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A Study on the Mini Constitution of India

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ABSTRACT

The Constitutional Amendment Act 1976 is one of the most controversial Amendments of India. It is referred to as the Mini Constitution of India as it sought to rewrite the Constitution by amending a large number of provisions of the Constitution. It consisted of fifty-nine provisions, of which 57 dealt with substantive and permanent changes in the text of the Constitution, while the last two were transitional in nature. To be more precise, it runs through the entire length and breadth of the Constitution right from the Preamble down to Article 368 and the legislative lists as well.

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 the then Prime Minister of India, Mrs Indira Gandhi and introduced by Shri H.R. Gokhale, the then Law Minister in Congress regime. One of the most interesting facts about this Amendment is that it was introduced during the period of Emergency and when most of the opposition leaders were behind the bars

Supreme court, through Minerva Mills v. Union of India and the 43rd and 44th Amendments in 1977 and 1978, undid most of the provision of distortions introduced by the 42nd Amendment.

I. INTRODUCTION

The 42nd Amendment to the Constitution of India, officially known as The Constitution (Forty-second Amendment) Act, 1976, was enacted during the Emergency (June 25 1975 – March 21 1977) by the Indian National Congress government headed by Indira Gandhi.[2]

Most provisions of the Amendment came into effect on January 3 1977, others were enforced from February 1 , and Section 27 came into force on April 1 1977. [3]

The 42nd Amendment is regarded as the most controversial constitutional Amendment in Indian history. It laid down the Fundamental Duties of Indian citizens to the nation. This Amendment brought about the most widespread changes to the Constitution in its history and is

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[2] *Hart, Henry C. (April 1980). "The Indian Constitution: Political Development and Decay". Asia Survey, Vol. 20, No. 4, Apr., 1980. University of California Press*

[3] Dev, Nitish. "Constitutional Amendments of India

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sometimes called a "mini-Constitution" or the "Constitution of Indira."[4]

The Amendment's fifty-nine clauses stripped the Supreme Court of many of its powers and moved the political system toward parliamentary sovereignty. It curtailed democratic rights in the country and gave sweeping powers to the Prime Minister's Office[5]

The Amendment gave Parliament unrestrained power to amend any parts of the Constitution without judicial review. It transferred more power from the state governments to the central Government, eroding India's federal structure.

The Janata government then brought about the 43rd and 44th Amendments in 1977 and 1978, respectively, to restore the pre-1976 position to some extent. However, the Janata Party was not able to fully achieve its objectives.

Key Words – Mini Constitution, 42nd Amendment, Constitution of Indira

(A) Research methodology

The research methodology employed by the researcher is doctrinal. In the doctrinal research, the researcher has relied on various books, commentaries, reports, dictionaries, journals, case laws, weblinks and various other sources of literature to understand how the concept of reservation has evolved over time.

II. CHANGES BROUGHT IN 1976

The 42nd Constitutional Amendment Act is the greatest insult hurled at the sacred Constitution of India and is at the same time one of the lasting legacies of the Emergency. This controversial Act had the dubious distinction of being called a mini –Constitution as it sought to rewrite the Constitution by amending a large number of provisions of the Constitution. It consisted of fifty-nine sections, of which 57 deal with substantive and permanent changes in the text of the Constitution, while the last two are transitional in nature. To be more precise, it runs through the entire length and breadth of the Constitution –right from the Preamble down to Article 368 and the legislative lists as well.

The reverend Constitutional expert, Shri D.D. Basu[6] puts it in brief thus:

"Special mention should however, be made of the 42nd Amendment Act, 1976 by which, the Congress Government, taking advantage of its monolithic control over the Union as well as the State Legislatures, effected comprehensive changes in the Constitution, overturning some of its bedrocks. So widespread and drastic was the impact of this Amendment Act that it would be proper to call it an Act for 'revision', rather than 'amendment' of the Constitution."[7]

M. P. Jain[8] explains the situation in these words- "Above all, the impertinence of fundamental rights was greatly devalued. Thus the whole

[4] *Ibid.*
[5] John R. Walker (21 June 1977). "Janata's flaws shown by wins in northern India". The Calgary Herald. Southam News Services.
[6] D.D.Basu, Introduction to the Constitution of India, 18th Edition, p.396
[7] *Ibid.*
[8] Jain M P- Indian constitutional law ,43rd Edn Central Law Agency.

