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**POLITICAL CONSTITUTIONALISM AND  
PARTICIPATORY DEMOCRACY: READING THE  
ESSENCE OF THE RIGHT OF PUBLIC PARTICIPATION  
IN ARTICLE 21 OF THE CONSTITUTION.**

AUTHORED BY - NAKUL SINGH

### **Abstract**

*By the medium of this paper, the author aims to provide in the introduction the cue which kindled the desire in the author to take up the topic. The article in the following sections would also attempt to explain the concept of 'political constitutionalism' and its relation with 'public participation' and the reading of the essence of 'public participation' into Article 21 of The Indian Constitution, 1950 and its relevance in the current times.*

### **INTRODUCTION**

The incentive to work on this topic was kindled in me when I decided to visit the office of the Commissioner of the Greater Visakhapatnam Municipal Corporation, Dr. G. Srijana, IAS in order to bring to ma'am's attention the suspicion which I had of wrongful acts like prostitution and smoking of Marijuana or *Ganja* were taking place in the densely covered garden right in front of the building I reside in.

To give context, in the year 2014 in Visakhapatnam post the Hudhud cyclone, my family and I had taken up the initiative to plant 250+ saplings in the same garden in order to compensate for the green cover that had been blown away and destroyed due to the strong and ferocious winds of the cyclone.

In the year, 2022, eight years later, the garden got densely covered with trees and their branches which entirely made all the activities happening inside the garden opaque from public gaze. It was this loophole due to which, anti-social, anti-ethical and injurious activities like smoking cigarettes, drinking liquor, smoking *Ganja* and interactions between couples in obscene and comprising positions started to occur rampantly in the garden.

Taking stock of the situation I decided to visit the office of the municipal commissioner and bring to her notice and knowledge the activities which were happening in the garden. Highly impressed with my initiative who happened to be a member of the public, I was given credit by ma'am and in order to encourage members of the public raising their voices and being vocal about their day-to-day localised concerns, ma'am immediately took action and by the evening of the same day, all the trees and overgrown bushes and shrubs were trimmed and truncated and lights were installed in the garden. Additionally, ma'am also went further in proposing a plan, after receiving inputs from me and my mother, that would convert the garden entirely into a fitness arena. The proposal was to not even cut down a single tree but to clear all bushes and shrubs and lay a walking track and benches and create open areas where the elderly from the surrounding residential areas could walk, sit or do yoga and breathing exercises like *Pranayama*.

In pursuance of the same, throughout the months of February and March, I have been involved and have been coordinating with the Zonal Commissioner of Ward – III of the Greater Visakhapatnam Municipal Corporation, Mr. Shiv Prasad in the planning and implementation of the fitness arena plan that had been proposed by Srijana ma'am.

Usually, the functionaries under the Government administrative and executive wings are infamous for their lax and lackadaisical attitudes. However, the importance and relevance of public participation in administering effectively, efficiently and in a time bound manner was realised by me when the instead of the state functionaries taking stock of the administrative issues, the public itself voiced their concerns and made the administrative functionaries aware of the concerns that the masses face.

It is therefore a sum total of all these instances and episodes which prompted me to work on this topic.

## **POLITICAL CONSTITUTIONALISM**

To aid in context and explain the true meaning of political constitutionalism,<sup>1</sup> it is imperative to differentiate it from another related concept which is that of legal constitutionalism.<sup>2</sup>

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<sup>1</sup> Richard Bellamy, University College, London, *Political Constitutionalism: A Genealogy*, (August, 21<sup>st</sup>, 2020).

<sup>2</sup> The Britannica, *Political and Legal Constitutionalism compared*, available at

<https://www.britannica.com/topic/constitutionalism/Political-and-legal-constitutionalism-compared>, (last visited on

Legal constitutional presupposes human infallibility and suggests that citizens and law makers alike may not always possess the traits or the foundations necessary for a constitutional democracy<sup>3</sup> and therefore such a foundation is to be preserved and protected by the judiciary. In other words, legal constitutionalism supposes or emphasises on the judiciary serving as key restraint on the legislature in order to determine if any particular piece of legislation satisfies or to the contrary contravenes constitutional values.<sup>4</sup>

An example for legal constitutionalism would be, for instance, the supreme court or the high courts striking down legislation which violate the freedom of speech<sup>5</sup> or go beyond or ultra vires the grammar of part- III rights.<sup>6</sup>

