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and
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CHAPTER 8

CONSTITUTIONAL CHANGE

a public choice analysis

SHRUTI RAJAGOPALAN

I. INTRODUCTION

PARLIAMENT has amended the Indian Constitution a hundred times since its ratification in 1950. The fundamental rights listed in Part III of the Constitution were frequently amended and some constitutional protections, such as the right to private property, deleted.¹

A closer look reveals that the fundamental rights were amended to accommodate positive entitlements for specific groups and interests. Balancing negative rights and positive entitlements, or constitutionally reconciling the fundamental rights with the Directive Principles of State Policy [hereinafter DPSP], has been the tough task faced by every government since 1950.² This has led to frequent amendment of the Constitution in Parliament, and frequent interventions by the judiciary.

Amendments to the Constitution, especially to the fundamental rights, have two starkly different patterns in Indian constitutional history. During 1950–80, Parliament was the battleground for seeking formal constitutional amendments; while post-1980, the Supreme Court became the power centre, with interest groups seeking amendments through interpretation.³

This becomes more puzzling when one considers the similarity in these two phases. The nature of the positive entitlement and the beneficiary may differ, but what is remarkably constant is the struggle to accommodate positive entitlements, usually fulfilling the DPSP, within the framework of the negative rights outlined in the Constitution. What has shifted is the *form* and *forum* for amending negative rights to accommodate positive entitlements.

¹ Twenty-one Amendments have directly amended fundamental rights.

² HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal Book Traders 2002) 1921–2020; SP Sathé, *Judicial Activism in India* (Oxford University Press 2011) 209–35.

³ The judiciary getting more involved in everyday matters and rights and entitlements of citizens is discussed in Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107; Burt Neuborne, 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476; Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 71.

What is the reason for this shift of interest-group activity from the legislature to the judiciary? The existing literature has attributed this shift to the increasing power of the Indian Supreme Court; coalition politics; changes in ideology; greater emphasis on positive rights; etc.⁴ In this chapter, I explain the change in constitutional amendments using economic analysis.⁵

An interest group attempting to change the Constitution has the option of approaching Parliament for an amendment, or alternatively, approaching the Supreme Court to favourably change the interpretation of the constitutional rule. To decide between the two forums and the associated forms, the interest group determines the expected costs and benefits of each option, and chooses the forum that maximises net expected benefit. Unlike the typical explanations from the perspective of the legislature or judiciary *supplying* the changes in rules, this chapter offers a *demand-driven* explanation, analysing the incentives of interest groups seeking rule changes.

To explain amendments in India, I argue that the change in substantive and procedural rules changed the costs and benefits of amending the Constitution, and therefore changed the incentives of interest groups pursuing amendments. This led interest groups to shift the *form* and *forum* while seeking rule change.⁶

Existing explanations centre on whether the legislature or the judiciary should be the guardian of the Constitution, thereby controlling the supply of rule changes. This chapter moves away from conventional doctrinal analysis and shifts the debate to constitutional design by looking at the costs and benefits imposed by different constitutional rules.

I present a framework to understand the choice of an interest group choosing between these two forms and forums to amend the fundamental rights. I demonstrate that, with the interaction of constitutional rules, the relative price of seeking formal amendments to the Constitution has increased, incentivising interest groups to seek rule changes through the judiciary.

II. AN ANALYTICAL FRAMEWORK FOR CONSTITUTIONAL AMENDMENTS

The central feature in this analysis is individual behaviour, and that individuals are pursuing their self-interest, though self-interest is not narrowly defined.⁷ These individuals act within a set of constraints determined by the existing constitutional rules.

⁴ Baxi (n 3); Neuborne (n 3); Mehta (n 3).

⁵ Economic analysis can be used to analyse political behaviour. Public Choice theory extends the self-interested individual assumptions from the market to political behaviour. See James M Buchanan and Gordon Tullock, *The Calculus of Consent* (Liberty Fund 1999).

⁶ I present a positive theory of constitutional change and maintenance to explain this trend in Indian constitutional history. I do not discuss the normative implications of frequent amendments, or positive entitlements these amendments enabled. The purpose of this chapter is not to analyse the content of each amendment.

⁷ Self-interest only requires that the interest of his opposite number in the exchange be excluded from consideration. The individual legislator, judge, bureaucrat, or political entrepreneur can be motivated

Political entrepreneurs and interest groups are motivated by expected returns from a particular rule change. They may use political activity for gain in the form of entitlements, benefits, targeted transfers, direct subsidies, tax breaks, control over licensing, price and quantity controls—more generally known as rent seeking.⁸

First, an interest group can lobby the executive—to either favour it in enforcement or change the rule through an executive ordinance.⁹ Secondly, it can lobby the legislature to enact a statute in its favour.¹⁰ Thirdly, it can petition the judiciary for a favourable interpretation of existing statutes.¹¹ In order to determine whether the interest group lobbies the executive, legislature, or judiciary, it determines the expected return to each option.

Where efforts to gain rents at the policy level are declared unconstitutional, entrepreneurial efforts may focus on a higher constitutional level, that is, to change the constitutional rules.

Constitutional rules create constraints within which an individual or an interest group chooses the form and forum of constitutional amendments. However, expectations of changes to these constitutional rules also create incentives for seeking amendments. Therefore, any analysis of interest groups seeking amendments must include: (i) the costs and benefits imposed by the existing set of rules; (ii) the expected costs and benefits from the rule change.

Constitutional rules governing the legislative or judicial process impact the expected costs and benefits for interest groups and political entrepreneurs through two types of constraints: first, the domain of what can or cannot be collectively decided (substantive rules) and secondly, the process by which the collective decision making will be made (procedural rules). An independent judiciary enforces both substantive and procedural constitutional rules.