complexion was sought to change so as to reduce the element of constitutionalism therein."[9]

Another view was put forward by P.G. Mavalankar, who articulated that "This is a massive measure of 59 clauses and it contains (s) far-reaching and sweeping changes. to call it a minor piece of legislation is a mockery of words."[10]

The 59-clause bill inserted two new Parts (IV-A and XIV-A) and 11 new articles (31D, 32A, 39A, 43A, 48A, 131A, 139A, 144A, 226A, 228A and 257A). It substituted new Articles for articles 103, 150, 192, 226 and amended the Preamble and the Seventh Schedule and Articles 31C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 105, 118, 145, 166, 170, 172, 189, 191, 194, 208, 217, 225, 227, 228, 311, 312, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368 and 371F.[11]

The justification given was that it is to remove hurdles & obstacles to socio-economic legislation.

The 42nd Amendment was regarded as an attempt to institutionalize Emergency in the country forever. To curtail the power of the High courts and the Supreme Court to review legislation and give redress to the individual against administrative excesses. Art 368 was sought to be amended to make parliaments amending power beyond judicial review. The 44th Amendment undid most of the provision of distortions introduced by the 42nd Amendment.

(A) Changes in the Preamble

The issue of characterizing the Constitution as 'Socialist' has been proposed before in 1948 by KT Shah, who made a strong plea to include the words 'Secular' and 'Socialism'.[12] But this socialist aspect was opposed by Ambedkar as unacceptable because he believed that "If you state in the Constitution that the social organization of the State shall take a particular form, you are, in my judgment, taking away the liberty of the people to decide what should be the social organization in which they wish to live."[13] However, it was the 42nd Amendment that explicitly changed the Preamble to "Sovereign, Socialist Secular Democratic Republic" from what it used to be prior to that — "Sovereign Democratic Republic." Through the Forty-second Amendment Act, the Congress Party wanted to further the teleological ideals of the Constitution. New phrases 'Secular' and 'Socialist' were added, and along with the word Unity of the Nation, the word 'Integrity' was appended in the Preamble as many as twenty-two members participated in the debate out of which twentyone members supported the changes [14]in the Preamble and one member P.G.Mavalankar opposed the change.[15] Defending the changes in the Preamble, Jagan Nath Rao said, "The Preamble is like a golden epigram, so nicely

[9] *Ibid.*
[10] Lok Sabha Debates, Vol. LXV No. 3, 1977
[11] G.G. Mirchandani, Subverting the Constitution, Abhinav Publications, New Delhi, 1977, p.83
[12] H.V.Hande, Our Constitution –Distortions done during the Emergency and The Need for a Review, Chengacherial Publishers, Chennai, 2002, p.117
[13] Constitutional Assembly Debates, Vol.VII, pp.401-402
[14] Lok Sabha Debates, Vol.LXV-No. 1, 2, 3, 25 to 27 October 1976
[15] Lok Sabha Debates, Vol.LXV-NO.3, 27 October 1976, Col.98-99

worded that the addition of the two words will make it more attractive[16].

1) Socialism: Socialism has been the declared policy of the Nehruvian Era, but it became a part of the Preamble during the Indira Gandhi regime who affirmed that "We are fighting for an Indian version of socialism"[17]. As such, the word Socialism has not been defined in the Constitution, but in the Indian context, it means a non-exploitative society. The socialist part of the programme means nationalizing the key industries, redistribution of wealth and power in society, social and economic equity and providing work and equal opportunities to one and all. Defending the changes in the Preamble, Shree Swaran Singh, during the debates in Lok Sabha, said the Amendment sought to ensure that the fruits of development would not be confined to a few hands but would be distributed among large sections of the society.[18]

2) Secular: Secularism has been one of the basic features of our Constitution. Even before the use of this term in the Preamble, various Articles viz., Articles 13, 23(2), 25, 26, 27, 28(1), 15, 16, 29(2) of the Constitution threw ample light on the secular aspects. The addition of the word Secular in the Preamble by 42nd Amendment Act only resonates an already existing essential characteristic of the Constitution in the Indian society. The Indian variant of Secularism has not treated Secularism as something opposed to religion; rather, it means freedom of religion and equality of religion. It emphasizes that there is no state religion in India and the State neither favours nor discriminates on the basis of religion in India. The addition of this word requires a Government to effectively pursue a policy of non-interference and impartiality in the matters of religion. Unlike the State-backed theocracy in Pakistan, Indian Secularism is much more collaborative and consolidative. It demands that in the guise of celebrating certain occasions and events related to religious leaders, the Governments should abstain from spending on unproductive functions.

