

PANEL DISCUSSION REPORTS
THE ROLE OF POLITICAL THEORIES
IN CONTEMPORARY INDIAN
LEGISLATIVE PROCESS

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Political theories dictate that there is always a trade-off among various sections of the society. Systems are supposed to reform according to the needs of the hour. If law is unjust, it has to be changed. Though in a multicultural society, the dominant idea judges the other opinions in comparison to its own conception, there is always need for constructive deliberation upon what constitutes Constitutional Morality. CED&L Panelists examine.

PANEL
DISCUSSION
REPORT

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REPORT

The Centre for Economy, Development and Law conducted a Panel Discussion on Role of Political Theories in Contemporary Indian Legislative Process on 24th November 2015. The programme began at 10:30 am. In the introductory Welcome Speech was delivered by Sreenath Namboodiri, student GLC Thrissur. The introductory speech briefly enunciated the existent political theories. The speaker brought out the metaphor of ‘map’ for seafarers and compared it to the need of political theories in the arena of legislation. He defined the scope of the discussion to consider the hows and whys of law-making.

Thereafter, Prof. Binu Poornamodan Cholayil, Principal, Government Law College Thrissur conveyed the Presidential Address. She talked about the relevance of such a discussion in the light of recent reporting of passive parliamentarians pursuing all sorts of activities during Parliament sessions. She pointed out, with regret, the instance of passing of around eight bills including the Trade Marks Amendment Bill in the Parliament in a matter of 5 minutes. She indicated the rise of incident based legislations and posed the question “Whether such a propensity of incident based legislations in the modern age replacing the traditional legislative process is a good sign?” Thus, reiterating the challenges upon the function of law-making in India, she concluded her address with a hope that the following discussion would kindle the thought process of the audience.

The Panel Discussion began with the Key Note address by Prof. J. Prabhash, Department of Political Science, University of Kerala in which he also declared the inauguration of the discussion.

Prof. J. Prabhash

The speaker began with the identification of the problem of disconnection between political theory and legislative process. He suggested a further disconnect between theory and practice on one hand and the people on the other. The key-noter quoted Nobel Laureate Gabriel Garcia Marques’s observations on fame. “The problem with fame is that it has an expiry date”. Prof. Prabhash remarked that Garcia’s observations on fame would be equally applicable to political ideologies and forms of government. Democracy, according to him, has transformed so much so that it is unrecognizable and further away from people for whom it was created. He cited the example of the decision of the Bush administration in continuing the Iraq War even at the cost of the negative public opinion against it. Legislation has also not escaped this transformation. The United States Lobbies have become a major player exercising influence in the process of law-making in the Congress. Statistics state that around 2.17 million dollars is spent on lobbying in the US. Often cited as the cradle of democracy, the United States political process has changed such that it sways against the very principles of democracy on which its firm foundations were laid. Concurrently, in India also the effects of lobbying have been felt in the legislative corridors. In fact, according to the speaker, lobbying has been legitimized in India too. Prof Prabhash then put forth some basic questions to the audience, “Is Lobbying required in a democracy?”, “If required, for whom must it be done?”.

Further he reminded that democracy in India was moving in directions uncharted by the framers of our Constitution. The spirit of the constitution has been relegated as a celebration on a single day in a year, 26 November. There has arisen a crisis of representation. The Constitution and the legislations deviated into different paths without a common meeting point. He pointed out the “offload” incident of Greenpeace activist Priya Pillai invoking the ‘etc’ clause in the Look Out Circular. The ambiguous nature of operation of laws is in derogation of the freedom of speech and expression guaranteed under the Constitution. He said that this was an issue of Creature (Legislation) counterworking the Creator (Constitution). It was not Marx or Lenin, but Adam Smith (classical economist) who stated that Laws and Governments are combinations of the rich to oppress the poor. Democracy was considered a solution to this prophecy and has been dubbed as a mechanism to attain social justice in the 20th century. Today, however, particularly in India, the notion that election of representatives would be based on perusal of the manifestos of the candidates is delusion. He observed that the Modern day politicians also retract from their promised policies. In Verbatim, he said, “Modern day Politicians are hamlets without memories or rather, I must say, Selective memories”. Thereupon, he asserted that there was an existent disconnect between theory and practice.