In the Indian context, we can identify the substantive rules as the fundamental rights in Part III, and the DPSP in Part IV of the Constitution. The fundamental rights impose constraints on the ability of individuals and interest groups to redistribute and capture transfers and positive entitlements. Amending the fundamental rights, or removing the constraints to enable transfers and positive entitlements represents the potential benefit available to interest groups. The DPSP allow for positive entitlements for groups, though unenforceable in courts. Therefore, constitutional amendments tend to take the form of allowing for the DPSP, which are otherwise constrained by the fundamental rights. Article 368 represents the procedural costs faced by individuals and interest groups lobbying Parliament.

Existing procedural rules determine the costs imposed on the interest group seeking a rule change and the change in substantive rule represents the benefit to the interest group.

for various reasons. The motivation for the rule change may be that the individual truly believes in a different and more just distribution of resources. But the pursuit of the rule change as an end would be characterised as pursuing his self-interest. See Buchanan and Tullock (n 5).

⁸ Robert D Tollison, 'Rent Seeking: A Survey' (1982) 35 *Kyklos* 575.

⁹ Susan M Olson, 'Interest-group Litigation in Federal District Court: Beyond the Political Disadvantage Theory' (1990) 52 *Journal of Politics* 854.

¹⁰ George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *The Bell Journal of Economics and Management Science* 3; Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 *Journal of Law and Economics* 211.

¹¹ Warren J Samuels, 'Interrelations between Legal and Economic Processes' (1971) 14 *Journal of Law and Economics* 435.

1. Procedural Rules

Procedural rules determine how legislative decisions will be made. Procedural rules to enact legislation specify the type of legislature, the veto power of the President or council, the majority requirements of the voting rule, etc. In a parliamentary system, not just the number of votes required but also the number of parties forming the majority group, and the dynamics of coalition politics impact on organisational costs.

The Indian central legislature is bicameral, comprising a Lower House and an Upper House. To pass legislation requires a simple majority of members present and voting in each House of Parliament (Article 100(1)) with a minimum quorum of one-tenth of the members of the House (Article 100(3)). Legislation also requires Presidential approval, which the President may withhold. To pass ordinary legislation in a State requires the majority of members present and voting in the State legislature (Article 189(1)), with a minimum quorum of one-tenth of the members of the House (Article 189(3)). It then requires the State Governor's approval, which the Governor may withhold. Procedural costs of passing legislation in States are lower than in Parliament, as State legislatures are smaller in size, and twenty-two of the twenty-nine States' legislatures are unicameral.

The Constitution includes specific provisions on the powers of Parliament to formally amend the Constitution (Article 368). Only Parliament can enact formal amendments to the Constitution. The Constitution can be divided in three categories based on the procedure required to amend these clauses. First, some clauses of the Constitution may be amended with a simple majority.¹² Secondly, amendments to provisions pertaining to separation of powers and federalism, also called 'entrenched clauses' of the Constitution, require ratification by at least half the State legislatures, in addition to a supporting vote by the majority of the total membership of the House, with not less than two-thirds of the members present and voting in each House of Parliament, and Presidential approval.¹³ Thirdly, amendments to most provisions of the Constitution, including the fundamental rights, may be initiated in either House of Parliament and require a majority of the total membership of the House with not less than two-thirds of the members present and voting in each House of Parliament, and Presidential approval.¹⁴

Procedural rules impose organisational costs on interest groups seeking a rule change. Voting rules with simple majority requirements impose lower organisational costs on a group seeking a favourable rule change, relative to voting rules that require super-majority or unanimity. Clauses specifying quorum requirements, bicameral legislatures, super-majority requirements, ratification by States, Presidential assent, etc, are procedural rules imposing additional costs.

Under Article 368, the fundamental rights can be amended *relatively* easily. The amendment procedure has a super-majority requirement only for the *quorum*, and only a *majority* of votes required to pass in each House. This amounts to a relatively easy procedure to amend

¹² Constitution of India 1950, arts 2, 11, 59(3), 73(2), 75(6), 97, 105(3), 124(1), 125(2), 133(3), 135, 137, 148(3), 158(3), 171(2), 221(2), 343(3), 348(1), and Schedules 5 and 6.

¹³ Constitution of India 1950, arts 54, 55, 73, 162, 124-47, 214-31, 241, 245-55, 368; and any of the Lists in the Seventh Schedule.

¹⁴ The only exception is the First Amendment, passed by a unicameral Provisional Parliament of India in 1951, before the bicameral legislature was established.

the Indian Constitution compared to procedures laid down in other constitutions (which typically require super-majority voting rules to amend rights) and also compared to other provisions within the Indian Constitution (such as amending provisions on federalism, separation of powers, etc), which require ratification by the States.

Similarly, there are organisational and administrative costs for seeking rule changes through the judiciary. These include court fees, litigation costs, and also the procedures and time frames involved in petitioning courts, appeals processes, the size of the bench where the interest group is seeking a rule change, etc. There are two different types or stages of organisational costs. Locus standi requirements, court filing fees, etc determine the relative costs of *approaching* the judiciary. On the other hand, once the suit is filed, the size of the bench, constitutional bench, etc, determines the costs of *securing* a favourable verdict.

A trend lowering costs of *approaching* the judiciary is the dilution of the locus standi requirements post-Emergency. Instrumental in lowering costs for interest groups in *securing* favourable verdicts is the size of the bench. In the 1950s, almost half the constitutional benches of the Supreme Court had more than five judges. This decreased to 15 per cent by the late 1970s, and is steadily decreasing thereafter.¹⁵

In addition to imposing costs for a specific type of rule change in a specific forum, *differences* in procedural rules also provide the *relative price* of approaching different forums for rule changes.¹⁶ For instance, voting rules where the quorum requirement is 10 per cent versus 66 per cent change the relative price of approaching the legislature versus the judiciary.