3) Integrity: As to the addition of the word "Integrity" to the "Unity of the Nation" in the Preamble, there are no two opinions. India being a vast country with linguistic, regional, racial and other differences, the term "Integrity" will always remind us to put an end to separatist tendencies. It reinforces the concept of national unity. It would also mean that the states have no right to secede from the federation. Furthermore, reasonable restrictions on the freedom of speech and expression of citizens have been imposed in the interest of 'integrity' and 'sovereignty' of the country.

(B) Directive Principles of State Policy override Fundamental Rights

The 42nd Amendment Bill ensured the supremacy of Directive Principles over Fundamental Rights. Article 31-C, which was introduced by the twenty-fifth Amendment, was further widened so as to cover laws made to

[16] Lok Sabha Debates, Vol. LXV-No.1, 25 October 1976, Col.155
[17] The Times of India, 14 September, 1976
[18] Lok Sabha Debate, Vol.LXV., NO.3, 27 October 1976, col. 236

secure all or any of the Directive Principles of State Policy and not confined to Article 39(b) and (c).[19] Any Legislation seeking to promote any aspect of Directive Principles of State Policy could not be declared ultra vires on the ground that it conflicted with the Fundamental Rights. To further this, some new words were inserted in Article 31 of the Constitution. The second part of Article 31C declares that the Directive Principles shall be fundamental in the governance of the country, and it shall be the duty of the State to apply them in making laws. If a chapter on 'Fundamental Rights' is a' must 'for a State of the modern democratic type with a written Constitution, a chapter on ' Directive Principles of State Policy is a 'must' for a welfare state with a written constitution.[20]

The latter part of the Article 31C was struck down by the Supreme Court in the Kesavanand Bharti case. This Article 31C only gave precedence to two Directive Principles, namely 39(b) and (c) over three Fundamental rights embodied in Articles 14, 19 and 31. The Congress Party and Parliament were not content with it so far. By the 42nd Amendment Act, the scope of Article 31C was enlarged by substituting the phrase "the principles specified in clause (b) or clause (c) of Article 39" by "all or any of the principles laid down in Article 39". This Amendment clearly emphasized the significance of Directive principles. Opinions from all the quarters poured in when this change was introduced. The editorial of the Financial Express articulated that the proposal to give precedence to Directive Principles was not only repugnant to the basic concepts of the original Constitution but also calculated virtually to negate the sanctity of Fundamental Rights.[21] It added, "Any enhancement of the powers of Parliament or the Executive, at the cost of the citizen's ambit of freedom, contains in it the prospect of a dangerous concentration of power in the hands of a few. Historical experience shows that freedom is in peril where there is the concentration of power." Gandhian leader Shriman Narayan also commented on the prospects of the Amendment to Article 31. He said "While I would not plead for a capitalist system where the interests of a society are sacrificed at the altar of individual greed, I do feel that the new Amendment would tend to subordinate the individual citizen to the organized power of the State in a very improper manner. Such a situation may lead to an authoritarian regime in the future."[22]

Nonetheless, the Congress Party went ahead with the Amendment to Article 31C on the ground that the Directive Principles should prevail over some of the Fundamental rights because the majority of the Directives aimed at securing social and economic justice. The Congress Party suggested that the Amendment in Article 31C did not provide for the abolition of fundamental rights and not even the right to property. It was said that

[19] O.Chinnappa Reddy, The Court and the Constitution of India ----The Summits and Shallows, OUP, Delhi, p.67

[20] K.C.Markandan, Directive Principles in the Indian Constitution, Allied publishers Private Ltd., Delhi, 1966, p. vii

[21] Financial Express, September 3, 1976

[22] G.G. Mirchandani, Subverting the Constitution, Abhinav Publications, New Delhi, 1977, p.101

the Fundamental rights would continue to be a part of the Constitution; only some of them would be subordinate to the Directive Principles of state policy. On behalf of the Government, it had been stated that this had been done in order to restore the primacy of the directive principles over the Fundamental rights as was intended by the fathers of the Constitution itself.[23]