Quoting Woodrow Wilson’s statement in Detroit meeting of Businessmen in 1916, “United States is a government of the businessmen and we should conquer the world”, Prof. Prabhash opined that this is the exact situation in India too. He voiced the concern that ‘Make in India’ initiative may actually unmake India.

Furthermore, he said that he believes the neo liberal era has witnessed two major issues, namely, the society’s desocialization and the consequent depoliticisation of the political process and the new found relation between state and business. The Preamble of the Constitution was an invitation to the people of India to make India. The Late Prime Minister, J.Nehru’s task was to first create a republic and then to govern it. It was believed to be a socio-political process unlike business process. Professor recalled a recent order of the Kerala government proposing seeking of prior approval of senior officer before any publication by employees of the state. According to him; administration must keep away from concerns of ethics and morality.

Referring to Margret Thatcher’s statement, “There is nothing called society; there are only individuals and at the most families” and connecting it to Aldous Huxley’s (1932) Brave New World where people were factory made without any thoughts, he alluded to the fact of desocialization. He further pointed to a survey conducted by CoCola 5yrs ago. The survey was conducted among the youth and some basic questions were asked, namely what their ambition was definition of a family etc. Among the options given, most of the participants chose ‘becoming rich quicker’ and ‘a family consisting of man, woman, a child and a car’. Professor commented that this desocialized opinion of the youth has become the norm of the day.

In enunciation of the second major issue of neo-liberal era, Prof. Prabhash stated that the major economic policies today are not decided by the Parliament, but by transnational and

private entities which are not accountable to people. He commented that the World Trade Organization was a most mysterious association. Legislation in India today either is not deliberated upon or is bulldozed through the Parliament based on majority of the party system. He further, channeled our attention to our former Prime Minister Dr. Manmohan Singh's description of democracy as 'Free Market Democracy'. Further he suggested that the said description points to the alternative nature of free market to democracy and not to its complementary nature. He alluded to the qualification of the word 'free' to market and the word 'market' to democracy. Thereby, he suggested that in such a situation citizen transforms to a consumer citizen, eroding the essence of democracy.

Professor reproduced the thoughts of Francis Fukuyama "Your decision not to vote and your decision not to buy from a mall are both political decisions. In the new age, the latter has gained importance rather than the former." He thus highlighted the death and inoperativeness of politics today. In a nutshell, he condensed his proposition to this 'Neo-liberal era favours shifting power to unaccountable concentration of powers.' He went further and expounded the new-found relation between business and state. Commenting that it is doubtful whether a Member of Parliament is elected on the basis of vote or money, He referred to Max Weber's classic phrase 'Political Capitalism'. He hypothesized that politics as a productive asset would find the largest market if the stock exchanges were to register it.

He adverted to the presence of businessmen as members of Parliament. He indicated the changing position of businessmen by pointing out that before 30 years the business class pulled strings from behind the members of Parliament but now they directly exercise legislative powers. He further brought out the statistics of multimillionaires in Parliament in a country where the average income of a person is in the tens place. Professor implied the investment of business classes in politics through way of advertised slogans (like India shining), paid dharnas and immeasurable donations. He suggested that this was the precise cause for the political class becoming 'hamlet with selective memories'. One cannot expect the political class to forgo their financial masters once in power. So, we see that about 5 times the money spent for Public Distribution System in India is used up to provide business subsidies and waive corporate tax. Even public policies are twisted and abandoned for the emancipation of the capital class. The u-turn of the Government on the policy of rejecting the Genetically modified crops in favour of industrial giants like Monsanto has called in much protest (this is because of the fact that those who control the seed, control the food and control the government too). The Maharashtra government's scrapping of the river regulation zone policy has been criticized as sacrificing environment at the altars of economics. These instances clearly validate the observations of John Dewey, 'Politics is the shadow cast on society by big businesses'.