2. Substantive Rules

Substantive rules specify requirements with respect to what may or may not be the content of legislation. Common substantive rules include individual rights within the framework of constitutional rules. Typically, substantive rules restrain the State from action on certain spheres. However, substantive rules may also be written to require a positive action by the State. One can make this distinction of negative and positive rights based on whether they involve a 'duty of restraint' or a 'duty to facilitate entitlements' from the State.

In 1950, Part III of the Constitution guaranteed fundamental rights, including the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and most importantly right to writ remedy through an independent judiciary. These rights were strong, specific, and generally applicable to all, with few exceptions (accommodating enforceable positive entitlements to protect backward classes, women, minorities, etc). The Constitution also included the DPSP, which outlined positive non-enforceable rights for citizens. At the time of ratification, the positive entitlements provided under the DPSP were not enforceable, and did not infringe on or contract the fundamental rights.

However, positive and negative rights have been in constant conflict. Political entrepreneurs can lobby to change substantive rules to accommodate the tensions between positive

¹⁵ Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Constitutional Benches since Independence' (2011) 46(9) Economic and Political Weekly 27.

¹⁶ Paul H Rubin, Christopher Curran, and John F Curran, 'Litigation versus Legislation: Forum Shopping by Rent Seekers' (2001) 107 Public Choice 295.

and negative rights. Since negative rights restrict the State from making wealth transfers and favouring specific individuals or groups, it may be to the benefit of individuals to organise into interest groups and seek exceptions to these rules.

Amendment of substantive rules leads to expansion and contraction of specific rights. In India, during 1950–80 there was an explicit contraction of negative rights and post-1980 there was an explicit expansion in positive rights. However, in both time periods what is implicit is that the expansion of positive rights leads to contraction of negative rights, and vice versa. They are just flip sides to the fundamental conflict between negative and positive rights.¹⁷ What is interesting in the Indian case is that the *form* of these expanding and contracting rights changed. Initially, negative rights were formally contracted in Parliament to expand positive entitlements. And in the second phase, positive entitlements were expanded by interpretation, thereby contracting negative rights.

3. Choosing the Forum for Amendments

If the Constitution contains strong substantive rules and weak procedural rules, interest groups are more likely to lobby the legislature to formally change the rules. Weak procedural rules imply relatively low costs associated with obtaining the requisite change in the rules through the legislature. A judiciary enforcing strong substantive rules prevents positive entitlements to particular groups, incentivising interest groups to seek constitutional amendments, because *changing* the substantive rule may benefit the interest group.

There is another element to this calculation. These benefits from changing the substantive rule must necessarily exceed the costs imposed by procedural rules. The higher the majority requirements (ratification, quorum, etc), the higher will be the costs of gaining the formal amendment. Therefore, where procedural rules are weaker, it is more likely that interest groups lobby for a formal amendment of the Constitution through the legislature. This is even more likely when the procedural rules of approaching the legislature are *relatively lower cost* than the procedural rules for approaching the judiciary.

The period 1950–80 witnessed an independent judiciary enforcing strong fundamental rights, unenforceable DPSP, and a relatively easy procedure to amend the fundamental rights, resulting in constitutional amendments by Parliament to weaken fundamental rights. It was relatively difficult to approach the Supreme Court for constitutional rule changes, as it adopted a strict interpretation of rules, strong locus standi requirements, and large average bench size. In this phase, the formal amendments in Parliament would be the form and forum of constitutional change. This is demonstrated in detail in Section III.1.

If the Constitution contains relatively weak substantive rules, and strong procedural rules to amend the Constitution, interest groups are more likely to seek amendments through interpretation by the judiciary.

With weak substantive rules, providing exceptions to general rules and allowing for positive transfers, legislation giving effect to these entitlements may escape constitutional challenge. Weak substantive rules—in the Indian case conflicting positive and negative rights—have two effects. First, more special-interest legislation is allowed under existing constitutional rules, and therefore interest groups need to seek fewer constitutional

¹⁷ Seervai (n 2) 1921–2020; Sathe (n 2) 209–35.

amendments. Secondly, if the legislation is not allowed by the Constitution, weak substantive rules allowing for many exceptions provide greater opportunity for the judiciary to give a broad interpretation, thereby informally amending the rule. Therefore seeking a formal rule change may be relatively less beneficial and more costly than approaching the judiciary.

While choosing between the judiciary and the legislature, interest groups must also consider costs, and ascertain whether the benefits of pursuing the amendment outweigh the costs. Strong procedural rules impose greater organisational costs and therefore interest groups are less likely to seek formal constitutional amendments from the legislature. This is especially true when the procedural rules of approaching the judiciary are *relatively lower cost* than the procedural rules for amending the Constitution in the legislature.

Since 1980, the Court has enforced weaker fundamental rights (weakened by frequent amendment), and placed a stronger constraint on Parliament's ability to amend the Constitution. While there has been no change to the weak procedure to amend the Constitution under Article 368, the emergence of strong judicial precedent in *Kesavananda Bharati v State of Kerala*¹⁸ (hereinafter *Kesavananda Bharati*) that created a requirement of judicial approval of constitutional amendments, has made the procedure to amend the Constitution through Parliament relatively more costly.

Further, post-Emergency, the Supreme Court has reduced locus standi requirements. Other factors have also changed—for instance, a decrease in the average size of constitutional benches. These actions have reduced the costs imposed on interest groups to approach the judiciary, resulting in increased interest-group activity through the courts relative to the legislature. This is demonstrated in detail in Section III.2.