Out of the seventeen members who participated in the discussion, this change was welcomed by fourteen members[24] while two members, B.R.Shukla and P.G.Mavalankar [25]had opposed it. When the Lok Sabha began consideration of the Bill on October 25 1976, H.R.Gokhale observed it as a measure towards the assertion of the supremacy of the Parliament and the primacy of Directive Principles of State Policy which aim at establishing a just society free from exploitation and various inequalities.[26] This Amendment in Article 31C was, however, challenged in the Minerva Mills v. Union of India[27] case, 1980. The Supreme Court, by a majority of a decision, declared it unconstitutional. As per the Supreme Court, it affected the basic feature of the Constitution, namely the balance between Fundamental Rights and Directive Principles of State Policy.

(C) Addition of New Directive Principles

The 42nd Amendment Act inserted some new Directive Principles in Part IV of the Constitution. These new Directives have been warmly welcomed by all the sections of the society and largely viewed as a move towards establishing a progressive polity. Four clauses were introduced in part IV of the Constitution.

1) Article 39(a) recommends that "the State shall secure that the operation of the legal system promotes justice on the basis of equal opportunity and shall, in particular, provide free legal aid by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are nor denied to any citizen by reason of economic or other disabilities."[28]This directive was added to ensure equal justice, which has been promised to all the citizens by the Preamble and to further the guarantee of equality before law vested in Article 14, which was unmeaning to a poor man so long as he was unable to pay for his legal advisor.

2) Article 39(f) provides that "children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that children and youth should be protected against exploitation and against moral and material abandonment."[29]

3) The participation of workers in the management was a long-cherished goal. In all the socialist nations, this participation is a must for improving the efficiency of the enterprise. India being a developing country, requires workers participation in order to increase production. The inclusion of Article 43 (A) in the Constitution is a step in the right direction. Article 43(A) provides that "the state shall take steps by

[23] The Statesman, New Delhi, 11 October, 1976, p.1
[24] Lok Sabha Debates, Vol. LXV-No. 1, 2, 3, 25 to 27 October 1976
[25] Lok Sabha Debates, Vol. LXV No. 1, 3
[26] Sh. Chintamani Panigram, Lok Sabha Debates, Vol. LXV., No.8, November 2 1976, col
[27] Minerva Mills vs. Union of India Case, AIR 1980, S.C. 1790
[28] Clause 8, 42nd Amendment Act, 1976
[29] Clause 7, 42nd Amendment Act, 1976

suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishment or other organizations in any industry."[30] This would result in a sense of belonging and dedication amongst the workers, which will inspire them to achieve maximum results.

4) Another promising Article inserted by way of the 42nd Amendment Act is Article 48(A), which provides that "the state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife in the country."[31]This has led to a string of cases involving environmental jurisprudence.

(D) Obnoxious Article 31D inserted

The most objectionable and obnoxious Article inserted by Section (5) of the 42nd Amendment Act was Article 31(D) in the Constitution. It purported to prevent or prohibit anti-national activities and to prevent and prohibit the formation of anti-national associations. It provided immunity to all laws made for the prevention or prohibition of so-called anti-national associations. The expressions 'association' and 'anti-national activity' were also defined and defined so widely that any individual or association could be branded as anti-national, all democratic dissent could be suppressed on that ground, and sycophancy would be patented as patriotism. The span of Article 31-D is so wide that it can take the breath out of democracy, leaving a mere carcass behind. Any inconvenient association can be banned under this Article. There would be no redress before any impartial tribunal.[32]

As a result of the powers conferred through this Amendment, the Government could acquire blanket powers to become a Union Gestapo that would prevent any activity, including the formation of political or any associations or convening of public meetings. Even if the actions of the Executive were malafide in nature, the aggrieved person could no longer go to the Court to seek justice because the umbrella articles like 14, 19 or 31, which protect the Fundamental Rights, had been silenced by the Emergency's new Article 31D.

