BLOGS

Key Constitutional Law Developments in October for CLAT (Part 1/2)

Indrasish Majumder · 17 Jan 2022

As a student of law, you never stop learning. And as a law aspirant, it is extremely important to stay on top of ALL the important legal developments that are taking place. This is especially true in the case of Constitutional Law as it forms the foundation of the legal framework of a country.

In this newly introduced series, you will be apprised of all the key constitutional law developments that take place, not only in India, but throughout the globe. Read on:

1. Canada SC Rejects Idea of Basic Structure Doctrine, Unwritten Constitutional Principles

On 1st October 2021, a 9-judge (Constitution) bench of the Supreme Court of Canada in the case of *Toronto (City) v. Ontario (Attorney General)* decided against giving validity to unwritten Constitutional principles over codified legislative documents, by a wispy majority of 5 against 4.

The case was set up to examine the validity of the Better Local Government Act, 2018 which reduced the number of electoral wards in Toronto from 47 to 25, which were only recently increased from 44 to 47.

The enactment of the legislation came only after the nominations for the election were filed and campaigns for individual candidacy were drawing to a close.

The legislation was challenged for being violative of Section 1 and Section 2(b) of the Canadian Charter which provided citizens with the fundamental rights and right to effective representation, respectively.

Referring to Section 33 of The Canadian Charter of Rights and Freedoms, the majority bench judgement, authored by Wagner CJ, noted that unwritten constitutional principles did not give the Judiciary the jurisdiction to strike down legislation unless it violated explicit articles of the Canadian Charter of Rights and Freedoms.

In a strong dissent, the minority opinion, authored by R.S. Abella J, argued that unwritten constitutional norms like judicial independence and the rule of law might be used to invalidate legislation.

The minority bench made several references to domestic and international judicial precedents including ***Kesavananda Bharati v. State Of Kerala***, wherein it was ruled that Constitutional Amendments which violated the basic structure of the Constitution were liable to be struck down, and reasoned that unwritten principles do not merely serve as a backdrop or context of a legal framework, but are rather obligations of the State and should be so recognised by the Judiciary.

The minority bench also referred to a barrage of cases to demonstrate that prior rulings had recognised that the authority unwritten principles flowed from the Preamble of the Constitution Act, 1867.

As a result, the minority claimed that the *"rule of law"* is a basic tenet of their Constitution. Similarly, due to the vital role that courts play in the Canadian system of governance, judicial independence is an unwritten concept that was made a constitutional requirement.

It was highlighted that judicial independence principles have been utilized to overturn legislative measures.

FURTHER READINGS:

1. Ontario's Mid-Election Changes To Toronto Wards Not Unconstitutional: Supreme Court: This article discusses the majority and minority opinion on issues rendered in this case at great length. It follows a discussion which first flared up in 2018 here, and later in 2019 when the Court of Appeal passed their judgement.
2. Basic Structure Doctrine in Canada?: Authored by eminent and renowned legal scholar Professor Upendra Baxi, this article compares the ratio of the minority judgement in the present case with the majority opinion of Kesavananda Bharati. The article analyses the case in light of the State's Constituent Power, and the complex setup of the case.
3. What the Canadian Supreme Court held on Unwritten Constitutional Principles: This article analyses the factual background and composition of Canadian Municipal electoral wards. The article examines the minority opinion in light of legal principles and Kesavananda Bharati.

4. Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making: This paper traces the history of the partly written and partly unwritten Canadian Constitution. The paper goes back to assess the functioning of the Courts and the evolution of unwritten constitutional principles such as the Rule of Law and Judicial Independence.
5. Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System: This paper demonstrates that the Canadian legal system effectively allows the Canadian State to alter and amend the electoral system to its whims and fancies without any serious impediments. It argues that the operation of the Constitution is largely restricted in terms of check electoral changes, and hence constraints the advent of any sort of reforms.
6. The basic structure and unwritten constitutional principles: Analysing the Canadian Supreme Court's recent ruling in relation to the position in India: This article analyses the instant judgement in light of several landmark rulings of the Supreme Court of India and discusses the minority bench's reference to Kesavananda Bharati. The author further demonstrates that although the minority bench made a reference to Indian case laws, the very position of unwritten constitutional principles in India is not well settled.

2. SCOTUS Admits Controversial Texas Abortion Law for Constitutional Scrutiny

On 25th October 2021, the Supreme Court of the United States (SCOTUS) admitted two different challenges in *Whole Woman's Health v. Jackson* and *United States v. Texas* to examine the Constitutional validity of the recently enacted Texas Heartbeat Act 2021 (Texas Senate Bill 8) which prohibits an operation for abortion if there exists a foetal heartbeat.

A foetal heartbeat is usually determinable after 6 weeks of pregnancy. While the State does not itself enforce the law, it allows private individuals to sue under the Act other persons whom they suspect of aiding and abetting in an abortion.

The legal instruments in this respect range from an injunction to 10,000$ in damages, which will effectively cause a cessation of all abortions beyond 6 weeks of pregnancy.

In its order, the Apex Court of the country agreed to examine the validity of the Act and framed the issue to assess whether *"the state can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce*

that prohibition through civil action?".

At the heart of the dispute are Constitutional provisions that recognise Women's Rights and the autonomy surrounding Reproductive Freedom.

It is noteworthy that all the way back in 1973, the SCOTUS in *Roe v. Wade* had ruled for the protection of a woman's liberty in their choice of having an abortion and restricted the interfering powers of the State.

