



**HISTORICAL:
THE 42ND AMENDMENT TO THE
INDIAN CONSTITUTION**

2023

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Greetings Members!

With great enthusiasm, we feel happy to welcome you to this simulation of the Indian Historical Event Committee at Orpheus Youth Parliament 2023. We look forward to an enriching and rewarding experience.

The agenda for the session is

“Discussion on the 42nd Constitutional Amendment in the light of the question of dropping socialism from the Preamble”

This study guide is by no means the end of the research, we would very much appreciate it if the Parliamentarians can find new realms in the agenda and bring them forth in the committee. Such research combined with good argumentation and a solid representation of facts is what makes an excellent performance. In the session, the executive board will encourage you to speak as much as possible, as fluency, diction or oratory skills have very little importance as opposed to the content you deliver. So just research and speak and you are bound to make a lot of sense. We are certain that we will be learning from you immensely and we also hope that you all will have an equally enriching experience. In

In case of any queries feel free to contact us.

We will try our best to answer the questions to the best of our abilities. We look forward to an exciting and interesting committee, which should certainly be helped by the all-pervasive nature of the issue. Hopefully we, as members of the Executive Board, do also have a chance to gain from being a part of this committee.

Please do not hesitate to contact us regarding any doubts that you may have.

All the Best!!!

Jai Hind

Aman Yadav

(Moderator)

Prerna Singh

(Co-Moderator)

Introduction

The development and destiny of a country are majorly dependent on administrative actions, judicial determination, and the laws made by the legislature. All of these are governed by the Constitution of any given country. The Constitution assumes the role of a supportive system by containing the principles upon which the country would function. In the case of its absence, the whole classification and hierarchy upon which a nation is operated would easily fall apart. If a country is under executive supremacy (i.e Government or ruler is above everything), the existence of the constitution is nominal and its scope is minimal. But, on the other hand, most democratic countries including India follow the policy of constitutional supremacy where the constitution is given a higher position than that of the government or any other machinery.

First of all, the Constitution is important as it forms the basic structure of the administration. Secondly, it distributes the powers between various organs of the State. Thirdly, it determines the national goals which include democracy, integration, secularism, etc. Additionally, it guarantees the fundamental rights of the people which are of paramount importance for a person to live. The constitution is also very important in the aspect of any contingency or emergency as it establishes the change in the power structure without any uncertainty.

In light of the above-mentioned importance of the Constitution, the 42nd Amendment to the Indian Constitution that happened in 1976 assumes due significance as this amendment muddled with most of the principles which are stated above. Along with amending the existing provisions, it also added several new provisions. Therefore, the 42nd amendment is sardonically called a 'Mini Constitution' or 'Constitution of Indira'.

Background

Since the verdict was given in the case of *Golaknath v. State of Punjab* in 1967, there was a battle between the erstwhile government led by Mrs. Indira Gandhi and the Judicial machinery. Along with this, there was a lot of political unrest for various reasons during the same period. In 1971, the general elections were held across India when Mrs. Indira Gandhi conveniently won against Mr. Raj Narain and went on to become the Prime Minister. After the defeat, Mr. Raj Narain filed a case against the PM for election fraud and usage of State machinery in carrying out her election campaign. These charges were filed in Allahabad High Court and Mrs. Indira Gandhi had to appear in the court which was the first-ever such instance for a Prime Minister of India.

Since its initiation, the case went on for four years and was solely adjudged by Justice Jagmohanlal Sinha. In 1975, the Allahabad HC delivered a judgment finding her guilty of misusing police and government officers for the party election campaign. Henceforth, her election was declared null and void and she was banned from contesting in the election for the next six years. Many other charges filed against her were dropped and the aforementioned charges which were comparatively frivolous were proved in the Allahabad HC.

Later, as this case was appealed in the Supreme Court, the political opposition initiated anti-government protests. The renowned leader, Mr. Jaya Prakash Narayan who is popularly known as JP, organized a massive rally in the capital city demanding Mrs. Indira Gandhi to abandon the PM office. On 25th June 1975, an emergency was declared by the government across the country citing 'internal disturbance' as the reason.

During the period of emergency, the government undertook a series of amendments to the Constitution which can be categorized as the most

controversial amendments. These include various alterations made to the existing provisions and the addition of new provisions. First of all, the 38th Amendment was passed on 22nd July, 1975 which extended the State's authority to infringe the fundamental rights during the emergency and also barred judicial review on the proclamations of emergency. Secondly, the 39th Amendment was undertaken by the legislature which was also controversial for its intention and effect. As per this amendment, the power of High Courts to investigate the election of a Prime Minister was eliminated and the inquiry and investigation can only be done by the parliamentary committee constituted for the purpose. Similar amendments continued during the period of emergency amidst the arrest of the prominent opposition leaders and their absence from the legislature.