III. INTEREST GROUPS NEGOTIATING THE CONSTITUTION

Since the Constitution was adopted in 1950, its rules have evolved. The fundamental rights were gradually weakened through formal amendment, and in response the judiciary imposed additional constraints on Parliament's ability to amend the Constitution. This changed the incentives faced by groups demanding rule changes. There was a shift in the relative costs and benefits of seeking formal amendments, that is, formal amendments by the legislature became *relatively higher priced* than amendments through interpretation by the judiciary. Constitutional amendments saw a shift from formal amendments through Parliament until 1980 to amendments through interpretation by the judiciary after 1980.

1. Phase I (1950–80): Amendment by Parliament

At the time of ratification, the positive entitlements provided under the DPSP were not enforceable, and the Constitution contained strong enforceable fundamental rights. Article 368

¹⁸ (1973) 4 SCC 225.

provided a relatively easy amendment procedure for fundamental rights. This framework of rules created problems and opportunities for the government policies at the time.

The most pressing matter for India's first government was large-scale land reform. The focus was on abolition of the zamindari system, imposing agrarian land ceilings, and redistributing surplus landholdings, to further economic egalitarianism. Towards this end, various States formulated legislation to take land from zamindars and redistribute it among peasants.

The biggest challenge was to provide just compensation, required by Article 31, for land to be acquired for redistribution. The State could not provide compensation for the extensive land redistribution and also have the resources left to fulfil other welfare objectives.

This was the first of many policies pursued to fulfil the DPSP that violated the fundamental rights. Nehru described this tension as one between the socialist policies of the State, 'which represent dynamic movement towards a certain objective,' and the fundamental rights, which 'represent something static, to preserve certain rights.'¹⁹

State laws implementing land reforms were challenged in courts as unconstitutional. In *Sir Kameshwar Singh v Province of Bihar*,²⁰ the Patna High Court struck down the Bihar Management of Estates and Tenures Act 1949 as unconstitutional for discriminating between rich and poor landowners' compensation, violating the right to equality under Article 14.

While the State's appeal in *Kameshwar Singh* was pending in the Supreme Court, the Constituent Assembly which, at the time, was the Provisional Parliament, passed the Constitution (First Amendment) Act 1951, shrinking the right to private property to enable positive transfers/entitlements to specific groups of farmers, and giving effect to the DPSP under Article 39.

The First Amendment created a list of preferred legislation called the Ninth Schedule. Article 31B stated that laws listed in the Ninth Schedule could not become void on the ground that they violated any Fundamental Right. The government proposed to protect all land redistribution legislation by including it in the Ninth Schedule. In 1951, the First Amendment was challenged in the Supreme Court in *Shankari Prasad Singh Deo v Union of India*.²¹ The Court held that Parliament was empowered to amend the Constitution without any restrictions, as long as the procedure for amendment under Article 368 was followed.

The First Amendment amended strong substantive rules in two ways: (i) it created the Ninth Schedule and opened the gates to potentially unlimited exceptions to the fundamental rights, creating strong incentives for interest groups to seek favourable transfers; and (ii) it formally amended the language of the fundamental rights, weakening them in order to incorporate the DPSP. However, the problem of reconciling the DPSP with the fundamental rights was not resolved completely.

An important part of the balancing act between negative and positive rights was the compensation provided for infringement of property rights. If those whose property rights were taken were fully compensated, providing positive transfers to further egalitarianism became impossible. In *State of West Bengal v Bela Banerjee*,²² the Supreme Court held the West Bengal Land Development and Planning Act 1948 unconstitutional for violating principles

¹⁹ *Parliamentary Debates*, vol 12 (Lok Sabha Secretariat 1951) Part 2, col 8820–22.

²⁰ AIR 1950 Pat 392.

²¹ AIR 1951 SC 458.

²² AIR 1954 SC 170.

of just compensation. This decision prompted Parliament to pass the Constitution (Fourth Amendment) Act 1955.

In *Karimil Kunhikoman v State of Kerala*,²³ the Supreme Court held that the type of lands that the Kerala Agrarian Relations Act 1961 sought to acquire were not protected under the exceptions in Article 31A(1)(a). In response, Parliament enacted the Seventeenth Amendment, and expanded the positive entitlements to more groups by granting exceptions to Article 31.

The Supreme Court reviewed the Seventeenth Amendment in the case of *Sajjan Singh v State of Rajasthan*,²⁴ on the question of Parliament's power to amend the Constitution. The Court's ruling confirmed that Parliament's powers to amend the Constitution were absolute as long as the proper amendment procedure was followed.

The Seventeenth Amendment also marked the end of an era with Nehru's death. Indira Gandhi wanted extensive socialism, expanding redistribution in scope and by including more groups. In May 1967, she announced the Ten-Point Programme, outlining redistributive policies like nationalisation of banks, insurance, curbing monopolies, land reforms, urban land ceiling, and rural housing.

Before the government could launch this programme, the power of Parliament to amend the Constitution was reviewed by the Supreme Court in a challenge to constitutionality of the Ninth Schedule. In *Golak Nath v State of Punjab*,²⁵ the majority opinion held that in future Parliament could not amend the Constitution to abridge any fundamental right. This was the beginning of frequent clashes between the government and the judiciary on the question of contracting the fundamental rights to create exceptions for interest groups.

While the Supreme Court did not change any procedural constraints on the amending power of Parliament, it imposed a content-based constraint by excluding the fundamental rights. As a backlash to *Golak Nath*, the government enacted the Constitution (Twenty-fourth Amendment) Act 1971, which expressly stated that Parliament could amend the fundamental rights in Part III of the Constitution.

Immediately after, in *Rustom Cavasjee Cooper v Union of India*,²⁶ the Supreme Court held the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 void for violating Articles 14, 19, and 31(2).