On the other hand, political constitutionalism espouses that in upholding constitutional values, 'the democratic process' is significantly a lot more credible, legitimate and capable than courts in terms of resolving issues that strike at the bedrock of constitutional values.<sup>7</sup> The entire notion of political constitutionalism is that it seeks to resolve these issues by encouraging or improving the democratic processes by improving or enhancing the scope of consultations from the stakeholders.<sup>8</sup> Such steps would include, improving the electoral systems to achieve proportional representation, providing for multiple inflection points in order to balance and improve the federal structure. In other words, much more than the law or legislation in question, it emphasises or scrutinises the entire decision-making procedures and how the same can be further legitimised by ensuring the 'participation' of multiple stakeholders, especially, the 'public' at large. The norm of political constitutionalism sees or identifies itself as a system that places or emphasises on the importance of stakeholder consultation in the decision-making process.<sup>9</sup>

An infamous instance of completely disregarding the tenets or principles of political

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March 4<sup>th</sup>, 2022).

<sup>3</sup> The Sage Publications, *Constitutional Democracy*, Vol.29(6) (2001).

<sup>4</sup> Deccan Herald, *Lets safeguard constitutional values*, available at <https://www.deccanherald.com/opinion/comment/constitution-day-let-s-safeguard-constitutional-values-1054583.html>, (last visited on March 4<sup>th</sup>, 2022).

<sup>5</sup> The Constitution of India, 1950, Article. 19(1)(a).

<sup>6</sup> The Constitution of India, 1950, Article 12 – 35.

<sup>7</sup> The Citizen, *Are Constitutional Values in danger*, available at

<https://www.thecitizen.in/index.php/en/newsdetail/index/4/21114/constitutional-values-in-danger-say-former-civil-servants>, (last visited on March 4<sup>th</sup>, 2022).

<sup>8</sup> Isuelt Honohan, *Political constitutionalism*, Contemporary Political theory, Vol.8(371) (2009).

<sup>9</sup> DAVID & MALCOLM, *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* (2016).

constitutionalism came to light on the 24<sup>th</sup> February, 2015 when the government introduced the land acquisition bill, 2015.<sup>10</sup> The effect of this bill was that the government could in certain cases acquire land absolutely without the consent of the landowner or conducting a social impact assessment.<sup>11</sup> Though the bill did not get the required parliamentary support to give it the effect of a law, it is noteworthy that not only was the consent requirement or consultation requirement done away with, the bill effectively tried to circumvent parliament scrutiny as well as approval.

## **PUBLIC PARTICIPATION, PARTICIPATORY DEMOCRACY AND THE CONSTITUTION**

In increasing the scope of public consultation and from other stakeholders as well, the apex court in the case of *Rajeev Suri v. Delhi Development Authority*<sup>12</sup>, the Supreme Court categorically recognised participatory democracy or consultative democracy as an integral part of the constitution. The same amount of fervour or enthusiasm has not been shown however by the government.

For instance, in the year 2021, in the winter session of the parliament, out of 29 passed bills, 17 of them absolutely saw absolutely negligible public consultation. In other words, more than 73 percent of the total bills tabled in the winter session of the parliament absolutely saw negligible public consultation.<sup>13</sup>

Additionally, the bills which provided for public consultation on paper, in practise did not provide for public consultation as either the bill was not available for comments in the vernacular languages of the stakeholders or provided for an extremely short period of time within which comments had to be submitted. The most infamous instances of these occurrences being the Draft Lakshadweep Developmental Authority Regulation (DLDAR) and the draft environment impact

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<sup>10</sup> PRS Legislative Research, *The Land Acquisition Bill, 2015*, available at <https://prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-second-amendment-bill-2015#:~:text=in%20May%202015.->

, *The%20Right%20to%20Fair%20Compensation%20and%20Transparency%20in%20Land%20Acquisition,Parliamentary%20Committee%20for%20detailed%20examination.*, (last visited on March 4<sup>th</sup>, 2022).

<sup>11</sup> Science Direct, *Social Impact Assessment*, available at <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/social-impact-assessment>, (last visited on March 4<sup>th</sup>, 2022)

<sup>12</sup> Civil Appeal No. 229 of 2020.