Law is not a product of a factory; it is a product of the social-churning process. It is a reflection of the people's views in the society. He stated that the Chinese have only output legitimacy system but India has input legitimacy system. People in India elect government in India but don't govern while the elite never vote but they control. Further he compared this situation to the remark of Jean Bodin, 'The absence of a person who is present'. Professor asserted that "In Physics, Kilogram is heavier than grams, but in Politics it is the opposite".

He used the image of an iceberg to express the present political scenario in India wherein the tip is formed by the economic elites and the people remain submerged below the waters.

In conclusion, Prof. Prabhash opined that the political class must find answers to the questions ‘What is India?’, and ‘What does it mean to be an Indian?’. These answers must come from deep inside. Gandhi, Nehru, Patel all tried to find answers for these questions. He reminded that the answers must elevate, it must be aspirational to make Indians face the 21st century with confidence. The Political hamlet must inculcate a comprehensive memory.

The next session was taken up by Dr. Mathew Varghese, Department of Political Science, Maharaja’s College, Ernakulam. He focused on Political Theoretical Component and the Process of Legislation.

Dr. Mathew Varghese

Dr. Mathew started his session by reproducing three vignettes, namely:

1. Formation of the manifesto of the Communist Party in 1940s. This was the result of the widespread dissatisfaction in Europe which was suffering from the labour problems due to industrialization. It was not merely a political manifesto but also a pressing need of history.
2. Institutional Context in Holland. The Royal Academy of Arts and Science is a scientific institution created for the study of Government policies. This institution as a variation from its counterparts across the world is not a recommendatory body. It is an academic body actively participating in discussions of socio-political issues.
3. The Overhaul of the Venezuelan Constitution by the then President Chavez. This overhaul was the result of the deliberations within the Venezuelan society on the existing inequalities.

Mathew V., then observed that the first vignette was an instance of radical intervention in the society while the latter two presupposed an institutional involvement. These vignettes become significant as they address the most relevant political question, i.e., “How authorities behave in contingent contexts?” He opined that the people of India have also started thinking of radical interventions now.

Moving on to the idea of sovereignty, Dr. Mathew said that it was a tricky concept in political theory. Sovereignty relates to an ultimate overseer but the idea as to what constitutes the same has been a question of debate for political thinkers. Different writers have treated it in multifarious ways and so the concept of sovereignty, according to Dr. Mathew, seems to be transforming. He referred to some of these thoughts. He quoted Jean Bodin’s identification of sovereignty as the power of the French King over the nobility; Thomas Hobbes’ sovereign in the form of the Leviathan; and the later development of the Social Contract theorists’ recognition of people sovereignty. The transformation continued into the acceptance of Parliamentary Sovereignty and carried on into different spheres with the introduction federalistic ideas. Now it has reached into the categorization of monistic and pluralistic ideas of sovereignty. He traced the historical changes in the concept of sovereignty. The change in concept of political authority began when the concept of the

body of Christ evolved into a notion of two bodies — one, the *corpus naturale*, the consecrated host on the altar, the other, the *corpus mysticum*, the social body of the church with its attendant administrative structure. This latter notion — of a collective social organization having an enduring, mystical essence — would come to be transferred to political entities, the body politic. In the late Middle Ages, of the concept of the king's two bodies emerged. Whereas the king's natural, mortal body would pass away with his death, he was also thought to have an enduring, supernatural one that could not be destroyed, even by assassination, for it represented the mystical dignity and justice of the body politic. Later, the concept of sovereignty confined itself to secular representations in the form of the state.