Analysis of the 42nd Amendment Act, 1976

The Constitutional Amendment Act, 1976 which is the 42nd Constitutional amendment in India is well known for its controversial changes and inclusions. The changes were undertaken in consonance with the suggestions made by the Swaran Singh Committee constituted for the same purpose by Mrs. Indira Gandhi. This amendment includes alterations made to the Preamble, 40 provisions, the Seventh Schedule, and 14 new Articles that were inducted into the Constitution (the list of amendments to the existing provisions and of inducted new Articles can be found here). It is pertinent to be mentioned that as it is unfeasible to explain all the minor changes, let us hereby expound upon all the substantial alterations that changed the people's perception towards the Constitution, at least during the phase of the emergency. The following are some of the important alterations made through this amendment.

Preamble

The preamble is considered to be a reflection of the constitution. Two additions were made in the preamble of the constitution. Firstly, the representation that India is a “*Sovereign Democratic Republic* ” has been replaced by the expression “*Sovereign Socialist Secular Democratic Republic*”. Secondly, the expression “*unity of the nation*” was replaced by “*unity and integrity of the nation*”. Reportedly, this alteration faced a huge backlash across the country in the legal and public space for being ‘an altered representation of the Indian Constitution on the international arena’.

One of the arguments presented by the opposers was that the inclusion of the words ‘socialist’ and ‘secular’ was opposed by the drafting committee chairman Dr. B.R. Ambedkar at the time of preparing the Constitution as these words denote ‘Marxist socialism’ and ‘western concept of secularism’ across the world. These expressions are quite different from the Indian concept of socialism and secularism. Some others opposed this amendment as being against the principles and the procedure laid down in the case of *Kesavananda Bharati v. State of Kerala* Other than these criticisms, the change in the Preamble was heavily lashed by Mr. H.M.Seervai, an eminent Indian Jurist, as being ambiguous, and such words are inducted unreasonably.

Judicial Power

Before this amendment, the High Courts had the power even to adjudicate upon the Acts passed by the Union Legislature. This practice has been very convenient for the general public to challenge in their respective State’s High court. But, this amendment restricted the power of the High Court. Under Article 226A and Article 228A, this amendment allowed HCs only to adjudge the validity of State legislation. Similarly, Article 131A was added to empower the Supreme Court only to look into the validity of central legislation. Apart from

these alterations, another controversial change was brought into the realm of judicial power by inducting Article 144A and Article 228A into the Constitution.

As per these provisions, it was made mandatory in the Supreme Court to constitute a seven-judge bench to decide upon the constitutionality of any law brought at the Union level and such law can only be held unconstitutional when the judgment has a two-thirds majority. The amendment to the provisions relating to judicial power was highly condemned. It was seen as encroaching on the power of the judiciary by the legislature and was perceived as an attack on the doctrine of separation of powers.

Suspension of the Fundamental Rights

The Fundamental rights were conferred upon the people uninterruptedly since the Constitution has come into force. But, the 42nd amendment added the relevant provisions to the Constitution to suspend Fundamental Rights during emergencies. Article 358 had the effect of the suspension rights conferred under Article 19 of the Constitution without any special announcement whenever an external emergency is imposed. As per this provision, Article 19 is suspended for the entire duration of the emergency across the whole country, and immunity is provided to the '*emergency laws*' in the court of law.

Along with that, Article 359 was amended to that effect where the President can suspend the right to remedy for the people who are aggrieved by the '*emergency laws*' inconsistent with any specified fundamental right except Article 20 and Article 21 of the Indian Constitution. As per this provision, such Presidential order can be made either during an internal or external emergency for a specified time or for the entire emergency time. Here, it is pertinent to observe that the FRs are not automatically suspended but their 'enforceability' in the court is suspended as per Article 359 of the Constitution.

Induction of Fundamental Duties

The Constitution consisted of specific parts for the fundamental rights and Directive Principles since its inception of the Constitution. But, the government and the Swaran Singh Committee believed that the citizens of this country must also have certain duties towards the State to have a cordial relationship.

Hence, ten fundamental duties in the form of Part IVA were inducted into the Constitution under the 42nd Amendment of 1976. But, as it was unfeasible to enforce duties upon the citizens as it contradicts the whole structure of a democratic country, these were given a non-judicial and unenforceable effect. Some of the important fundamental duties are to abide by the Constitution and its ideals, to safeguard the sovereignty, unity, and integrity of the country, to protect the environment, to render national service, etc. This part of the amendment was not considered to be a controversial change as prima facie seems to protect that national interests.