To remove the problems posed by the Supreme Court enforcing the fundamental rights, Parliament set out to amend the Constitution to expand positive entitlements furthering the DPSP. The Constitution (Twenty-fifth Amendment) Act 1971 took away the supremacy of the fundamental rights. It explicitly stated that laws giving effect to the DPSP in Articles 39(b)–(c) shall not be deemed void, even if they were inconsistent with the fundamental rights guaranteed under Articles 14, 19, and 31. This Amendment remains valid and certain welfare policies under the DPSP trump the fundamental rights. The prior position was that the DPSP were unenforceable in a court of law, and in case of any conflict, fundamental rights would be enforced. However, this came in the way of enabling positive transfers, and the Twenty-fifth Amendment made the DPSP enforceable.²⁷

²³ AIR 1962 SC 723.

²⁴ AIR 1965 SC 845.

²⁵ AIR 1967 SC 1643.

²⁶ (1970) 1 SCC 248.

²⁷ In *Kesavananda Bharati*, the Court held that the Twenty-fifth Amendment violates the basic structure insofar as it violates the harmony between DPSP and Fundamental Rights. However, not all Fundamental Rights in Part III are part of the basic structure of the Constitution. Therefore, if laws

The Twenty-fifth Amendment was the biggest blow to the fundamental rights guaranteed in the Constitution. All types of special-interest legislation, enabling transfers, redistributions, creating discriminatory and regulatory rents, and positive entitlements, became constitutional as long as they were linked to the DPSP.

Despite the Twenty-fifth Amendment, legislation added to the Ninth Schedule was being battled in court. Two Kerala land reform laws, added to the Ninth Schedule, were challenged in the Supreme Court in *Kesavananda Bharati*. In a fractured 7–6 opinion, the Supreme Court recognised Parliament's power to amend the Constitution, but also protected individual rights by formulating the basic structure test. As a result, Parliament could amend the fundamental rights, but such amendments had to pass the basic structure test, that is, the amending power of Parliament could not be exercised in a manner such as to destroy the basic structure of the Constitution.

The Supreme Court enumerated a non-exhaustive list of features forming the basic structure; the preamble, supremacy of the Constitution, republican and democratic form of government, separation of powers, federalism, some fundamental rights, etc. The ruling substantively curtailed the power of Parliament to amend the Constitution and clarified that some parts of the Constitution were out of bounds of the amendment power of Parliament. However, not all the fundamental rights were part of the basic structure. Post-Emergency, the real procedural and substantive effect of this judicial ruling was functional; this effect is discussed below in the discussion on Phase II.

As part of the Ten-Point Programme, the Indira Gandhi-led government pledged to conduct more extensive agrarian redistribution. Positive entitlements now extended to urban as well as rural tenants against the interests of landowners. Various States passed laws and amendments to reduce the ceiling on family landholdings. Parliament, with renewed authority to amend the Constitution, enacted the Constitution (Thirty-fourth Amendment) Act 1974 adding twenty State laws to the Ninth Schedule.

In 1972–74, the government nationalised a number of firms, especially coal mines,²⁸ copper,²⁹ general insurance,³⁰ and textiles.³¹ In 1973, the government restricted new production activity to a very narrow set of industries and large firms.³² It introduced greater regulation for foreign exchange and foreign goods³³ and revived legislation regulating prices of essential commodities.³⁴ This prompted the Thirty-ninth Amendment,³⁵ adding thirty-eight laws to the Ninth Schedule, and the Fortieth Amendment³⁶ in 1976, adding sixty-four laws to the Ninth Schedule.

The fundamental rights were further weakened and exceptions for interest groups were created with alarming frequency. In each case the negative rights of property owners, businessmen, and shareholders were contracted to expand the positive entitlements of customers, debtors, labour unions, and employees.

giving effect to the DPSP violate a fundamental right that is not part of the basic structure, the essence of the Twenty-fifth Amendment holds.

²⁸ Coking Coal Mines (Nationalisation) Act 1972; Coal Mines (Nationalisation) Act 1973.

²⁹ Indian Copper Corporation (Acquisition of Undertaking) Act 1972.

³⁰ General Insurance Business (Nationalisation) Act 1972.

³¹ Sick Textile Undertakings (Nationalisation) Act 1974.

³² Monopolies and Restrictive Trade Practices Act 1969.

³³ Smugglers and Foreign Exchange Manipulators (Forfeiture of Properties) Act 1976.

³⁴ Essential Commodities Act 1955. ³⁵ Constitution (Thirty-ninth Amendment) Act 1975.

³⁶ Constitution (Fortieth Amendment) Act 1976.

During this economic reorganisation, in 1975, the Allahabad High Court found Indira Gandhi guilty of electoral malpractice and she declared a state of internal emergency on 25 June 1975. Parliament amended the Constitution to withdraw the election of the Prime Minister from the scope of judicial review.³⁷

During the Emergency, Indira Gandhi attempted to stack the Supreme Court with judges favourable to the government policy. The Constitution (Forty-second Amendment) Act 1976 stripped the Supreme Court of jurisdiction to review State laws and stripped the High Courts of the power to review central laws. The Forty-second Amendment was the most comprehensive constitutional amendment and had important implications for substantive rules, and the procedure to amend the Constitution. To nullify the effect of *Kesavananda Bharati*, the Amendment held 'that there shall be no limitation whatever on the constituent power of Parliament to amend' the Constitution, and that no amendment 'shall be called in question in any court on any ground'.

Before these changes could take effect, Indira Gandhi lost the election and in 1977–78 the Janata Party government passed the Forty-third³⁸ and Forty-fourth³⁹ Amendments, undoing many of the changes made by Indira Gandhi's government, thereby restoring democratic institutions. In particular, the restrictions on judicial review were removed. However, in keeping with its socialist leanings, the new government deleted the right to private property under Article 31, but did not delete Article 31C, which gave the DPSP primacy over the fundamental rights.