This Clause was endorsed by 8 members, and an equal number of members opposed it.[33]An interesting turn of events took place during the course of the debate in the Rajya Sabha on November 9, 1976, when a staunch supporter of Smt. Indira Gandhi's emergency Shri Bhupesh Gupta had suddenly turned a "hostile witness". He complained that the Swaran Singh report was nothing but mere eyewash. He added, "The recommendations of the Swaran Singh committee, finalized by the AICC disappeared into some lobbies, somewhere into some rooms in the Secretariat, and there the tampering with the recommendations started, by some officials and, maybe, by some others, in order to take the opportunity of the Constitutional Amendment to push in or smuggle in, many other things which

[30] Clause 9, 42nd Amendment Act, 1976
[31] Clause 10, 42nd Amendment Act, 1976
[32] 42nd Amendment Reduced Powers of the Judiciary, Took Away All Human Rights, Cover Story, India Today April 22, 2015 available at http://indiatoday.intoday.in/story/42nd-amendment-reduced-powers-of-the-judiciarytook-away-all-human-rights
[33] Lok Sabha Debates, Vol. LXV, No. 1, 2, 3, October 25, 26, 27, 1976

are absolutely unnecessary and irrelevant from the point of view of socio-economic changes that we contemplate under this Amendment. And this amendment-Clause (5) - was inducted or smuggled into the Bill behind the back of all of us."[34]

On the contrary, H.R. Gokhale in the Rajya Sabha said that anti-national activities should not endanger the unity, integrity and sovereignty of the country.[35]

(E) Inclusion of Fundamental Duties

The 42nd Amendment Bill incorporated a new part IV A incorporating the Fundamental Duties. Conventionally rights and duties go together, and therefore the addition of duties became imperative as they would greatly help in creating the atmosphere of responsive awareness towards national obligations in the people.

The suggestion regarding the inclusion of such duties in the Constitution was made by the Health Minister of India, Dr Karan Singh, on May 29, 1976.[36] This part has been added in accordance with the recommendations of the Swaran Singh Committee, which had suggested eight duties for inclusion in the Constitution.

(F) Vicious Emergency Clauses

As per the original article 352, introduced by Dr Ambedkar, a proclamation of Emergency could not be made in respect of a part of the country. But the 42nd Amendment stooped to the levels of viciousness through clauses 48, 49, 52 and 53. The new Amendment through Clause (48) said (a) in Clause (I) after the words 'make a declaration to that effect, the words "in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation" shall be inserted. Thus if the Government wanted to punish exclusively any one state, they could bring in Emergency only in that particular State, under the amended Article 352. It was, in a way, a means of intimidation. Resenting the Clause, Shri Bhupesh Gupta said, "Sir, it is another controversial clause, absolutely unnecessary. It has been smuggled in like other provisions of the Bill through the back door behind the back of many people."[37]

Discontented by the Amendment of Article 352, Article 353 was now tampered with. The Government wanted the stranglehold of the Union Executive to spread to the neighbouring states too. It was rather an elaboration of Clause 48. In order to achieve this, through Clause 49, a proviso was added to Article 353, saying "provided that where a Proclamation of Emergency is in operation only in part of the territory of India, (i) the executive power of the Union to give directions under Clause (a) and (ii) the power of Parliament to make laws under Clause (b) shall extend to any state other than a State in which the proclamation of Emergency is in operation, if and in so far as the security of India or any part thereof is threatened by activities in or in relation to the part of the territory of India in which the proclamation of Emergency is in operation." This proviso thus

[34] Speech made on November 9, 1976, p.47 Rajya Sabha Debates
[35] Rajya Sabha Debates, November 9, 1976, Col.323
[36] Proposed amendment to the Constitution of India by the Committee appointed by the Congress President Sh. D.K.Barooah on 26 February 1976, p.2
[37] Rajya Sabha Debates, November 10, 1976, pp.143-146

enabled the Executive to assume dictatorial powers, allowing it to act arbitrarily in any State, irrespective of whether Emergency had been declared there or not. Further, in order to obviate any judicial interference with any Emergency proclamation, the 42nd Amendment inserted Clause (5) in each of the Articles 352, 356, 360, precluding judicial review of the President's proclamation 'on any ground'.[38] The 42nd Amendment further widened the emergency powers of the Union Government. According to it, the period after which the proclamation of Emergency ceases is extended from six months to one year. Further, any law made by Parliament in the exercise of the powers of the State Legislature shall continue indefinitely till altered by the competent legislature or other authority instead of ceasing to operate one year after the expiration of Emergency.