He enunciated that the modern era has seen new interventions in politics. He gave the instance of the feminist movement. It threw open spaces not present in traditional politics—domestic and sexual aspects came to be considered. He quoted the role of Gramsci's superstructure. In this sense, the state is not only the apparatus of government (coercion), but also the private apparatus of civil society (consent). Therefore, the integral state represents not only political activities, but also social, intellectual and moral activities, namely whole superstructural activities. Nothing seems to have escaped the control of state today.

Dr. Mathew stated that the biological life is getting problematical. How life as a question is addressed by politics and what role legislation has to play in it are the fundamental problems today. He referred to Michael Foucault's research to distinguish the changing trends in sovereignty. Foucault pointed to a new kind of 'disciplinary power' that could be observed in the administrative systems and social services that were created in 18th century Europe, such as prisons, schools and mental hospitals. Their systems of surveillance and assessment no longer required force or violence, as people learned to discipline themselves and behave in expected ways. He came to the conclusion that power is pervasive and dispersed and not concentrated in purely 'sovereign' acts. Physical bodies are subjugated and made to behave in certain ways, as a microcosm of social control of the wider population, through what he called 'bio-power'. Disciplinary and bio-power create a 'discursive practice' or a body of knowledge and behaviour that defines what is normal, acceptable, and deviant. Biopower referred to a set of procedures, or relations, that manipulate the biological features (for example, birth rate, fertility) of the human species into a political strategy for governing an entire population.

Further he iterated the Roman concept of 'Homo Sacre' as someone who can be killed without the killer being regarded as a murderer. He observed that the modern day practice has borrowed this ancient concept and whenever a life form is considered unworthy of living, it is considered sacred. The Economic Zone categorisation has become a materialisation of this concept wherein certain areas are exempted from Social Impact Assessment during acquisitions in furtherance of a greater 'objective'. Social has given way to piecemeal considerations. He then quoted the observations of the Law Commission of India report of 1967 regarding retention of capital punishment based on the need for maintaining law and order in society in the wake of existing disparity in the level of morality and education in the country. Then he quoted the rarest of rare cases doctrine of the 1980s. The recent report of the Law Commission of India (262nd) recommending abolition

of death penalty except in terror cases seems to reduce a life form to less than an animal life and entails an action against democratic principles.

He then brought out the instances of watering down of empowering statutes like the Forest Act and the Right to Information Act. These beneficial legislations tend to pose problems for the state and hence their effectiveness is reduced by subsequent amendment. Mathew stated further that Political Theory is not a different realm from legislative process; in fact both of them go together. He then referred to the United States Declaration of Independence which has words, “We hold these truths to be self-evident.....”He concluded that the questions posed by the French philosopher Jaques Derrida i.e., ‘who signs, and with what so-called proper name, the declarative act that founds an institution?’, are significant and needs to be deliberated continuously, especially by legislators.

The last session was taken up by Mr. Aneish Rajan, Deputy Director, Central Excise Intelligence, Ernakulam.

Mr. Aneish Rajan

He started his session out with his apprehensions about the topic of the panel discussion. His apprehensions arose on two grounds namely, (1) A normative presupposition of the organizers about the existence of political theory; and (2) the pragmatic or even over-ambitious belief that there was something ‘contemporary’ in Legislative Process.

He then posed a question before the audience as to whether the Constitution framers had thought about political theories and then framed it or whether Constitution had emerged while they were considering conceptions of good life?