At the end of Phase I, in 1980, the fundamental rights were severely weakened and were very vulnerable to interest-group capture. Of the forty-five constitutional amendments, eleven directly amended the fundamental rights. Each instance amended more than one fundamental right. One-hundred-and-eighty-five laws were exempt from judicial review due to the protection of Article 31B and the Ninth Schedule.

2. Phase II (Post-1980): Amendment by Interpretation

To understand the framework of rules operational after 1980, one must understand the impact of *Kesavananda Bharati*. The ruling was upheld in *Minerva Mills v Union of India*,⁴⁰ confirming the basic structure test for amendments to the Constitution. This did not protect all fundamental rights, only those that formed the basic structure of the Constitution. It established that Articles 14, 19, and 21 are part of the basic structure, but other fundamental rights, like property rights under Article 31, may not form the basic structure.

The Supreme Court's rulings in *Minerva Mills* and *Waman Rao v Union of India*⁴¹ reaffirmed that the basic structure of the Constitution could not be amended. The Court did not provide an exhaustive list of articles that formed the basic structure and therefore rendered un-amendable. The Court had also ruled that the question of whether an amendment violated the basic structure was to be *judicially determined*. While the judiciary could review parliamentary amendments for violation of the basic structure, there was no similar test for judicial amendments by interpretation.

³⁷ Constitution (Thirty-ninth Amendment) Act 1975, s 4.

³⁸ Constitution (Forty-third Amendment) Act 1977.

³⁹ Constitution (Forty-fourth Amendment) Act 1978.

⁴⁰ (1980) 3 SCC 625. ⁴¹ (1981) 2 SCC 362.

This ensured that constitutional amendments could be vetoed *ex post* by the judiciary, if, according to the judiciary, the amendment violated the basic structure test. This posed an additional hurdle for interest groups seeking formal constitutional amendments from Parliament, because such amendments required *ex post judicial approval*, making amendments through Parliament more costly.

Substantive rules were frequently amended and weakened before and during the Emergency, which affected the post-Emergency era. Some fundamental rights continue to remain subject to the DPSP. The deletion of the right to property meant that even though laws included in the Ninth Schedule may be potential violations of the basic structure test, there is no substantive right which the judiciary can enforce in attempting to curtail interest groups seeking positive entitlements. Therefore, demand to add legislation to the Ninth Schedule was reduced, since such legislation would now be considered constitutional.

Attempts to formally change procedural rules by Parliament did not fare much better in this phase. One draft of the Forty-fourth Amendment attempted to add the requirement of a referendum for constitutional amendments—but it did not pass in Parliament. However, the *Kesavananda Bharati* precedent de facto strengthened the procedure to amend the Constitution by requiring *ex post* judicial approval.

The interaction between constitutional rules in this period caused two outcomes: (i) the weakening of substantive rules by frequent amendment; and (ii) increased difficulty in amending the Constitution (due to the basic structure test, which exposed all such additions to *post facto* judicial ratification).

The fundamental rights were still amended by Parliament. However, the manner in which the DPSP were read into the fundamental rights, and the process by which special classes of positive entitlements were created, shifted to the judiciary for the most part. Previously, legislators had invoked the DPSP to amend the Constitution; the Supreme Court now embarked on the same journey. In making this explicit, the Supreme Court held that the ‘harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.’⁴²

The Court started diluting locus standi requirements. Traditionally, the law required that only individuals whose rights had been violated or who were directly adversely affected by the action could approach the courts. In 1981, the Supreme Court held: ‘Where a legal wrong or a legal injury is caused to a person... and such person... [is] unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ...’⁴³

Post-1980, groups previously unable to access judicial remedies were represented in the courts. Article 23, which gives individuals the right to be free from human trafficking and forced labour, was interpreted for the first time and enforced.⁴⁴ This oppressed class previously had no access to the judiciary. The Court has also expanded the fundamental rights as enforceable against private persons in some cases, where previously they were only enforceable against the State.

⁴² *Minerva Mills* (n 40) [56].

⁴³ *SP Gupta v Union of India* (1981) Supp SCC 87 [17].

⁴⁴ *People’s Union for Democratic Rights v Union of India* (1982) 3 SCC 235.

Not all litigation led to enforcing *existing* rights for newly enabled groups. In many cases, an *expansive* interpretation and/or additions to the Right to Life under Article 21 was justified using the DPSP.⁴⁵ In a spate of litigation since 1980, the Court has read many of the positive entitlements listed in the unenforceable DPSP into Article 21.

Previously, cases reviewed by the Supreme Court were on violations of Articles 14, 19, and 31, because the State created entitlements for special groups as part of its economic policy. The expansion of right to life concerned specific classes, but based on social and not economic policy: for instance, rights of undertrials, convicts, and prisoners;⁴⁶ the right to a speedy trial;⁴⁷ the right to legal aid;⁴⁸ and the right to privacy.⁴⁹ These cases included both negative and positive action by the State, especially in the case of right to legal aid also provided for under Article 39A of the DPSP.

This was a big change in direction for the Supreme Court, where the Court upheld positive rights in individual cases, but it previously only enforced the negative component of Article 21. In 1960, in *Re Sant Ram*,⁵⁰ the Court held that the right to livelihood is included in the freedoms guaranteed under Article 19 in a limited sense, but not included in Article 21.⁵¹ However, this view shifted dramatically and the Court expressly read into the right to life the DPSP under Article 39(a) to include the 'right to an adequate means of livelihood'. In 1986, the Court held 'it would be sheer pedantry to exclude the right to livelihood from the content of the right to life'.⁵²

In *Bandhua Mukti Morcha v Union of India*, the Court held that the 'right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly... Articles 41 and 42'.⁵³ The right to dignity now includes the right of women against rape.⁵⁴

The Court has defined the right to health to include healthy working conditions for labourers, preventive care for women and children, and State medical care.⁵⁵ In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*,⁵⁶ the Court held that failure by a government hospital to provide timely medical treatment violates Article 21.