DPSP

Unlike the other alterations made concerning other parts, the changes made to the Directive Principles included both positive and negative criticisms. First of all, the amendment of Article 31C had become the most controversial provision concerning DPSP. Though this Article was added through the 25th Constitutional Amendment of 1971, its scope was expanded through the current amendment. Previously, this provision had the effect of creating a valid law under Article 39(b) and Article 39(c) of the Constitution even if such law is infringing the fundamental rights of the people. While it was perceived to be unacceptable by lots of the general populace, the 42nd amendment was introduced by which the scope of Article 31C expanded to such an extent that any law made as per any DPSP shall be considered valid even if such law is violating any fundamental

right. Along with this, Article 31D was introduced to legalize any laws made concerning Anti-National elements even if such laws are infringing on Article 14 and Article 19. These two changes regarding the functionality of DPSP faced numerous negative reactions in the public arena.

The other changes made in the DPSP which were lauded by the community are the introduction of Article 39-A and the alteration in Article 39(f) of the Constitution. As per Article 39-A, free legal aid is to be provided to the poor and weaker sections of society to avoid injustice only by the reason of economic or social backwardness. The pre-existing provision, Article 39(f) was amended to have an effect of protection against the exploitation and moral, material abandonment of children and youth. Apart from these changes, certain inductions such as Article 43A and Article 48F which deal with workers' rights and environmental protection respectively were made in Part IV (DPSP) of the Constitution.

Delimitation of Parliamentary Seats

The 42nd amendment had frozen the reorganization of boundaries of parliamentary constituencies till the first census after 2000 i.e 2001, 26 years from the year of the amendment. It also stopped the reallocation of the reservation to the SCs, STs, and women till the same period. Before this amendment, Article 82 provided for the reorganization of constituencies for parliament and state legislature after every census i.e. every 10 years as per the data collected.

Alteration in Article 74

This amendment made no real change but created a statutory provision for a practice that has been followed in the country. When we look at the power hierarchy in the country, the President is the Constitutional Head of the State who

is perceived to be nominal and the Prime Minister is seen as the actual head. Before the amendment in Article 74, the President used to act following the advice given by the cabinet even though the such practice is not affected by any provision of the Constitution or any other law. In such circumstances, this amendment was made only to give the such practice a statutory effect and did not lead to any special change.

Legislative and Judicial reactions

Post-emergency, in 1977, the general elections were held across the country in which Congress was defeated by the Janata Party alliances. The government was formed under the leadership of Mr. Morarji Desai and their primary duty was to place the Constitution in the former position as it was before the emergency. But, the new government and legislature were not with the view of undoing every amendment made during the Constitution. Hence, the 43rd Amendment Act of 1977 and the 44th Amendment Act of 1978 were introduced as a remedy for the 42nd amendment. Some of the notable changes made through these amendments are conferring the previous powers to the High Courts and Supreme Courts, replacing “Internal Unrest” with “Armed Rebellion” etc.

On the other hand, the case *Minerva Mills v. Union of India* is the major judicial reaction that undid some of the unconstitutional alterations made in the 42nd Amendment. As far as facts are concerned, Minerva Mills is a textile mill established in Bangalore city. These mills were nationalized by the congress government even before the amendment and the case was filed in the Supreme Court in 1977 to undo this action. Mr. Nani Palkhiwala, who's a great Constitutional law advocate, represented owners in the court. He challenged the government's action on various grounds and, alongside, alleged that Section 4

and Section 55 of the 42nd Amendment, 1976 were unconstitutional. As per Section 4, Article 31C was amended to have the effect of the dominance of DPSP over fundamental rights. Section 55 added two clauses to Article 368 to give uncontrolled power to the parliament to amend the constitution thereby nullifying the Kesavananda Bharati judgment and the other clause excluded the judicial review of any law made during an emergency. For many reasons as given in the judgment, accepting the clever arguments of Mr. Nani Palkhiwala, the court struck down Section 4 and Section 55 of the 42nd amendment of 1976. It is perceived as a remedial action undertaken by the judiciary which had to be taken by the legislature.

Conclusion

Though this amendment is considered to be the most controversial one in the history of the Indian Constitution, there are still certain provisions that continue to be in effect over years even to this day because they are considered to be beneficial. For instance, the free legal aid policy, protection of children and the environment, fundamental duties, etc are deemed advantageous at the individual or community level. But, due to its effect and various other reasons, this amendment carries a bad reputation along with it.