Mr. Aneish stated that he had gone through the Constituent Assembly Debates to find answer to the above question. And in his search, he had come across a particular debate occurring on the same day as the discussion, i.e., November 24, 1948. It was the Draft Constitution Motion No. 38 on “Ban on Alcohol”. The supporters of the ban put forward arguments of Gandhian principles, the unhealthy aspects of alcohol and the economic burden caused on the labourer community due to its consumption. Shri. B.H. Khardekar from Kolhapur’s arguments against prohibition is worth a read. The said member tried to rebut the arguments of the supporters by mentioning that even Gandhi accepted the existence of multifaceted truth, the need for revenue to be spent for education and public health and the need to allow maximum personal liberty to each individual. Another member Shri Jaipal Singh raised the issue of religious privilege of Adivasis in using rice beer. Shri. B.G. Khar refuted the arguments against prohibition by stating that material and intellectual progress must be accompanied with moral progress too. There was a strong conception that the Constituent Assembly was taking a post-colonial cane to teach the indigenous people how to live. Aneish compared this to Foucault’s ideas on governmentality, which presupposes a close link between forms of power and processes of subjectification.

He then brought out an instance from his area of practice. He enunciated that in the Central Excise and Customs Tariff, everything in the universe has been classified in 84 chapters

under 2 Volumes. The first chapter is on exempted entities which consist of all live animals except human, but yeast has been taxed as live animal. There is a harmonised system of nomenclature and everything is numbered. This, according to Aneish is a perfect example of Foucault's theory in practice.

He posed some pertinent questions, "Do we have something called Political Theory?", "What is the basic philosophy of law?" Constitution, he stated, was not a one-day phenomenon, it was a creation following a deliberation of socio-political domain of the country for 5 to 10 years. He referred to the subaltern critique of the Constitution as a continuation of the Government of India Act 1935. The inner domain of the society resisted to keep out the western domain and thereby colonialism. The Constitution-making process was affected by these ideational factors. Pandit Nehru's vision of creating a just society with just means faced several irreconcilable tensions in the form of conflict about priority of individual rights as citizen or as member of community?

Mr. Aneish then alluded to Dr. Ambedkar's motion for Hindu Code Bill which transformed the law then existing, i.e., providing for equal share of inheritance to daughters in father's property. He mentioned in this endeavour, the Indian scenario was better than even the United States. The civil society argument against this equal share for daughters was that the Hindu scriptures, like the Yajnavalkya, do not support such a preposition. But Dr. Ambedkar negated this argument saying that Puranas and Vedas can't be moral documents on which legal arguments can be made. Pandit Nehru supported it saying, as a country, there was a need for codified law. However, in 1947, India was in the throes of partition and envisaging a uniform codified law in a situation of communal riots was not feasible.

He said that the concept of multiculturalism is a late entry into political theory. He then distinguished between multiculturalism and pluralism. Theoretically, in multiculturalism, there is an element of equality. On the other hand, in pluralism there is only co-existence. He stated that equality entails a concept of opportunity. Affirmative action must see it through multiculturalism. He explained that affirmative action required positive discrimination. He probed how discrimination can be positive unless it has any justice to argue for its sake. He answered that Rawls theory of Justice may provide explanation for this. He then observed that Equality is, in actuality, attained when a condition of equality exists such that greatest good of the least advantaged is obtained. He then posed the question as how can persons be categorized as to be included in Scheduled list or not? He noted that State has to take a pastoral role to create a conducive domain. He quoted Granville Austin's comment that the Indian Constitution is basically an adoption of Isaiah Berlin's notions of liberty. Aneish then differentiated between Positive and Negative Liberty, wherein State was endowed with the responsibility of creating better conditions of life and provides resources for enjoyment of liberty to the individual in the former; while the later required the State to desist from interfering in an individual's personal domain. He quoted Rajeev Bhargava, writer of 'Politics and Ethics of Constitution' that the Fundamental Rights were basically an enunciation of negative liberty.