In the above case, the Supreme Court ruled that the Due Process Clause (Fourteenth Amendment) of the United States Constitution guarantees a basic "right to privacy" to a pregnant woman who wants to decide whether or not to undergo an abortion.

FURTHER READINGS:

1. Supreme Court Agrees to Hear Challenges to Texas Abortion Law: This article discusses the SCOTUS's admission of the 2 cases to examine the challenges. It explains the statute, issues, cases, and the background of the instant issue.
2. 30 years after the ruling, ambiguity, anxiety surround abortion debate: This article, written back in 2003 demonstrates that the issue surrounding foetal rights and reproductive freedom are neither new nor clear for either the American polity or the Constitutional Courts.
3. Predicted changes in abortion access and incidence in a post-Roe world: According to this 2019 research, if Roe v. Wade is overturned and abortion restrictions are enacted in trigger law states and states deemed extremely likely to outlaw abortion, an estimated 93,546 to 143,561 women will be denied access to abortion treatment.
4. Support Choice, Not Roe: This article argues that while the final judgement in Roe v. Wade was correctly reached, the reasoning behind the same may be slightly flawed. In this respect, the author stresses the American public to extend their support to the pro-choice movement rather than rallying behind the Roe v. Wade.
5. Justice Ginsburg: Roe v. Wade not 'woman-centred': This article discusses the views of former Associate Justice Ruth Bader Ginsburg (RBG) on Roe v. Wade, wherein RBG argues that the primary motivation behind the instant judgement flowed from a concern for physicians and doctors and that women's right and individual autonomy were not at the forefront.
6. Reproductive Rights: Status of Women in the States: This page article chronicles the various available Rights to Women in the United States in the form of access to abortion, affordable

healthcare, family planning policies, etc.

3. Supreme Court Issues Interim Orders on Pegasus Controversy after Union Govt Refuses to File a Detailed Affidavit

The Apex Court on 27th October issued interim orders in the matter of *Manohar Lal Sharma v. Union of India*, which is a case comprising of a batch of petitions requesting independent probes into the recent Pegasus Spyware controversy.

The bench comprising NV Ramana CJ & Hima Kohli and Surya Kant JJ, ordered the setting up of an independent expert committee to probe into the matter.

However, of great note are the observations and remarks made by the justices which add significantly to the existing conceptions of Right to Privacy, Right to Freedom of the Press and Judicial Review vis-a-vis national security.

The Court delved into how surveillance and spying affect the right to privacy of citizens. Though it is needed in this age of terrorism and complex crimes, the Court reiterated the three-fold test established in *Justice (retd.) K. S. Puttaswamy v. Union of India*.

This was to emphasize that the right to Privacy can only be breached in certain, very exceptional and compelling circumstances. Such infractions must be carried out through a procedure that is just, fair and reasonable and is not manifestly arbitrary.

Concerns of national security and fundamental rights of the individual, it was said, can and need to be balanced by instituting various oversight and regulatory mechanisms to prevent the violation.

Further, the Court linked how surveillance of journalists can have a ‘chilling effect’ on the freedom of the press and the Right to Speech and Expression. Such surveillance can lead to self-censorship which would detract from the press’s role as the fourth pillar of democracy.

An oft-ignored area of journalistic rights and freedoms is the protection of journalistic sources. The Court recognized that “*protection of journalistic sources is one of the basic conditions for the freedom of the press.*”

The protection of the identity of sources is inextricably linked to the press’s ability to act as the government’s watchdog in the failure of which information won’t be received by journalists for their stories.

Further, the court came down heavily on the government for failing to file a comprehensive affidavit and disclose required materials and documents on the grounds that disclosing facts and documents would compromise national security.

The government's effort to evade judicial review was futile, and the Court indicted the government and underlined the government's need to produce documents essential to investigate allegations of fundamental rights breaches.

Invoking its pronouncements in *Ram Jethmalani & Ors v. Union Of India* as well as *Anuradha Bhasin v. Union Of India*, the Court noted that, in the majority of cases, the Government is in possession of the information necessary to litigate and evaluate fundamental rights claims effectively, and that the Government cannot seek to obstruct the judicial process by withholding such information.

The Court noted that the Government's responsibility is to plead on affidavit and demonstrate why and how particular information if divulged, would compromise national security, to which petitioners may answer.

The Court will assess whether and to what extent the Government's position warrants respect based on these filings. Deference on national security grounds cannot be gained only on the basis of an allegation, and rather, doing so would encourage the Government to increasingly cite national security as a defence in fundamental rights matters.

The Court's unequivocal position on this typically neglected feature of fundamental rights lawsuits is critical in countering the Government's inclination to seek opacity regarding its operations and a stern command to make judicial review more effective.

FURTHER READINGS:

1. Explained: How Pegasus spyware infects a device; what data may be compromised:This report details how the Pegasus Spyware operates.
2. Revealed: How the Wire and Its Partners Cracked the Pegasus Project and What It Means for India: This article covers how the whistle-blowing report on the use of Pegasus Spyware had been prepared by journalists across the world.
3. No legal cover for journalists refusing to divulge source: This article explores the lack of legal or statutory protection given to journalists for refusing to disclose their sources.

4. Free Speech and Source Protection for Journalists: This article discusses the centrality of protection of journalistic sources to the freedom of the press and critically analyses the USA. European and Indian law in light of this issue.
5. Right To Privacy: Surveillance in The Post-Puttaswamy Era: This article links the threat posed by surveillance to privacy in post-Puttaswamy.
6. Are India's laws on surveillance a threat to privacy?:The article discusses the need for checks and balances to protect privacy whilst addressing security concerns.

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