in the imagination of a democratic society.

Deliberation is central to plenary debates in Parliament as well. But limited in time and scope, these debates do not permit for the kind of detailed, technical deliberation based on perspectives and inputs from multiple stakeholders that usually happen, or at least are supposed to happen, within Parliament Committees. The report and recommendations of Committees also provide scope for improvement in Bills. It continues to be a healthy practice for governments to positively consider and, in many cases, incorporate many of the recommendations of the Committees in their legislative proposals. For instance, in 2019, three labour codes were referred to the Parliament Standing Committee on Labour, which, after months of deliberations, suggested 233 amendments to the codes, of which the government accepted 174 and redrafted the codes completely.

A government secure in its majority and confident of its ability to push any bill through would be less keen to send Bills to Committees and it would be equally difficult for MPs in such scenarios to push the government to do the same. However, the need for deliberation is much greater under majoritarian governments where dissent and diversity may barely be tolerated, if not actively suppressed. Deliberation backsliding, then, becomes a possible precursor to democratic backsliding.

Deliberative Democracy—Democracy in Action

The authors of an introduction to deliberative democracy in the Oxford Handbook of Deliberative Democracy, define it simply “as any practice of democracy that gives deliberation a central place.” Deliberation itself is defined as “mutual communication that involves *weighing and reflecting on preferences, values and interests regarding matters of common concern*” (emphasis supplied). They acknowledge that while authoritarian and populist leaders across the world would have little interest in advancing deliberation, they also argue that deliberative democracy “constitutes the best response to authoritarian populism and post-truth politics.” Deliberation in large, diverse and complex societies may not be easy, but instead of negating, for such societies, it only reinforces the importance of deliberation as a way to accommodate multiple voices and interests.

In her essay on representation and deliberative democracy, Nadia Urbinati, argues that in modern democracies, representation enables political equality and participation. Referring to the concept of representation as creating a “deferred democracy”, she argues that beyond the act of voting, it is the existence of public spheres of deliberation and interactions between representatives and their constituents which enable citizens to exercise control over their representatives. In the process, it “stimulates advocacy in society” and empowers citizens to become active citizens. Deliberative democracy is also grounded in the agency of individuals to think, reason and consider arguments and emotions across the board while critically appreciating any law or policy decision. It also provides legitimacy to the government’s decisions based on consideration of different opinions and stakeholder perspectives.

However, to what extent deliberation can be a tool to counter-majoritarian tendencies and create spaces for multiple voices to exist depends on the form of deliberative democracy institutions. This is where the role of Parliament Committees becomes crucial.

Though there are some recent problematic developments, mostly in the last two decades, Parliament Committees have emerged as accessible avenues for citizens to engage in law and policy-making via their representatives, even as there is scope for making them much more accessible. Particularly through the conventions of inviting inputs from all interested and affected stakeholders, making study and field visits, interacting with experts and taking testimonies and evidence from citizens, Committees have ensured that a multitude of voices are reflected in their recommendations, which, though not binding on the government, hold immense persuasive value. There have been some recent incidents of Committees not inviting comments from stakeholders before finalizing their report, or undertaking rushed deliberations, which set dangerous precedents of reducing deliberation to a formality: so far this remains an exception and not the norm. However, what is increasingly becoming a norm, as the data also confirms, is to skip sending bills to Committees altogether, indicating a particular disdain for deliberation.

Constitutionalism and Deliberative Democracy

In his book on Comparative Constitutionalism, Norman Dorsen outlines some "principle demands of constitutionalism", which include, particularly for the purpose of this essay, the constitution being accepted as the supreme law, government governing as per the rule of the supreme law and not as per its will, a commitment to ideals of individual rights, limited government, checks and balances and acknowledgement of people as the locus of sovereignty. Upendra Baxi argues, in his essay on constitutionalism, that a constitution is not merely the text of a document because it is possible to change or amend the text and thus the identity of the constitution itself. He complicates the idea of constitutionalism by proposing its reading on "three interlocking places"—C1, C2 and C3. C1, as per Baxi, is the text of the Constitution and C2 its authoritative interpretation by courts, resulting in the creation of a body of constitutional law. C3 is particularly important for our purpose, which Baxi describes as a "set of ideological sites that provide justification / mystification for constitutional theory and practice."