(G) Constitution of Administrative Tribunals

The Amendment inserted Part XIV-A relating to Tribunals. Among the many innovative provisions adopted by the Forty-second Amendment of the Constitution (1976), a measure of far-reaching importance was the provision for the setting up of Administrative Tribunals. In order to rein in the power of a fiercely independent judiciary, tribunals were set up as allegedly speedy and specialized alternatives to regular courts by the Indira Gandhi regime. Thus, the intention was to create a parallel justice system that was outside the purview of the High Courts. As expected, they were staffed for the most part with executive stooges, raising serious issues about their impartiality and independence. As tellingly noted by Justice Ruma Pal (a former judge of the Supreme Court) in her Tarkunde memorial lecture: "It has been said of Britain by a British judge that "the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it." The same could be said of the Indian Judiciary.

"The year 1976 saw the Executive deliver what they must have perceived as the coup de grace against a stubbornly independent judiciary by the enactment of the 42ndConstitutional amendment which introduced Articles 323A and 323B, authorizing legislatures to create tribunals for adjudicating disputes."[39]

A new chapter, Part XIV- A for the Constitution of new Tribunals, though innocent-looking were sinister in design; they were to render the existing judicial system completely ineffective.

The 42nd Amendment Act of 1976 brought about a massive change in the adjudication of disputes in the country. Clause 46 of the Act inserted two new Articles viz., 323A and 323 B in the Constitution. Article 323A authorizes the Parliament and Article 323B the state legislatures to create tribunals to which the power of adjudication of disputes on various subjects can be transferred while excluding the jurisdiction of the courts in these matters.[40]

[38] D.D.Basu, Shorter Constitution of India, 11th edition, p.1168

[39] The Radical Humanist, available at http:// radicalhumanist.com

[40] Tribunal Travails, The Telegraph. May 20, 2015 at http://www.telegraphindia.com/1150520/jsp/opinion/ story

(H) Article 368 distorted

Article 368 is, in a way, the most important Article of the Constitution of India. To put in medical parlance, Article 368 can be called the coronary artery, which supplies blood to the heart, which in turn pumps blood to the entire body. If the Constitution of India is the heart, Article 368 is the coronary artery. It may be submitted here that this crucial Article was also operated surgically to suit the needs of the Government of the day. Explaining the dangers that accompanied the 42nd Amendment Act, Shri D.D. Basu admitted that "All previous amendments paled into insignificance after the passing of the 42nd Amendment Act 1976, which would alone illustrate how momentous is the amending power under the Indian Constitution, and how easy it is to change extensive and vital provisions of the Constitution, without any elaborate formalities, when the ruling party has a comfortable majority in the two Houses of Parliament."[41]

Two new dictatorial clauses (4) and (5) were added in Article 368 of the Constitution by clause 55 of the 42nd Amendment Bill, 1976. Clause 4 of Article 368, which was added by the 42nd Amendment Act, 1976, stipulated that "no amendment of this constitution (including the provisions of Part III) made or purporting to have been made under this Article …shall be called in question in any court on any ground." Therefore in India, as of 1976, the Supreme Court of India was precluded from reviewing the constitutionality of constitutional amendments.[42] There is no doubt on this issue because clause 4 explicitly prohibits the judicial review of constitutional amendments. Moreover, Clause 5 also made it clear that Parliament could amend by way of addition, variation or repeal any of the provisions of the Constitution. The amended provision would remove all restrictions on the Parliament's power of Amendment -.in effect, Kesavanand Bharti's basic structure principle would be no longer good law. No Court has the right to declare a constitutional amendment invalid on any ground.

However, clauses (4) and (5) of Article 368 were rendered ultra vires in the Minerva Mills Case[43] as they exclude judicial review, which is a basic feature of the Constitution

(I) Education transferred to the Concurrent List

Through Clause 57, the 42nd Amendment Act sought to either amend the existing entries in the lists of the Seventh schedule or to transpose certain entries or subjects in certain entries from one list to another. The entries or subjects which have been transposed from List II to List III and pro tanto reducing State jurisdiction over several matters are:[44]

i. Administration of justice, Constitution and organization of all courts except the

[41] D.D.Basu, Introduction to the Constitution of India, 18th ed., pp.155-157

[42] Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study. 2008.p.8

[43] Minerva Mills Ltd. V, Union of India, AIR 1980 SC 1789 : (1980) 3 SCC 625

[44] Basu's Commentary on the Constitution of India, Silver Jubilee edition, 6th Ed., Vol. C, S.C.Sarkar and Sons, Calcutta, p.118