<sup>13</sup> Business Today.in, *Zero Public consultation on majority of the bills*, available at <https://www.businesstoday.in/latest/policy/story/winter-session-2021-zero-public-consultation-on-60-of-the-bills-to-be-introduced-313219-2021-11-24>, (last visited on March 4<sup>th</sup>, 2022)

assessment (EIA). Additionally, it is also pertinent to note that the text of the DLDAR is only available in English and according to the 2011 census, it was ‘only one’ person who got registered as literate in English in Lakshadweep.<sup>14</sup>

Additionally, the EIA notification was only published in the online format when as per reliable statistics, among the pool of the most affected by the EIA, only 25.36 percent of the population had access to the internet.<sup>15</sup>

Taking cue from jurisdictions abroad, the South African Appellate court in the case of *Doctors for Life International v. Speaker of the National Assembly*<sup>16</sup> (doctor’s case) concluded that ‘it was the duty’ of the legislature to encourage and create avenues for public involvement in the legislative and administrative procedures undertaken by the state and that participation by the public is the sine qua non to accommodate pluralistic viewpoints and is extremely important to the functioning of a participatory democracy. The same reasoning was also adopted by the courts in the cases of *King v. Attorney’s Fidelity*<sup>17</sup> and *Matatiele Municipality*.<sup>18</sup>

Additionally in the doctors’ case, the court further opined that the government is under an obligation to facilitate public participation and the same is brought into play by the aid of two elements. The very first requires that citizens have the necessary information to take an ‘informed consent’ or have an ‘informed engagement’ with the law and the second is to provide citizens an effective opportunity for them to play their role in the law-making procedure.

The very same elements have found their mention in the jurisprudence of the Supreme court in multiple cases by being read into Article 21.<sup>19</sup> (A.21) For instance, in the case of *Reliance Petrochemicals*<sup>20</sup>, the apex court of India held that the ‘right to know’ is an essential ingredient of ‘participatory democracy’ and has been included under A.21. Additionally, in the *Kamil* case<sup>21</sup>, it

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<sup>14</sup> Bar and Bench, Unpacking the protests against DLDAR, available at <https://www.barandbench.com/columns/unpacking-protests-draft-lakshadweep-development-authority-regulation-2021>, (last visited on March 4<sup>th</sup>, 2022)

<sup>15</sup> Census of India, 2011, Paper 1 of 2018, *Language*, India, States and Union territories, Table (C-16)

<sup>16</sup> 2006 (12) BCLR 1399 (CC).

<sup>17</sup> 2006 (1) ALL SA 458 (SCA)

<sup>18</sup> 2006 (5) BCLR 622 (CC)

<sup>19</sup> The Constitution of India, 1950, Article. 21.

<sup>20</sup> *Reliance Petrochemicals v. Indian Express*, 1988 SCR Supl. (3) 212.

<sup>21</sup> *Kamil v. Union of India*, W.P. no. 4332 of 2020.

was held that the expression of one's free will by the medium of political participation is under the ambit of the right to life and liberty which has been enshrined in A.21. It is also to be noted that in the case of Hanuman Laxman<sup>22</sup>, the supreme court has categorically held that public participation is not to be reduced to a step that is a mere procedural formality. The court in the particular case emphasised on the constitutional importance of public participation and localised administration and categorically stated that vis-à-vis decisions which have a significant impact on the lives of individuals must also be taken in a way that accounts for their concerns as well. Additionally, in the Research Foundation case<sup>23</sup> not only did the Supreme court read into A.21 the protection of the environment and human health but also categorically stated and furthered the view of the right to information being recognised under A.21.

## Conclusion

In the conclusion, it is apt to state that the very relevance of the right to public participation is to cross fertilize and better or enhance any specific policy decision by taking into account the views of those who would be the most affected by the policy in question. In other words, the engagement and involvement of the members of the civil society in the legislative process will only pan out to enrich the 'tapestry of a participative democracy'. However, the author submits that the enforcement and recognition of the said right under A.21 is just a mere step in the accomplishment of the ultimate goal which is all about giving the governed a voice in their own governance. The author also submits that in order to achieve the genuine and true democratic constitutional ideals, the mere existence of public participation only on paper or present in a formal or tokenistic fashion is not enough at all. All the stakeholders and most importantly the governed, should always be given an effective and reasonable opportunity to advance their opinions in matters which significantly affect them.

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<sup>22</sup> Hanuman Laxman v. Union of India, Civil Appeal no. 12251 of 2018.

<sup>23</sup> Research Foundation v. Union of India, Civil Appeal no. 657 of 1995