This reading of the Constitution from the perspectives of different ideologies opens up discursive spaces for multiple interpretations of a Constitution from the perspective of different stakeholders, especially when juxtaposed with the idea of governments deriving their legitimacy from the sovereignty of people. And herein lies a central role for deliberation.

The Indian Constitution itself provides a relatively tedious process for amending the Constitution, requiring a recorded vote by a special majority in Parliament and, in some circumstances, ratification by legislative assemblies of at least half of all the states in the Union of India. This process has an in-built requirement for deliberation and reaching across the political aisle to ensure sufficient numbers for carrying out

constitutional amendments, but it falls short of what has been termed as “public will formation”. Undertaking deliberations at the pre-legislative stage and also through Parliament Committees could ensure a dialogue between people’s representatives and various stakeholders in the process of amending the Constitution. But, as numbers indicate, that happens only infrequently.

Contemporary Dangers to the Indian Constitutionalism Project

Last year, the current Vice President of India and the ex-officio Chairman of the upper chamber of Parliament courted controversy by questioning the landmark “basic structure” judgment of the Supreme Court of India. This judgment, called *Kesavanand Bharati v. State of Kerala* and pronounced in 1973 by a thin majority of 7:6, put limits on the powers of the Parliament to amend the Constitution in a way that alters the basic structure of the Constitution. This did not mean that Parliament could not amend the Constitution at all, a power that the Constitution itself gives to Parliament. However, the judgment laid down that there are certain features of the Constitution considered to be so fundamental or basic to its structure that they will be beyond the power of the Parliament to amend. This ensures, in a way, the coming together of C1, C2 and C3, where public discourse can continue shaping and amending the Constitution, considered a living document, but bars the government from completely altering the identity of the Constitution.

Though this judgment was a culmination of a long period of tension between co-equal institutions of legislature and judiciary, it has not prevented governments from attempting to test the limits of the doctrine. Not long after the judgment was pronounced, a national emergency was imposed in India by the then Prime Minister and while the emergency was in operation, during which several MPs from the opposition were in jail under preventive detention laws, Parliament passed a bill significantly amending the Constitution, without much deliberation. One such amendment was the addition of the words “secular and socialist” to the Preamble of the Constitution. After the emergency was lifted and a new government was voted to power, most of these amendments were undone through another amendment bill, but the addition of the words secular and socialist to the Preamble remained and continues to do till date.

What gives teeth to the basic structure doctrine is the power of judicial review, which itself has been considered to be a basic feature of the Constitution. This makes every amendment of the Constitution by Parliament amenable to judicial review and liable to be struck down if found to be unconstitutional or violative of the basic structure of the Constitution. Though courts have sparingly resorted to this doctrine to strike down constitutional amendments, the attempt by the current government to set up a National Commission for Judicial Appointments, providing a greater role to the executive in appointing judges, was struck down by the Supreme Court in 2015 for attacking the independence of the judiciary and the separation of powers, which are basic features of the Constitution.

Now, the current government seems to have embarked on a project to revert to the “original” Constitution, in which the words secular and socialist, and particularly secular, were not included in the Preamble, arguing that these were inserted during the undemocratic emergency. It has also not minced any words in making clear that it wants greater control and a say in the appointment of judges on the ground that the present system of appointments through a collegium is not explicitly mentioned in the Constitution and is a judicial invention. The basic structure doctrine stands in the way of the government having its way, but it is not certain for how much longer.

Conclusion

Majoritarian governments do not like fetters on their powers to amend the Constitution. In the recent past, the Indian judiciary has also come under much criticism for its “refusal” to live up to the expectation of being a counter-majoritarian institution, particularly on politically sensitive matters. A Parliament reeling under near complete executive takeover, a government not keen on deliberations and a political party confident of mustering enough numbers to amend the Constitution unilaterally present grave danger of the constitutionalism project failing in India.