Supreme Court and the High Courts - Entry 11A

ii. Education –Substitution of Entry 25

iii. Weights and measures –Entry 33A

iv. Forests and –Entry 17A

v. Protection of wild animals and birds – Entry 17B

vi. Population Control and family planning –Entry 20A

As the future of any country depends upon a viable education system, the transfer of the vital subject of education to the Concurrent list was a move meant to bring about uniformity in the education policy throughout India. As Mr Swaran Singh rightly remarked, "there is an All-India aspect of education to ensure the unity and integrity of the country, and from this point of view, this provision is salutary".[45]

(J) 42nd Amendment castrates the Judiciary

Judiciary became a casualty during the Emergency years greatly.

The provisions which suffered the brunt of the Act are as follows:

i. The 42nd Amendment had inserted a new Article 32 A, according to which a Central Law could only be challenged in the Supreme Court. [46] But before the 42nd Amendment Act, it could be challenged both in Supreme Court and High Court[47]

ii. Article 228, which had clothed the High Courts with the required power, were subjected to two distortions by the 42nd Amendment Act through its clauses 41 and 42. It curtailed the scope of Article 228, which was related to the transfer of cases to the High Courts, made the High Court's absolutely powerless and brought them on par with the subordinate courts. For this purpose, it had inserted the words, "It shall withdraw the case and, subject to the provisions of Article 131A may— in the original Article 228."[48]

iii. 42nd Amendment further provided through Article 144A (which was later repealed by the Forty-Third Amendment Act, 1977, Sec. 5) that when the Supreme Court sat to determine the constitutional validity of any law, the bench would consist of at least seven judges. And no law could be declared unconstitutional unless two-thirds of the members of the Bench of the Supreme Court supported it.[49] The Central/State law could not be declared constitutionally invalid unless a majority of two-thirds of the seven Judges held so. This was obviously to get over the 6:5 or 7:6 verdicts that were rendered in Golaknath and Kesavanand Bharati.[50] Similarly, the 42nd Amendment made it clear that when a High Court was called upon to determine the constitutional validity of state law, the bench would consist of at least five judges. If the strength of a High Court was less than five judges, then all of them would sit to determine the question. Article 228 A was inserted for this purpose.[51]

[45] Indian Express, Sept. 1976.
[46] Clause 6, Ibid
[47] This clause is deleted by 43rd Amendment Act
[48] Clause 41, Ibid., This clause is also deleted by 43rd Amendment Act
[49] Clause 25, Ibid.,
[50] Arvind Dattar, Our Constitution and its Self-inflicted Wounds, Indian Journal of Constitutional Law, p.109
[51] Clause 42, Ibid., This clause is repealed by 43rd

iv. The onslaught on the High Courts worsened even more, when the power of the High Court to decide the validity of any Central law was excluded. The writ jurisdiction was substantially curtailed, and Article 226 was resubstituted. The power to grant interlocutory orders was drastically limited. It had curtailed the jurisdiction of the High Courts by Amendment to Article 226. They could now exercise jurisdiction only in –

a. The case where there was a contravention of a statutory provision causing substantial injury to the petitioner and;
b. Cases where there was illegality resulting in substantial failure of justice.

v. Before the 42nd Amendment, a State law could be challenged both in the Supreme Court and the High Court. But post amendment, Clause 39 of the Act inserted Article 226 A, by which a State law could be challenged only in the High Court.[52]

vi. Finally, the Amendment also left room for the Government to appoint new and differing kinds of judges. Under the Amendment, a person could be appointed as a judge to the High Court if he was a 'distinguished jurist'. A distinguished jurist could just be anything. He need not be a lawyer. He could be an academic, a left-wing radical, a right-wing conservative or even a run of the mill politician.

III. CONCLUSION

After traversing the entire length and breadth of the 42nd Amendment Act, one can say that despite its acts of omission and commission, it was a historic piece of legislation that cannot be ignored. It not only altered the Constitution drastically but virtually added a new dimension to the constitutional discourse as it affected all the aspects of the Indian polity. Some may call it the epitaph of Mrs Gandhi, while some may call it the rewriting of the Constitution. Nevertheless, the vestiges of the Act still remain with us, and it is these remnants that are studied in this segment.

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Amendment Act

[52] Clause 42, Ibid., This clause is repealed by 43rd Amendment Act