In *Francis Coralie v Union Territory of Delhi*, the Supreme Court clarified that Article 21 includes dignity and the 'bare necessities of life such as adequate nutrition, clothing and

⁴⁵ *Sathe* (n 2) 209–35.

⁴⁶ *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526; *Munna v State of Uttar Pradesh* (1982) 1 SCC 545; *Sheela Barse v Union of India* (1986) 3 SCC 596.

⁴⁷ *Hussainara Khatoon (I) v Home Secretary, State of Bihar* (1980) 1 SCC 81; *Kadra Pahadiya v State of Bihar* (1983) 2 SCC 104; *Common Cause v Union of India* (1996) 4 SCC 33; *Common Cause v Union of India* (1996) 6 SCC 775; *Raj Deo Sharma v State of Bihar* (1998) 7 SCC 507.

⁴⁸ *MH Hoskot v State of Maharashtra* (1978) 3 SCC 544; *Khatri (2) v State of Bihar* (1981) 1 SCC 627; *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

⁴⁹ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148; *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632; *People's Union for Civil Liberties v Union of India* (1997) 1 SCC 301; *Mr 'X' v Hospital 'Z'* (1998) 8 SCC 296.

⁵⁰ AIR 1960 SC 932.

⁵¹ This view was held until the early 1980s and was affirmed in *AV Nachane v Union of India* (1982) 1 SCC 205; *Begulla Bappi Raju v State of Andhra Pradesh* (1984) 1 SCC 66.

⁵² *Olga Tellis v Bombay Municipal Corp* (1985) 3 SCC 545 [33]; *DTC v Mazdoor Congress* (1991) Supp (1) SCC 600.

⁵³ (1984) 3 SCC 161 [10].

⁵⁴ *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490.

⁵⁵ *Parmanand Katara v Union of India* (1989) 4 SCC 286.

⁵⁶ (1996) 4 SCC 37.

shelter and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.⁵⁷

In several cases,⁵⁸ the Court read shelter as a basic right. In *State of Himachal Pradesh v Umed Ram Sharma*, the Court held that the right to life ‘embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself.’⁵⁹ The Supreme Court has taken the right to life to also include the ‘finer facets of human civilisation which makes life worth living’ including ‘tradition and cultural heritage.’⁶⁰ It has expanded the right to include the ‘right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care, and shelter.’⁶¹

Under the expanded view of the right to life, the Supreme Court has held that a citizen ‘has a fundamental right to free education up to the age of 14 years.’⁶² This has now become a formal right with the addition of Article 21A.⁶³

The biggest expansion of the the right to life was in reading Articles 21, 47, 48A, and 51A(g) together, with the Court opening the gates to environmentalist interest groups. The Court has read that the right to life includes ancillary rights like the right to a clean environment,⁶⁴ clean drinking water,⁶⁵ and clean air.⁶⁶

The 1980s witnessed various groups approaching the judiciary to enforce specific rights and positive entitlements.⁶⁷ ‘Pre-Emergency clientele essentially consisted of landlords whose lands were about to be taken away... industrialists whose businesses were about to be nationalized, higher caste applicants opposing reservations... The poor and disadvantaged could never reach the Court.’⁶⁸

Sathe’s argument highlights first that the Supreme Court reduced the costs for approaching the court, allowing representation for the disadvantaged. Secondly, the pre-Emergency clientele of the Court had their negative rights violated by impugned action or legislation. Groups demanding positive entitlements sought relief from the legislature. Post-Emergency, interest groups were petitioning a different forum as predicted—the judiciary—to expand and enforce positive rights and entitlements.

While this does not imply that there were no formal amendments to the fundamental rights in Parliament, more demands for amendments have shifted to the judiciary. Since 1980, ten⁶⁹ out of fifty-five amendments (18.1 per cent) enacted by Parliament have

⁵⁷ (1981) 1 SCC 608 [8].

⁵⁸ *Olga Tellis* (n 52); *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.

⁵⁹ (1986) 2 SCC 68 [11].

⁶⁰ *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42 [22].

⁶¹ *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549 [8].

⁶² *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645 [175].

⁶³ Constitution (Eighty-sixth Amendment) Act 2002.

⁶⁴ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212; *MC Mehta v Union of India* (1996) 4 SCC 750; *Vellore Citizens’ Welfare Forum v Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

⁶⁵ *AP Pollution Control Board II v Prof MV Nayudu* (2001) 2 SCC 62.

⁶⁶ *MC Mehta v Union of India* (1998) 6 SCC 63.

⁶⁷ Baxi (n 3) 109. While these groups were formed by civil society actions and social movements, instead of the market, they still represented very specific interests, demanding specific entitlements and relief.

⁶⁸ Sathe (n 2) 210.

⁶⁹ Forty-seventh, Fiftieth, Sixty-sixth, Seventy-sixth, Seventy-seventh, Seventy-eighth, Eighty-first, Eighty-fifth, Eighty-sixth, and Ninety-seventh Amendments.

amended fundamental rights. Four of these amendments have specifically added laws to the Ninth Schedule.⁷⁰ Eighty-one of the ninety-seven laws added to the Ninth Schedule in this period were land reform laws. While Article 31 was deleted in 1978, seventy-three of the ninety-seven laws (75 per cent) added to the Ninth Schedule in this period were amendment acts where the original legislation was already in the Ninth Schedule; the constitutional amendment sought to expand the existing constitutional protection to include these amendments.