He stated that the Preamble has become the horoscope of our country. The rule of not vitiating the basic structure during amendment of the Constitution was mentioned by him. He then broached the subject of a pending Supreme Court case challenging the inclusion of 'socialist' term in the Preamble. He then mentioned that Hugo Grotius's theory of eminent domain i.e., the unabated power of State to take property of an individual for public purpose, is in reality exercised as an attribute of sovereignty. Despite two years debate in Constituent Assembly about land and property rights, the first amendment of Constitution was about Land Rights. Still the debate is going on even about The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Second Amendment) Bill, 2015. Earlier, during the time of the first amendment, the State was empowered to acquire land on its whim but 67 years later, the land acquisition provisions have closer to being beneficial for the individuals. The conceptions of freedom and liberty have changed.

He then quoted instances to derive a theory of legislation. The amendment of Indian Citizenship Act to include Persons of Indian Origin (PIO) but the absence of comprehensive definition of PIO is a lacuna. Lawyers must see what is conspicuously absent in the Constitution. Inclusive citizenship was absent in the Constitution. The presence of Section 377 in the Indian Penal code is another instance. He stated that the written Constitution must not restrict powers. The Legislative Process should have contemporary amendments.

Narrating his personal experience, he confesses that adjudicating authorities often do not consider the human factor just because the law omits to say about it. While considering a case for inclusion of expenses of gardening facilities in the determination of tax credit, the authority's view of denying the same on the reasoning that provision of gardening facilities is not part of manufacturing process was against the spirit of law. Theory has to be understood in terms of the human requirement. Individual liberty is the most important factor in Constitution and the laws must connect to this.

Mr. Aniesh concluded after reference to Benjamin Franklin's criticism of allowing liberty to individuals by State. According to him, our Country is not a creation of any religious text. Village republics won't solve the problems in our country as it has a large influence of caste hierarchy inherent in it. Our Constitution has its basis on conceptions of good life and political theory. He quoted the question of K.R. Narayanan, "Is it the Constitution that failed us or did we fail it?" Social justice and principles of good life must govern the process of legislation in the country.

On the conclusion of the sessions by the speakers, questions were called from the audience. The questions raised and the answers given by the panelists are the following:

a) How does the conflict of identities figure in the legislative process?

Ans) Even if one is a part of majority, one may not be able to come up. Democracy doesn't base itself on majority or minority. Majority figures only in the procedural rules of electing democratic government. Minority opinion can reflect in legislative process. For instance, the land reforms.

The Constitution couldn't have imagined a modern individual. Instead of identity, basic human rights have been taken as the most important factor in framing of the Constitution. If religious identity was taken as the basis; conflicts would have bound to occur. Constitution is a reconciliation and compromise; a new document for new life amid the conflicts existing at that time.

b) Is Business interest is one of the major influences in Parliament?

Ans) Most of the acquired land of the poor is given for development of Special Economic Zones. Mostly, the position in the power structure determines whether one's opinions will be taken up in the formation of legislations or not.

Business interest is one of the prime interests in Parliament today. By and large, after 60 years of independence, the concept of New Public Management, though not intrinsic to Indian citizens, has become part and parcel of government.

c) Whether right to recall must be brought in India?

Ans) Bringing right to recall in India is a debatable issue. Huge expenditure involved and the size of the country are limitations.

Referendum and recall are mechanisms in a democratic state to promote accountability. Another institutional mechanism is the making of a governing council which would guide governance in a country. That would be a radical innovation.

d) The issues like uniform civil code and recognition of transgender community are much discussed in the country. Do these need to be legalized?

Ans) Allowing gay marriages will effect family conceptions. Democracy in the country is affected much by the culture existent. Constitutional morality has to be created, it is not natural. Instead of Uniform Civil Code, we need a Democratic Civil Code.

Political theories dictate that there is always a trade-off among various sections of the society. Systems are supposed to reform according to the needs of the hour. If law is unjust, it has to be changed. Basic human rights must be considered rather than religious texts during legislation.

In a multicultural society, the dominant idea judges the other opinions in comparison to its own conception.

The Panel Discussion came to an end with the rendering of the Vote of Thanks by Shri. Abhilash Gopinath, Asst. Professor, Government Law College , Thrissur at 1:30 pm.