Since Article 31 had been deleted, and fundamental rights weakened, these amendments by Parliament were less frequent, created fewer exceptions to existing fundamental rights, and there was less interest-group activity in Parliament. Important exceptions are Articles 15 and 16, leading to interest-group activity in the judiciary and in Parliament seeking exceptions to constitutional constraints on reservations in jobs and educational institutions.

In 1992, the VP Singh-led government created a 27 per cent quota of all government jobs for 'Other Backward Classes' (OBCs). The 27 per cent quota for OBCs was in addition to the 22.5 per cent of all government jobs reserved for Scheduled Tribes (ST)/Scheduled Castes (SC). This caused public protests and litigation and in *Indra Sawhney v Union of India*,⁷¹ the Supreme Court held that the reservation policy was constitutionally valid, but such reservations must not exceed 50 per cent of all jobs. This was essentially amendment by interpretation of Article 16, as there were no formal guidelines on the proportion of reservations in the Constitution.

Subsequently, Tamil Nadu created a quota of 69 per cent for government jobs and admissions to educational institutions.⁷² Parliament enacted the Constitution (Seventy-sixth Amendment) Act 1994 to exempt the legislation from judicial review by adding it to the Ninth Schedule. This is an exception, as it was included in the Ninth Schedule, while most other States were petitioning the judiciary.

In *Indra Sawhney*, the Court held that reservations made for posts were limited to initial appointment and did not extend to promotions. In response, Parliament passed the Constitution (Seventy-seventh Amendment) Act 1995 to specifically allow for promotions in the reserved category. When the Court held that the backlog of unfilled vacant posts could not form a separate category, the government passed the Constitution (Eighty-second Amendment) Act 2000. In *Union of India v Virpal Singh Chauhan*⁷³ and *Ajit Singh Januja v State of Punjab*,⁷⁴ the Court prevented SC/ST candidates, promoted on the rule of reservation, from enjoying seniority, which prompted the Constitution (Eighty-fifth Amendment) Act 2002.

These constitutional amendments were challenged before the Supreme Court. Unusually, the Court overruled its prior rulings, in upholding all three constitutional amendments, which enabled exceptions to the 50 per cent rule formulated by the Court.⁷⁵

In reservations in educational institutions, in *TMA Pai v State of Karnataka*,⁷⁶ the Court held that the State cannot impose quotas in private unaided institutions. In response, Parliament enacted the Constitution (Ninety-third Amendment) Act 2005, amending Article 15, to allow for reservations in private unaided colleges, except minority institutions

⁷⁰ Forty-seventh, Sixty-sixth, Seventy-sixth, and Seventy-eighth amendments.

⁷¹ (1992) Supp (3) SCC 217.

⁷² The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes Act 1993.

⁷³ (1995) 6 SCC 684. ⁷⁴ (1996) 2 SCC 715.

⁷⁵ *M Nagaraj v Union of India* (2006) 8 SCC 212. ⁷⁶ (2002) 8 SCC 481.

under Article 30(1). This amendment has been challenged in the Supreme Court⁷⁷ and the question of violating the basic structure was left to a larger bench.

What makes these relatively recent constitutional amendments both interesting and insignificant is that post-*Kesavananda Bharati*, interest groups benefit *only if* they secure judicial approval of constitutional amendments. This has led to interest groups seeking favourable interpretations directly through the judiciary, and approaching Parliament *only when they fail to secure such interpretation*. Success with Parliament amending the Constitution is irrelevant until the judiciary ratifies such amendments.

What is unusual about reservations is that both the judiciary and State and Central legislatures have been lobbied to gain exceptions and entitlements for specific groups—with success at the legislature. There may be many reasons—first, uncertainty over a favourable judicial outcome, or certainty over a negative judicial outcome. Secondly, the interest groups in question have lower costs of approaching the legislature, due to social organisation factors. However, one aspect conforming to the trend is that, relative to the demand, there are fewer amendments in Parliament, especially fewer additions to the Ninth Schedule. In fact, there have been no additions to the Ninth Schedule since 1995, despite frequent demands from interest groups.⁷⁸

IV. CONCLUSION

Indian constitutional history has witnessed a slow evolution in constitutional rules. This change in the constraints—imposed by the fundamental rights and costs imposed by procedures to amend the Constitution—changed the incentives for interest groups. While both the Supreme Court and Parliament are very important in this evolution of rules, the interest-group explanation provides us with the demand-side impetus for rule changes in specific forms and forums.

From 1950 to 1980, almost a quarter of the constitutional amendments amended the fundamental rights, mostly to accommodate DPSP. Post-1980, Parliament enacted formal amendments, but the percentage amending the fundamental rights dropped and some of these amendments had little to do with furthering DPSP. However, the Constitution has not remained static, and has evolved significantly in this period due to amendment by the judiciary. Post-1980 India witnessed an explosion in litigation on welfare issues, reading in various DPSP by amending the interpretation of Article 21.

The consequence is clear: with few exceptions, there has been a shift in interest groups demanding rule changes from Parliament to the judiciary. This trend is likely to continue unless there is a substantial change in the framework of rights and procedures, and the consequent incentives for interest groups demanding rule changes.

⁷⁷ *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

⁷⁸ AH Zaidi, 'Promises, Promises—That's Our Manifesto Destiny' *The Times of India* (New Delhi, 1 February 1998); 'RPI Threatens Nationwide Stir if Temple Work Begins' *The Times of India* (New Delhi, 28 December 1999); S Gupta, 'Quota Reservations: Q&A—Ashok Yadav' *The Times of India* (New Delhi, 27 July 2001); 'Parliamentary Committee Chairman Visits Mumbai' *The Times of India* (New Delhi, 4 January 2002); 'Centre to Move Bill on Quota in Promotions' *The Indian Express* (New Delhi, 9 August 2012).